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Federal Law	State Law
<p><b>Step 1:</b>  <b>Ask: Is there a Power to pass the law in the first place</b>  <b>Includes:</b></p> <ul style="list-style-type: none"> <li>• Head(s) of power <ul style="list-style-type: none"> <li>◦ External Affairs <ul style="list-style-type: none"> <li>▪ 3 components to this so could say in the exam: The external affairs power allows parliament to pass laws with respect to those things <ul style="list-style-type: none"> <li>• physically external to Australia,</li> <li>• things with respect to foreign affairs such as intl relations and</li> <li>• implement treaties.</li> </ul> </li> <li>▪ It therefore appears at issue that the discussion will focus on this specific aspect of External Affairs.</li> </ul> </li> <li>◦ Incidental Power</li> <li>◦ Corps Power</li> </ul> </li> <li>• Interpretation; and <ul style="list-style-type: none"> <li>◦ Next: What does the power mean? The power to implement treaties, what does that mean? And ...</li> </ul> </li> <li>• Characterisation <ul style="list-style-type: none"> <li>◦ Is our law a law with respect to a component head of power? What is the sufficient connection? In the alternative if a the leg is supported by a head of power, then we need to consider whether limitations of power are relevant</li> </ul> </li> </ul>	<p><b>Power to pass the law in the first place</b>  <b>Includes</b></p> <ul style="list-style-type: none"> <li>• Plenary Power</li> </ul>
<p><b>Step 2: Ask: Are there any Limitations on Power? Or do I need to go on to a limitation?</b></p> <ul style="list-style-type: none"> <li>• Boilermakers</li> <li>• Implied freedom of communication</li> <li>• Intergovernmental immunities</li> </ul>	<p><b>Limitations on Power?</b></p> <ul style="list-style-type: none"> <li>• S 109 inconsistency</li> <li>• Kable Doctrine</li> <li>• Political Communication</li> <li>• Intergovernmental immunities</li> </ul>
<p><b>OR: Power for Executive Govt to take action</b></p> <ul style="list-style-type: none"> <li>• Power to do action...? <ul style="list-style-type: none"> <li>◦ S 61</li> </ul> </li> <li>• Limitations? <ul style="list-style-type: none"> <li>◦ Legislation abrogating the power</li> <li>◦ Constitutional Conventions</li> <li>◦ Political Communication</li> </ul> </li> </ul>	
<p><b>Consequences of invalidity</b>  What does it mean?  Severance  Reading Down</p>	<p><b>Consequences of invalidity</b>  What does it mean?  Severance  Reading Down</p>

Structure:

Intro: This case is about... the key issues are about ... because (set the scene) to the point.

When talking about cases, this case is about this... the judge said this... this case established the rules, steps, process for ...

1. Power to pass laws in first place
  - a. External Affairs Power (are ss 2 and 4 valid under the External Affairs Power)
    - *Then you would have a short introductory sentence (The federal Parliament has the power to implement laws within the External Affairs Power... The external affairs power allows parliament to pass laws with respect to those things physically external to Australia, things with respect to foreign affairs such as intl relations and implement treaties) **List the three.***
      - i. Power to implement international legal obligations (Are ss 2 & 4 implement international legal obligations?)
        1. Rules/Principles
          - a.
        2. Application
      - ii. International Relations/Foreign Affairs (Are ss 2 & 4 laws with respect to international relations?)
        1. Rules/Principles
          - a. HC has said that the treath of terrorism is an issue to do with foreign affairs.  
Can pass the laws that stuff about terrorism
        2. Application
    - It therefore appears at issue that the discussion will focus on this specific aspect of External Affairs. Limitations on Power (Does s 4(4) breach the implied freedom of political communication)
  - b. Political Communication (have to describe the extent of this limitation from Lange, about justifying the burden). – General Application, where it comes from (Cases)
    - i. Is there a burden?
    - ii. Purpose of the law compatible?
      1. What is the purpose of the law?
      2. What does compatible mean?
      3. Is the purpose compatible?
    - iii. Means...?
      1. Does it pass the McCoy test?
      2. Does it pass other tests?
        - a. Brown says it is a tool for applying reasonably appropriate adapted
          - There are other ways such as Gaegler's way of doing it.
  - c. Boilermakers – is there a breach?
    - i. General application of Boilermakers – in the topics workbook
    - ii. Is the power judicial or non-judicial? – what is the definition...
    - iii. Is the repository of the power a court?
      - 1.
2. Consequences of Invalidity

- Need to know what characterisation is, how you go about that – look at the cases in the topic of characterisation. Then have to apply it to a particular head of power and law.

