



# Infosheet

## THE CONSTITUTION

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### What is a constitution?

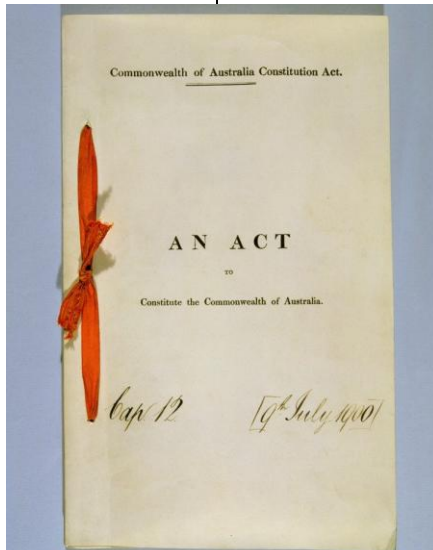
A national constitution is a set of rules for governing a country. Such rules may be based on tradition or may be written down in the form of a law or a number of laws. In some countries laws forming the constitution are ordinary laws which can be changed just like any other law, but in most countries the laws forming the constitution have a special status.

The Constitution of Australia has a special status—it cannot be changed in the same way as other laws can be changed and it is a supreme law, that is, it overrides other laws.

### How was the Australian Constitution created?

Before 1901 the present Australian States were separate colonies of the then British Empire. When the colonies decided to join together in a federation, representatives from each colony were elected to attend meetings (called constitutional conventions) to draw up a constitution for the new nation. The draft constitution was later approved by a vote of the people in referendums held in each colony.

The new Australian nation was established on 1 January 1901 following the passing of the Commonwealth of Australia Constitution Act by the United Kingdom Parliament. The purpose of the Act was 'to constitute the Commonwealth of Australia'. The Constitution drawn up at the conventions was included as part of this Act, which declared that 'The Constitution of the Commonwealth shall be as follows:— . . . '.



*The Commonwealth of Australia Constitution Act*

### What does the Australian Constitution do?

Australia is a federation of States which each have their own constitution, government and laws. The Australian Constitution originated as an agreement under which the former colonies came together as States in a federation. In brief, the Constitution establishes the form of the federal government (that is, the Commonwealth, national or central government) and sets out the basis for relations between the Commonwealth and the States.

### What does the Constitution cover?

#### Chapter 1—The Parliament

This chapter, the longest, covers the structure and powers of the federal Parliament, including:

#### General

- the legislative or law-making power of the Commonwealth. This is held by the federal Parliament, consisting of two Houses—the Senate and the House of Representatives—and the Queen (represented by the Governor-General);
- the appointment of the Governor-General and the Governor-General's powers to summon and dissolve Parliament;

#### The Senate

- the composition of the Senate. Each State is represented equally and there must be at least six Senators from each State. The Parliament may make laws setting out how Senators are

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elected and also to change the number of Senators (there are now 12 from each State);

- frequency of elections. Elections for half the Senate take place every three years. Senators serve for six years, except following a dissolution of the Senate (brought about by disagreement between the two Houses) when half the newly elected Senators serve only three years;
- qualifications of Senators;
- the filling of vacant Senate places by State Parliaments ('casual vacancies');

### **The House of Representatives**

- the composition of the House of Representatives. The House of Representatives represents the people of each State in proportion to their numbers—that is, there are more Members from the States with the largest populations. Each of the original States must have at least five Members. The total number of Members must be, as nearly as practicable, twice the total number of Senators. The Parliament may make laws setting out how Members are elected (see Infosheet No. 8 'Elections for the House of Representatives') and also to change the number of Members;
- frequency of elections. After election the House of Representatives may last not more than three years, but can be ended (dissolved) sooner by the Governor-General;
- qualifications of Members of the House of Representatives;
- elections to fill vacant House of Representatives places (by-elections);

### **Both Houses of the Parliament**

- matters disqualifying Members and Senators;
- the settling of disputed elections;
- parliamentary privilege (see Infosheet No. 5 'Parliamentary Privilege');

