

(CTH) CONSTITUTION [1005] cl 1 Short title

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

Alexander Flecknoe-Brown

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CONSTITUTION**

Table of Alterations

The Constitution as reproduced below contains all the alterations of the Constitution made up to 31 October 1986. Particulars of the Acts by which the Constitution was altered are as follows:

Act	Number and Year	Date of Assent
Constitution Alteration (Senate Elections) Act 1906	1 of 1907	3 Apr 1907
Constitution Alteration (State Debts) Act 1909	3 of 1910	6 Aug 1910
Constitution Alteration (State Debts) Act 1928	1 of 1929	13 Feb 1929
Constitution Alteration (Social Services) Act 1946	81 of 1946	19 Dec 1946
Constitution Alteration (Aboriginals) Act 1967	55 of 1967	10 Aug 1967
Constitution Alteration (Senate Casual Vacancies) Act 1977	82 of 1977	29 Jul 1977
Constitution Alteration (Retirement of Judges) Act 1977	83 of 1977	29 Jul 1977
Constitution Alteration (Referendums) Act 1977	84 of 1977	29 Jul 1977

CONSTITUTION

An Act to constitute the Commonwealth of Australia

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

[1005] 1 Short title

(CTH) CONSTITUTION [1005] cl 1 Short title

This Act may be cited as the Commonwealth of Australia Constitution Act.

End of Document

(CTH) CONSTITUTION [1010] cl 2 Act to extend to the Queen's successors

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[1010] 2 Act to extend to the Queen's successors

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.

End of Document

(CTH) CONSTITUTION [1015] cl 3 Proclamation of Commonwealth

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[1015] 3 Proclamation of Commonwealth

It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Clause 3 Generally

[1015.1] Date of Proclamation

The Proclamation was made on 17 September 1900 and is published in Gaz 1901 p 1; and see Commonwealth Statutory Rules 1901–1956 Vol V p 5300.

End of Document

(CTH) CONSTITUTION [1020] cl 4 Commencement of Act

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[1020] 4 Commencement of Act

The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

End of Document

(CTH) CONSTITUTION [1025] cl 5 Operation of the Constitution and laws

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[1025] 5 Operation of the Constitution and laws

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

End of Document

(CTH) CONSTITUTION [1030] cl 6 Definitions

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[1030] 6 Definitions

The Commonwealth shall mean the Commonwealth of Australia as established under this Act.

The States shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called “a State”.

Original States shall mean such States as are parts of the Commonwealth at its establishment.

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(CTH) CONSTITUTION [1035] cl 7 Repeal of Federal Council Act

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[1035] 7 Repeal of Federal Council Act

The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Clause 7 Generally

[1035.05] Repealed Acts

L Legislation cited in this paragraph

(CTH) [Defence Act 1903](#) s 6.

The following Acts have repealed Acts passed by the Federal Council of Australasia:

Defence Act 1903, No 20 s 6; Pearl Fisheries Act 1952, No 8 s 3 which was repealed by the Continental Shelf (Living Natural Resources) Act 1968, s 3; Service and Execution of Process Act 1901, No 11 s 2. This section was subsequently repealed by Service and Execution of Process Act 1963 s 3.

End of Document

(CTH) CONSTITUTION [1040] cl 8 Application of Colonial Boundaries Act

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[1040] 8 Application of Colonial Boundaries Act

After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

End of Document

(CTH) CONSTITUTION [1045] cl 9 Constitution

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[1045] 9 Constitution

The Constitution of the Commonwealth shall be as follows:—

THE CONSTITUTION

This Constitution is divided as follows:—

Chapter I	— The Parliament:
Part I	— General:
Part II	— The Senate:
Part III	— The House of Representatives:
Part IV	— Both Houses of the Parliament:
Part V	— Powers of the Parliament:
Chapter II	— The Executive Government:
Chapter III	— The Judicature:
Chapter IV	— Finance and Trade:
Chapter V	— The States:
Chapter VI	— New States:
Chapter VII	— Miscellaneous:
Chapter VIII	— Alteration of the Constitution.
The Schedule	

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(CTH) CONSTITUTION [1050] s 1 Legislative power

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CHAPTER I THE PARLIAMENT [ss 1–60]

PART I GENERAL [ss 1–6]

[1050] 1 Legislative power

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called “The Parliament”, or “The Parliament of the Commonwealth”.

End of Document

(CTH) CONSTITUTION [1055] s 2 Governor-General

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[1055] 2 Governor-General

A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.

End of Document

(CTH) CONSTITUTION [1060] s 3 Salary of Governor-General

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[1060] 3 Salary of Governor-General

There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

The salary of a Governor-General shall not be altered during his continuance in office.

End of Document

(CTH) CONSTITUTION [1065] s 4 Provisions relating to Governor-General

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[1065] 4 Provisions relating to Governor-General

The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

End of Document

(CTH) CONSTITUTION [1070] s 5 Sessions of Parliament, prorogation and dissolution

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[1070] 5 Sessions of Parliament, prorogation and dissolution

The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

Summoning Parliament — After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

First session — The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

End of Document

(CTH) CONSTITUTION [1075] s 6 Yearly session of Parliament

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[1075] 6 Yearly session of Parliament

There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

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(CTH) CONSTITUTION [1155] s 7 The Senate

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PART II THE SENATE [ss 7–23]

[1155] 7 The Senate

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Section 7 Generally

[1155.5] Number of senators

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxvi), s 7.

(CTH) [Representation Act 1983](#) s 3.

(CTH) [Commonwealth Electoral Act 1918](#) s 40(1).

Pursuant to the power foreshadowed by the third paragraph of [s 7](#), and conferred by [s 51\(xxxvi\)](#), the number of Senators for each state was increased from 6 to 10 by the Representation Act 1948; and

further increased to 12 by the Representation Act 1983 s 3. The Territories have 2 Senators each: Commonwealth Electoral Act 1918, s 40(1).

[1155.10] Sections 7 and 122

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 7.

(CTH) [Commonwealth Electoral Act 1918](#) ss 40–50.

Despite the references in [s 7](#) and associated sections to the Senate as “composed of senators for each state”, [s 122](#) of the Constitution authorises the Parliament to legislate for the representation of the Territories in the Senate by Senators with full voting rights: *Western Australia v Commonwealth* (1975) 134 CLR 201; [7 ALR 159](#); 50 ALJR 68 [CB](#); *Queensland v Commonwealth* (1977) 139 CLR 585; [16 ALR 487](#); 52 ALJR 100 [CB](#). See Commonwealth Electoral Act 1918, ss 40–50.

[1155.15] Form of election

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) 24, s 7.

On the assumption that [s 7](#) requires the Senate to be chosen by democratic methods, it is nevertheless open to the Parliament to prescribe a system of voting by reference to political groups: the apparent disadvantage to candidates who are not members of parties or groups does not offend democratic principles: *McKenzie v Commonwealth* ([1984](#)) [57 ALR 747](#); (1984) 59 ALJR 190; [1984] HCA 75; [BC8400465](#) [CB](#). See at 749 per Gibbs CJ: members of Parliament were organised in political parties long before the Constitution was adopted.

