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1. Was the Delegation/ Enabling provision Valid?

Assessing validity of primary legislation which purports to delegate power

a. Was there a head of power for the primary legislation?

- Did the parliament have a head of power to make this provision? (Commonwealth powers found in s 51, State powers plenary)
 - Delegation of power to make laws re a subject matter which Parliament has power to make laws over falls within that head of power
- **Vagueness:** Invalid if the subject matter of the delegated power is so extensive or broad that the enabling legislation cannot be said to be concerned with/ fall within any head of legislative power → *Dixon J in Dignan's Case*

b. Does the delegation abdicate the law-making power of parliament?

- Delegation of legislative power to Executive is usually not a problem re separation of powers as delegated legislation remains constrained and subordinate to will of parliament. Does not give the Executive true independent legislative power → *Dignan*
- **Abdication:** Any law that purports to delegate all law-making power in relation to any subject matter/ head of power may be invalid where it abdicates legislative power over that head. Look for excessive breadth/ discretion. → *Evatt J in Dignan's Case*
- However, may be a high standard to reach 'abdication'.
 - No delegation has ever been struck down on this basis
 - It is not invalid for delegated legislation to amend or override existing primary legislation (referred to as Henry VIII clauses). → *Dignan's Case*

2. Parliamentary Scrutiny of Delegated Legislation

- Either house of Parliament has the power to veto/disallow subordinate legislation after it is made and tabled by the external body → *Legislation Act 2003 (Cth)*
 - Delegated legislation must be presented to Parliament within 6 sitting days. If not presented, then has no effect
 - Parliament has 15 days to decide whether to overrule the legislation.
- Senate Standing Committee on Regulations and Ordinances:
 - Assesses delegated legislation against a set of principles outlined in *Senate Standing Order 23*.
 - Includes considering whether:
 - It is in accordance with the requirements of the Enabling Act
 - It appears to be supported by a constitutional head of power
 - It trespasses unduly on personal rights and liberties
 - It unduly excludes or limits independent review of decisions affecting rights, liberties, obligations or interests
 - It contains amendments or modifications to primary legislation

1. When can Judicial Power be Exercised?

- Separation of powers = Fundamental principle of Constitution. Judiciary must remain impartial and independent to from the Executive and Legislative branches of government.
- Various rules are in place to 'insulate' courts and judicial powers from other governmental branches and functions

Separation Rules

A. FEDERAL

- *Boilermakers 1956* Set out **2 key principles** which uphold the Separation of judicial power under the Constitution:

1. **LIMB ONE: Only bodies meeting the description of a Chapter III 'Court' can exercise federal judicial power**

- S 71 is exhaustive, so federal judicial power can only be exercised by courts that are properly constituted in accordance with requirements of Chapter III → already established in *Alexander 1918*

1.1. **When is a body a Chapter III Court?**

Must fit characteristics of Court established in Chapter III

a. Judge's Tenure Requirements

- **Constitution s 72**
 - Safeguards the independence of the federal judiciary
 - Judges are not subject to arbitrary removal – only for misbehaviour
 - Not subject to pay decreases
 - Means judges are not responsible to parliament and are thus insulated from political pressures and independent
- To constitute a Chapter III court, the body must be constituted solely of judges with tenure and security as per **s 72 Constitution** (above) → *Alexandar*
 - *Wheat Case 1915*: Inter-State Commission not a court because members had a 7-year tenure (life tenure required at the time)
 - *Alexander Case 1918*: Cth Court of Arbitration not a court because members had a 7-year tenure (life tenure required at the time)
- Must have tenure specific to that position. Ie the fact that the judge may have a tenure in another judicial position does not satisfy this requirement

1. Nationhood Power

- **S 61** describes power of Executive to 'execute and maintain the Constitution and the laws of the Commonwealth'
- **S 51 xxxix**: Gives Cth parliament power to legislate on matters incidental to the execution of any power vested by the Constitution or Parliament
- **Nationhood power**: Implied power held by Commonwealth Executive and Legislature to engage in activities/ pass legislation to protect the nation (without statutory authority).
 - Nationhood power can be either Executive or Legislative
- Note: this is a very confined power. Only 2 cases where the High Court has held something to fall within 'nationhood power' (*Davis* and *Pape*), and both in exceptional circumstances.
- **2 stages of Analysis**:
 1. Is it a subject matter than can fall under 'nationhood' power under **s 61**? Apply 2 limb test
 2. If so, was the legislation *incidental* to the use of those powers so as to be supported by **s 51 xxxix** (ie was it done under that head of power?)

2. Breadth: Does a nationhood power exist?

- **Definition**: S 61 gives the Commonwealth Executive an implied power to engage in activities '*peculiarly adapted to the government of a nation which cannot otherwise be carried on for the benefit of that nation*' (*Mason J in AAP Case 1975*).
- This therefore creates 2 limb test for determining whether something falls under 'nationhood' power':

1.1. The activity must be a National Endeavour (something peculiarly adapted to the government of a Nation)

- **Test**: Nationhood power extends to matters affecting the nation as a whole where the measures to deal with such are peculiarly within the capacities and resources of the Commonwealth government (*Pape*)
- **NOTE**: The fact that States are all working together is not enough to make something that would not otherwise fall under a 'national endeavour' → *Williams No 2*
- *Pape*: GFC created conditions that affected the nation as a whole (nationwide economic crisis).
- *Davis*: National Commemoration was a national endeavour.

1.2. The activity cannot otherwise be carried out by the States

- **Convenience not enough**: The fact it is more convenient an action to be performed by the Commonwealth does not bring it within the nationhood power. Must be only materially possible for Cth. (*Mason j in AAP Case*)