

6.4 Delegated legislative power

Primary legislation refers to legislation created by passing a bill through Parliament. As **secondary act** has not been created via this process, and instead has been created by **person**, as part of their Executive functions, it may be secondary/delegated legislation.

Secondary legislation is legislation created by an Executive body, empowered by a delegation of legislative power stated in primary legislation. Although not expressly authorised in the Constitution, the Constitution's formulation of the separation of powers does not prohibit Parliament's ability to create statutes that confer such legislative power (Dignan, [101]).

Analyse whether parliament delegated legislative power (most likely yes)

The primary legislation is ..., whereby the enabling provision ... in the primary legislation delegates legislative power to ... And therefore ... is a piece of delegated legislation.

The enabling provision is analogous to that of the Public Health Act 2010 (NSW) s 7(2) the Minister (b) may by order give such directions as the Minister considered necessary...

Note the delegated legislation fits within the scope of the primary statute (consistency), and that this enabling provision is still valid as parliament has not retracted the authorisation.

Note, since the primary legislation is a Commonwealth/state act delegating power to the Federal/state executive, this analysis will use federal/state cases.

Issue: Now established as delegated legislation, whether **secondary act** specifically **regulation** is valid needs assessing to determine whether **impact/actions** are legally justified.

There are three key constitutional constraints on legislative power which must also apply to laws under delegated authority (Evatt J, Dignan at 121). Firstly, the legislative power conferred onto the executive must fall under a s 51 federal head of power. Secondly, the delegation of power cannot restrain the legislature's power to make such laws, thereby amounting to an abdication of legislative power. Thirdly, the subject-matter of the primary act cannot be so 'extensive or vague' (Dignan, [101]; [121]).

Analyse whether the 3 constraints are satisfied

1. Head of power - go through s 51 list

- a) Eg Williams (No 2) primary legislation permitting Commonwealth expenditure on the Chaplaincy Program was unconstitutional as it was not within the scope of s 51(xxxix)

2. The delegation of power cannot be an abdication of legislative power, maintaining the principle of parliamentary sovereignty whereby parliament cannot bind its successors.

- a) Whether the delegated legislation has bound future parliaments from being able to make future laws in this area
 - i) Delegating an entire head of legislative power = abdication
- b) The parliament must retain ultimate supervisory power and power to withdraw delegation at any time (Dixon J, Dignan)

3. Whether the term is 'extensive or vague'

([53]). Moreover, in *CPCF v MIB*, Hayne & Bell JJ's obiter impliedly expresses doubt regarding such prerogatives as their Honours purport that Commonwealth executive power alone does not provide legal authority to detain persons ([148]).

Ultimately, since no definite denial of the prerogative exists, the prerogative power to detain aliens entering Australia, as exercised by *Executive*, can be argued as a common law precedent received in Australia at colonisation. Note, the prerogative operates as the 'UK version' in its condition at the time of reception. However, due to the uncertainty, *Executive* should argue 'nationhood power' as an authority for their actions (as accepted in *Tampa*) – this will be further discussed in xx. (Include Nationhood intro, tie back to *Tampa* quote (was nationhood))

6.5.2 Capacities derived from a polity's legal personality - non prerogatives

Spending money

First determine if there is a statutory authority to spend

- If commonwealth statute, must be supported by a head of power such as under ss 51 and 52 (*Williams (No 2)*)
- If delegated legislation, regulation must be within power conferred by the enabling act, enabling act must be within a head of power, separation of power must be maintained and the commonwealth must not abrogate its legislative supremacy: *Dignan's Case*, *Communist Party*
- If there is no statutory authority, an appropriation under s 81 does not authorise spending and the incidental power under s 51(xxxix) does not extend to a power to authorise spending in; must rely on non-statutory executive power

Second, determine if there is a non statutory authority to spend

- Prerogative (above)
- Non prerogative
- Nationhood power

Non prerogative powers

The executive derives some non-statutory capacity from its legal personality as a polity (*Plaintiff M68* at [132] *Gageler J* following *Brennan J* in *Davis*). This includes capacities conferred on all legal persons under general law, one being the **ability to contract and spend**. However, there are Constitutional limits (*Williams (No 1)* [238]), and the exercise of a non-prerogative capacity is only capable of producing legal effects to the same extent as the actions of other legal persons (unlike prerogatives) under the ordinary course of administration (*Williams (No 1)* and *Plaintiff M67*).

Issue: Since *Executive* have spent money on xxx, whether this was constitutionally valid needs assessment.

Ultimately, the Commonwealth Executive can spend public money maintaining it has been legally appropriated and authorised (*Williams (No 1)* [165]).

