

LAWS6006: Constitutional Law

Newcastle City Precinct
Semester 1 – 2024



THE UNIVERSITY OF
NEWCASTLE
AUSTRALIA

OVERVIEW

Course Description This course primarily deals with the study of the Australian *Constitution*. State constitutions receive limited attention.

The aim of the course is to impart an understanding of the fundamentals of Australian constitutional law through the study of key judicial decisions on powers and prohibitions in the Commonwealth Constitution. In a one semester course it is neither possible nor desirable to study all aspects of constitutional law. The course is designed to provide a conceptual framework for solving problems about constitutional law by a detailed, analytical treatment of selected topics. Mastery of these should enable students to master all issues arising in constitutional law whether or not they are specifically dealt with in this course.

Skills Focus This course will focus on assisting students to develop the following skills:

- Writing for a legal audience
- Advocacy
- Assessing and using sources

Requisites Students must be active in either the Juris Doctor, the Juris Doctor/Grad Dip Legal Practice or the Master of Laws to enrol in this course.

Assumed Knowledge LAWS6000, LAWS6001, LAWS6120, LAWS6121 (or LAWS6002B), LAWS6130 (or LAWS6003B), LAWS6140 and LAWS6141 (or LAWS6004B).

Contact Hours

Newcastle City Precinct
Online Activity
Weekly online lecture for full term (2 hours per week).

Seminar *
Weekly on campus face to face seminar for full term (2 hours per week)

* This contact type has a compulsory requirement.

Compulsory Attendance The School of Law and Justice's attendance policy applies to this course. Please see p 4 of this Course Outline for further details.

Unit Weighting 10

Workload Students are required to spend on average 120-140 hours of effort (contact and non-contact) including assessments per 10 unit course.

COURSE OUTLINE

CONTACTS

Course Coordinator **Newcastle City Precinct**
Dr David Tomkins
David.Tomkins@newcastle.edu.au
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Consultation: By appointment. (Tuesdays, Wednesdays or Thursdays preferred)

Teaching Staff Dr Joseph Wenta
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Dr Kcasey McLoughlin
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Consultation: By appointment.

Other teaching staff will be advised on the course Canvas site.

School Office **School of Law and Justice**
5th Floor
NU Space
409 Hunter Street
Newcastle
Law-School@newcastle.edu.au
+61 2 4921 8666

SYLLABUS

Course Content Topics covered in this course include:

1. Fundamental principles of Australian constitutional law: federalism, the separation of powers, responsible government, the distribution of power.
2. Fundamental techniques of Australian constitutional law: constitutional interpretation, characterisation, reading down, severance, the distinction between purposive and non-purposive powers, incidental powers.
3. Inconsistency (s 109).
4. Trade and commerce power (s 51 (i)).
5. Corporations power (s 51 (xx)).
6. Defence power (s 51 (vi)) and the doctrine in the *Communist Party Case*.
7. External affairs power (s 51 (xxix)).
8. Commonwealth financial powers: taxation and grants (ss 51 (ii), 55, 96) and excise (s 90).
9. Appropriations.
10. Freedom of interstate trade, commerce and intercourse (s 92).
11. Executive power.
12. Judicial power and the separation of judicial power.
13. Express and implied rights and freedoms, including the implied freedom of political communication.
14. Intergovernmental immunities.
15. The Constitution and First Australians.
16. Aspects of State constitutional law

Course Learning Outcomes **On successful completion of this course, students will be able to:**

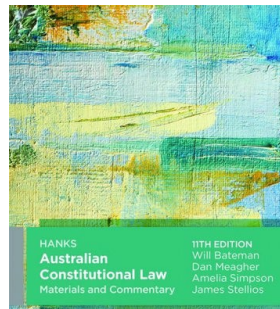
1. Demonstrate an extended and integrated understanding of (i) the function of the High Court as the final arbiter of constitutionality in Australia and (ii) the techniques of judicial review as applied in Australia;
2. Demonstrate contextual and specialised knowledge of constitutional law doctrine;
3. Using specialised legal skills, identify legal issues, adduce relevant legal principles and rules and apply these to solve problems (whether hypothetical or real) based on constitutional law;
4. Critically and with integrated understanding assess the adequacy of the Constitution as

Australia's fundamental law and basic instrument of government and the scope for constitutional reform;
5. Using specialised legal research skills provide critical analysis of and reflection on primary and secondary materials;
6. Communicate effectively in writing to specialist and non-specialist audiences and conduct independent legal research in the context of constitutional law.