[Sections 7](#) and [24](#) do “not limit the Parliament’s selection of a method of voting by which a voter’s choice is known so long as the method allows a free choice”: *Langer v Commonwealth* (1996) 186 CLR 302 at 317; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#) [CB](#) (*Langer*); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 192–4; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#) [CB](#) (*Mulholland*).

Compulsory voting is not inconsistent with either [s 7](#) or [s 24](#) of the Constitution, as it is reasonably appropriate and adapted to a legitimate legislative purpose: see *Langer* at CLR 318, 334.

The Constitution leaves substantial room for parliamentary choice as to many basic attributes of representative democracy in Australia. The imposition of requirements for a minimum level of support for a party as a precondition of registration as a political party, and a requirement that there be no overlap between the members of different parties for the purpose of calculating that support, was consistent with constitutional requirements: see *Mulholland* at CLR 194, 206.

[1155.20] Term of senators

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 7.

(CTH) [Commonwealth Electoral Act 1918](#) s 42.

The term of senators for the territories is not prescribed by [s 7](#) of the Constitution, but by s 42 of the Commonwealth Electoral Act 1918.

[1155.25] Representative democracy

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) 24, ss 7.

The elected institutions of representative government established by [ss 7](#) and [24](#) of the Constitution assume a system of representative democracy: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 55–6; [7 ALR 593](#) per Stephen J; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; [108 ALR 577](#) at [593](#) ^{CB} per Mason CJ, 603 per Brennan J, 617 per Deane and Toohey JJ, 651 per Gaudron J and 665 per McHugh J; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [108 ALR 681](#) at [703](#) ^{CB} per Brennan J and 722 per Deane and Toohey JJ; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 557; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) ^{CB}; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#) ^{CB}; *Roach v Electoral Cmr* (2007) 233 CLR 162; [239 ALR 1](#); [\[2007\] HCA 43](#); [BC200708182](#) at [\[81\]](#) ^{CB}; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; [273 ALR 1](#); [\[2010\] HCA 46](#); [BC201009576](#) ^{CB}; *Monis v R; Droudin v R* (2013) [295 ALR 259](#); 87 ALJR 340; [\[2013\] HCA 4](#); [BC201300755](#) ^{CB} at [102] per Hayne J. That system demands constitutional protection for communications between members of the community on matters relevant to voting in a federal election, public affairs and political and economic matters: *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, above, per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Nationwide News Pty Ltd v Wills*, above, per Brennan, Deane, Toohey and Gaudron JJ. See [\[1505.9\]](#) for a discussion of the implied freedom of political communication.

According to today's standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy: *McGinty v Western Australia* (1996) 186 CLR 140 at 201, 221, 287; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#) ^{CB}; *Langer v Commonwealth* (1996) 186 CLR 302 at 342; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#) ^{CB}; *Roach v Electoral Commissioner*, above, at [6]–[8], [83]. In *Roach*, a provision denying the vote to any person serving a sentence of imprisonment was held invalid because it was not reasonably appropriate and adapted to serve an end which was consistent or compatible with the maintenance of the constitutionally prescribed system of representative government (as the prohibition operated without regard to the nature of the offence, the length of the imprisonment or the circumstances of the offender): see, above, at [7], [49], [78], [85], [90], [95]. However, a provision denying the vote to persons sentenced to a term of imprisonment of 3 years or longer was valid, because it was reasonably appropriate and adapted to such an end: at [102].

[Section 7](#) does not, however, require adherence to the principles of “one vote, one value”. The High Court has twice dismissed challenges based upon disproportionate electoral boundaries, although the judgments do suggest that there is an outer boundary at which gross disproportion between electorates may result in invalidity: see *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 23–4, 35–6, 56–8, 61; [7 ALR 593](#) (*McKinlay*); *McGinty v Western Australia*, above, at CLR 175, 184–6 (in the context of asserted limits on state elections deriving from the Commonwealth Constitution; three members of the Court followed *McKinlay*, although Gaudron and Toohey JJ dissented and Brennan CJ left the matter open). Beyond this point it could be argued that a law was not one for the peace, order and good government of the Commonwealth.

In *Rowe v Electoral Commissioner*, above, a majority of the High Court upheld a challenge to provisions of the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 that introduced amendments to the Commonwealth Electoral Act 1918 that had the effect of preventing new enrolments of electors from 8:00 pm on the date of the writ (rather than from 8:00 pm seven days after the date of the writ) until the end of the polling day; and of preventing transfers of enrolment of electors from 8:00 pm on the third working day after the date of the writ (rather than from 8:00 pm seven days after the date of the writ) until the end of the polling day. The plaintiffs challenged the validity of the amendments, claiming that they contravened the requirement of [ss 7](#) and [24](#) of the Constitution that the members of both houses of the Parliament be “directly chosen by the people”. The majority held that the practical impact of the amendments upon the fulfilment of the constitutional mandate was disproportionate to the benefits of a smoother and more efficient electoral system, particularly given the absence of any previous systematic fraud associated with the pre-amendment cut-off period.

In any democratic vote, electors would expect to have information about the vote made publicly available, in the interests of transparency, in order to have confidence in the maintenance of the electoral system chosen by the Parliament in the exercise of its legislative power with respect to federal elections: *Palmer v Australian Electoral Commission* [\(2019\) 372 ALR 102](#); [\[2019\] HCA 24](#); [BC201907075](#) at [\[49\]](#) [\[CB\]](#).

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(CTH) CONSTITUTION [1160] s 8 Qualification of electors

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[1160] 8 Qualification of electors

The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Section 8 Generally

[1160.5] House of Representatives electors

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) ss 93, s 93A(2)(a), 94.

The Parliament has prescribed the qualification for electors of members of the House of Representatives in the Commonwealth Electoral Act 1918, ss 93 and 94: see [1335.5]. The Electoral Commission may refuse to include a person's name in a Roll if it is considered the name is fictitious, frivolous, offensive or obscene: s 93A(2)(a).

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[\(CTH\) CONSTITUTION \[1165\] s 9 Method of election of senators](#)

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[\[1165\] 9 Method of election of senators](#)

The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all these States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places — The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Section 9 Generally

[1165.5] Method of choosing senators

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) Pts XVI, XVIII.

The Parliament has prescribed the method of choosing senators in the Commonwealth Electoral Act 1918, Pts XVI and XVIII.

[1165.10] State legislation

L Legislation cited in this paragraph

(QLD) [Senate Elections Act 1960](#).

(SA) [Election of Senators Act 1903](#).

(TAS) [Senate Elections Act 1935](#).

(VIC) [Senate Elections Act 1958](#).

The following State legislation, determining the times and places of elections of Senators for the State, is currently in force:

New South Wales: Senators' Elections Act 1903;

(CTH) CONSTITUTION [1165] s 9 Method of election of senators

Queensland: Senate Elections Act 1960;

South Australia: Election of Senators Act 1903;

Tasmania: Senate Elections Act 1935;

Victoria: Senate Elections Act 1958;

Western Australia: Election of Senators Act 1903.

