

Australian Constitution Online Program

Part B: Power Background Notes

The Three Arms of Government

The Australian Constitution establishes three arms of government, each with their own role and contribution to the running of the country. The three arms are; the Legislature, established in Chapter One of the Constitution, the Executive, established in Chapter Two, and the Judicature (also known as the Judiciary), established in Chapter Three.

The Legislature arm of government makes the law, the Executive arm implements the law, and the Judicature arm interprets the law.

The Legislature

Chapter One of the Australian Constitution is titled *the Parliament*, and sets up a **bicameral** (two house) Federal Parliament system to act as the Legislature (law making) arm of government. As Australia is a **Constitutional Monarchy**, this system also features a link to Britain by including the Monarch as the symbolic Head of State who is represented at a federal level in Australia by the Governor-General.

Chapter One goes into specific detail about what the Federal Parliament has power to make laws on, with limited detail about the actual structure and operation of the institution - instead relying on unwritten traditions and customs from Britain known as conventions. Members of the Executive arm come from the Legislature arm.

The Executive

The Executive is the arm of government designed to implement the law in Australia. The Executive consists of the Governor-General, the Prime Minister and other Government Ministers, mainly senior Ministers from the Cabinet.

The Executive has the power to put the law into action. The Executive makes and enforces the regulations, policies and actions required, to ensure the laws passed by the Legislature are followed in Australia by the government and the people.

Similar to the Legislature, the Executive arm of government relies heavily on constitutional conventions, as the roles of its members are not mentioned in the Constitution. There are 60 sections in Chapter One of the Constitution describing the Legislature and only ten sections in Chapter Two describing the Executive.

Section 61 of the Constitution establishes that the Queen is the person who holds Executive power for Australia, which can be exercised on her behalf by the Governor-General (*the Constitution was written when Queen Victoria was the current Monarch, but the original Act includes a clause specifying that any reference to "the Queen" also includes any future successors*). It identifies this power as covering the execution and maintenance of the Constitution, and the execution and maintenance of laws passed by the Legislature.

Chapter Two of the Constitution establishes a Federal Executive Council to advise the Governor-General on the use of Executive power, identifying members as Ministers of State chosen by the Governor-General. There are certain powers the Governor-General can only exercise 'in Council,' meaning they can only act with the advice of the Federal Executive Council.

Due to convention, the way this operates in Australia is more complex than the wording in the Constitution. Australia follows the principle of responsible government, which means that members of the Executive Council should hold the support of the lower house of Parliament. In Australia, this means that Ministers must be members of the political party or coalition holding the most seats in the House of Representatives - the government.

The Constitution also makes no reference to the role of the Prime Minister, even though in practice they hold a lot more power than the Governor-General. The Prime Minister is the leader of the political party or coalition holding the most seats in the House of Representatives, and is always a member of the lower house.

The Prime Minister selects Members of Parliament to serve as members of the Executive Council, and then they are officially appointed by the Governor-General. Each Minister will be responsible for at least one or more areas of governing, known as portfolios. Some examples of portfolios include Defence, Foreign Affairs and Health. Different portfolios have at least one department to help the Minister with the implementation of the relevant laws, such as the Department of Defence or the Department of Health.

Ministers can also be selected by the Prime Minister to form Cabinet, the institution most responsible for government decision making.

The Judicature

The Judicature, or Judiciary, is the arm of government in Australia responsible for interpreting the law. They make decisions on what the law means, and make judgements on whether the law was followed in specific cases brought before them. The Judicature is established in Chapter Three of the Constitution, which has ten sections.

The Judicature consists of the High Court of Australia and other federal courts established by the Parliament, currently this includes the Federal Court of Australia and the Federal Circuit and Family Court of Australia. The judges who sit on federal courts and make decisions are known as Justices and they are appointed by the Governor-General in Council (on advice of the Executive Council).

The High Court of Australia is established in section 71 of the Constitution, and section 73 establishes it as the highest court in Australia. There are six Justices and one Chief Justice who sit in the High Court, and once appointed they can remain until reaching the age of 70, after this they must retire.