Course Materials

PRESCRIBED TEXT:

- 1) Will Bateman, Dan Meagher, Amelia Simpson and James Stellios *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 11th ed, 2021).



 LexisNexis

This is the same book and same edition as was set in 2022 and 2023. *Earlier editions of the prescribed text* (such as the 10th edition (2016) which was used in the 2021 course and earlier) *should be used with due caution as they will not always reflect the current state of the law.*

The prescribed text can be purchased from the [School Locker](#) (either online or at the retail store located at the University's Callaghan Campus), from the publisher [LexisNexis](#), or from other online providers.

- 2) Students will also require a copy of the ***Constitution of the Commonwealth of Australia***.

Like most legislation, this can be accessed free of charge online (e.g. from the official [Federal Register of Legislation](#) – including a printable pdf version; from the [Federal Parliament's website](#) – including a different printable pdf version; or from [Austlii](#)). If you would like a professionally printed copy **a pocket edition is available for \$3 from the Parliamentary Education Office**. The course coordinator will have a number of pocket Constitutions available for purchase for \$3 each should you wish to purchase a copy in this way.

RECOMMENDED TEXTS / READINGS:

The following book, available from the university library, comes highly recommended:

- Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015). **[This is a textbook, not a casebook. It makes an excellent companion to your casebook.]**

The following books, also available from the university library, come particularly recommended:

- James Stellios *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022). **[This is the standard scholarly text in the field. For students who wish to engage with the issues in this course in greater depth it comes highly recommended. It is the outstanding text in the field.** If the 7th edition (by James Stellios) is unavailable the 6th edition (2015) also by James Stellios or the 5th edition (2008) by Leslie Zines (which was the last edition authored by Professor Zines before his passing in 2014) are also well worth consulting. If you are consulting earlier editions of this book do not be confused by the change in title following the change in authorship. The 5th edition (by Leslie Zines) is entitled *The High Court and the Constitution*. The 6th edition (by James Stellios) is entitled *Zines's The High Court and the Constitution* while

the 7th edition (also by James Stellios) is entitled *Zines and Stellios's The High Court and the Constitution*.

- Peter Hanks, Frances Gordon and Graeme Hill *Constitutional Law in Australia* (LexisNexis Butterworths, 4th ed, 2018). [This is a textbook, not a casebook and is not to be confused with the Hanks casebook which is your prescribed text].

Other collections of materials and commentary (i.e. casebooks):

- Nicholas Aroney, Sarah Murray, Peter Gerangelos, Patrick Emerton, Adrienne Stone and Joel Harrison *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Thomson Reuters, 5th ed, 2022). **[For many years this book (in previous editions) was the prescribed text at this Law School and is an excellent resource** — although typically more advanced in its coverage than the Hanks casebook which is now the set text. Those of you looking to consider the issues in this course in greater depth may wish to refer to this book at times. If the 5th edition (2022) is not available, the 4th edition (2017) is also worth consulting.
- Peta Stephenson, Rebecca Ananian-Welsh, Andrew Lynch, George Williams and Sean Brennan *Blackshield and Williams' Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 8th ed, 2024). **[This is another good casebook** — although again, typically a little more advanced in its coverage than the set text which is the Hanks casebook. If the 8th edition is not available, the 7th edition (2018) is also worth consulting]

Other reference books:

- Sarah Joseph and Melissa Castan *Federal Constitutional Law: A Contemporary View* (Thomson Reuters, 6th ed, 2024). If the 6th edition is unavailable, the 5th edition (2019) is also worth consulting. [This is a textbook, not a casebook].
- P.H. Lane *A Manual of Australian Constitutional Law* (Law Book Co, 6th ed, 1995)
- John Trone *Lumb, Moens & Trone: The Constitution of the Commonwealth of Australia Annotated* (LexisNexis Butterworths, 10th ed, 2021). **[Contains very useful references to the literature]**

COMPULSORY REQUIREMENTS

In order to pass this course, each student must complete ALL of the following compulsory requirements:

Contact Hour Requirements:

- There is a compulsory attendance requirement in this course. Attendance at all classes (seminars and workshops) will be monitored and records maintained by the Course Coordinator; In order to satisfy the "compulsory attendance" requirement, students must be present at a minimum of 80% of scheduled classes as spelled out in the course outline, unless they are able to demonstrate that their absence falls within the Adverse Circumstances policy. Unless this requirement is met, despite marks awarded in other assessment items, the student will receive a zero mark and a CF (component fail) grade for the course.
- Please note that if you miss more than 2 classes for reasons that fall within the University's adverse circumstances policy you may be required to complete additional assessment items to ensure that you have completed the required volume of learning for this course.

