UNIT 3
LAW-MAKING
INTRODUCTION TO UNIT 3

AIM
The aim of this introduction is to give those of you who have not previously studied Units 1 and 2 an introduction to the basic concepts covered early in the course. These are concepts that will be developed in Units 3 and 4. This introduction also provides an easy way to revise the essential concepts and ideas at the commencement of Unit 3.

KEY AREAS OF KNOWLEDGE
The following key areas of knowledge are summarised in this introduction:

- the nature of legal and non-legal rules
- why laws are needed
- the classification of laws
- the nature of criminal and civil law
- the essential features of parliament, the courts and subordinate authorities and their roles as law-makers
- the nature and role of the Constitution.
THE NATURE OF LEGAL AND NON-LEGAL RULES

Laws are rules by which those in society live. Rules can be either:
- non-legal rules
- legal rules – these are called laws.

Non-legal rules provide us with guidelines of what is acceptable behaviour at home, at school, on the sporting field, such as rules in a game of football or netball, and in other situations. Non-legal rules are made by private individuals, groups or private clubs in society.

Legal rules, or laws, are applicable to the community as a whole. They are made by law-making bodies and are enforceable through the courts.

WHY LAWS ARE NEEDED

Laws provide the framework in which society functions so individuals can cooperate and live in harmony. This is known as social cohesion. Without laws there would be no guidelines on what is acceptable behaviour. The main aim of laws is to protect individuals from harm and to ensure that the rights of individuals are preserved. Without laws, people would not feel safe to walk down the street. The existence of these laws deters most people from committing crimes.

When people live together, laws will be broken and disputes will arise as each person competes for a share of the same space and resources. To survive, society must develop a mechanism of dispute resolution so disputes that arise can be settled peacefully.

Laws need to reflect the values and attitudes of the majority in the community, and need to change as values and attitudes change.
CLASSIFICATION OF LAW

The legal system consists of a whole body of law that regulates the activities of society. The law can be classified in different ways. The main classifications relevant to Legal Studies are:

• **statute law** and **common law** (also called case law or judge-made law)
• **criminal law** and **civil law**

The classifications of statute law and common law refer to the source of the law.

**Statute law**

A **statute** is an **Act of parliament** (passed by either a state parliament or the Commonwealth Parliament). Another term for this is **legislation**. Parliament’s main role is to pass legislation to regulate the community. This involves drawing up a **bill** (a proposed law). It is then necessary for each bill to be passed by both houses of parliament. It must receive **royal assent** before finally becoming an Act of parliament. Royal assent is given by the Queen’s representative at the state level (governor) or federal level (governor-general).

**Common law**

Common law, by contrast, is the law made by judges when deciding a particular case before the court. The reasoning adopted by the judge in a superior court becomes a **precedent** (a principle of law) to be followed by other courts that are lower in ranking and where the circumstances of the case are similar. This is the basis of the **doctrine of precedent** (the common law principle by which the reasons for the decisions of courts higher in the hierarchy are binding upon courts lower in the same hierarchy).

The courts are arranged in a **hierarchy** or ranking that allows this process to occur. This type of law is also referred to as case law or judge-made law.

**Criminal law**

Criminal law deals with **acts or omissions** that offend against existing laws, are harmful to individuals and society as a whole and are punishable by law. For example, you would be breaking a criminal law if you stole something from a shop.

The result of a successful criminal prosecution is a finding of guilty and the imposition of an appropriate punishment (**sanction**). There is a wide range of sentencing options or sanctions, including fines, community correction orders and imprisonment.
Civil law

Civil law is an area of law that regulates disputes between individuals and seeks to enforce rights where some harm has been done, or is anticipated to be done, to an individual or a company. The purpose of a civil action is to, as far as possible, return the wronged person (the plaintiff) to the position he or she was in before the wrong occurred. This is usually done by awarding a remedy, such as compensation.

Rather than punishment, civil law is about finding which party was liable and awarding a remedy. There is a range of remedies that can be awarded in a successful civil claim, the most usual of which is compensation or damages.

LAW-MAKING BODIES

Parliament

Parliament is made up of the Queen's representative and all democratically elected members of parliament, who have been elected by the people to represent the people. The Queen's representative is the governor-general at a federal level and the governor at a state level.

Parliament is the structure within which the government (the party winning the most votes at election), the opposition (the main political party other than the government) and other political parties and independent members, debate and pass laws ‘for the peace, order and good government’ of the community.

The Victorian Parliament and the Commonwealth Parliament are bicameral (two houses or chambers) structures. There is an upper house (a house of review) and a lower house. Legislation is usually initiated by the government in the lower house.

Law-making is parliament’s main function, although parliament can delegate part of this function to subordinate authorities.

Subordinate authorities

These authorities are part of the law-making process. The state and Commonwealth parliaments can delegate their law-making power to subordinate authorities to pass laws in their particular areas of expertise. One example of these bodies is local councils. Parliament maintains a general supervisory role over these bodies.
Courts

The role of judges in courts is to interpret and apply the laws made by parliament and, where necessary, to set a precedent which is a principle of law that is to be followed in the future. It can therefore be said that judges are also law-makers. Although they are not elected, judges are appointed by elected governments. The courts operate independently of governments.

CONSTITUTION

The document we refer to as the Constitution is properly entitled the Commonwealth of Australia Constitution Act 1900 (UK). It came into operation on 1 January 1901, the date of federation. There are also state constitutions. The Commonwealth Constitution is an Act of the British Parliament which sets out the framework for our parliamentary system and, in particular, the structure of the upper and lower houses, the powers of the Commonwealth Parliament to enact laws and, by implication, the powers of the states. Limitations on federal and state powers are also set out, as well as the mechanism by which the wording of the Constitution may be altered (the referendum procedure).

The High Court is the guardian of the Constitution and one of its roles is to settle disputes regarding the interpretation of the Constitution.

Constitutional monarchy

Australia is a constitutional monarchy in which the Queen (the monarch) is our head of state but our parliamentary system is governed by the terms of the Constitution. Australia is a democracy because we are governed by members of parliament who are voted into office and who represent the wishes of the people. Members of parliament usually belong to a political party. The party with a majority of members in the lower house forms the government.

If Australia were to become a republic, an Australian person (possibly known as a president) would be appointed and would replace the Queen as our head of state. A republic is different from a monarchy in that the head of state would be elected or chosen rather than inherit the position.

Summary

Nature of legal and non-legal rules
Why laws are needed
Classification of law
Law-making bodies
Constitution
CHAPTER 1

THE AUSTRALIAN PARLIAMENTARY SYSTEM

OUTCOME
This chapter is relevant to learning outcome 1 in Unit 3. You should be able to explain the structure and role of parliament, including its processes and effectiveness as a law-making body, describe why legal change is needed, and the means by which such change can be influenced.

KEY KNOWLEDGE
The key knowledge covered in this chapter includes:

• the principles of the Australian parliamentary system: representative government, responsible government and the separation of powers
• the structure of the Victorian Parliament and the Commonwealth Parliament and the roles played by the Crown and the houses of parliament in law-making.