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(CTH) CONSTITUTION [1170] s 10 Application of State laws

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[1170] 10 Application of State laws

Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Section 10 Generally

[1170.5] State laws displaced

The Parliament has otherwise provided for elections of senators: see [1165.5].

[1170.10] Exclusive polling day

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 10.

Under [s 10](#) of the Constitution, the Parliament may legislate so as to prohibit the holding of a State poll on a day fixed for the election of senators in that State: *R v Licensing Court of Brisbane: Ex parte Daniell* (1920) 28 CLR 23 [CB](#). See also *Spence v Queensland* (2019) 367 ALR 587; [\[2019\] HCA 15](#); [BC201903864](#) at [\[43\]–\[45\]](#) [CB](#).

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(CTH) CONSTITUTION [1175] s 11 Failure to choose senators

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[1175] 11 Failure to choose senators

The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

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(CTH) CONSTITUTION [1180] s 12 Issue of writs

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[1180] 12 Issue of writs

The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

End of Document

[\(CTH\) CONSTITUTION \[1185\] s 13 Rotation of senators](#)

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[1185] 13 Rotation of senators

As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of three years, and the places of those of the second class at the expiration of six years, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made within one year before the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of July following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of July preceding the day of his election.

[s 13 am Act 1 of 1907 s 2]

Section 13 Generally

[1185.5] Non-justiciability

Mandamus will not lie against a Governor of a State to compel the Governor to issue a writ for the election of Senators for a State: *R v Governor of South Australia* (1907) 4 CLR 1497 [CB](#). State Governors are not officers of the Commonwealth: their duties, in this regard, called “duties of imperfect obligation”, have political not legal force: *Randren House Pty Ltd v Water Administration Ministerial Corp* [\[2020\] NSWCA 14](#); [BC202000864](#) at [\[136\]](#) [CB](#) per Leeming JA.

[1185.10] Division of senators for the states into two classes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 13.

In accordance with a resolution adopted by the Senate at its first meeting in 1901, the division of

(CTH) CONSTITUTION [1185] s 13 Rotation of senators

senators into the two classes referred to in [s 13](#) is based on the number of votes polled by each senator at her or his election: see Constitutional Commission, Final Report, 1988, p 209.

End of Document

(CTH) CONSTITUTION [1190] s 14 Further provision for rotation

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) >
[CONSTITUTION](#) > [CHAPTER I THE PARLIAMENT \[ss 1–60\]](#) > [PART II THE SENATE \[ss 7–23\]](#)

[1190] 14 Further provision for rotation

Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Section 14 Generally

[1190.5] Regularity in rotation

L Legislation cited in this paragraph

(CTH) [Representation Act 1983](#) s 5.

For the transitional provisions designed to maintain regularity in the rotation of senators on the increase to 12 of the number of senators for each state, see Representation Act 1983, s 5.

End of Document

(CTH) CONSTITUTION [1195] s 15 Casual vacancies

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: June 2020

Alexander Flecknoe-Brown

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[1195] 15 Casual vacancies

If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen, sitting and voting together, or, if there is only one House of that Parliament, that House, shall choose a person to hold the place until the expiration of the term. But if the Parliament of the State is not in session when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days from the beginning of the next session of the Parliament of the State or the expiration of the term, whichever first happens.

Where a vacancy has at any time occurred in the place of a senator chosen by the people of a State and, at the time when he was so chosen, he was publicly recognized by a particular political party as being an endorsed candidate of that party and publicly represented himself to be such a candidate, a person chosen or appointed under this section in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, shall, unless there is no member of that party available to be chosen or appointed, be a member of that party.

Where —

- (a) in accordance with the last preceding paragraph, a member of a particular political party is chosen or appointed to hold the place of a senator whose place had become vacant; and
- (b) before taking his seat he ceases to be a member of that party (otherwise than by reason of the party having ceased to exist),

he shall be deemed not to have been so chosen or appointed and the vacancy shall be again notified in accordance with [section twenty-one](#) of this Constitution.

The name of any senator chosen or appointed under this section shall be certified by the Governor of the State to the Governor-General.

If the place of a senator chosen by the people of a State at the election of senators last held before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 became vacant before that commencement and, at that commencement, no person chosen by the House or Houses of Parliament of the State, or appointed by the Governor of the State, in consequence of that vacancy, or in consequence of that vacancy and a subsequent vacancy or vacancies, held office, this section applies as if the place of the senator chosen by the people of the State had become vacant after that commencement.

A senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, being a senator appointed by the Governor of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State, shall be deemed to have been appointed to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State that commenced or commences after he was appointed and further action under this section shall be taken as if the vacancy in the place of the senator chosen by the people of the State had occurred after that commencement.

Subject to the next succeeding paragraph, a senator holding office at the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977 who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office until the expiration of the term of service of the senator elected by the people of the State.

If, at or before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, a law to alter the Constitution entitled “Constitution Alteration (Simultaneous Elections) 1977 ” came into operation, a senator holding office at the commencement of that law who was chosen by the House or Houses of Parliament of a State in consequence of a vacancy that had at any time occurred in the place of a senator chosen by the people of the State shall be deemed to have been chosen to hold office —

- (a) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and seventy-eight — until the expiration or dissolution of the first House of Representatives to expire or be dissolved after that law came into operation; or
- (b) if the senator elected by the people of the State had a term of service expiring on the thirtieth day of June, One thousand nine hundred and eighty-one — until the expiration or dissolution of the second House of Representatives to expire or be dissolved after that law came into operation or, if there is an earlier dissolution of the Senate, until that dissolution.

[s 15 subst Act 82 of 1977 s 2]

Section 15 Generally

[1195.5] Void election creates no casual vacancy

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 15, s 44.

Where the election of a person returned as a Senator is invalid (as, for example, where the person is incapable of being chosen as a Senator because of [s 44](#) of the Constitution), the election is incomplete, no casual vacancy arises to fill the empty place and [s 15](#) of the Constitution is not applicable: *Vardon v O’Loughlin* (1907) 5 CLR 201 [CB](#); *Re Wood* (1988) 167 CLR 145; [78 ALR 257](#) [CB](#). The person must be *capable* of being chosen: *Re Kakoschke-Moore* (2018) 263 CLR 640; [352 ALR 579](#); [\[2018\] HCA 10](#); [BC201801847](#) at [\[35\]](#) [CB](#).

[1195.10] Final paragraph of s 15 inoperative

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 15.

The Constitution Alteration (Simultaneous Elections) 1977 did not come into operation at or before the commencement of the Constitution Alteration (Senate Casual Vacancies) 1977, by which the present form of [s 15](#) of the Constitution was substituted. Accordingly, the final paragraph of [s 15](#) is not operative.

End of Document

(CTH) CONSTITUTION [1200] s 16 Qualifications of senator

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1200] 16 Qualifications of senator

The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Section 16 Generally

[1200.5] Party affiliation

Section 16 of the Constitution does not prohibit reference to party affiliation of senators: *McKenzie v Commonwealth* ([1984](#)) [57 ALR 747](#) at [749](#); 59 ALJR 190; [BC8400465](#) .