SCHEDULE

Week	Week Begins	Topic	Learning Activity	Assessment Due
1	26 Feb	Introduction to and Fundamental Principles of Australian Constitutional Law	Before the seminar: Required reading and working through the online materials Seminar: Orientation to the course, case reading, legal argumentation.	
2	4 Mar	Constitutional interpretation and characterisation (using the Trade and Commerce power (s 51(i) as an illustration)	Before the seminar: Required reading and working through the online materials Seminar: Class discussion and problem solving in seminar	
3	11 Mar	Inconsistency (s 109)	As above	
4	18 Mar	Corporations Power (s 51(xx))	As above	
5	25 Mar	External Affairs Power (s 51(xxix))	As above	Case Analysis (20%) (due Monday 25 March, 11.59 pm)
6	*1 Apr	(Tue) NO SEMINARS* (Thu) Defence Power (s 51(vi)) and the Doctrine in the Communist Party Case	As above	
7	*8 Apr	(Tue) Defence Power (s 51(vi)) and the Doctrine in the Communist Party Case (Thu) Commonwealth Financial powers (ss 51(ii), 55, 96)	As above	
Mid-Term Break				Professional Writing Task (30%) (due Sunday 21 April, 11.59 pm)
Mid-Term Break				
8	29 Apr	Executive Power and Executive Government (Chapter II, esp s 61)	As above	
9	6 May	Judicial Power and the Separation of Judicial Power (Chapter III), including the <i>Kable</i> principle	As above	
10	13 May	The Implied Freedom of Political Communication	As above	
11	20 May	Freedom of Interstate Trade, Commerce and Intercourse (s 92)	As above	
12	27 May	A. Express Rights and Freedoms B. Intergovernmental Immunities	As above	
13	3 Jun	Revision	TBC	

Examination Period
Examination Period

* *Tuesday 2 April (Easter Tuesday) is a University holiday. In addition to the statutory public holidays of Good Friday, Easter Saturday, Easter Sunday and Easter Monday (29 March to 1 April), the University is also closed on Easter Tuesday (2 April). There will be no seminars taking place on this day. Seminars on the Defence Power and the Doctrine in the Communist Party case will be conducted in the regular class times on Thursday 4 April (week 6) and Tuesday 9 April (week 7). A seminar on Commonwealth Financial Powers will be conducted on Thursday 11 April (week 7). Further information regarding attendance at the seminar on Thursday 11 April will be made available on the course Canvas site in due course.*

ASSESSMENTS

This course has 3 assessments. Each assessment is described in more detail in the sections below.

	Assessment Name	Due Date	Involvement	Weighting	Learning Outcomes
1	Case Analysis	Monday 25 March, 11.59 pm (Monday of Week 5)	Individual	20%	1, 2, 4, 5, 6
2	Professional Writing Task	Sunday 21 April, 11.59 pm (end of the first week of the mid-semester break)	Individual	30%	1, 2, 3, 4, 5, 6
3	Open Book Formal Examination	Held in the formal examination period (commencing Monday 10 June)	Individual	50%	1, 2, 3, 6

Late Submissions

The mark for an assessment item submitted after the designated time on the due date, without an approved extension of time, will be reduced by 10% of the possible maximum mark for that assessment item for each day or part day that the assessment item is late. Note: this applies equally to week and weekend days.

Adverse Circumstances

All three assessment items in this course are subject to the University's adverse circumstances policy and procedure. In particular, this statement constitutes notice under clause 4(b) of the [Adverse Circumstances Affecting Assessment Items Procedure](#) in respect of Assessment 1 – Case Analysis.

Final Results

To ensure that grades are fair both within and between courses and cohorts the School of Law and Justice has a rigorous policy of moderating and reviewing assessment. The School Assessment Board (SAB) reviews all final grades before they are released to students and the SAB process may result in the overall marks of a class being moved up or down by a specific number, thus impacting upon individual marks. This is consistent with grading practices in other law schools across the country and important to ensure the integrity of assessment. This means that the final grade you are awarded may not be the sum of marks you have received in all assessments.

Assessment 1 - Case Analysis

Assessment Type Description

Written Assignment

Students will be asked to prepare a written analysis of a landmark case in constitutional law. The primary purpose of this assessment item is to provide students with the opportunity to improve their skills of critical analysis of a primary legal source and written expression; this assessment also provides students with the opportunity to obtain knowledge of a landmark constitutional law case.