If external affairs is in the exam: It appears that this is in relation to external affairs power.

## Topic 1: Intro

Aus cons found in s 9 of *Commonwealth of Australia Constitution Act 1900* (Imp)

- Constitution serves 3 functions
  - Basic law
    - Distributing powers, rights, duties and responsibilities and promoting political stability – Australia is this one
    - Is procedurally legitimate, to the extent that people clothed with state power make decisions according to legal rules and procedures.
  - Higher law
    - Functioning as a source of inspiration and aspiration and a repository of values and principles
  - People's law
    - Serves as a constitutive narrative through people imagine themselves as people.
- Rule of Law
  - Non-arbitrariness – in the first place, the absolute supremacy or predominance of regular law as opposed to the influence or arbitrary power
  - Subjection of all to the law and legal equality
    - Equality before the law
  - Law is a consequence of the rights of individuals
- Westminster Govt
  - Responsible
    - Only the person commanding the confidence of lower house is entitled to form govt
  - Representative
    - Parl should be made up of people freely elected by the people
  - Sovereignty
    - Pal can make or unmake any laws it wants.

## Topic 2: State Legislative Powers

- *S 106 = Constitution of each State of the Cth 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*
  - Starts with the assumption that the States have pre-existing constitutions and those constitutions continue in force subject to any limitations in the federal constitution, and those state constitutions can be altered in accordance to that State Constitution.
- *s 107 = every power of the Parl of a Colony which has become or becomes a State, shall unless it is by this Constitution, exclusively vested in the Parl of the Cth or withdrawn from the Parl of the State, continue as at the establishment of the Cth, or as at the admission or establishment of the State, as the case may be*
  - all powers of the colonies / states had before federation continue, unless the fed constitution puts a particular power exclusively in the hands of the fed parl or takes it away from the States.

**Ask:** Are there limitations to State legislative powers

1. Some powers are vested exclusively with the Cth (ss 52 & 90 (Customs, excise and bounties))
  - a. States cannot make laws on those subject matters
2. Some provisions expressly limit the powers of the States (s 114: States cannot raise forces, taxation of property belonging to Cth or State)
3. Limitations implied in the Constitution (freedom of political communication, institutional integrity of the Courts)

**General Rule:** Leg power of States is plenary = *they can make and unmake any law they want*

- Limitation to this is that one Parliament cannot bind a future parliament.
  - E.g. if Vic parliament passed a law saying that Parl must not impose payroll tax, a Vic-NSW Parl still retains power to impose payroll tax
  - But a State Parl can, in limited circumstances, enact laws that restrict the manner in which a future parl may exercise its leg power on certain matters.

State Constitutions are ordinary Acts of Parliament

- They can make laws for the peace, welfare and good government

The grant of Plenary Legislative Power is confirmed by **s 2 Australia Act 1986**

**Ask:** Are the words peace, welfare and good government words of limitation? Can the courts rule that a particular law is not in fact for the peace, welfare and good government, and therefore invalid?

- *Building Construction Employees and Builders' Labourers Federation of NSW v Minister for Industrial Relations (BLF case) (1986, HC)*
  - BLF argued that the legislation that confirmed its deregistration under industrial laws was invalid because it abrogated fundamental rights.
  - Street CJ – Minority
    - The words were limiting
    - Laws inical to, or which do not serve, the peace, welfare and GG of our parliamentary democracy will be struck down as unconstitutional
  - Kirby P – Majority View
    - Rejected the idea the words were of limitation.
- *Union Steamship Co of Australia Pty Ltd v King (1988, HC)*
  - Are the words to limitation?
  - HC said no, it is a grant of plenary legislative power. This is because State Parl have plenary power and can make or unmake any laws that it wants subject to federal constitutional limits.
- *Durham Holdings v NSW (2001, HC)*
  - Concerned NSW Leg 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 leg violated the common law right to receive fair compensation that was firmly rooted in the common law
- NSW Court of Appeal rejected that idea
- HC denied application for special leave
- Gaudron, McHugh, Gummow and Hayne JJ