End of Document

(CTH) CONSTITUTION [1205] s 17 Election of President

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1205] 17 Election of President

The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

Section 17 Generally

[1205.5] Senators' qualifications

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [1355].

The qualifications of a member of the House of Representatives are discussed in [\[1355\]](#).

End of Document

(CTH) CONSTITUTION [1210] s 18 Absence of President

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

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[1210] 18 Absence of President

Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

End of Document

(CTH) CONSTITUTION [1215] s 19 Resignation of senator

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Constitution current to: Act 84 of 1977

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[1215] 19 Resignation of senator

A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

End of Document

(CTH) CONSTITUTION [1220] s 20 Vacancy by absence

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Constitution current to: Act 84 of 1977

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[1220] 20 Vacancy by absence

The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

End of Document

(CTH) CONSTITUTION [1225] s 21 Vacancy to be notified

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Constitution current to: Act 84 of 1977

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[1225] 21 Vacancy to be notified

Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

End of Document

(CTH) CONSTITUTION [1230] s 22 Quorum

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1230] 22 Quorum

Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Section 22 Generally

[1230.5] Territorial senators

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) s 41(1)(a).

Senators for the territories are included in the quorum for the Senate: Commonwealth Electoral Act 1918, s 41(1)(a).

End of Document

(CTH) CONSTITUTION [1235] s 23 Voting in the Senate

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

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[1235] 23 Voting in the Senate

Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative.

Section 23 Generally

[1235.5] Voting in the Senate

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 128, s 40, s 57.

A simple majority will be constituted by half the senators present and voting on a motion or resolution, plus one senator. [Section 40](#) prescribes a similar requirement for all questions arising in the House of Representatives; but the Speaker of the House is limited to a casting vote. An absolute majority (constituted by half the senators entitled to vote on a motion or resolution, plus one vote) is required for any proposed law to alter the Constitution: [s 128](#). A similar absolute majority is required for the passage of a proposed law at a joint sitting convened under [s 57](#).

End of Document

(CTH) CONSTITUTION [1305] s 24 Constitution of House of Representatives

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: June 2020

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > [CHAPTER I THE PARLIAMENT \[ss 1–60\]](#) > **PART III THE HOUSE OF REPRESENTATIVES [ss 24–40]**

PART III THE HOUSE OF REPRESENTATIVES [ss 24–40]

[1305] 24 Constitution of House of Representatives

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

- (i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of senators:
- (ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Section 24 Generally

[1305.5] Directly chosen by the people

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 24.

The Constitution does not mandate any particular electoral system beyond certain limited constitutional requirements; the form of representative government, including the matter of electoral systems, is left to the Parliament: *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; [209 ALR 582](#); [\[2004\] HCA 41](#); [BC200405814](#) at [\[64\]](#)  per McHugh J. The effect of [s 24](#) was

considered in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; [7 ALR 593](#) ^{CB}. It does not impose strict constraints, based on some ideal type of democracy, on the system for election of members of the House of Representatives, but does require that the choice be direct rather than, for example, by the State Parliaments or through an electoral college: 135 CLR 1 at 44; 7 ALR 593 at 622. In particular, where the States are divided into electorates (as they have been since the first election in 1901), the section does not require equality in the numbers of voters in each of the electorates within a State. However, [s 24](#) reflects the principle of representative democracy, a “spectrum [with] finite limits”, one which probably assumes a broadly-based franchise and proscribes “grossly disproportionate” variations in the numbers of voters: 135 CLR 1 at 57, 61, 36 and 71–2; 7 ALR 593 at 632, 615 and 643–4. See also *McGinty v Western Australia* (1996) 186 CLR 140; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#) ^{CB}, where a majority of the High Court (Brennan CJ, Dawson, McHugh and Gummow JJ) concluded that no implication could be drawn from the Constitution as a whole or from s 24 demanding that the voting system observe the principle of “one vote, one value” (although Gaudron and Toohey JJ dissented and Brennan CJ left the matter open).

According to today’s standards, a system which denied universal adult franchise would fall short of a basic requirement of representative democracy: *McGinty v Western Australia*, above, at CLR 201, 221, 287; ALR at 320; *Langer v Commonwealth* (1996) 186 CLR 302 at 342; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#) ^{CB}. See also *Rowe v Electoral Commissioner* (2010) 243 CLR 1; [273 ALR 1](#); [\[2010\] HCA 46](#); [BC201009576](#) ^{CB}.

The power of the Parliament to regulate federal elections to facilitate election by the people is to be found in the express conferral in s 51(xxxvi) of the Constitution: *Spence v Queensland* [\(2019\) 367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[42\]](#) ^{CB}. This would be aided by the incidental power in s 51(xxxix).

[1305.6] Representative democracy

See the commentary at [\[1155.25\]](#), [\[1505.6A\]](#), [1505.9].

[1305.10] Distribution of electorates

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) Pt IV.

The process currently prescribed by the Parliament for distributing electorates within each state (and the Australian Capital Territory) is set out in the Commonwealth Electoral Act 1918, Pt IV.

[1305.15] Sections 24 and 122

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 24.

(CTH) [Commonwealth Electoral Act 1918](#) ss 51–4.

Despite the references in [s 24](#) and associated sections to the members of the House of Representatives being chosen in the several States, [s 122](#) of the Constitution authorises the Parliament to legislate for the representation of the Territories in the House of Representatives by members with full voting rights: *Western Australia v Commonwealth* (1975) 134 CLR 201; [7 ALR 159](#); 50 ALJR 68 ^{CB}; *Queensland v Commonwealth* (1977) 139 CLR 585; [16 ALR 487](#); 52 ALJR 100 ^{CB}. See now Commonwealth Electoral Act 1918, ss 51–4.

[1305.20] Nexus with the Senate

The requirement that “the number of ... members of the House of Representatives be, as nearly as practicable, twice the number of the senators”, was considered in *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527; [12 ALR 129](#) ^{CB}. First, when determining the number of members and ensuring the constitutionally required nexus, only the senators and members for the states are to be taken into account, and those for the territories are to be disregarded. Second, the nexus requirement prevents the addition, to the number of members allocated to any state, of an extra member when there was a remainder (of whatever size) after dividing the population of that state by the quota (itself calculated by dividing the total population of the Commonwealth by twice the number of senators). Third, such an addition is also prevented by the requirement of proportionality, referred to in [1305.25].

[1305.25] Proportionality

The requirement, that “the number of members chosen in the several states shall be in proportion to the respective numbers of their people”, is a constant requirement, to be observed at each regular general election for the house; and legislative provisions which could delay a necessary re-adjustment of the numbers of seats will be invalid: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; [7 ALR 593](#) ^{CB}.

[1305.30] Allocation of members

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 24.

(CTH) [Commonwealth Electoral Act 1918](#) s 48.

Following the decision in *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527; [12 ALR 129](#) ^{CB}, the Parliament has prescribed the method for determining the number of members to be chosen in the several states in terms substantially identical to the process set out in the second paragraph of [s 24](#): Commonwealth Electoral Act 1918, s 48.

[1305.51] No personal right to choose

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 24.