### **Powers of the Parliament**

- the matters on which the Commonwealth can make laws. The federal Parliament can make laws only on certain matters. These include: international and inter-State trade; foreign affairs; defence; immigration; taxation; banking; insurance; marriage and divorce; currency and weights and measures; post and telecommunications; and invalid and old age pensions. On some matters the Commonwealth is given exclusive powers—that is, the States

are not able to legislate in these areas. On other matters the Commonwealth and the States have what are called concurrent powers—that is, both the Commonwealth and the States may legislate. The States retain legislative powers over matters not specifically listed in the Constitution;

- the limits to the Senate's ability to initiate or amend certain financial legislation. In other respects the Senate has the same law-making powers as the House of Representatives (including the power to reject any legislation);
- special requirements for financial legislation (see Infosheet No. 10 'The Budget and Financial Legislation');
- procedures when there is disagreement between the Houses over legislation. This can result in both Houses being dissolved by the Governor-General (see Infosheet No. 18 'Double dissolution') and, when the disagreement continues, the two newly elected Houses meeting together (a 'joint sitting') to resolve their differences.

## **Chapter 2—The Executive Government**

The structure and powers of the Executive Government, including:

- the executive powers of the Governor-General;
- the establishment of the Federal Executive Council;
- the appointment of Ministers;
- the creation of government departments and the appointment of officers (public servants).

## **Chapter 3—The Judicature**

The structure and powers of the federal judicial system, including:

- the establishment and jurisdiction of the High Court of Australia;
- provision for the creation of other federal courts;
- the appointment of judges;
- guarantee of trial by jury for indictable offences against Commonwealth law.

## **Chapter 4—Finance and Trade**

Commonwealth finances and trade between the States, including:

- federal Parliament's control over Commonwealth expenditure;
- Commonwealth control of customs and excise;

- free trade between the States;
- Commonwealth powers to give financial assistance to the States.

## Chapter 5—The States

The relations of the States with the Commonwealth. Under these provisions:

- the States keep the same constitutions, powers and laws as they had prior to federation, except as modified by the Australian Constitution;
- in cases of conflict in areas where the Commonwealth and States have concurrent powers to make laws, Commonwealth law has priority and the State law is invalid to the extent of the inconsistency;
- States may give territory to the Commonwealth;
- the Commonwealth is prevented from passing laws to 'establish' any religion (that is, make any religion the national religion).

## Chapter 6—New States

Deals with the creation of new States and gives the Commonwealth power to make laws for the government and representation of the Territories.

## Chapter 7—Miscellaneous

Covers the establishment of the Seat of Government (i.e. the Australian Capital Territory) and allows the Governor-General to appoint deputies to exercise powers or functions in his or her behalf.

## Chapter 8—Alteration of the Constitution

Sets out how the Constitution may be changed (outlined below).

### Matters *not* in the Constitution

Some of the central features of Australia's system of government (described as parliamentary, cabinet or responsible government and also called a Westminster-style system) are not set down in the Constitution but are based on custom and convention. These include the position of Prime Minister and the group of senior Ministers called the Cabinet, who make major policy and administrative decisions and in effect govern the country.

On some matters the Constitution sets down temporary arrangements 'until Parliament otherwise provides'. The Parliament does this by passing legislation. For example, the first national elections were held under State laws. Later elections were conducted under the provisions of the *Commonwealth Electoral Act*. Another example is the number of Senators and Members, which may be changed by an Act of Parliament as long as the specific conditions set by the Constitution are met.

Unlike the constitutions of some other countries, the Australian Constitution does not contain a list of the rights of citizens (a 'bill of rights').

## Interpreting the Constitution—the role of the High Court

One of the roles of the High Court is the interpretation of the Constitution. The High Court does this only when a specific case is before the court requiring a ruling on a provision of the Constitution; it does not give advisory opinions.

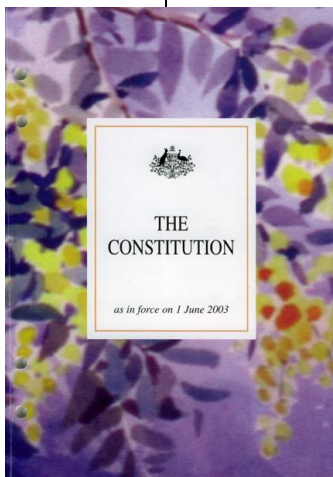
Interpretation of the Constitution has been needed not only because of disagreements over the meaning and application of particular provisions, but also because of developments which were not foreseen when the Constitution was written (for example, aviation and television).