KEY SKILLS
You should demonstrate your ability to:

• define key legal terminology and use it appropriately
• discuss, interpret and analyse legal information and data
• explain the principles and structures of the Australian parliamentary system.
KEY LEGAL TERMINOLOGY

bicameral  Means ‘two houses of parliament’. All parliaments in Australia except that of Queensland and the territories have two houses.

government  Government is formed by the political party that governs the country [or state]. This is the party that achieves the largest number of members voted into the lower house (the House of Representatives at a federal level and the Legislative Assembly at a state level). All members of parliament who belong to this political party form the government. Government does not make laws – this is the role of parliament. Government decides which laws should be introduced to parliament.

parliament  Parliament is the supreme law-making body consisting of all elected members of both houses from all political parties and the Crown’s representative. The main role of parliament is to make laws. Government makes laws for only as long as it has the support of the lower house of parliament. If the government loses the support of the lower house then it must resign.

representative government  Representative government refers to a government that represents the view of the majority of the people.

responsible government  The executive government (prime minister, senior ministers and government departments) is accountable to parliament, and can only continue to govern as long as it has the support of the lower house of parliament. If the government loses the support of the lower house then it must resign.

royal assent  Royal assent is the signing of a proposed law by the Crown’s representative before it becomes law.

separation of powers  The principle of separation of powers refers to the fact that there are three separate types of powers in our parliamentary system. These are legislative power, executive power and judicial power. Judicial power is separate from legislative power and executive power.

parliament  Parliament is the supreme law-making body consisting of all elected members of both houses from all political parties and the Crown’s representative. The main role of parliament is to make laws.

legislation  Laws made by parliament, known as Acts of parliament or statutes.

minister  A government minister is a member of parliament who is also a member of the political party that has formed government, and has some particular responsibility such as being in charge of a government department. For example, in 2014 the Hon Peter Dutton is the federal Minister for Health and Minister for Sport, and has responsibility for financing and providing medical services through entities such as Medicare.

prime minister  The member of parliament who leads the political party that has formed government.

queen  The authority of the Queen is represented in Australia by the governor-general (federal) and the governor of each state.

Westminster principles  The set of principles that underpin our parliamentary system, inherited from the United Kingdom, known as the Westminster system. These are the principles of representative government; responsible government; the separation of powers; the structure of state and Commonwealth parliaments and the roles played by the Crown and the houses of parliament.
The historical development of parliament

Early in the fourteenth century, in England, debates were conducted between the barons and clergy in one house of parliament, which became the House of Lords (the upper house), and the elected knights and burgesses in the other house, which became the House of Commons (the lower house).

The Tudor monarchs (kings and queens), who reigned between 1485 and 1603, had the power to make law by royal proclamation – the king or queen alone could decide on a new law – but as this was unpopular, laws were usually made by Acts of parliament.

During the seventeenth century, the Stuart kings tried to override the authority of parliament. Conflict between the monarchs and the parliament grew through the reign of James I (1603–25) and his son Charles I (1625–49). The power of the people over the divine right of kings manifested itself when Charles I was brought to trial for treason against the people. Charles I was beheaded, and Oliver Cromwell led the country without a monarch for a short period, but the Crown was restored in 1660 when Charles II came to the throne. Both Charles II and James II, who followed, were unpopular because they believed in the divine right of kings. In 1688 the throne was offered to William and Mary, Prince and Princess of Orange (Orange consisted of principalities in the south of France and the Netherlands), on condition they would govern with due deference to the rights of their subjects.

After this time the law-making power rested with the parliament, with the monarch having very few powers. The Queen of England is the Queen of Australia. The Australian parliamentary system is based on the British parliamentary system, known as the Westminster system, which is named after the British Parliament situated at Westminster in London. Under the Westminster system there are two houses of parliament (a bicameral system) and the monarch is the head of state.

THE AUSTRALIAN PARLIAMENTARY SYSTEM

Australia is a constitutional monarchy with a monarch (the Queen of the United Kingdom and Australia) and a constitution that establishes the parliamentary system and provides a legal framework for making laws. It is also a representative democracy and a federation of states. A representative democracy is political government carried out by elected representatives of the people.

Under the Australian federal system of government, the country is divided into states and territories. Each state and territory has its own parliament, making a total of nine parliaments in Australia:

- the Commonwealth Parliament (the central parliament or federal parliament)
- six state parliaments
- two territory parliaments.

The members of parliament are elected by the people and must therefore represent the needs of the people if they wish to keep their seat in parliament. The elected members of parliament are also responsible to the parliament and the people for their actions.

The Australian parliamentary system is mainly based on the British Westminster system, which was adopted in the Commonwealth of Australia Constitution Act 1900 (UK), known as the Commonwealth Constitution. This Act was passed in the United Kingdom because Australia and its states were originally British colonies.
The Commonwealth Constitution established the Commonwealth Parliament and outlined its law-making powers. This Act came into operation on 1 January 1901.

The Queen of England (also the Queen of Australia) is the head of state and is therefore part of the parliamentary system in Australia. The Queen’s representative at a federal level is the governor-general and at a state level is the governor.

The bicameral system

The Commonwealth and state parliaments operate on a bicameral system, which means two houses: an upper house and a lower house. Queensland and the territories are exceptions to this rule and only have one house each. At a federal level the two houses are the Senate (upper house) and the House of Representatives (lower house). In Victoria the two houses are the Legislative Council (upper house) and the Legislative Assembly (lower house).

**Learning Activity 1.1**

**The Australian parliamentary system**

1. What is the Westminster system?
2. In what way is the Australian parliamentary system a constitutional monarchy?
3 What does the term ‘bicameral system’ refer to?
4 Give an example of a parliament in Australia that does not have a bicameral system.
5 In the Constitution, the executive power is vested in the Queen. Does this mean that the Queen makes decisions about what laws should be passed? Explain.
6 What title is given to the Queen’s representative at a:
   • federal level?
   • state level?

THE STRUCTURE OF THE COMMONWEALTH PARLIAMENT

The structure of the Commonwealth Parliament consists of:
• the Queen (represented by the governor-general)
• the Senate (upper house)
• the House of Representatives (lower house).

![Diagram of Commonwealth Parliament structure]

The House of Representatives

The House of Representatives (the lower house) is sometimes referred to as ‘the people’s house’. This house reflects the current opinion of the people at an election, because it determines which party or coalition of parties should form government. It is therefore also known as the ‘house of government’.

The political party (or coalition of parties) that achieves the highest number of elected members to the House of Representatives becomes the government of the day. The leader of that political party becomes the prime minister who appoints the government ministers.

The party with the next highest number of elected members becomes the opposition. The leader of the opposition appoints shadow ministers. A shadow minister is usually appointed for every government minister. Their role is to keep a check on the activities and responsibilities of the corresponding government minister.

There are 150 members of the House of Representatives and each member represents an electoral division. The term of office for members of the House of Representatives is three years. In Australia, voting in an election is compulsory, and failure to vote can result in a fine being imposed. To be eligible to vote, a person must be 18 years old and registered to vote.
Figure 1.3 Seating in the House of Representatives of the 44th Parliament (June 2014)
The following diagram shows the composition of the Commonwealth Parliament as at June 2014.

![Figure 1.4: Composition of the House of Representatives as at June 2014](image)

Following the October 2013 general federal election, the coalition of the Liberal Party, the Nationals and Country Liberals (NT) won a total of 90 votes. This gave them a clear majority and they were able to form government because they held a majority of seats in the House of Representatives. The Australian Labor Party, with 55 votes, formed the opposition.

**A HUNG PARLIAMENT IN 2010**

The August 2010 federal election resulted in a hung parliament, with neither major party (the Australian Labor Party and the Liberal Coalition) holding enough of the 150 seats to ensure the successful passage of important bills or the defeat of votes of no confidence in the government. The Labor Party and the Liberal/Nationals Coalition held 72 seats each in the House of Representatives. The remaining seats were held by one WA Nationals member (Tony Crook), one Australian Greens member (Adam Bandt) and four non-aligned independent members (Bob Katter, Rob Oakeshott, Andrew Wilkie and Tony Windsor).

The Commonwealth Constitution does not provide a mechanism for resolving a hung parliament, although there are unwritten conventions to deal with this situation. If, after an election, no party emerges with an absolute majority in the House of Representatives, the incumbent prime minister (being the leader of the party holding government before the election) is seen as the last person to hold the confidence of the House. He or she therefore has the right to remain in office and test his or her support on the floor of the House.

The Labor Party was able to secure the promise of three of the independents (Oakeshott, Windsor and Wilkie) and the one member of the Australian Greens, to vote with them and was therefore able to form government (with a promise of 76 votes – more than half of the 150 seats).

