

Contents

EXECUTIVE POWER	2
The King	2
The Governor-General	2
Responsible Government	3
Collective and individual responsibility	4
Responsible government and federalism	4
Categories of executive power	4
Implied nationhood power.....	8
INTERGOVERNMENTAL IMMUNITIES	9
Balancing centralisation and decentralisation.....	9
Crown immunity	9
Three phases of federalism jurisprudence	10
Phase I.....	10
Phase II.....	11
Phase III.....	12
FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE	15
Corresponding powers and rights	15
Freedom of interstate trade, commerce and intercourse	15
Two general approaches	15
Individual right theory.....	16
Free trade theory	16
Two ways a law may contravene s 92.....	17
FREEDOM OF POLITICAL COMMUNICATION	22
A deliberate choice to omit freedom of speech.....	22
Sections 7 and 24	22
Basis for the implied freedom	23
Test for justified interference	24
McCloy Test.....	26
Burdens: Free Trade v Free Speech	28
Recent cases.....	28
FREEDOM OF RELIGION.....	29
Australian v US Constitution.....	29
Oaths and affirmations of office.....	29
Legislative and administrative action	30
Definition of religion	30
Commonwealth, States and Territories.....	30
Decisions	31
Non-establishment of religion.....	32
Who or what is protected by s 116.....	33
International Covenant on Civil and Political Rights	34

Executive Power

CONSTITUTION	
S 61	The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.

The King

His Royal Majesty King Charles III.

CC 2	The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.
S 1	The King is a component of the Commonwealth Parliament.
S 61	The executive power of the Commonwealth is vested in the King.
S 42, SCHEDULE	All members of Parliament must take an oath or affirmation of allegiance to the King.
SUCCESSION TO THE CROWN ACT 2015	The Crown is a hereditary office determined according to the royal succession.

SUCCESSION TO THE CROWN ACT 2015

STATUTE OF WESTMINSTER 1931 (UK)	
S 4	UK statute enacted at the request and consent of each dominion.
AUSTRALIAN CONSTITUTION	
S 5(XXXVIII)	Commonwealth statute enacted at the request and consent of the States.
SUCCESSION TO THE CROWN ACT 2015 (CTH)	
GENERAL	Male and female succession. Marrying a Roman Catholic no longer disqualifying. Only first six persons in line require the sovereign's approval to marry.

The Governor-General

S 2	Appointed by the King.
S 4	Salary cannot be altered during office.
S 5	Summons, prorogues and dissolves parliament.
S 58	Assents to bills in the name of the King.
S 61	Exercises the executive power of the Commonwealth.
S 62	Appoints, summons and chairs the Federal Executive Council.
S 64	Appoints ministers of state, including the Prime Minister.
S 67	Appoints civil servants.
S 68	Commander in chief of the armed forces.

APPROPRIATION AND SPENDING

AAP CASE, MASON J AT 396

Appropriation Acts are only permission from the Parliament for the withdrawal of funds by the Executive. Appropriation Acts do not empower the Executive to engage in the activities which require the expenditure of these funds.

SPENDING AND COMMON LAW CAPACITIES

PAPE V COMMISSIONER OF TAXATION (2009)

Commonwealth power to spend is not sourced in appropriations laws passed under ss 81 and 83. This shifted the focus from 'purposes of the Commonwealth' to the scope of the common law capacities of the Crown, incorporated in s 61.

COMMON LAW CAPACITIES: TWO COMPETING VIEWS

UNLIMITED CAPACITIES	THE COMMON ASSUMPTION
Commonwealth enjoys the same unlimited capacity to contract and spend as a natural person.	Commonwealth's capacity to contract and spend follows the 'contours' of the Commonwealth's legislative powers in ss 51, 52 and 122 of the Constitution.

Both views were **rejected** in the *School Chaplains' Case*.

WILLIAMS V COMMONWEALTH (2012) (SCHOOL CHAPLAINS CASE)

The National School Chaplaincy Program ('NSCP') was supported by a parliamentary appropriation (s 83) but not authorised by legislation (ss 51 or 52). The Commonwealth entered into a funding agreement with Scripture Union Queensland for the provision of chaplaincy services at the Darling Heights State School.

