The Nationhood Power – Purposive

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

S 51 (xxxix) - The Parliament shall, subject to this Constitution, have power to make laws...with respect to:

- Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth

Scope

Nationhood power is the Power of the Commonwealth (specifically, the executive) to make laws based on Commonwealth as a nation.

1. Protection of the Nation

Power to protect the nation: *Burns v Ransley (1949)* – able to make laws in regards to seditious words. The executive has a power to make laws for the protection of Australia and the Constitution. Not only against acts but also words. Here, the court held that ‘while the Parliament has no power to pass a law to suppress or punish political criticism... excitement to disaffection against a government goes beyond political criticism.’ ‘Commonwealth has the power to make the law to protect’: Latham CJ in *Burns v Ransley (1949)*

In *Communist Party Case (1951)*, it was discussed again by the court – struck down legislation that was too specific in that it was about certain people and bodies were named – it was not directed at the nation and therefore was invalid.

2. Advancement of the Nation

- The nationhood power can also be used for the advancement of the nation.
  - Brennan J in *Davis v Commonwealth (1988)*: ‘it extends to the advancement of the nation whereby its strength is fostered’.
  - Wilson, Dawson and Toohey dissented, saying that it couldn’t go beyond self-protection – they said there was no implied legislative power in the nationhood power.
  - Mason, Gaudron and Deane J said it could go beyond self-protection – they said there is a legislative power.

- This was first affirmed in *Victoria v The Commonwealth and Hayden (1975)* by Mason J:
  - ‘there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(***ix) and 61 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’.
This scope of the nationhood power was confirmed in *Pape v Commonwealth (2009)*; however the court unanimously stated that the power has to be limited by the principles of Federalism.

- The AAP case recognised that that not only is the nationhood power for the benefit of the nation, but also a power that can have appropriation of funds attached to it. So, the government can actually spend money when exercising the nationhood power
  - French CJ: *‘It has to be capable of serving the proper purposes of a national government. On the other hand, the exigencies of “national government” cannot be invoked to set aside the distribution of powers between the Commonwealth and the States and between the three branches of government for which this Constitution provides, nor to abrogate constitutional prohibitions’.*
- At present, not enough case law to determine detailed criteria, however “as cases are decided, perhaps precise tests will be developed”: *Davis v The Commonwealth (1988)*

Must be peculiarly adapted to the federal government (e.g. it shouldn’t be more appropriate for the state to enact the legislation): *Pape*

3. No interference with federal balance

Must be something ONLY the federal government could achieve – couldn’t otherwise be completed: Mason J in *AAP’s case*.

Something more than mere convenience – can’t be a disagreement between states and federal government – Barwick CJ – subsequently confirmed by Deane J in *Tasmanian Dams case* – or where it is more appropriate for states to act – *Tasmanian Dams case*.

Confirmed further in *Pape* with all seven judges saying it had to be limited by the considerations of federalism.

Commonwealth can regulate territorial waters of Australia: Barwick CJ in *Seas and Submerged Land Case*

**Characterisation**

Once the matter falls within a head of power, it does not matter whether the legislative means chosen to achieve an aim within power go beyond what it necessary or desirable: *Leask v Commonwealth*.

Is the law reasonably appropriate and adapted to the character and status of the Commonwealth as a national government: *Davis v Commonwealth*.

At present, not enough case law to determine a detailed criteria, however “as cases are decided, perhaps precise tests will be developed”: *Davis v Commonwealth*.

- In other words, is the penalty in proportion to the offence?
- If not, can implied freedom of political communication come to its aid? Not disproportionate if there exists a sliding scale.

**Limits**
In *Davis*, the court held that there was a limit to exercise of power by the executive. The various sections that gave exclusive rights to words, symbols and trademarks went beyond what was reasonably necessary. Here, the court is applying the **purposive test**. The legislation went beyond the purpose of what the Commonwealth intended to achieve (celebrate the bicentenary – the exclusive granting of use of these words went beyond that purpose and were therefore invalid).

**Power is not unlimited**: Mason in *APP Case* – The executive power is limited to the distribution of powers effected by the Constitution: *Commonwealth v Colonial Combing, Spinning & Weaving Co*

Mason CJ stated in the *Australian Assistance Plan Case*, that ‘in scope it [nationhood] is not unlimited and that its content does not reach beyond the area of responsibilities allocated to the Commonwealth by the Constitution.’

Must be something only Commonwealth government could achieve: *AAPs Case*

Can’t be more appropriate for states to legislate on the matter: *AAPs Case*

**Melbourne Corporation Principle**: Immunity of states from Commonwealth legislation that would destroy or curtail their continued existence or their capacity to function as governments.

And that it can only be used for the benefit of the nation: *Davis v Commonwealth*.

Benefit is defined by the Parliament - All other limitations (implied and express)