Section 24 of the Constitution does not confer on each elector a personal right to vote for the candidate of his or her choice or a correlative right not to state a preference between a limited group of candidates. It is consistent with the requirements of [s 24](#) that voters be required to vote according to a preferential system: *Langer v Commonwealth* (1996) 134 ALR 400 ^{CB}.

(CTH) CONSTITUTION [1310] s 25 Provision as to races disqualified from voting

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Constitution current to: Act 84 of 1977

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[1310] 25 Provision as to races disqualified from voting

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

End of Document

(CTH) CONSTITUTION [1315] s 26 Representatives in first Parliament

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[1315] 26 Representatives in first Parliament

Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows: —

New South Wales..	twenty-three;
Victoria..	twenty;
Queensland..	eight;
South Australia..	six;
Tasmania..	five;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales..	twenty-six;
Victoria..	twenty-three;
Queensland..	nine;
South Australia..	seven;
Western Australia..	five;
Tasmania..	five.

(CTH) CONSTITUTION [1320] s 27 Alteration of number of members

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[1320] 27 Alteration of number of members

Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Section 27 Generally

[1320.5] Number of members

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) Pt III, Div 3.

The number of the members of the House of Representatives is now to be determined under the Commonwealth Electoral Act 1918, Pt III, Div 3.

End of Document

(CTH) CONSTITUTION [1325] s 28 Duration of House of Representatives

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

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[1325] 28 Duration of House of Representatives

Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

End of Document

(CTH) CONSTITUTION [1330] s 29 Electoral divisions

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1330] 29 Electoral divisions

Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate.

Section 29 Generally

[1330.5] Distribution of electorates (divisions)

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) Pt IV.

The Parliament has otherwise provided: the process currently prescribed by the Parliament for distributing electorates within each state (and the Australian Capital Territory) is set out in the Commonwealth Electoral Act 1918, Pt IV. As noted in [1305.5], the Parliament is not required to ensure equality in the numbers of voters in each of the electorates within a state: *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1; [7 ALR 593](#) .

End of Document

(CTH) CONSTITUTION [1335] s 30 Qualification of electors

Practice & Procedure High Court & Federal Court of Australia

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[1335] 30 Qualification of electors

Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Section 30 Generally

[1335.5] Electors' qualifications

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) ss 93, 94.

The Parliament has otherwise provided: Commonwealth Electoral Act 1918, ss 93 and 94. The question whether the qualifications of electors are at the discretion of the Parliament, or whether there is minimum constitutional content to the franchise (so that the Parliament may not restrict the franchise to males or property owners, for example) was discussed in *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 at 36, 44, 56, 62 and 68–9; [7 ALR 593](#) at [615](#), [622](#), [632](#), [637 and 641](#)–3.

End of Document

(CTH) CONSTITUTION [1340] s 31 Application of State laws

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: June 2020

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[1340] 31 Application of State laws

Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Section 31 Generally

[1340.5] Conduct of elections

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 31, s 51(xxxvi).

The power of the Parliament to legislate for the regulation of elections to the House of Representatives, foreshadowed by [s 31](#) and conferred by [s 51\(xxxvi\)](#), is exclusive and plenary; accordingly, the Parliament may legislate to require that any printed matter concerning candidates or issues in an election carry the name and address of the author: *Smith v Oldham* (1912) 15 CLR 355 [CB](#). Similarly, the Parliament may legislate to require that any person nominating for election deposit with the Commonwealth Electoral Officer a sum of money as a deposit, although the prescription of a “disproportionate” sum of money “might well be beyond power”: *Fabre v Ley* (1972) 127 CLR 665 at 669.

In any democratic vote, electors would expect to have information about the vote made publicly available, in the interests of transparency, in order to have confidence in the maintenance of the electoral system chosen by the Parliament in the exercise of its legislative power with respect to federal elections: *Palmer v Australian Electoral Commission* (2019) 372 ALR 102; [\[2019\] HCA 24](#); [BC201907075](#) at [\[49\]](#) [CB](#).

The power to regulate federal elections is to be found in express conferral in s 51(xxxvi) of the Constitution: *Spence v Queensland* (2019) 367 ALR 587; [\[2019\] HCA 15](#); [BC201903864](#) at [\[42\]](#) [CB](#). This is aided by the incidental power in s 51(xxxix).

End of Document

(CTH) CONSTITUTION [1345] s 32 Writs for general election

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Constitution current to: Act 84 of 1977

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[1345] 32 Writs for general election

The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

End of Document

(CTH) CONSTITUTION [1350] s 33 Writs for vacancies

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Constitution current to: Act 84 of 1977

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[1350] 33 Writs for vacancies

Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

End of Document

(CTH) CONSTITUTION [1355] s 34 Qualifications of members

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1355] 34 Qualifications of members

Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows: —

- (i) He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:
- (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State.

Section 34 Generally

[1355.5] Members' qualifications

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 16, s 34, s 51(xxxvi).

(CTH) [Commonwealth Electoral Act 1918](#) s 163.

The Parliament has exercised the power foreshadowed by [s 34](#), and conferred by [s 51\(xxxvi\)](#), and prescribed the qualifications for members of the House of Representatives: Commonwealth Electoral Act 1918, s 163. These qualifications are adopted for senators by [s 16](#) of the Constitution: see [\[1200.5\]](#). The Parliament may be able to impose a property qualification for members and senators: *Fabre v Ley* (1972) 127 CLR 665 at 672.

[1355.10] Constraints on power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [1415], [1420], [1425].

(CTH) CONSTITUTION [1355] s 34 Qualifications of members

The power to prescribe qualifications for members of the House of Representatives and senators is circumscribed by ss 43, 44 and 45 of the Constitution, which prescribe incapacities for and disqualifications from membership of the Parliament: see [\[1415\]](#), [\[1420\]](#) and [\[1425\]](#).

End of Document

(CTH) CONSTITUTION [1360] s 35 Election of Speaker

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[1360] 35 Election of Speaker

The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.

End of Document

(CTH) CONSTITUTION [1365] s 36 Absence of Speaker

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[1365] 36 Absence of Speaker

Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

End of Document

(CTH) CONSTITUTION [1370] s 37 Resignation of member

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[1370] 37 Resignation of member

A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

End of Document

(CTH) CONSTITUTION [1375] s 38 Vacancy by absence

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[1375] 38 Vacancy by absence

The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.

End of Document

(CTH) CONSTITUTION [1380] s 39 Quorum

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[1380] 39 Quorum

Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.

Section 39 Generally

[1380.5] Territorial members

L Legislation cited in this paragraph

(CTH) [Commonwealth Electoral Act 1918](#) s 53(1)(a).

Members for the territories are included in the quorum for the House of Representatives: Commonwealth Electoral Act 1918, s 53(1)(a).

End of Document

(CTH) CONSTITUTION [1385] s 40 Voting in House of Representatives

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[1385] 40 Voting in House of Representatives

Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.

Section 40 Generally

[1385.5] Voting in the House of Representatives

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 128, s 23, s 57.