Williams argued this was contrary to s 116, as it involved unauthorised contracting and spending.

HELD

The contracting and spending was *not* supported by s 61 and was therefore *invalid*. Contracting and spending must be:

- (a) incidental to the ordinary, well-recognised functions of government; or
- (b) in exercise of the implied nationhood power; or
- (c) authorised by legislation under ss 51, 52 or 122.

RATIONALES

Contracting and spending by the Executive without supporting legislation diminishes parliamentary oversight. Prior legislative authorisation enables the Senate to exercise an appropriate role in the supervision of Commonwealth activities. Commonwealth capacities are limited by the federal division of powers – the States had the legal and practical capacity to implement the Program.

COMMONWEALTH RESPONSE

Amendments to the *Financial Management and Accountability Act 1997* included empowering the Commonwealth to make, vary or administer arrangements (including contracts, agreements or deeds) which are listed in the *Financial Management and Accountability Regulations 1997*. Some arrangements listed in the *Regulations* had no obvious connection with a head of power in ss 51, 52 or 122.

WILLIAMS V COMMONWEALTH [NO 2] (2014)

The amendment did not constitutionally authorise spending for the Program because it was not a law with respect to 'benefits to students' under s 51(xxiiiA).

INDUSTRIAL RELATIONS ACT CASE (1996)

Amendments to the *Industrial Relations Act* (Cth) introduced a range of 'protections' for employees:

- s 170DE(1) required all employers, including States, to have a 'valid reason' for terminating employment 'connected with operational requirements' of an enterprise;
- s 170DG prohibited employers from terminating employment in contravention of an Industrial Relations Commission order relating to severance pay and union consultation;
- s 6 provided that the Act applied to the Crown in right of the States;
- s 7A(1) provided that the Act was to be 'read down' so as not to have any 'invalid operation'.

Section 170DE(1) would 'operate to prevent a State from determining the number and identity of those to be made redundant'. Section 170DG would 'clearly impair a State's right to "determine the number and identity of [those] whom it wishes to dismiss ... on redundancy grounds"'.

These and other provisions invalidly apply to 'higher levels of government'. The amendments must be read down to have only a valid operation, which meant not to bind the States.

AUSTIN V COMMONWEALTH (2003)

A Commonwealth law imposed a tax surcharge on the employers of 'high income earners, including State judges who were paid out of consolidated revenue. This placed substantial taxation liability on judges. Two State judges challenged the federal law imposing the surcharge.

The discrimination principle in *Melbourne Corporation* was held to be an aspect of a wider principle stated in *Australian Education Union*, that the Commonwealth could not impair the capacity of the States to function effectively as independent governments in the exercise of their constitutional powers. This wider principle encompasses both 'limbs' of the immunity as previously understood.

The Commonwealth law imposed an onerous special tax on State judges, impairing the freedom of the States to determine the remuneration of State judges.

CLARKE V FEDERAL COMMISSIONER OF TAXATION (2009)

FRENCH CJ, *MULTIFACTORIAL ASSESSMENT* AT P 299

- (1) Whether the law *singles out* one or more of the States and imposes a special burden or disability on them.
- (2) Whether the operation of a law of general application imposes a *particular burden or disability* on the States.
- (3) The effect of the law upon the *capacity* of the States to exercise their *constitutional powers*.
- (4) The effect of the law upon the *exercise* of their *functions* by the States.
- (5) The *nature of the capacity or functions* affected.
- (6) The *subject matter of the law* and the extent to which the constitutional *head of power* under which the law is made authorises its discriminatory application.

SUMMARY OF STATE IMMUNITY FROM FEDERAL LAWS

The two distinct limbs originally set out were (*Queensland Electricity Commission v Commonwealth*, Mason J):

- (a) prohibition of discriminatory laws which place special burdens or disabilities on the States (*Melbourne Corporation v Commonwealth*, Dixon J); and
- (b) prohibition of generally applicable laws which operate to destroy or curtail the continued existence of the States or their capacity to function as independent governments (*Re Australian Education Union*).

In *Austin v Commonwealth*, these became conceived as one principle: that the Commonwealth could not impair the capacity of the States to function effectively as independent governments in the exercise of their constitutional powers.