Students apply critical thinking in analysing a particular constitutional law case. They effectively communicate in writing the strengths, weaknesses, significance and broader doctrinal context of the case, the parties' main arguments and the judges' reasoning therein.

More detailed instructions, including the list of cases to choose from, will be made available to students via Canvas.

Weighting

20%

Due Date

Monday 25 March, 11.59 pm (Week 5)

Submission Method

Online via Canvas. **It is each student's responsibility to keep a copy of the assignment that is submitted.**

Assessment Criteria

In preparing their case analysis students should take particular care to demonstrate the following:

- Evidence of having read the complete case report (including the summary of counsel's argument and the written judgment or judgments) in the Commonwealth Law Reports;
- Correct referencing of primary legal sources. Unless otherwise advised referencing should be in accordance with the *Australian Guide to Legal Citation* (4th edition) ('AGLC4'). This may be viewed online at: <https://law.unimelb.edu.au/mulr/aglc/about>;

- Capacity to write clearly, concisely and accurately about the case chosen;
- Advanced capacity to synthesise legal material in a judgment into a comprehensible and accurate statement of reasoning;
- Advanced capacity to evaluate the legal reasoning in the chosen case and the significance of the chosen case to the development of constitutional law doctrine;
- Strong skills in written expression, including clarity, structure, grammar and spelling.

N.B. This is an assessment testing your skills in the use of PRIMARY legal materials only; in preparing their case analysis students should **not** refer to secondary sources. Marks may be deducted for the use of secondary legal sources (including but not limited to textbooks, journal articles, case notes, internet commentary, and material published on law firm sites). Moreover, unacknowledged use of secondary sources may amount to plagiarism and be subject to penalty for academic misconduct (on which see p 9 below).

Return Method

Marks will be made available on Canvas. Marked assignments and brief written feedback will either be distributed in class [or available for collection from the course coordinator] (if marked on paper) or available online via the course Canvas site (if marked electronically).

Feedback Provided

Yes. Brief written feedback is provided.

Assessment 2 – Professional Writing Task

**Assessment Type
Description**

Written Assignment

The purpose of this assessment is to assess students' capacity to apply principles of constitutional law and reasoning to factual matrices to solve constitutional problems, to identify tensions and lacunae in the existing state of the law, and to propose solutions to these constitutional problems in the context of a professional writing exercise. This should promote professionalism, community responsiveness and scholarship.

Students apply critical thinking in assessing factual matrices and in discerning and applying relevant constitutional principles. They effectively communicate in writing the strengths, weaknesses, significance and applicability as well as the broader historical, political and social context of various constitutional perspectives. They develop and deploy reasoned arguments for their own perspective on matters where the law is unclear or apt to change.

Students should not underestimate the attention to detail and the grasp of nuance required to produce a good answer.

Weighting

30%

Due Date

Sunday 21 April, 11.59 pm (during the mid-semester break)

Submission Method

Online via Canvas. **It is each student's responsibility to keep a copy of the assignment that is submitted.**

Assessment Criteria

The professional writing task will require students to:

- Demonstrate advanced knowledge and integrated understanding of the course content
- Demonstrate an advanced ability to apply principles of constitutional law and constitutional reasoning to solve legal problems
- Demonstrate a critical awareness of the nuances and uncertainties in constitutional law; where there is uncertainty in the law students will need to demonstrate an ability to adopt a reasoned position of their own
- Present advanced and integrated arguments in writing.

Return Method

Marks will be made available on Canvas. Marked assignments (with brief written feedback if feedback has been requested) will either be distributed in class or alternatively available for collection from the course coordinator (if marked on paper), or available online via the course Canvas site (if marked electronically).

Feedback Provided

Written feedback will be available on an "opt in" system. Students may request written feedback by arrangement with the course coordinator at the time of (or prior to) submission. Further details on how to do this will be made available with the assignment instructions when they are released on Canvas.