The High Court also has the power to make judgements on matters of the Constitution, and decide whether laws created by the Legislature or the actions taken by the Executive are valid and have the proper constitutional authority.

The Separation of Powers

The separation of powers is the principle that the power to govern should be divided between different institutions, to provide balance and ensure no single person or group has an excessive concentration of power.

This concept inspired the writers of the Constitution to separate the three arms of government, and although not always followed exactly in Australia, it is a key feature for the operation of our democracy.

History

The idea of separating power can be traced as far back as Ancient Greece, but the separation of powers principle as it is understood today was introduced by French philosopher Charles de Montesquieu in 1748. He suggested every person with power is apt to abuse it, and to prevent this, there should be a check to power. According to Montesquieu, a nation's freedom depended on the three powers; Legislative, Executive and Judicial having their own separate institution.

The separation of powers principle has been incorporated into the development of many democratic nations such as the Netherlands, UK, USA and India.

Purpose

The separation of powers is designed to create checks and balances on the power of government. Because each arm of government should hold a similar amount of power but act separately and independent of each other, they can provide balance in the system ensuring that no one area of government holds too much power. In theory this can help prevent damage being caused from corruption or abuse of power, as no single arm of government can achieve significant change without the support of the other two.

Each arm of government having a similar amount of power allows them to keep a check on the actions of the others, and challenge or disallow stances the other arms take that are not considered to be in line with the interests of the Constitution or the Australian people. As suggested by Montesquieu - power should be a check to power - if one institution holds all the power, no other body is strong enough to keep them accountable.

Australian Implications

There are criticisms in Australia about the lack of a fully functioning separation of powers, as the Executive and the Legislature are so closely linked. Members of the Executive are chosen from within the Legislature, and as the members of the Executive come from the majority party in the House of Representatives they can often set the legislative agenda, so the same people often propose, make and implement laws.

The separation of powers principle is still an important part of Australia's democracy as the Judicature remains separate from the other two arms. The Legislature is also still able to keep a check on the Executive through the functions of the Opposition and the Senate.

Case Study: The 'Malaysia Solution'

A recent example of how the three arms of government work to balance and check each other in Australia is the High Court case Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32.

In 2011 the Federal Minister for Immigration and Citizenship signed an agreement with the Malaysian government regarding the processing of asylum seekers and the resettlement of refugees. This was an attempt by the Executive to implement the *Migration Act* 1958 (Cth), a law passed by the Legislature.

The agreement known as the "Malaysia Solution," and the validity of the scheme was challenged in the High Court by two asylum seekers who had recently arrived in Australia and would have been sent to Malaysia for processing if the agreement was implemented.

The High Court ruled that Malaysia did not meet the requirements specified in the *Migration Act* for the Minister to validly declare it a country to which asylum seekers can be transferred for processing, preventing the scheme from occurring.

This is an example of how the Judicature was able to check the actions of the Executive, and ensure they were in balance with the Legislature. The Minister was not accurately implementing the law as it was specified in the *Migration Act*, and because the High Court has separate and independent power they were able to hold the Minister accountable, and prevent an agreement going ahead that did not align with the laws passed by the Legislature.

While on the surface this example is a demonstration of the separation of powers, the actions which followed can be seen as demonstrating the lack of separation between the Executive and the Legislative.

Within a month of the ruling of the High Court, the Minister for Immigration and Citizenship introduced the *Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011* to Parliament. The new amendment passed through Parliament, overturning the clause in the previous version of the *Migration Act* that prevented the Malaysia Solution from going ahead.

While the Executive did not try to reinstate the Malaysia Solution, they later implemented a similar concept with Papua New Guinea and the Republic of Nauru, countries identified as suitable refugee processing locations.



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Acknowledgement of Country The Department of the Premier and Cabinet acknowledges the traditional custodians throughout Western Australia and their continuing connection to the land, waters and community. We pay our respects to all members of the Aboriginal communities and their cultures; and to Elders past and present.