A simple majority will be constituted by half the members present and voting on a motion or resolution, plus one member. [Section 23](#) prescribes a similar requirement for all questions arising in the Senate; but the President of the Senate is limited to a deliberative vote. An absolute majority (constituted by half the senators entitled to vote on a motion or resolution, plus one vote) is required for any proposed law to alter the Constitution: [s 128](#). A similar absolute majority is required for the passage of a proposed law at a joint sitting convened under [s 57](#).

End of Document

(CTH) CONSTITUTION [1405] s 41 Right of electors of States

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Constitution current to: Act 84 of 1977 • Commentary Published: April 2009

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PART IV BOTH HOUSES OF THE PARLIAMENT [ss 41–50]

[1405] 41 Right of electors of States

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

Section 41 Generally

[1405.5] Adult person

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 41.

The reference in [s 41](#) to an “adult person” is a reference to an adult as that term was understood in 1901, that is, a person over the age of 21 years, and not a person who has achieved the current legal age of majority: *King v Jones* (1972) 128 CLR 221 [CB](#).

[1405.10] A transitional provision

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 41.

[Section 41](#) was intended to protect the right to vote of those persons who had that right to vote at elections for the more numerous house of the parliament of a state as at the enactment of the Commonwealth Franchise Act 1902. “It follows ... that the practical effect of [s 41](#) is spent”: *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254 at 280; [45 ALR 1](#) at [21](#).

End of Document

(CTH) CONSTITUTION [1410] s 42 Oath or affirmation of allegiance

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[1410] 42 Oath or affirmation of allegiance

Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.

End of Document

(CTH) CONSTITUTION [1415] s 43 Member of one House ineligible for other

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Constitution current to: Act 84 of 1977

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[1415] 43 Member of one House ineligible for other

A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

End of Document

(CTH) CONSTITUTION [1420] s 44 Disqualification

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[1420] 44 Disqualification

Any person who —

- (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii) Is an undischarged bankrupt or insolvent: or
- (iv) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or
- (v) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section (iv) does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

Section 44(i)

[1420.5] Foreign citizens

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(i).

A person who is otherwise qualified for election to the Parliament will be disqualified by s 44(i) if that person is, according to the law of a foreign country, a citizen of that country, unless the person has taken reasonable steps to renounce the foreign citizenship: *Sykes v Cleary (No 2)* (1992) 109 ALR 577; 67 AJLR 59; [BC9202696](#) ^{CB}.

It may be said that s 44(i) renders persons incapable of being chosen or of sitting who have the “status of subject or citizen of a foreign power”: whether a person has this status must be determined by the law of the foreign power in question and a candidate’s knowledge of his or her foreign citizenship status is not necessary to bring about the disqualifying operation of the provision: *Re Canavan; Ludlam; Waters; Roberts [No 2]; Joyce; Nash; Xenophon* (2017) 263 CLR 284; [349 ALR 534](#); [\[2017\] HCA 45](#); [BC201709006](#) at [\[71\]](#) ^{CB}. The status of foreign citizenship necessary for the engagement of s 44(i) involves the conferral of a foreign power on a person of the rights and privileges generally understood to pertain to citizenship and a reciprocal obligation of allegiance owed by that person to the foreign power: *Staindl v Frydenberg* (2020) 376 ALR 226; [\[2020\] FCAFC 41](#); [BC202002829](#) at [\[70\]](#) ^{CB}. The petitioner failed in that case in not having established the reciprocal obligation of allegiance.

On a renunciation of a foreign citizenship see *Re Gallagher* (2018) 355 ALR 1; 92 ALJR 502; [\[2018\] HCA 17](#); [BC201803520](#) at [\[31\]](#) ^{CB} (it is “necessary in every case that all steps reasonably required which are able to be taken towards renunciation are taken”).

Section 44(ii)

[1420.10] Attainder of treason

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(ii).

The reference, in s 44(ii), to a person “attainted of treason” was described by the Constitutional Commission as one whose “precise meaning is not clear”. The disqualification (which is permanent and cannot be removed by, for example, pardon) “may not require that the person has been convicted of treason”: Constitutional Commission, *Final Report*, 1988, pp 291–2.

[1420.15] Conviction and sentence

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(ii),.

The second disqualification prescribed by s 44(ii) will only operate while a convicted person is under sentence or awaiting sentence for an offence which carries a minimum of one year’s imprisonment. The nature of the sentence imposed is irrelevant: it is the *potential* sentence, and the fact that sentence is still outstanding, which brings the s 44(ii) disqualification into effect.

The history of [s 44\(ii\)](#) is examined in *Roach v Electoral Commissioner* (2007) 233 CLR 162; [239 ALR 1](#); [\[2007\] HCA 43](#); [BC200708182](#) at [\[20\]](#), [\[63\]–\[70\]](#) ^{CB}, in the context of legislative restrictions on the franchise (the validity of which were influenced by the terms of [s 44\(ii\)](#)). This case decides that elimination of voting power from those serving prison sentences is not a denial of their implied right to political communication.

A rationale for the exclusion of persons under [s 44\(ii\)](#) might be found in conduct manifesting a

rejection of civic responsibility warranting withdrawal of a civic right: see *Murphy v Electoral Commissioner* (2016) 261 CLR 28; [334 ALR 369](#); [\[2016\] HCA 36](#); [BC201607502](#) at [\[30\]](#) [CB](#).

A conviction alone is not sufficient to disqualify a candidate under [s 44\(ii\)](#): *Nile v Wood* (1988) 167 CLR 133 at 139; [78 ALR 684](#); [\[1998\] HCA 30](#); [BC8802608](#) [CB](#). See also *Re Culleton (No 2)* (2017) 263 CLR 176; [341 ALR 1](#); [\[2017\] HCA 4](#); [BC201700348](#) at [\[17\]](#) [CB](#).

Section 44(iii)

[1420.20] Undischarged bankrupt or insolvent

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(iii), s 45(ii).

The adjective “discharged” in [s 44\(iii\)](#) attaches both to “bankrupt” and to “insolvent”; so that a person who cannot pay her or his debts as they fall due is not disqualified unless the person has been declared bankrupt or insolvent and has not been discharged from that condition: *Nile v Wood* (1987) 167 CLR 133 at 139; [76 ALR 91](#) at [95](#). See also [s 45\(ii\)](#), discussed at [\[1425.5\]](#).

Section 44(iv)

[1420.25] Office of profit under the Crown

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44, s 44(iv), s 64.

The expression “office of profit under the Crown” applies to “public servants, who are officers of the departments of government”: *Sykes v Cleary (No 2)* [\(1992\) 109 ALR 577](#) at [582](#) per Mason CJ, Toohey and McHugh JJ. It is “a recognition of the incompatibility of a person at the one time holding such an office and being a member of the House. There are three factors that give rise to that incompatibility. First, performance by a public servant of his or her public service duties would impair his or her capacity to attend to the duties of a member of the House. Secondly, there is a very considerable risk that a public servant would share the political opinions of the minister of his or her department and would not bring to bear as a member of the House a free and independent judgment ... Thirdly, membership of the House would detract from the performance of the relevant public service duty”: *Sykes v Cleary (No 2)*, *above*, at 582 per Mason CJ, Toohey and McHugh JJ.