The number of seats held by either major party changed slightly during the course of the Labor Government, but not enough to change the party holding government. The changes occurred by a member of the House of Representatives, Craig Thompson, leaving the Labor Party to become an independent and Peter Slipper temporarily stepping aside from the position of Speaker of the House. Bob Katter chose to form his own party.

**>>GOING FURTHER**

**Electoral divisions**

The voting for the House of Representatives is conducted on a preferential system of voting, which means the most preferred candidate wins the seat. If no candidate receives more than half
The role of the House of Representatives

The role of the House of Representatives is shown below.

- **initiate and make** laws – The main function of the House of Representatives is to initiate and make new laws. New laws are usually introduced to the House by the government, although any member may introduce a proposed law (bill). Bills must be passed by both the House of Representatives and the Senate for a law to be made. Bills may also be initiated in the Senate.

- **determine the government** – After an election, the political party (or coalition of parties) that has the most members in the House of Representatives forms government, or in the case of a hung parliament has the promise of enough votes to defeat a no-confidence motion and to pass important legislation, such as supply bills.

- **provide responsible government** – Ministers are responsible to parliament and therefore to the people. They may present petitions from citizens and raise citizens’ concerns and grievances in debate. If the government loses the support of the lower house it must resign.

- **represent the people** – The House of Representatives plays a role in forming a representative government. Members are elected to represent the people and are given authority to act on behalf of the people. The House of Representatives should represent the interests of the majority of people. The proposed laws introduced to the House of Representatives should reflect the views and values of the majority of the community.

- **publicise and scrutinise government administration** – It is the role of the House of Representatives to publicise the policies of government, to make sure that legislation is debated, matters of public importance are discussed, and members of parliament are able to ask the government and ministers questions relating to their work and responsibilities. Committees also investigate proposed laws.

- **control government expenditure** – A bill must be passed through both houses of parliament before a government is able to collect taxes or spend money. Expenditure is also examined by parliamentary committees.
The effectiveness of the House of Representatives

The House of Representatives is the house of government, and if the government holds a majority of seats, as it did after the 2013 election, the governing party should be able to get its legislative program passed by the House and fulfil its program of changes in the law, which it has been elected to do. However, this could mean there may be less debate of major issues before proposed bills are passed.

The hung parliament – which was the outcome of the 2010 federal election – led to the Labor Party constantly having to engage in complex negotiations with the Australian Greens and the independents to achieve the passage of many bills through both houses. For example, in October 2011 the 18 pieces of carbon tax legislation were passed by a vote of 74 to 72 in favour, after considerable discussion and compromises.

HOW EFFECTIVE IS A HUNG PARLIAMENT?

The Gillard Government, operating within a hung parliament, without a majority of seats, did prove successful in passing important reforms. These included carbon taxes and mining taxes, plain packaging laws for cigarettes, paid parental leave and the Murray-Darling Basin Plan. In fact, between 2010 and 2012, the Gillard Government managed to get 432 bills passed by the Commonwealth Parliament. This compares favourably with the 549 bills passed by the Commonwealth Parliament during the Howard Government between 2004 and 2007, when the Howard Government held a majority in both houses.

The Senate

The Senate has virtually equal power with the House of Representatives for making laws. The Senate consists of 76 senators, around half the number of members in the House of Representatives. Each state elects 12 representatives, regardless of the population of that state. There are two representatives elected from each territory. The Senate is elected by proportional representation,
so that its composition closely reflects the voting pattern of the electors. Candidates are elected by obtaining a predetermined proportion, or quota, of the total votes. Once a candidate has obtained the required quota, any excess votes he or she receives are transferred to another candidate in the voters’ order of preference.

Each senator is elected for a period of six years. Half of the senators are elected every three years, with the changeover of seats occurring on 1 July of the relevant year.

Figure 1.6 Inside the Senate chamber, sometimes referred to as the red chamber

The role of the Senate

The Senate’s main role is to make laws. Its law-making powers are seen as being equal to those of the House of Representatives in that it can initiate proposed laws (bills), although money bills cannot be initiated in the upper house. Money bills impose taxes and collect revenue. They must be introduced in the lower house at both federal and state levels. The Senate is not able to amend money bills, but it can request that the House of Representatives make amendments.

A minister of the government will generally introduce a bill because it will reflect government policy. As most ministers are members of the House of Representatives, more bills go through the House of Representatives first. A bill goes through specific stages in the first house before it is passed on to the other house, where it goes through the same processes before it receives royal assent (the signing of the proposed law by the Crown’s representative) before it becomes law.

The Senate debates the proposed laws and has a large and active committee system that enables senators to inquire into policy issues in depth and to scrutinise bills before they become law.

The main roles of the Senate are summarised below.

- **initiate and pass bills** – The Senate is able to initiate bills (other than money bills) or pass bills that have previously been passed through the House of Representatives.
- **act as a states’ house** – At the time of the creation of the Commonwealth Parliament, under the Commonwealth of Australia Constitution Act 1900 (UK), the states (which were separate colonies before federation) were afraid of giving up too much of their power. This was especially important to the smaller colonies, which did not want the more populated colonies to hold all the power in
the Commonwealth Parliament. To overcome this, S7 of the Constitution provides that the Senate should have equal representation from each state, regardless of its size or population. In this way the Senate represents the interests of the states (representative government).

- **act as a house of review** – The majority of bills are initiated in the lower house and the Senate (the upper house) has the task of reviewing the bills already passed through the lower house. The Senate can, therefore, ensure that bills which could be seen as too radical are not rushed through the parliament. Half-senate elections assist in this process. Since half the senators are put up for election every three years, the senators that remain are likely to have considerable experience in law-making.

The Senate fulfils its role of scrutinising legislation by checking all bills and delegated legislation (regulations made by subordinate bodies) to ensure that they are in the public interest. The Senate also operates as a check on government, including government administration, and government policy in general (responsible government). The Senate committee system assists the Senate in this scrutinising and checking process.

The Senate may pass a bill without amendment, pass it with amendments (or, in the case of money bills, request amendments before passing it) or reject it. The Senate is able to insist on changes to proposed laws before they are passed into law.

### Double dissolution

Generally, at the time of an election, only half the senators are up for election. The governor-general has the power to dissolve the House of Representatives and the Senate at the same time – a double dissolution. This may occur in situations where the Senate and the House of Representatives are unable to agree over one or more pieces of legislation.

When the government does not have a majority in the upper house, there may be a disagreement about proposed legislation. In most cases a compromise is reached, amendments are made and the legislation is passed.

If a compromise cannot be reached, the governor-general can dissolve both houses (double dissolution) and a full election of all members of the Senate and the House of Representatives can take place. This rarely happens.

The possibility of a double dissolution occurs if the Senate rejects a bill passed by the House of Representatives and, after an interval of three months, the House of Representatives passes the bill again and sends it to the Senate. If the Senate again rejects the bill, or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the prime minister can ask the governor-general to dissolve both houses.

### Effectiveness of the Senate

In practice the senators tend to vote according to the dictates of their party. This means that the upper house largely does not fulfil its role as a states’ house or a house of review. If the government controls the upper house (has a majority), it tends to be a ‘rubber stamp’, merely confirming the decisions made in the lower house.

If, however, there is a hostile Senate (controlled by the opposition), then the upper house is likely to review the bills passed through the lower house more carefully. If the balance of power in the Senate is held by a minority party or an independent member of parliament (one not aligned to any political party), the government will endeavour to win the support of that minority party in order to pass bills through the Senate.
The following table shows the composition of the Senate after 1 July 2011 (as at January 2012) and the composition of the Senate after 1 July 2014.