Assessment 3 - Open Book Formal Examination

Assessment Type	Formal Examination (Open Book)
Description	<p>The purpose of this assessment is to assess students' capacity to apply principles of constitutional law and reasoning to factual matrices to solve constitutional problems, to identify tensions and lacunae in the existing state of the law, and to propose solutions to these. This should promote professionalism, community responsiveness and scholarship.</p> <p>Students apply critical thinking in assessing factual matrices and in discerning and applying relevant constitutional principles. They effectively communicate in writing the strengths, weaknesses, significance and applicability as well as the broader historical, political and social context of various constitutional perspectives. They develop and deploy reasoned arguments for their own perspective on matters where the law is unclear or apt to change.</p>
Weighting	50%
Due Date	Held in the formal examination period.
Submission Method	Students must sit the exam at the allotted time and venue in the formal examination period
Assessment Criteria	<p>The exam will require students to:</p> <ul style="list-style-type: none">• Demonstrate advanced knowledge and integrated understanding of the course content• Demonstrate an advanced ability to apply principles of constitutional law and constitutional reasoning to solve legal problems• Demonstrate a critical awareness of the nuances and uncertainties in constitutional law; where there is uncertainty in the law students will need to demonstrate an ability to adopt a reasoned position of their own• Present advanced and integrated arguments in writing.
Return Method	N/A
Feedback Provided	No

ADDITIONAL INFORMATION

Grading Scheme

This course is graded as follows:

Range of Marks	Grade	Description
85-100	High Distinction (HD)	Outstanding standard indicating comprehensive knowledge and understanding of the relevant materials; demonstration of an outstanding level of academic achievement; mastery of skills*; and achievement of all assessment objectives.
75-84	Distinction (D)	Excellent standard indicating a very high level of knowledge and understanding of the relevant materials; demonstration of a very high level of academic ability; sound development of skills*; and achievement of all assessment objectives.
65-74	Credit (C)	Good standard indicating a high level of knowledge and understanding of the relevant materials; demonstration of a high level of academic achievement; reasonable development of skills*; and achievement of all learning outcomes.
50-64	Pass (P)	Satisfactory standard indicating an adequate knowledge and understanding of the relevant materials; demonstration of an adequate level of academic achievement; satisfactory development of skills*; and achievement of all learning outcomes.
0-49	Fail (FF)	Failure to satisfactorily achieve learning outcomes. If all compulsory course components are not completed the mark will be zero. A fail grade may also be awarded following disciplinary action.

*Skills are those identified for the purposes of assessment task(s).

Wellbeing Contacts	<p>There are a variety of pressures on law students, and being able to perform well academically under pressure, without excessive stress will contribute to enhanced outcomes in wellbeing and academic results. Reach out to support services and learn ways to maintain your mental health, deal with stress and common issues like perfectionism, procrastination and anxiety.</p> <p>To access UON support: https://www.newcastle.edu.au/current-students/support/personal Ph: 4921 6622 or email: counselling@newcastle.edu.au</p> <p>For support outside of office hours call the University Crisis Support Line on 1300 653 007 or for chat SMS 0488 884 165.</p> <p>For immediate support contact Lifeline 24/7 on 13 14 11 or https://www.lifeline.org.au/</p>
Course Evaluation	<p>Each year feedback is sought from students and other stakeholders about the courses offered in the University for the purposes of identifying areas of excellence and potential improvement.</p>
Oral Interviews	<p>As part of the evaluation process of any assessment item in this course an oral examination may be conducted. The purpose of the oral examination is to verify the authorship of the material submitted in response to the assessment task. The oral examination will be conducted in accordance with the principles set out in the Oral Examination Guidelines. In cases where the oral examination reveals the assessment item may not be the student's own work the case will be dealt with under the Student Conduct Rule.</p>
Academic Misconduct	<p>All students are required to meet the academic integrity standards of the University. These standards reinforce the importance of integrity and honesty in an academic environment. Academic Integrity policies apply to all students of the University in all modes of study and in all locations. For the Student Academic Integrity Policy, refer to https://policies.newcastle.edu.au/document/view-current.php?id=35.</p>
Adverse Circumstances	<p>The University acknowledges the right of students to seek consideration for the impact of allowable adverse circumstances that may affect their performance in assessment item(s). Applications for special consideration due to adverse circumstances will be made using the online Adverse Circumstances system where:</p> <ol style="list-style-type: none">1. the assessment item is a major assessment item; or2. the assessment item is a minor assessment item and the Course Co-ordinator has specified in the Course Outline that students may apply the online Adverse Circumstances system;3. you are requesting a change of placement; or4. the course has a compulsory attendance requirement. <p>Before applying you must refer to the Adverse Circumstance Affecting Assessment Items Procedure available at: https://policies.newcastle.edu.au/document/view-current.php?id=236</p>
Important Policy Information	<p>The 'HELP for Students' tab in UoNline contains important information that all students should be familiar with, including various systems, policies and procedures.</p>

This course outline was approved by the Head of School. No alteration of this course outline is permitted without Head of School approval. If a change is approved, students will be notified and an amended course outline will be provided in the same manner as the original.

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