The exclusion may also apply to persons employed by public statutory authorities: Constitutional Commission, *Final Report*, 1988, p 299.

Exclusion of holders of an “office of profit under the Crown” from participation in the Parliament plays an important part in retaining a politically neutral public service: compare *Comcare v Banerji* [\(2019\) 372 ALR 42](#); [\[2019\] HCA 23](#); [BC201906868](#) at [\[64\]](#) [CB](#) per Gageler J.

A person employed by the Crown continues to hold an office of profit under the Crown, and to be disqualified by [s 44\(iv\)](#), notwithstanding that the person is on unpaid leave from their employment: *Sykes v Cleary (No 2)* (1992) 176 CLR 77; [109 ALR 577](#); 67 ALJR 59; [BC9202696](#) [CB](#).

Note the list of exempted officers in the final paragraph of [s 44](#). The principal exemption, the Queen's Ministers of State for the Commonwealth, applies to persons appointed by the Governor General, under [s 64](#) of the Constitution, to administer departments of state, who may only hold their offices for longer than three months only if they are or become members of the Parliament.

[1420.26] State public servants

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(iv).

(VIC) [Teaching Service Act 1981](#).

The reference to “the Crown” in [s 44\(iv\)](#) includes the Crown in right of each of the States as well as the Commonwealth; accordingly, a person holding a permanent appointment as a teacher under the repealed Teaching Service Act 1981 (Vic) holds an office of profit under the Crown: *Sykes v Cleary* (No 2) [\(1992\) 109 ALR 577](#) [CB](#).

Section 44(v)

[1420.30] Agreement with the Public Service

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(v).

The origins of the disqualification expressed in s 44(v) lie in Burke's Act of 1782, 22 Geo III c 45, which disqualified government contractors from membership of the House of Commons. The disqualification was read down by Barwick CJ as applying only to executory contracts, that is, continuing contracts under which something remained to be done in *Re Webster* (1975) 132 CLR 270 at 280; [6 ALR 65](#) at [71](#). This reading of the provision can no longer be sustained following the decision in *Re Day* (No 2) (2017) 263 CLR 201; [343 ALR 181](#); [\[2017\] HCA 14](#); [BC201702531](#) [CB](#), where the decision in *Re Webster* was expressly not followed. The plurality in *Re Day* (No 2) at [48] held that the “object [of s 44(v)] is to ensure not only that the Public Service of the Commonwealth is not in a position to exercise undue influence over members of Parliament through the medium of agreements; but also that members of Parliament will not seek to benefit by such agreements or to put themselves in a position where their duty to the people they represent and their own personal interests may conflict.”

[1420.35] Interest as shareholder

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44(v).

Despite the limited exclusion expressed in s 44(v), Barwick CJ held that s 44(v) would not affect a person whose “pecuniary interest in any agreement” was as a shareholder in a company of fewer than 25 shareholders: *Re Webster* (1975) 132 CLR 270 at 287; [6 ALR 65](#) at [77–8](#). This can no longer be so following the ruling in *Re Day* (No 2) (2017) 263 CLR 201; [343 ALR 181](#); [\[2017\] HCA 14](#); [BC201702531](#) [CB](#). At [68] the plurality held that both beneficiaries of a discretionary trust (which benefits from, or via its trustee is party to, an agreement to which s 44(v) refers) as well as any shareholders in a company may be regarded as having a pecuniary interest under s 44(v).

SECTION 44 GENERALLY

[1420.40] Consequence of breach of s 44

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 15.

An election is not complete when an unqualified candidate is returned as elected; so that, where it was found that such a candidate had been returned to the Senate, there was no casual vacancy for a Senator within [s 15](#) of the Constitution and the vacancy should be filled by the further counting of the ballot papers cast for candidates at the election when the unqualified candidate was returned: *Re Wood* (1988) 167 CLR 145 at 164–9; [78 ALR 257](#). This decision was discussed (and not departed from) in *Re Day (No 2)*, above, at [77]–[80].

[1420.45] Disqualification operates throughout electoral process

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44.

The disqualifications effected by [s 44](#) prevent a person from being chosen as a member of Parliament; the process of choice commences with nomination for candidature; accordingly, a person who holds an office of profit under the Crown (or, it seems, is otherwise affected by one of the paragraphs of [s 44](#)) at the time of *nominating* as a candidate for election cannot validly be elected to the Parliament: *Sykes v Cleary (No 2)* (1992) 176 CLR 77; [109 ALR 577](#); [BC9202696](#) ^{CB}. The process of choice mandated by the Constitution begins with nomination; it is not concluded until only candidates capable of being chosen are returned or elected; ineligibility as a candidate at a poll denies legal effect to the votes cast for the candidate: *Re Kakoschke-Moore* (2018) 263 CLR 640; [352 ALR 579](#); [\[2018\] HCA 10](#); [BC201801847](#) at [\[21\]](#) ^{CB}, [29].

(CTH) CONSTITUTION [1425] s 45 Vacancy on happening of disqualification

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[1425] 45 Vacancy on happening of disqualification

If a senator or member of the House of Representatives —

- (i) Becomes subject to any of the disabilities mentioned in the last preceding section: or
- (ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
- (iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

Section 45 Generally

[1425.5] Consequence of breach of s 45

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44, Section 45.

[Section 45](#) does not operate, as [s 44](#) does, to disqualify from election. It operates to declare vacant the place of a person already elected. Accordingly, where a senator or member of the House of Representatives is affected by [s 45](#), a casual vacancy for the senator's or member's place arises.

Section 45(ii)

[1425.10] Bankrupt or insolvent debtors

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 45(ii).

(CTH) [Bankruptcy Act 1966](#) Pt X.

Section 45(ii) appears to be designed to prevent members of Parliament avoiding bankruptcy or

(CTH) CONSTITUTION [1425] s 45 Vacancy on happening of disqualification

insolvency proceedings (and hence disqualification) by entering into an arrangement with creditors sanctioned by a court. It may also cover a solvent person who makes such an arrangement — under, for example, [Pt X](#) of the Bankruptcy Act 1966: see Constitutional Commission, *Final Report*, 1988, p 299.

End of Document

(CTH) CONSTITUTION [1430] s 46 Penalty for sitting when disqualified

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[1430] 46 Penalty for sitting when disqualified

Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Section 46 Generally

[1430.5] Common informer proceedings

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 4 , s 46, s 51(xxxvi).

(CTH) [Common Informers \(Parliamentary Disqualifications\) Act 1975](#) Common Informer (Parliamentary Disqualifications) Act 1975.

Exercising the power foreshadowed by [s 46](#) and conferred by [s 51\(xxxvi\)](#), the Parliament has legislated to limit the liability of a person found to have sat while incapable of sitting: Common Informer (Parliamentary Disqualifications) Act 1975. See also [s 4](#) of that Act: after commencement of the Act “a person is not liable to pay any sum under s 46 of the Constitution and no suit shall be instituted, continued, heard or determined in pursuance of that section.”