1. Appropriation

Appropriation is Constitutionally mandated (s 83) to allow withdrawal from the s 81 Consolidated Revenue Fund for a specified purpose (Pape [9]); this ensures that parliament 'controls the public purse'. S 83 does not provide a source of spending power.

A statutory authority is necessary for appropriation from the revenue fund. However, appropriation does not authorise spending of appropriated funds, it merely authorises the treasurer to withdraw funds for a specified purpose (Pape, [42]). Therefore, whilst *legislation* provides for the appropriation of funds for *purpose*, the spending must be authorised.

Analyse whether the law allows appropriation

2. Authorisation for spending - statutory and constitutional provisions

Prior to Williams No 1 and No 2, there was the 'common assumption' that the commonwealth does not need specific statutory authority to exercise non prerogative capacities to spend appropriated public funds (broad assumption) when expenditure related to subjects in ss 51 and 52 (narrow assumption). The broad common assumption was rejected in Williams (No 1), and the majority also rejected the narrow assumption. Therefore, the current stance is that the commonwealth can only enter into contracts and spend money without parliamentary authorisation 'in the ordinary course of administering a recognised part of government' [74] (French CJ), [209] (Hayne J), [529] (Crennan J).

Authorisation for spending can derive from the Constitution, legislation, ordinary administrative functions, a prerogative power or nationhood power (Williams 1).

For prerogative power: unlikely to be a prerogative as most prerogatives (eg entering into treaties, the prerogative of mercy and the like) do not entail the expenditure of money': Twomey, 2013

For nationhood power: Pape suggests that nationhood power includes a power to spend, whether the need for immediate fiscal stimulus was a nationhood power under s 51(xxxix), executed by legislation. However, Hayne J casts doubt on this in Williams (No 1) as the expenditure was unable to be supported on the same basis [240]. Therefore, whether nationhood power extends to expenditure is unclear and the *purpose* is distinguished because of *factors ie national emergency* so it is unlikely to be a nationhood power.

Analyse down the list

Legislation

Although *legislation* seemingly authorises the spending, this must fall within a head of s 51 Commonwealth legislative power to be valid (Williams (No 2) [440]).

Analyse by going down the s51 list

Ordinary Administrative Functions

The commonwealth can only enter into contracts and spend money without parliamentary authorisation 'in the ordinary course of administering a recognised part of government' [74] (French CJ), [209] (Hayne J), [529] (Crennan J). It was held in NSW v Bardolph that these ordinary administrative functions can extend to the Government's 'recognised and regular activity of the government'

NO LEGISLATION

This is supported by the Constitution s 61, the source of 'Nationhood' power, which enables powers for the execution and maintenance of the Constitution (Davis, [92]-[93]).

LEGISLATION

This is tied to the Constitution – s 51(xxxix) empowers the creation of legislation concerning matters 'incidental to the execution' of executive power, thereby giving s61, the source of 'Nationhood' power, effect (Davis, [111]).

BOTH

Note however the controversiality regarding 'Nationhood', specifically what is Nationhood's breadth and whether it can add depth to executive power (Williams; Tampa). As these questions are addressed with reference to federalism (e.g., federalism implies the demarcation (fixing boundaries) of subject-matters constituting breadth), the controversiality as a stand-alone can largely be ignored for this analysis because the method for determining whether xxx is a Nationhood endeavour follows is guided by federalism.

Mason J's two-limb test (AAP, [397]) to identify nationhood endeavours firstly asks whether the activity can be executed by the federal government as a national endeavour and secondly whether the activity can be done by the state governments (affirmed by Dean J in Tasmanian Dams). Thereby a determination of 'valid Nationhood power' using the test would also mean the power is in accordance with federalism.

1. National endeavour

This first limb relates to the aforementioned quote about being 'peculiarly adapted to the [federal] government']'.

Analyse eg

- Pape = national crisis
- Davis = national identity (bicentenary)

2. Inability of states to do activity

The second limb is to particularly prevent the Commonwealth executive power from 'competing' with state executive power. Federalism has guided judicial reasoning to assert that mere convenience (e.g., efficiency and uniformity) attached to the Commonwealth doing xxx, as opposed to the states, is not sufficient to show xxx cannot be carried out by the states (AAP, [364]). Otherwise, state executives would become obsolete.

To determine if the states are able to perform the activity, reference to s 96 is beneficial. Ask whether the commonwealth parliament can grant financial assistance under s 96 to the states for them to address xxx rather than requiring the commonwealth executive do it.

Once a nationhood endeavour is identified, determine whether the executive action is proportionate to the purpose