Through interpretation the effect of the Constitution has been changed over the years. Many of the court's rulings have had the result of extending the powers of the Commonwealth at the expense of the States.

## How can the Constitution be changed?

The Parliament can change ordinary laws by passing amending laws, but it can only initiate proposals for changes to the Constitution. The approval of the people of Australia is necessary for any change to the Constitution, just as the approval of the people of Australia was a step in the process of creating the Constitution in the first place. The Constitution itself sets out the way in which it can be changed.

A proposal to alter the Constitution starts as a bill in either House of the Parliament and can be introduced by any Member or Senator. A constitution alteration bill goes through the same stages and follows the same procedures in each



House as any other bill (see Infosheet No. 7 'Making laws') with the important exception that its third reading must be passed by an 'absolute majority'. An absolute majority means that it must be agreed to by more than half of the total number of Members of the House—other bills need only the agreement of the majority of Members voting at the time (a 'simple majority').

When a constitution alteration bill has passed both Houses it is voted on by the people of Australia in a referendum (held after two months but within six months). To save expense referendums are usually held at the same time as elections for the House of Representatives and/or the Senate.

A constitution alteration bill does not have to be passed by both Houses of Parliament. If one House refuses to pass a constitution alteration bill which has been passed by the other House, the bill may be submitted to a referendum if the first House passes the bill a second time.

To be successful the proposal must be approved by the majority of voters nationwide, and also by the majority of voters 'in the majority of the States' (that is, in at least four States). If a proposal affects an individual State rather than all States generally, the proposal must also obtain majority approval in the State concerned.

Many proposals for constitutional change have been discussed over the years, but most have not got as far as referendum or have been rejected at referendum. Forty-two proposals to alter the Constitution have been passed by the Parliament and submitted to referendum, but only eight have been successful. These were:

- to allow Senator's terms to commence in July instead of January (1906);
- to allow the Commonwealth to take over State debts (1910);
- to permit the Commonwealth to make agreements with the States about the States' public debts and borrowings (1928);
- to give powers to the Commonwealth to legislate on a range of social services (1946);
- to remove provisions which had prevented the Commonwealth from making laws with respect to Aboriginal people and which had excluded them from being included when counting the population (1967);
- to provide for casual vacancies in the Senate to be filled by a person of the same political party as the Senator being replaced (1977);
- to let electors in the Territories vote in referendums (1977);

- to set a retiring age of 70 for High Court and federal court judges (1977).

Since 1901 the Constitution has been reviewed by several official bodies, including a Royal Commission (1928); a Conference of Commonwealth and State Ministers (1934); a Convention of Members of Commonwealth and State Parliaments (1942); a Parliamentary Joint Select Committee (1956); a Constitutional Convention (1973); a Constitutional Commission (1988); and a Republic Advisory Committee (1993).

The Constitutional Centenary Foundation was formed in 1991 to encourage public discussion, understanding and review of the Constitution in the lead up to the centenary of federation in 2001.

A Constitutional Convention was held in February 1998 to consider whether or not Australia should become a republic. After a majority of delegates voted in favour of a republic, constitution alteration bills were passed by the Parliament containing changes to the Constitution necessary to put into place the republican model most widely supported at the Convention. However, these proposals were unsuccessful at referendums held in November 1999.



*The Australian Coat of Arms*

### For more information

Copies of the Constitution are available from the Parliamentary Education Office. The Constitution is available online from several sites including [www.aph.gov.au/senate/pubs](http://www.aph.gov.au/senate/pubs)

The following references contain information on the Constitution as it affects the Parliament and on the processes involved in passing constitution alteration bills:

*House of Representatives Practice*, 5<sup>th</sup> edn. Department of the House of Representatives, Canberra, 2005. (This book also contains the full text of the Constitution).

*Oggers' Australian Senate Practice*, 12<sup>th</sup> edn. Department of the Senate, Canberra, 2008.