



Unit 6: The Constitution, Federalism and Westminster System – Year 6 -
Civics and Citizenship (C & C) Strand: Government & Democracy

Topic 6.2: Introducing different elements in the Australian Constitution,
Westminster influences, and the covering clauses and Preamble.

What are the Covering Clauses of the Constitution Act?

Australia's Constitution is contained in section 9 of a British Act of Parliament – the [Commonwealth of Australia Constitution Act 1900](#). The reason for placing the Constitution there was to give it a status above that of an ordinary statute of the Commonwealth Parliament, and to prevent it being altered except by a special method – the approval of the people in a referendum. But what about sections 1 to 8 (known as the 'covering clauses') of that Act? What do they do and are they still important?

Some of them – covering clauses [1](#), [3](#) and [4](#) – are formalities, dealing with the name of the Act, its commencement and the making of the proclamation to create the Commonwealth of Australia. They do not have any additional work to do. Covering clauses [7](#) and [8](#) deal with the application of old British laws, which are now only of historical relevance.

Covering clause 2 – The Queen (or King) and her successors

[Covering clause 2](#) says: 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.' On its face, this could be taken merely as meaning that the references to 'Queen' don't just refer to Queen Victoria (who was the Queen when the Constitution came into being), but also include any subsequent 'King' or reigning 'Queen', such as Queen Elizabeth II and King Charles III. The problem is how the connection to the 'sovereignty of the United Kingdom' is to be interpreted. This is because in more recent times the High Court of Australia has interpreted references to the 'Queen' in the Constitution as meaning the 'Queen of Australia', rather than the 'Queen of United Kingdom'.

When the Constitution was enacted, there was only one office of 'Queen' which applied to the whole Empire. The Crown was 'indivisible'. But as the various parts of the Empire became independent nations, the Crown became 'divisible'. It split off into separate Crowns of Canada, Australia, New Zealand, etc.



*King Charles III
addressing the Scottish
Parliament following his
accession as King
September 2022
Source: Wiki Commons*



The royal family on the balcony of Buckingham Palace after the annual Trooping the Colour in 2013

Source: Royal Family website

When the 'Queen of Australia' exercised a power, she did so on the advice of Australian Ministers, but if she acted as 'Queen of the United Kingdom', she did so on the advice of British Ministers. That's why it is important to know which 'Queen' (or now, King) has the power to act, as it affects who gets to advise them.

At the moment, it is the one person – King Charles III – who holds all these different offices. But what if the British changed their rules for determining who their monarch is? Would this bind Australia so that we automatically got the same King as the United Kingdom, or is this a matter for Australian law to decide? On the one hand, covering clause 2 suggests we are tied to whoever is the monarch of the United Kingdom. On the other hand, the Crown has in fact become divisible, Australia is an independent nation and the Crown has a different constitutional role than it did in 1901. This view was taken when the rules of succession to the Crown changed in 2015 to remove discrimination against females. Australia [voluntarily changed](#) its own laws about the order of succession to the Crown of Australia so that they were the same as those of the United Kingdom and the other Realms.

Covering Clause 6 – Definition of States

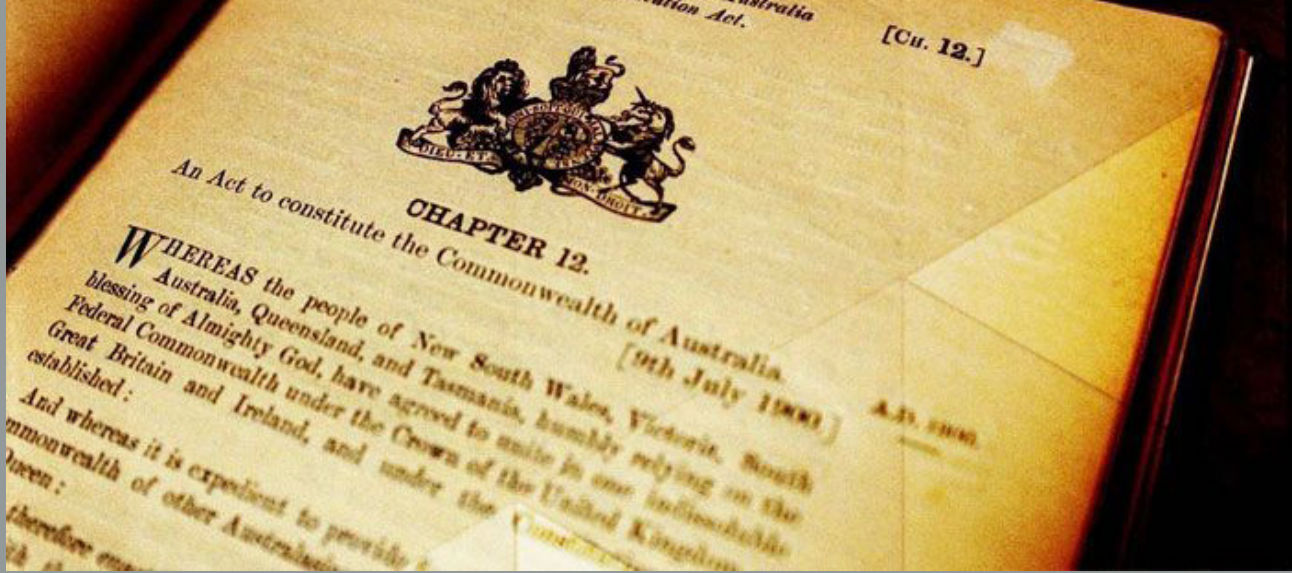
[Covering clause 6](#) defines 'the Commonwealth', 'the States' and 'Original States'. Its definition of