### Table 1.1 Composition of the Senate, from 1 July 2011 and after 1 July 2014

<table>
<thead>
<tr>
<th>PARTY/AFFILIATION</th>
<th>NUMBER OF SENATORS FROM 1 JULY 2011</th>
<th>NUMBER OF SENATORS FROM 1 JULY 2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coalition</td>
<td>34</td>
<td>33</td>
</tr>
<tr>
<td>Australian Labor Party</td>
<td>31</td>
<td>25</td>
</tr>
<tr>
<td>Australian Greens</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td>Democratic Labour Party</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Palmer United Party</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Others</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>76</strong></td>
<td><strong>76</strong></td>
</tr>
</tbody>
</table>

Note: The four ‘Others’ [after July 2014] consist of one independent and one each from the Liberal Democratic Party, the Family First Party and the Australian Motoring Enthusiast Party.

Source: compiled from AEC 2010 election result data and senators’ terms data

After July 2011, the Australian Labor Party (ALP) secured the support of the Australian Greens senators to enable many pieces of legislation to be passed in the Senate. The ALP had 31 seats, and together with the support of the nine Australian Greens senators (40 votes in total) it was more likely that government legislation could be passed in the Senate. Considerable negotiations were required with the Australian Greens senators to secure continued support.

The Senators elected in October 2013 took their place in the Senate on 1 July 2014. The Coalition has 33 senators. The ALP has 25 senators. With the support of the Greens and the Democratic Labour Party, the ALP has a possible 36 votes. The Coalition needs the support of six senators from the Palmer United Party and others in order to pass legislation. If this occurred, the Coalition would have the support of 39 senators and the ALP 36 (plus the possible support of one of the others). The Coalition will need to engage in careful negotiation with the Palmer United Party and the others to pass legislation through the Senate.

**LEARNING ACTIVITY 1.2**

The structure of the Commonwealth Parliament

1. Which is the house of government? Explain.
2. If you were elected to a seat in the House of Representatives, how many years would you serve before the next election?
3. Explain three roles of the House of Representatives.
4. What type of bills cannot be introduced in the Senate?
5. How many members sit in the:
   - House of Representatives?
   - Senate?
6. Explain the significance of a ‘hung parliament’. How does this affect the effectiveness of the House of Representatives? How did the Gillard Government overcome some of these problems?
7. When might the Senate be a ‘rubber stamp’ for the House of Representatives?
8. Explain the terms ‘house of review’ and ‘states’ house’. Do you think these terms apply to the Senate today? Explain.

9. After 1 July 2014, the Coalition Government has a majority in the Senate. Will this mean an easy passage of bills through the Senate or may some difficulties be experienced? Explain.

THE STRUCTURE OF THE VICTORIAN PARLIAMENT

The Victorian Parliament operates in the same way as the Commonwealth Parliament, with an upper and lower house. The structure of the Victorian Parliament is:

- the Queen (represented by the governor)
- the Legislative Council (upper house)
- the Legislative Assembly (lower house).

Legislative Assembly

For elections, Victoria is divided into 88 districts. One member of the Legislative Assembly (MLA) is elected to represent each of these districts. A member of the Legislative Assembly is elected for four years.

After the passing of the Constitution (Parliamentary Reform) Act 2003 (Vic.), the parliament sits for fixed four-year terms. Elections are held on the last Saturday in November every four years.

The following diagram shows the composition of the Legislative Assembly after the 2010 elections.

The role of the Legislative Assembly

The Legislative Assembly is the house of government. The party with the majority of members in the Legislative Assembly forms the government. The main role of the Legislative Assembly is to make laws. Most bills are initiated in the Legislative Assembly.
Members of the Legislative Assembly are elected to represent the interests of the people (representative government). Their actions must reflect the views and values of the people. If they cease to do this it is likely they will be voted out of office at the next election.

**Legislative Council**

Following the passage of the Constitution (Parliamentary Reform) Act 2003 (Vic.), the Legislative Council in Victoria is divided into eight regions, each consisting of 11 districts. Five members of the Legislative Council (MLCs) are elected for each region, making a total of 40 MLCs to be elected. Members for each region are elected to serve a fixed four-year term.

The election for the Legislative Council uses a proportional representation system. Candidates are elected by obtaining a predetermined proportion, or quota, of the total votes. Once a candidate has obtained the required quota, any excess votes he or she receives are transferred to another candidate in the voters’ order of preference.

<table>
<thead>
<tr>
<th>Legislative Council</th>
<th>Liberal Party</th>
<th>National Party</th>
<th>Australian Labor Party</th>
<th>Australian Greens</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>18</td>
<td>3</td>
<td>16</td>
<td>3</td>
</tr>
</tbody>
</table>

**The role of the Legislative Council**

The role of the Legislative Council is similar to that of the Senate. It acts as a house of review for legislation that has been passed in the Legislative Assembly. It does this by scrutinising, debating and, on occasion, amending or rejecting legislation that has been initiated by the government.

By performing these functions, the upper house can apply many of the important checks and balances that uphold the system of responsible government.
The Legislative Council has a number of committees that debate the proposed laws at length. Bills can also be initiated in the Legislative Council but it is less common than in the Legislative Assembly. Money bills can only be initiated in the Legislative Assembly.

The ability of the current Coalition Government to get the parliament to pass its legislative program is enhanced by the fact that it holds a majority in both the lower house and the upper house. However, this could lead to less scrutiny of government programs and less debate in parliament.

**Table 1.2** Electorates in the Commonwealth Parliament and Victorian Parliament

<table>
<thead>
<tr>
<th>COMMONWEALTH</th>
<th>STATE (VICTORIA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>House of Representatives</td>
<td>Legislative Assembly</td>
</tr>
<tr>
<td>150 seats</td>
<td>88 districts</td>
</tr>
<tr>
<td>150 electorates across Australia</td>
<td>One member for each district</td>
</tr>
<tr>
<td>Term of office is usually three years</td>
<td>Term of office is fixed four years</td>
</tr>
<tr>
<td>Number of members is decided on the population of each state (except Tasmania) because each original state must have at least five members according to S24 of the Constitution. There must be, as near as possible, twice as many members of the House of Representatives as the Senate</td>
<td></td>
</tr>
<tr>
<td><strong>The Senate</strong></td>
<td><strong>Legislative Council</strong></td>
</tr>
<tr>
<td>Each state is an electorate</td>
<td>Eight regions with five members representing each region</td>
</tr>
<tr>
<td>12 senators elected from each state two senators elected from each of the Australian Capital Territory and the Northern Territory</td>
<td>Five members elected for each region</td>
</tr>
<tr>
<td>76 senators</td>
<td>40 members</td>
</tr>
<tr>
<td>Term of office is usually six years (half elected every three years)</td>
<td>Term of office is fixed four years</td>
</tr>
</tbody>
</table>

**LEARNING ACTIVITY 1.3**

**The structure of the Victorian Parliament**

1. What is the structure of the Victorian Parliament?
2. If you were elected to the Legislative Council, how long would you serve? How does this compare with the term of office of the Senate?
3. Explain the role of both houses of the Victorian Parliament.
4. The Coalition has a majority in the Legislative Council and the Legislative Assembly in Victoria. To what extent does this lead to effective law-making? Discuss.

**THE ROLE OF THE CROWN**

The Crown is represented in Australia by the Queen’s representatives: the governor-general at a federal level and the governors of the six states. Under the Constitution the executive power of the Commonwealth is vested in the Queen and exercisable by the governor-general as the Queen’s representative. The governor-general has the responsibility of appointing a federal executive council, made up of the prime minister and senior ministers, to give advice about the government of the Commonwealth, to establish departments of the government, to appoint ministers to administer
them and to approve delegated legislation (rules and regulations made by subordinate authorities). In practice, however, the governor-general acts on the advice of the prime minister and senior ministers, and the executive power is carried out by the government. The governor-general is appointed by the Queen on the advice of the prime minister.

The governor-general is required to sign bills giving royal assent to them before they can become law. The governor-general’s main responsibility is to ensure that the democratic system operates effectively. This requires an effective electoral system, parliament, government and courts. It is also essential that the majority of people are confident that their community functions as a democracy.

