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Legislature

Is there a head of power?

Commonwealth

Commonwealth Parliament must have had a valid source of power to enact the Act.

Constitutional Heads of Power

Commonwealth parliament has a broad legislative authority over subjects encompassed by Heads of Power from the Constitution:

- Trade and Commerce – **s51(i)**
 - Taxation – **s51(ii)**
 - Postal, telegraphic, telephonic & other like services – **s51(v)**
 - Defences – **s51(vi)**
 - Lighthouses, lightships, beacons and buoys – **s51(vii)**
 - Currency; Bankruptcy, Corporations – **s51 (xxii); (xvii); (xx)**
 - Naturalisation; Immigration – **s51(xix); (xxvii)**
 - External Affairs – **s51(xxix)**
 - Matters referred to the Cth by States – **s51 (xxxvii)**
 - Matters Constitution makes provision for – **s51(xxxvi)** [use when section allows]
 - Incidental Matters – **s51(xxxix)** [use when section is less relevant]
- Other relevant Constitutional Sections:
 - Use of phrase ‘**until Parliament otherwise provides**’ or ‘**Parliament may pass laws**’ grants federal Parliament a Head of Power in the area the provision relates to. Cite in conjunction with **s51(xxxvi)**.
 - Voting: **s8, s30**
 - Has Australia **signed a treaty**? Will there be **no head of power otherwise**?
 - As there is no legislative Head of Power in the Constitution that covers _____, Cth Parliament will lack a source of power unless Australia has signed a treaty on the matter and can rely on **s51(xxix)** – **Tasmanian Dams**

Nationhood Power

The nationhood power can be used where there is no express power over _____.

General rule: However, Parliament **may legislate** with respect **on any matter incidental to** the execution of the Commonwealth **executive powers** under **s61 Constitution – s51(xxxix); AAP Case**

- ‘legislative powers of the Commonwealth extend beyond the specific powers conferred... by the Constitution and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity...’ - **Davis**

When can nationhood power be exercised?

The nationhood power permits the Commonwealth Government to undertake activities in areas **appropriate to the character and status** of the Commonwealth as a national government, and where suitable for protecting and advancing the nation – **Tampa**

- “a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation” – **AAP (Mason J); Pape**

- Functions, powers and privileges which can be described as inherent in or appropriate to a nation state. Can be used to both to **protect and advance** the Australian nation. – **Davis**
- ‘National’ = nationhood quality of a power is for the courts to decide. Standard is not rigid and may change over time – **Vic v Cth**

Limitations on nationhood power:

- Distinction between purpose of power and actual measure – **measure must be reasonable and proportionate to its purpose** – **Davis**
 - **Davis**: Prescribing certain expressions is grossly disproportionate to the need to protect commemoration.
 - This **can depend on appropriate distribution of power between Cth and States**.
 - “clearest where...involves not real competition with State executive or legislative competence’ – **Davis**
 - **Tasmanian Dams**: provision not supported by legislative nationhood power because regulation of property was normally performed by states.
- Coercive power declaring certain conduct unlawful can only be enacted pursuant to a given head of power, not under nationhood power – **Tasmanian Dams**

State

Plenary Grant of Power

- State plenary power is derived from **s107** of the Commonwealth Constitution, which grants state legislatures the power to legislate in all matters not exclusively vested by the Commonwealth Constitution in the Commonwealth Parliament.
- States can legislate on matters concurrently vested with Commonwealth (shared between Commonwealth and States) subject to **paramount power of Commonwealth** per **s.109** to legislate in that area and cover the field.
 - E.g. **51.1** (trade and commerce), **51.17** (bankruptcy), **51.21-22** (family law).
- States also have the power to amend or repeal their own Constitutions, subject to the Commonwealth Constitution and the *Australia Acts*
 - Only constrained by Commonwealth Constitution – **Union Steamship**
 - High Court has yet to authoritatively hold that fundamental common law rights or political principles constrain State Parliament legislative power – **Union Steamship; Durham Holdings**

Section 2(2) of the Australia Act 1986 (Cth): ‘It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State’.

NB plenary power is non-extraterritorial (inconsistent with Commonwealth jurisdiction and **s 109** triggered)

Territory Constitutions:

- Territory constitutions are established by the Commonwealth Parliament under ss 111, 112 and 125 of Constitution.