'States' is most interesting. It refers specifically to 'South Australia, including the northern territory of South Australia', which shows that even before the Northern Territory was surrendered to the Commonwealth, it had a unique status as separate entity within South Australia. Most attention, however, has been attracted by the reference to New Zealand. Sometimes people argue that New Zealand is really a State of Australia because of this reference in covering clause 6. But if you read it closely, it says "The States" shall mean such of the colonies of New South Wales, New Zealand, Queensland.... as for the time being are parts of the Commonwealth..." So until New Zealand joins the Commonwealth and becomes part of it, it is not a State of Australia, even though it is mentioned in covering clause 6.

Covering Clause 5 – The provision that makes the Constitution binding

The crucial provision is [covering clause 5](#). It says that the Constitution and all Commonwealth laws 'shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth' regardless of State laws.

This means that there are effectively two rules about inconsistency of laws. First, if a State law is inconsistent with a valid Commonwealth law, the State law is inoperative to the extent of that inconsistency, but will revive if that inconsistency is removed. This is due to the application of section 109 of the Commonwealth Constitution.



*Commonwealth of Australia Constitution Act
An Act to Constitute the Commonwealth of
Australia 1901
Source: Wiki Commons*

Second, if a State law is inconsistent with the Commonwealth Constitution, then that State law is invalid because covering clause 5 says that the Constitution is binding on the courts, judges and the people, regardless of what the State law says. This means that the State had no power to enact its inconsistent law. It cannot revive, because there was no power to make it to begin with.

If a Commonwealth law breaches the Constitution it is invalid, because covering clause 5 makes the Constitution binding on the courts, judges and the people of every part of the Commonwealth. Courts are therefore required to interpret all laws in Australia as subject to the overriding force of the Commonwealth Constitution, which due to covering clause 5, applies by 'paramount force' in Australia.

Covering clause 5 is also interesting for what is not in it. It does not make international treaties, made by the Commonwealth, binding on the courts, judges and people. The equivalent provision in the United States Constitution does make treaties binding and was originally included in the draft Commonwealth Constitution. The British did not like it. They thought that Parliament should be sovereign and that treaties should not become law unless Parliament passes a law to implement them. So the reference to treaties was removed from covering clause 5.

When devising the 1999 republic referendum, the Commonwealth took the peculiar approach of not attempting to repeal (ie legally remove) the covering clauses or alter the status of the Constitution as a section of a British Act of Parliament. Instead it decided simply to ignore the British Act. This would have meant that covering clause 5 was ignored too.

To avoid this, the Commonwealth Government proposed to insert a version of covering clause 5 in the text of the Constitution itself, as a new section 126. It would have said: 'This Constitution, and all laws made under it by the Parliament, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State'. Its basis would have been the act of popular sovereignty of the people in approving it in a referendum (rather than the sovereignty of the British Parliament). But the referendum was lost, so it did not happen. Covering clause 5 therefore continues to operate.





Topic 6.2: Lesson/ Activities Five



AUSTRALIAN
CONSTITUTION
CENTRE

Introducing the covering
clauses of the Constitution Act.
A federated Australia for the
common good

Time/Lesson

- 1 hour

Learning Goal

To understand what the covering clauses are and why some remain important.

Teaching Reference Document

- TRD 53: What are the covering clauses of the Constitution Act?

The 'covering clauses' are the first 8 sections of the British Act which contains the Australian Constitution in section 9. What is in those first 8 sections and do any of them remain important?

"If a Commonwealth law breaches the Constitution it is invalid, because covering clause 5 makes the Constitution binding on the courts, judges and the people of every part of the Commonwealth. Courts are therefore required to interpret all laws in Australia as subject to the overriding force of the Commonwealth Constitution, which due to covering clause 5, applies by 'paramount force' in Australia."

Resources

- Australia's Constitution Pocket Edition or online copy of the Constitution

Teacher Instruction

- Lesson outlines and guiding questions:
- Ask students to look at covering clause 2. If the United Kingdom changes who gets to be King of the United Kingdom, should covering clause 2 be interpreted as meaning that Australia automatically gets that same person as its King, or should it instead be interpreted as meaning that Australian law decides who is King of Australia? Students could hold a debate about who should get to decide.
- Discover and understand covering clause 6. Draw a map of Australia and name the States/Territories. Have any new States or Territories been added since 1901?
- Research why New Zealand, which was once part of New South Wales, became a separate nation, and did not join in federation with Australia in 1901.
- Introduce covering clause 5 which says that the Constitution is binding on "the courts, judges, and people of every State and of every part of the Commonwealth" regardless of anything in a State law. Why is it that treaties are not binding in Australia in the same way as a law, unlike in America. Discuss whether the Commonwealth Government should be able to legally bind the people by entering into a treaty, or whether it is more democratic to leave it to Parliament to make a law to implement treaty obligations?

Assessment Strategies

Assessment tasks following lesson activities:

- In their own words students identify one clause from the Australian Constitution's covering clauses and explain why they think it is important.
- Students write an opinion piece for a newspaper about whether they think New Zealand would be better or worse off if it had become one or two States of Australia.