The governor of Victoria is responsible for acting as part of the state executive council with similar duties to the governor-general. The governor also has reserve powers; for example, the power to dismiss a premier if he or she refuses to leave office after a defeat in an election. Since the *Australia Act 1986* (Cth), the governors of each state are appointed by the monarch on the advice of the premier of that state, rather than on the advice of the Commonwealth and Foreign Office of the United Kingdom.

**Reserve powers**

The governor-general and the governors of each state hold reserve powers that can be exercised without the advice of ministers and are not listed in the Constitution. These reserve powers date back to the time when the monarch was not a mere figurehead; the governors in the British colonies around the world represented the monarch and could exercise discretion in order to protect Britain’s interests.

One of the functions of the governor-general as the formal head of state is to ensure that the country continues to be governed; if a government that had been voted out refused to step down, the governor-general could be expected to step in.

The reserve powers include the power to appoint a new government after an election, the power to appoint a prime minister if an election has resulted in a ‘hung parliament’, the power to dismiss a
prime minister who has lost the confidence of the parliament or who is acting unlawfully, the power to dissolve or refuse to dissolve the House of Representatives despite a request from the prime minister, and the power to appoint or dismiss ministers.

Exactly what the reserve powers are, and whether they should be acted on, is debatable. In 1975 when Sir John Kerr, the then governor-general, dismissed the Whitlam Government, there was much disagreement between constitutional experts and within the general public as to whether he had acted legally in exercising the reserve powers of his office.

Following the 2010 Tasmanian election in which both Labor and Liberal parties won 10 seats, the Tasmanian governor refused to accept the Labor leader’s resignation and ordered the Labor leader to form a government with the help of the Greens.

Executive council

The governor-general (or governor of each state) is responsible for making delegated legislation, while acting in council with relevant ministers as the executive council. Delegated legislation (also known as subordinate legislation) is the rules and regulations made by government bodies such as government departments, the executive council or statutory authorities, for example, the Australian Broadcasting Authority and VicRoads. Some Acts, such as the Road Safety Act 1986 (Vic.), give the executive council the power to make rules and regulations relating to their relevant area, such as road safety.

Royal assent

Royal assent is the signing of a proposed law by the governor-general. It is necessary before an Act of parliament can become law. It is normally given as a matter of course on the advice of the prime minister or ministers.

Withholding royal assent

At a federal level, the governor-general has the power under the Constitution to withhold royal assent in certain circumstances.

At a state level, the governor of each state does not have the power to withhold royal assent. This power was removed at a state level when the Australia Act 1986 (Cth) was passed.

>>GOING FURTHER

Withholding royal assent

At a federal level, the Commonwealth Constitution states that the governor-general may:

• withhold or reserve royal assent for the monarch’s pleasure (s58 and s60). The bill will not come into force unless it receives the monarch’s assent within two years
• make recommendations to the house in which a bill originated for amendments to the bill (s58)
• disallow any law within one year of the royal assent having been given (s59). This disallowance would make the law void.

At a state level, s8 of the Australia Act states that no Act that has been given royal assent by the monarch’s representative can be subject to disallowance. Section 9 of the Australia Act provides that royal assent to state laws cannot be withheld or reserved.
LEARNING ACTIVITY 1.4

Role of the Crown
1 Explain the role of the Crown in the Australian parliamentary system.
2 What is the Executive Council and what is its role?
3 To what extent do you think royal assent is an automatic process?
4 How important is royal assent in the process of law-making?
5 Do the governor-general and the governors of each state have the right to withhold royal assent? Explain.
6 Explain the reserve powers of the governor-general and the governors of each state. Do you think these reserve powers are important to the running of our democratic system? Explain.

THE FUNCTIONS OF PARLIAMENT

Parliament is the law-making body. It consists of all members of both houses, from all political parties, plus the Crown’s representative. The Commonwealth Parliament is made up of the governor-general, the Senate and the House of Representatives.

The main functions of parliament are to:
• make laws on behalf of the people for the good government of our society – the laws should reflect the views and values of the majority of the community
• provide for the formation of government
• provide a forum for popular representation and debate
• scrutinise the actions of government
• delegate some of its law-making power to subordinate bodies and check any delegated legislation
• balance the books – that is, decide what revenue is required and how it is to be spent.

Committees
Parliament is able to set up committees for the purpose of investigating the needs of the community and the activities of government instrumentalities. These committees can be joint committees (consisting of members from both houses), select committees (set up to investigate one particular issue) or standing committees (long-term committees that do not change with a change of government).

The Family and Human Development Committee in their report into child abuse, recommended a new offence of grooming a child for sexual abuse. The Crimes Amendment (Grooming) Act 2014 (Vic.) created this new offence.

Government
The government consists of all members of parliament who are members of the political party that holds the majority of seats in the lower house, whether they are members of the upper or lower house.

Opposition
The opposition is the political party holding the second largest number of seats in the lower house. It is an alternative government and if the party wins the next election it will form a new government.
It is the role of the opposition to examine policies of the government, check decisions made by the government and scrutinise all bills that are presented to parliament. An effective opposition will hold the government accountable for its actions. It can do this by asking questions at question time.

Prime minister, premiers and ministers

The prime minister is the leader of the government at a federal level. The government is the party with the majority of members in the lower house of parliament. The leader of the government in each of the states is called the premier. The prime minister’s role is not stated in the Constitution but is based on conventions established under the Westminster system. The prime minister and premiers appoint ministers to be responsible for various departments, such as the Education Department. Ministers are responsible for running their departments and are responsible to parliament for the activities of their departments. A minister’s area of responsibility is often referred to as a portfolio.

Cabinet

Cabinet consists of the prime minister and senior ministers. The cabinet’s main role is to decide on general government policy and to formulate proposed laws (known as bills) to be introduced to parliament.

The cabinet is not mentioned in the Constitution but operates under a set of conventions which include:
- the governor-general acts on the advice of the cabinet
- members of cabinet (the ministers) come from the party that holds the majority in the lower house
- members of cabinet have the support of the members of the party with the majority in the lower house
- if members of cabinet lose the support of the party, they will resign from cabinet.

Learning activity 1.5

The functions of parliament

1. Explain the main functions of the houses of parliament.
2. What role do committees play in the law-making process?
3. What is the role of the opposition?
4. Describe the role of cabinet.
5. Explain the difference between government and parliament.
6. Using the Internet, investigate the role of parliament and the role of the Crown, and write a short report on each.
The principles of the Australian parliamentary system

The three main principles of the Australian parliamentary system are representative government, responsible government and the principle of separation of powers.

<table>
<thead>
<tr>
<th>The principles of the Australian parliamentary system</th>
</tr>
</thead>
<tbody>
<tr>
<td>representative government</td>
</tr>
<tr>
<td>responsible government</td>
</tr>
<tr>
<td>separation of powers</td>
</tr>
</tbody>
</table>

Representative government

Representative government refers to a government which represents the views of the majority of the people. The government consists of representatives of the people who are chosen by the people. This is essential for a democracy. To achieve representative government there must be regular elections so the people can vote for politicians to represent them in parliament. If the government does not represent the needs of the majority of the people, it is likely to be voted out of office at the next election.

The principle of representative government is established in the Constitution, which requires the members of the Senate and the House of Representatives to be chosen directly by the people (S7 and S24).

For a government to be representative, it must be answerable to the people. When people have a real concern about a need for a change in the law they may form a demonstration to indicate to government that there is an injustice in the law. For example, many people are lobbying for a change in the law to allow same-sex marriage. However, there are also people who do not agree with same-sex marriage. The government needs to initiate laws that are supported by the majority of people.

Many people have been calling for tougher sentences. The Sentencing Amendment (Baseline Sentences) Bill 2014 (Vic.) would increase the sentences for six serious offences. The baseline sentences are the sentences parliament expects will become the median sentence. This Bill has not been passed.

