
AUSTRALIAN CONSTITUTIONAL LAW NOTES

STATE LEGISLATIVE POWERS	2
COMMONWEALTH CONSTITUTION.....	2
CONSTITUTION ACT 1902 (NSW).....	2
<i>Plenary Power of the States</i>	3
Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations ('BLF case') (1986) NSWSC.....	3
Union Steamship Co of Australia v King (1988) HCA.....	3
Durham Holdings Pty Ltd v NSW (2001) HCA	3
STATE REFERRALS OF POWER TO THE COMMONWEALTH	3
R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex pare Australian National Airways Pty Ltd (1964) HCA	4
CONSTITUTIONAL AMENDMENT.....	5
COMMONWEALTH CONSTITUTIONAL AMENDMENT.....	5
<i>Process for Federal Referenda</i>	5

STATE LEGISLATIVE POWERS

Commonwealth Constitution

- **S. 106:** The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.
- **S.107:** Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

There are three main limitations on State legislative powers arising from the Australian Constitution.

1. Some powers are vested exclusively in the Commonwealth Parliament (ss. 52, 90), which means that the States can't make laws on those subject matters.
2. Some provisions expressly limit the powers of the States (s 114 a State shall not impose any tax on property belonging to the Cth).
3. Limitations implied in the Constitution (freedom of political communication, the institutional integrity of the State courts).

The state legislative power is generally considered plenary in nature, which is the closest thing to Parliamentary Sovereignty that exists within Australia. This means that the parliament may make laws on any subject matter- so long as it doesn't conflict with the jurisdictional boundaries of the Commonwealth.

A limitation however, is that a Parliament may not bind a future parliament- this is to allow for the plenary nature of the power to continue.

Constitution Act 1902 (NSW)

- **S. 5:** The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever.

The words, "*Peace, welfare and good government*" are used traditionally to grant plenary power to a legislative authority. The grant of plenary legislative power to the States is confirmed by *Australia Act 1986* s 2- the Act replacing the former *Colonial Laws Validity Act*.

However, several cases have been tried and found that these words cannot be used as a source of limitation on power.

Plenary Power of the States

Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations ('BLF case') (1986) NSWSC

FACTS: The BLF argued that legislation that confirmed deregistration under industrial laws was invalid because it's abrogated fundamental rights.

ISSUE: Were the words 'Peace, Welfare and good Government' limiting?

DECISION: Street CJ, argued that the words did limit the plenary power of government in practice. The court found that the words are not. As Kirby P stated, '*By their history, purpose and language these words may not be apt to provide a limitation on what the legislature may enact.*'

Union Steamship Co of Australia v King (1988) HCA

ISSUE: Are the words 'peace, welfare and good government' words of limitation?

DECISION: The High Court unanimously said no. The words "for the peace, order and good government" are not words of limitation. They do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government.

Durham Holdings Pty Ltd v NSW (2001) HCA

FACTS: The case concerned NSW legislation that vested coal in certain land in the Crown in right of NSW but compensation payable to land owners was less than full compensation. Durham Holdings was a landowner and argued the legislation violated the common law right to receive fair compensation that was firmly rooted in the common law.

ISSUE: Did the Right to fair compensation for property acquisitions by Government conferred in s.51 (xxx1).

DECISION: The court found the limitation for which the applicant contended is not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate. The case therefore found that the Commonwealth right to fair compensation didn't apply as a limitation on the State Legislatures.

State Referrals of Power to the Commonwealth

- *Constitution s. 51:* The [Commonwealth] Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to ...
 - (xxxvii) matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law

This effectively makes it possible for the State Governments to refer power to the Commonwealth to legislate on. However there has been some clarification needed to determine that this power isn't a full transferral, nor is it indefinite.

R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) HCA

FACTS: Tasmania passed a statute referring power to the Cth in respect of air transport for a period which might at any time be terminated by the State Governor.

ISSUE: Could s 51(xxxvii) allow States to put time limits on a referral of power?

DECISION: The court found, "*The will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal*".

Therefore, should the state parliament put a limitation, time frame or sunset clause into the referral of power, it will make it possible for the power referred to the Commonwealth to expire or be repealed.

CONSTITUTIONAL AMENDMENT

Commonwealth Constitutional Amendment

- **S. 128-** Sets out the terms for which the constitution may be amended by way of referenda. This requires not only a majority of electors but also a majority of states. It also includes time frames and manner and form to which referenda may be launched (See full text).

Process for Federal Referenda

