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LEGISLATIVE POWERS

S51 – *main grant of legislative power of Federal government. Some powers are exclusive to Commonwealth.*

- There are NO exclusive State powers – ***Engineers Case (1920***)
- State powers are concurrent with Commonwealth power unless there is an inconsistency at which time s109 is utilised. Commonwealth prevails to the extent of the inconsistency.
- Most of s51 powers relate to SUBJECT matter
- Some powers relate to PURPOSE 'is directed to a purpose or end' e.g. defence power
- Purposive power needs to be PROPORTIONARE to be valid
- A law enacted under s51 MUST be in respect to a head of power listed under s51 = CHARACTERISATION
- There need be a connection between the law and the head of power.

Can have dual characterisation provided one of the subjects is within a subject matter of s51 (***NSW v Commonwealth (2006)).***

INTERGOVERNMENTAL IMMUNITIES

- Presumption at common law is that Crown is not bound by legislation but can be displaced by express statement or by implication.

- Government can pass legislation that affects/binds the States. (***Engineers Case; West v Commissioner of Taxation)***

***1. AUSTIN* (2003)** TEST OF BURDEN AGAINST STATE

The Austin test in reaffirming the Melbourne Corporations test involves one limb

- Does it impose a 'special burden on the state which curtail its capacity to function as a separate government'?
  - Eg. Cannot remove State judge
  - Matter of degree
    - High Court not often found that this occurred
  - Commonwealth cannot give a State exclusive jurisdiction over a constitutional matter as it burdens the state in exercise of constitutional power

- **States typical constitutional functions:**
  - Judiciary- Running of courts, hiring and firing judges
  - State elections
  - Parliament- Relating to the running of parliament
  - Executive- Premier, cabinet, ministers, appointing governor, relationship between them all, senior public servant, departments for the state (how they are run) statutory etc.
  - Policing

- Is the subject matter of a constitutional nature?
- Would the state still run as a state regardless of the provisions in the Act?

- If no substantial burden apparent the test is not met, and the state would continue to function as an autonomous state.

Clarke v Commissioner of Taxation [2009]
Considering whether a law singles out a State will be considered and weighed together with the following

- Immunity applies to members CRUCIAL to the state
- Does it single out state and create special burden or disability on them
- Does the operation of law of general application impose particular burden
- Impact on states ability to exercise their constitutional powers
- Effect on states exercising their functions
- Nature of the capacity of functions affected
- Subject matter of the law effecting the states

DEFENCE POWERS

EXTERNAL AFFAIRS

NATIONHOOD POWER

JUDICIAL POWERS

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