The bicameral system contributes towards a more representative government because the lower house reflects the will of the people. Each state is equally represented in the upper house, regardless of the size of the population of the state. This allows for the election of more representatives acting on behalf of minority groups. One house can also act as a review of the operations of the other.
Responsible government

Responsible government refers to the government’s responsibility to the voters. A democratically elected government must be answerable and accountable to the people for its actions. Ministers are drawn from within the government and they must maintain the confidence of the government. The Senate is able to scrutinise bills before they are passed and become law. This helps to ensure the government is being accountable to the people.

The principles of a responsible government are listed below.

• Ministers are responsible to parliament and therefore to the people – a minister can be called upon to explain in parliament his or her actions and those of the department and agencies under his or her control (this is referred to as ministerial accountability).
• Members of parliament have the opportunity to question ministers about their activities and the activities of their departments.
• Ministers must carry out their duties with integrity and propriety or resign.
• There are opportunities for public scrutiny of the law-making process so the public can hold the government accountable for its actions; the government must respond to concerns of the parliament and the people and must answer questions where appropriate – a record of parliamentary proceedings is kept in Hansard, which is available to the public, and the public can view parliament in operation.
• If the government loses the support of the lower house it must resign, hence the government is responsible to parliament. The parliament in return is responsible to the people.

Separation of powers

The principle of the separation of powers is a basic principle underpinning our parliamentary system. This principle refers to the three separate types of powers in our parliamentary system, and that these powers should be held by separate bodies so that no one body has absolute power or control over the functions of the political and legal systems.

The Constitution makes provision for each of these separate powers to operate at a federal level. These powers are:

• executive power – the power to administer the laws and manage the business of government, which is vested in the governor-general as the Queen’s representative, although in practice it is carried out by the prime minister and senior ministers
• legislative power – the power to make laws, which resides with the parliament
• judicial power – the power given to courts and tribunals to enforce the law and settle disputes, which is vested in the High Court and other federal courts. This power is independent and separate from the legislative and executive powers (at a federal level).

In Australia the legislative power and the executive power are combined. Although the legislative power and the executive power are described in the Constitution as separate powers, the duties of the legislature (the law-making bodies) and the executive (the governing body) are combined.

In practice the power to administer the law and carry out the business of government (the executive power) is placed in the hands of the cabinet, rather than the executive. The head of the executive, in practice, is the prime minister, not the monarch or the monarch’s representative.

The governor-general, as the Queen’s representative, is part of the executive power, as well as being part of the structure of parliament or legislative power. Likewise the prime minister and the cabinet are part of the governing body (the executive power) and are also part of parliament (the legislative power). This reflects the principle of responsible government under which government
ministers must be members of the parliament and must be accountable to the parliament, and hence to the people through the vote.

The executive power and the legislative power are closely linked by the fact that laws passed by parliament must receive royal assent from the governor-general in order to become law. There are also many Acts of parliament that give the executive council (the governor-general and senior ministers) the right to make regulations, but parliament retains the right to disallow or reject these regulations.

Despite the overlap between the executive and the legislature, there are still checks and balances between these two areas of power. Ministers are subject to the scrutiny of other members of parliament during question time. It is the role of the opposition to examine the policies and bills of the government and to expose any flaws that may be apparent in proposed laws. At times, the upper house (the Senate) is controlled by the opposition, which provides for greater scrutiny of the government and its legislation.

**The legislative power and the judicial power must be kept separate.** Only a court or tribunal has the power to decide if a law (made by parliament) has been contravened. It is the sole province of the High Court to decide disputes on issues involving the Constitution although, as a secondary role, the courts have the power to make law through the application of precedent and the interpretation of statutes (see chapter 5 for information on law-making through courts). At a state level these lines of separation are less clearly defined.

Although the state and federal governments appoint judges, the courts are independent of political influence. In this way, citizens are safeguarded from the misuse of political power or corruption in the resolution of disputes. The impartiality of judges is protected by the fact that federal judges, for example, are appointed until the age of 70 and cannot be removed unless there is proven impropriety and parliament approves their removal.

### Background Information

**Separation of powers**

The idea of the separation of powers was adopted by the British Government in the mid-eighteenth century, influenced by the writings of the French philosopher Baron de Montesquieu (published in his book *The Spirit of the Laws*, 1748). Montesquieu felt that this separation was essential to protect the stability of the government and the freedom of the people. Montesquieu argued that the executive, legislative and judicial functions of government should be held by different bodies, so that attempts by one branch of government to impose their will on another could be restrained by the other branches. Accordingly, if one body held the power to make laws as well as the power to enforce the laws, it could lead to an abuse of power, because there would be no way to ensure that this body did not exceed its power. Without the courts checking to ensure that parliaments do not exceed their jurisdiction, a parliament could assume too much power and consequently have unreasonable control over people’s lives.

**The Constitution**

The principle of the separation of powers is established in the *Commonwealth of Australia Constitution Act 1900 (UK).*

- Chapter one establishes the Commonwealth Parliament to make laws according to the powers set out in the Constitution. This chapter also refers to the powers of the governor-general and the structure of parliament.
- Chapter two sets out the powers of the executive government and the role of ministers.
Chapter three establishes the High Court to exercise the judicial power. The independence of the judiciary is referred to in s71 of the Constitution.

Section 64 of the Commonwealth Constitution provides that the monarch’s ministers of state shall be members of the executive council. The executive council is set up under s62 of the Constitution to ‘advise the governor-general in the government of the Commonwealth’. It is made up of the governor-general and any relevant ministers [being those ministers concerned with the matter under discussion]. Section 64 of the Constitution provides that the ministers must be members of parliament.
Reasons for the separation of powers

In Australia, the separation of powers is based on the notion of checks and balances. Each power is separate and independent and creates a check upon the other. The separation of power therefore:

- protects the stability of government and the freedom of the people
- provides independence between the bodies that make the law (the legislature, that is parliament) and the bodies that enforce the law (the judiciary, that is the courts)
- provides a check on the power of parliament to ensure that it does not go outside its area of power.

The government and the parliament must work together to pass laws, and the independence of the judiciary must be preserved. For example, a person who feels a parliament has passed a law that contravenes the Constitution or basic human rights can take the matter to court. Such challenges would be fruitless if courts were not independent of the government and parliament.

The power to judge criminal guilt, and to punish those who have broken the law, resides with the judiciary. It would be a conflict of interest if parliament, which makes the laws, were also given the power to prosecute and adjudicate on issues relating to those same laws. Similarly, in order to maintain the independence of the judiciary, judges cannot take a seat in parliament where laws are made.

LEARNING ACTIVITY 1.6

The principles of the Australian parliamentary system

1. Explain the principle of representative government.
2. Distinguish between the terms ‘representative government’ and ‘responsible government’.
3. Explain how our Commonwealth Government is a responsible government under the requirements of our Australian parliamentary system.
4. List the three types of powers under the principle of separation of powers. Explain each power.
5. Explain how the legislative power and the executive power are combined in Australia.
6. Describe the separate nature of the judicial power.
7. ‘The principle of separation of powers is an essential element of democracy in Australia.’ Explain this statement and give reasons for the separation of powers.

GOING FURTHER

United States

In the United States, the separation of powers is much more clearly defined, as the executive power and the legislative power are quite separate in practice as well as in theory. The US president, who is not part of the law-making body, holds the executive power. In fact, no member of the legislative, executive or judicial bodies may be a member of any other body.

Victoria

In Victoria, and in other states, there is a blurring of the principle of separation of powers. This principle is not enshrined in state constitutions and is mainly followed as a matter of convention. The principle is, however, seen as important and should be followed, although there are some state bodies that are required to make decisions on disputes (the judicial role) and also make regulations (the legislative role).
EFFECTIVENESS OF THE PARLIAMENTARY SYSTEM

The main function of a parliament is to make laws for and on behalf of the people. Parliament is referred to as a supreme law-making body because its main role is law-making and it can change or repeal its own laws. It can also override law made by courts.

The party with the majority in the lower house will form government. The government of the day is given a mandate by the electors at the time of its election to make laws for the good government of the country. The prime minister (and premier of each state) forms a cabinet to make policy decisions on what laws are required.

Is parliament a rubber stamp?

Members of parliament from the government ranks are expected to support all government bills, and because the government has the majority in the lower house (or in the case of a hung parliament can usually gain sufficient support from independent members of the parliament), once cabinet has decided to introduce a bill into parliament, it will generally be passed by the lower house. This is referred to as voting on party lines, because the government members of parliament vote according to the wishes of the government.

Parliament provides a forum for discussion and evaluation of government proposals. The opposition parties are able to scrutinise proposed legislation to ensure that it reflects the needs of the people. This situation is made more difficult for the government if it does not hold an absolute majority in the lower house because they have to negotiate with independent members of parliament, and sometimes compromises must be reached in order to gain their support. The actions of the government are therefore under greater scrutiny.

If the governing party does not have a majority in the upper house, there is further scrutiny. If the Greens support the Australian Labor Party in the Senate, the Coalition Government will require the support of six of the other members of the Senate.

Even when the government has a majority in both houses, the parliament plays an active role in ensuring, as much as possible, that the proposed laws are discussed fully and amended to suit the needs of most people. The government should govern for all the people, regardless of whether they voted for them.

On some issues, usually those relating to moral values, the members of parliament are allowed to vote according to their conscience. The Gillard Government allowed the Labor members of the House of Representatives to vote according to their conscience on same-sex marriage. The then Coalition Opposition required their members to vote on party lines and the bill was defeated. A conscience vote may be allowed on this issue in the future.

Time for public debate

A bill may be presented to parliament, but the passing of the bill delayed to allow time for debate in the community. This is a way of gauging the popularity of the proposal, and finding out any problems that the proposal may cause if it becomes law. For example, the Juries Act 2000 (Vic.) was first introduced in 1999. Under the original proposal the use of majority verdicts was to be extended to include murder cases. There was considerable community concern about this proposal, and it was omitted from the final Act, which came into full operation in August 2001.
Restrictions on parliament

Parliament is the supreme law-making body because it can override other types of law-making bodies such as courts and subordinate bodies. However, this supremacy is restricted by the Constitution. Each parliament can only pass laws within its jurisdiction (area of power).

Parliament as a whole is restricted in the law-making process, because it can only pass laws which are presented to it, usually by the government of the day. The government must ensure that the laws presented to parliament are, as far as possible, responding to the needs of the people. Parliament may, however, be restricted by the cost of implementing any new laws, the long-term effects on the economy, and their acceptability or otherwise to the public in general.

If a highly vocal group of people is against a particular change in the law, the government may be reluctant to initiate the change. For example, there are outspoken and vocal conflicting opinions about proposals to change the law to allow voluntary euthanasia or allow same-sex marriages. There has been considerable debate about these issues in the community, and the parliament has been reluctant to change the law without a clear majority view.

Laws should reflect values

For laws to be effective they must reflect the values of the community. The government, when deciding on proposals for changes in the law, has to establish which changes would be most generally acceptable. For example, values have changed about the right to smoke in a public place. Some people believe they should be able to shop in a smoke-free area, while others believe they should be allowed to smoke when they are shopping.

Smoking is now banned in Victoria in most enclosed workplaces including restaurants, shopping centres and licensed premises. In August 2009, the Victorian Parliament passed laws banning smoking in motor vehicles if a person under the age of 18 years is present.

In some instances the law-makers can influence values in the community. For example, the Equal Opportunity Act 2010 (Vic.) promotes a tolerant attitude in the community. Under this Act it is unlawful to discriminate against parents or carers in employment or employment-related areas.

The Victorian Charter of Human Rights and Responsibilities, which was passed in 2006, reflects the values of society such as the right to life and equality before the law. A compatibility statement must be provided to parliament prior to the second reading of any proposed laws to ensure that the provisions of the bill are compatible with the Charter of Human Rights and Responsibilities. This Charter also seeks to generate values by stating those rights that are considered important to our society, and putting in place measures to protect these rights. At a federal level, the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) requires that bills be checked for their compatibility with human rights.

Participation by the individual

The Australian parliamentary system is based on democratic principles which allow the people to participate in the law-making process by being able to vote their representatives into office and keep a check on the operations of parliament through the ballot box.

People can also vote a member of parliament out of office, if it is thought that the member no longer represents the people’s needs. In 2013, political commentators observed that the Labor Government was no longer providing the government that the majority of people required. It was voted out of office in the 2013 election.
Every member of the community who is 18 or older and has registered to vote has the right to vote, although there are exceptions such as prisoners serving more than three years in prison. Voting in Australia is compulsory. Not everyone agrees with this system as it may mean that people with little knowledge of political parties and the candidates are forced into voting for a member of parliament. On the other hand, the compulsory nature of our voting system makes people participate in the parliamentary system. Voting in some countries, such as the United States and the United Kingdom, is not compulsory and political parties spend a lot of resources encouraging people to vote.

Individuals in the community can influence changes in the law by letting the members of parliament know the needs and attitudes of the people by contacting members of parliament, being on talk-back shows, taking part in protests and contacting the media.

**LEARNING ACTIVITY 1.7**

Effectiveness of the parliamentary system

1. Why is parliament referred to as the supreme law-making body?
2. Explain how conflicting opinions about a proposed change in the law can restrict the law-making process.
3. Why must laws reflect the values of the people?
4. How can laws encourage values within the community to change? Give an example.
5. How can individuals participate in the law-making process?
6. Discuss the advantages and disadvantages of compulsory voting.

**LEARNING ACTIVITY 1.8**

Mind map

Construct a mind map using ‘parliament’ as the central word. In your mind map, mention the words listed below and make the connections. Other words can be added to extend your mind map. Think about how your mind map can spread out as branches of a tree.

- government
- voters
- representative government
- responsible government
- Crown
- House of Representatives
- Senate
- bicameral
- cabinet
- governor-general
- ministers
- executive
- laws

*Figure 1.12*

An example of the beginning of a mind map to be completed by students – your mind map does not need to follow this pattern.
### Practice exam questions

1. Describe the principle of and reasons for the separation of powers. *(6 marks)*
2. What is meant by the term ‘responsible government’? Analyse the extent to which the Commonwealth Government is a representative government and a responsible government. *(6 marks)*
3. Explain the roles played by the House of Representatives, the Senate and the Crown in the law-making process and discuss the effectiveness of the parliamentary system. *(8 marks)*

### Assessment tasks

Students should read the information at the beginning of the chapter relating to the learning outcome, key knowledge and key skills before attempting these tasks.

#### Assessment task folio exercise

**Australian parliamentary system**

One type of assessment is a folio exercise. Each folio exercise is designed to test your knowledge and understanding of areas that will be covered in your examination at the end of the year, and as such is a useful tool in your revision process.

1. Describe cabinet and explain its role. *(2 marks)*
2. Fill in the following table. *(2 marks)*

<table>
<thead>
<tr>
<th>The name of the Victorian upper house</th>
</tr>
</thead>
<tbody>
<tr>
<td>The name of the Victorian lower house</td>
</tr>
<tr>
<td>The name of the upper house of the Commonwealth Parliament</td>
</tr>
<tr>
<td>The name of the lower house of the Commonwealth Parliament</td>
</tr>
<tr>
<td>How long are members of the lower house in Victoria elected for?</td>
</tr>
<tr>
<td>How long are members of the upper house in Victoria elected for?</td>
</tr>
<tr>
<td>How long are members of the upper house of the Commonwealth Parliament elected for?</td>
</tr>
<tr>
<td>How long are members of the lower house of the Commonwealth Parliament elected for?</td>
</tr>
</tbody>
</table>

3. Describe the principle of the separation of powers and explain the main reasons for this principle. *(6 marks)*
4. Explain the roles of the House of Representatives and the Senate. *(4 marks)*
5. Assess the effectiveness of the Senate as a states’ house and a house of review. *(6 marks)*

**Total 20 marks**

#### Assessment task case study

**Functions of the House**

Read the information ‘Functions of the House’ and answer the questions.

1. Why is it important that the House of Representatives is the House where the government is formed? *(2 marks)*
2. Under what circumstances might the power to unmake the government be exercised? Explain. Why is it an important power? *(6 marks)*
3 Under what circumstances might a government be required to resign? (2 marks)
4 Investigate one of the 1929, 1931 or 1941 examples of the government resigning or the House being dissolved and explain the reason for the resignation or dissolution of government in the particular example. (4 marks)
5 Investigate the 1987 double dissolution and explain the circumstances that led to the double dissolution and the outcome. (4 marks)
6 Why are the majority of bills introduced in the House of Representatives? How can the opposition influence the make-up of bills introduced to the House? (2 marks)
7 How might the House of Representatives act as an essential safeguard over excessive use of power? (2 marks)
(Total 20 marks)

Functions of the House

It is accepted that the House of Representatives, which reflects the current opinion of the people at an election, is the appropriate House in which to determine which party or coalition of parties should form government. Thus the party or coalition of parties which commands a majority in the House assumes the Government and the largest minority party (or coalition of parties) the Opposition.

Within this framework resides the power to ‘unmake’ a Government should it not retain the confidence and support of a majority of the Members of the House. To enable a Government to stay in office and have its legislative program supported (at least in the House), it is necessary that Members of the government party or parties support the Government, perhaps not uncritically, but support it on the floor of the House on major issues. Party discipline is therefore an important factor in this aspect of the House’s functions.

A principal role of the House is to examine and criticise, where necessary, government action, with the knowledge that the Government must ultimately answer to the people for its decisions. It has been a Westminster convention and a necessary principle of responsible government that a Government defeated on the floor of the House on a major issue should resign or seek a dissolution of the House. Such a defeat would indicate prima facie (on the fact of it) that a Government had lost the confidence of the House, but there is no fixed definition of what is a matter of confidence. If a defeat took place on a minor or procedural matter may be acknowledged, but not lead to further action, the Government believing that it still possessed the confidence of the House.

The Government has been defeated on the floor of the House of Representatives on a major issue on eight occasions since Federation following which either the Government resigned or the House was dissolved. The most recent cases were in 1929 (the Bruce–Page Government), 1931 (the Scullin Government), and 1941 (the Fadden Government). On 11 November 1975 immediately following the dismissal of the Whitlam Government, the newly appointed caretaker Government was defeated on a motion which expressed a want of confidence in Prime Minister Fraser and requested the Speaker to advise the Governor-General to call the majority leader (Mr Whitlam) to form a government. However, within the next hour and a half both Houses were dissolved and the resolution of the House could not be acted on.

The fact that the power of the House to ‘unmake’ a Government is rarely exercised does not lessen the significance of that power. Defeat of the Government in the House has always been and
still is possible. It is the ultimate sanction of the House in response to unacceptable policies and performance. In modern times, given the strength of party discipline, defeat of a Government on a major issue in the House would most likely indicate a split within a party or a coalition, or in a very finely balanced House the withdrawal of key support.

The initiation and consideration of legislation

Section 51 of the Constitution provides that the Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to specified matters. The law-making function of Parliament is one of its most basic functions. The Senate and the House have substantially similar powers in respect of legislation, and the consideration of proposed laws occupies a great deal of the time of each House. Because of the provisions of the Constitution with respect to the initiation of certain financial legislation and the fact that the majority of Ministers are Members of the House of Representatives, the vast majority of bills introduced into the Parliament originate in the House of Representatives.

The right to govern carries with it the right to propose legislation. Private Members of the Government may be consulted on legislative proposals either in the party room or through the system of party committees. The result of these consultations may determine the extent to which the Government is willing to proceed on a policy issue or a course of executive action. In addition, the Opposition plays its role in suggesting changes to existing and proposed legislation. Some suggestions may be accepted by the Government immediately or taken up either in the Senate or at a later date.

Seeking information on and clarification of government policy

The accountability of the Government to Parliament is pursued principally through questions, on and without notice, directed to Ministers concerning the administration of their departments, during debates of a general nature – for example, the Budget and Address in Reply debates – during debates on specific legislation, or by way of parliamentary committee inquiry.

The aim of parliamentary questioning and inquiry is to seek information, to bring the Government to account for its actions, and to bring into public view possible errors or failings or areas of incompetence or maladministration.

Surveillance, appraisal and criticism of government administration

Debate takes place on propositions on particular subjects, on matters of public importance, and on motions to take note of documents including those moved in relation to ministerial statements dealing with government policy or matters of ministerial responsibility. Some of the major policy debates, such as on defence, foreign affairs and the economy, take place on motions of this kind. Historically, opportunities for private Members to raise matters and initiate motions which may seek to express an opinion of the House on questions of administration were limited, but these increased significantly in 1988.

It is not possible for the House to oversee every area of government policy and executive action. However the House may be seen as an essential safeguard and a corrective means over excessive, corrupt or extravagant use of executive power. From time to time the Opposition may move a specific motion expressing censure of or no confidence in the Government. If a motion of no confidence were carried, the Government would be expected to resign. A specific motion of censure of or no confidence in a particular Minister or Ministers may also be moved. The effect of carrying such a motion against a Minister may be inconclusive as far as the House is concerned as any further action would be in the hands of the Prime Minister. However, a vote against the Prime Minister, depending on circumstances, would be expected to have serious consequences for the Government.
Summary

The structure of parliament is based on the British Westminster system.

Australia is a constitutional monarchy, a federation of states and a representative democracy.

Australian parliamentary system

Bicameral system

Structure of Commonwealth Parliament
- governor-general (the Queen’s representative)
- Senate (upper house)
- House of Representatives (lower house)

The role of the House of Representatives
- initiating laws
- determining the government
- providing responsible government
- representing the people
- publicising and scrutinising government administration
- controlling government expenditure

The effectiveness of the House of Representatives

The role of the Senate
- house of review/scrutinising bills from lower house
- states’ house
- initiating laws except money bills

The effectiveness of the Senate

Structure of Parliament of Victoria
- governor (the Queen’s representative)
- Legislative Council (upper house)
- Legislative Assembly (lower house)

The role of the Legislative Assembly

The role of the Legislative Council

The role of the Crown

The functions of parliament
- making new laws and amending existing laws
- providing for the formation of government
- providing a forum for popular representation and debate
- scrutinising the actions of government

- delegating some of its law-making power
- checking any delegated legislation
- balancing the books

Roles of the government, cabinet, prime minister/premier and committees

The principles of the Australian parliamentary system

Representative government
- represents the views of the people
- regular elections
- if government does not represent the people it is likely to be voted out of office

Responsible government
- government answerable to the people
- if government loses the confidence of the people it must resign
- ministers are responsible to parliament and therefore the people
- members of parliament can question ministers
- ministers are responsible for the actions of their departments
- ministers must carry out their duties with integrity and propriety or resign

Principle of separation of powers
- legislative power
- executive power
- judicial power
- legislative and executive power combined
- judicial power separate

Reasons for separation of powers
- protects the stability of government
- provides independence between the bodies that hold these powers
- provides a check on the power of parliament and the government

Effectiveness of the parliamentary system
- is parliament a rubber stamp?
- time for public debate
- restrictions on parliament
- laws should reflect values
- participation by the individual
representative government

role of the Crown
role of the Senate and the House of Representatives

responsible government

the principle of separation of powers
- executive power and legislative power combined
- judicial power separate and independent

AUSTRALIAN PARLIAMENTARY SYSTEM

Commonwealth Parliament
- governor-general
- Senate
- House of Representatives

Victorian Parliament
- governor
- Legislative Council
- Legislative Assembly

structure of state and Commonwealth parliaments

UNIT 03: LAW-MAKING