End of Document

(CTH) CONSTITUTION [1435] s 47 Disputed elections

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[1435] 47 Disputed elections

Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Section 47 Generally

[1435.5] Jurisdiction over disputed returns

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 47, s 51(xxxvi).

(CTH) [Commonwealth Electoral Act 1918](#) ss 353(1), s 354(1), s 376..

Exercising the power foreshadowed by [s 47](#) and conferred by [s 51\(xxxvi\)](#), the Parliament has conferred exclusive jurisdiction on the High Court, as the Court of Disputed Returns, over any dispute relating to the validity of any election: Commonwealth Electoral Act 1918, ss 353(1) and 354(1). The High Court may refer the dispute to the Supreme Court of the State or Territory in which the election was held or the return made: Commonwealth Electoral Act 1918, s 354(1). The Parliament has also authorised either House to refer to the High Court any question arising in that House relating to a member's qualifications or to a vacancy in that House: Commonwealth Electoral Act 1918, s 376. The jurisdiction of the High Court over such questions is, accordingly, not exclusive and is contingent on a resolution of the Senate or the House of Representatives. There must be doubts about the validity of s 376 to the extent to which a question referred may be entirely hypothetical.

(CTH) CONSTITUTION [1440] s 48 Allowance to members

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Constitution current to: Act 84 of 1977

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > [CHAPTER I THE PARLIAMENT \[ss 1–60\]](#) > [PART IV BOTH HOUSES OF THE PARLIAMENT \[ss 41–50\]](#)

[1440] 48 Allowance to members

Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

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(CTH) CONSTITUTION [1445] s 49 Privileges, etc, of Houses

Practice & Procedure High Court & Federal Court of Australia

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[1445] 49 Privileges, etc, of Houses

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Section 49 Generally

[1445.5] Declaration of privileges

L Legislation cited in this paragraph

(CTH) [Parliamentary Privileges Act 1987](#) ss 10, 11, ss 12, 13, s 14, s 16, s 16(3), s 16(3)(b), (c), s 16(5), ss 4, s 5, 6, s 7, s 8, s 9.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 49.

The Parliament has legislated to declare aspects of the powers, privileges and immunities of the Senate and the House of Representatives: Parliamentary Privileges Act 1987. This Act is not exhaustive, and, except to the extent that the Act “expressly otherwise provides”, parliamentary powers, privileges and immunities are left to the operation of [s 49](#) of the Constitution: s 5.

The Act fixes the maximum penalties which either House may impose for a breach of its privileges and immunities (s 7); requires that resolutions imposing imprisonment and the consequent warrant must set out the particulars of the breach of privilege (s 9); limits the conduct which may be regarded as a breach of privilege (ss 4 and 6); removes the power of each House to expel its members (s 8); defines the immunity of members, officers and witnesses from civil court process (s 14); regulates the reception of Parliamentary proceedings in evidence by courts and tribunals (s 16); protects the publication of parliamentary documents and proceedings (ss 10 and 11); and creates criminal offences to protect parliamentary witnesses: ss 12 and 13.

The effect s 16 of the Parliamentary Privileges Act was considered by the Federal Court of Australia.

In *Hamsher v Swift* (1992) 33 FCR 545 at 564, French J noted that s 16(3) of the Act prohibited the tender or reception of evidence and the making of submissions or comments concerning proceedings in Parliament for particular purposes. French J observed that s 16(3) “is expressed in terms of an absolute prohibition” and doubted that it could “be overcome by any permission of the House of Parliament concerned ... But it is apparent under the legislation as it now stands that the prohibition contained in s 16(3) cannot be waived by an individual member or be taken to have been waived in the absence of objection”. French J said (at 564) that s 16(3) “does not affect the ability of the courts to resort to such matters as a record of parliamentary proceedings in aid of the interpretation of an Act: s 16(5). Evidence may also be given of facts that occurred in the course of a sitting of the Parliament such as that a particular member spoke or was present or acted in a particular capacity”. However, French J held that s 16(3) prevented the use of a ministerial statement made to the Senate as evidence of the making of a decision by the minister, or as an element in establishing an estoppel against the minister, or as a means of characterising certain action taken by the minister as a deferral, rather than the making, of a decision. The last-mentioned use, French J said, would “involve the use of evidence of the minister’s statement to the House for the purpose of establishing his intention or otherwise inviting the drawing of inferences from the proceedings in the Parliament of which that statement formed part. Such a use of the statement is prohibited by s 16(3)(b) and (c) of the Act. For similar reasons the statement cannot be taken as evidencing a decision made by the minister on that date. Even were it capable of supporting such an inference ..., its use to establish the inference would appear to contravene s 16(3)(c)”: (1992) 33 FCR 545 at 564. French J did not decide whether an estoppel might be raised against a minister by virtue of a parliamentary statement — a question which he said “may be debatable”.

In *Amann Aviation Pty Ltd v Commonwealth* (1988) 19 FCR 223 at 232; [81 ALR 710](#), Beaumont J observed that it was open to the Court, consistently with s 16(3) of the Act, to consider an extract from *Hansard*, receiving it provisionally for the purpose of a temporary and conditional examination in order to enable the Court to inquire whether the reception of the extract into evidence is or is not prohibited by s 16(3) as properly construed. Beaumont J then refused to admit into evidence an extract from *Hansard* which the applicant contended would assist in establishing that a Minister had acted for an improper purpose:

In my view, the present tender is by way of or for the purpose of questioning the motive, intention or good faith of the [Minister] and is thus proscribed by s 16(3)(b). Also, in my opinion, the tender is by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate and is thus made unlawful by s 16(3)(c): (1988) 19 FCR 223 at 231; [81 ALR 710](#) at 718.

A detailed analysis of the operation of s 16(3) is undertaken by White J in the Federal Court in *Hanson-Young v Leyonhjelm* (No 4) [\[2019\] FCA 1981](#); [BC201910576](#) at [\[354\]–\[406\]](#) ^{CB}. His Honour sets out a number of principles which are applicable. He rejected the application for a stay in that case based on s 16(3). His Honour said (at [366]) that the purpose of s 16(3) “is to preserve freedom of speech in Parliament by ensuring that those who participate in debate in the Houses of Parliament can do so confident in the knowledge that what they say cannot be impeached at a later time in a court of law or in any place other than the Parliament itself”. He said that it was not correct that its provisions should be read narrowly but that it is an exclusionary provision relating to statements, comments etc concerning “proceedings in Parliament” which is an expression defined in s 16(2) of the Act. Applying *Rann v Olsen* [\(2000\) 172 ALR 395](#); 159 FLR 132; [\[2000\] SASC 83](#); [BC200001817](#) at [\[25\]](#) ^{CB} per Doyle CJ, White J (ibid) said that a “court is not precluded from making a finding about a matter simply because it involves a conclusion about proceedings in Parliament, or involves dealing with a matter which has been the subject of proceedings in Parliament.”

[1445.10] Adjudicating on privileges



Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 49.

Despite the separation of judicial power in the Commonwealth Constitution, either House of Parliament may exercise the power of adjudicating on an alleged breach of its privileges and imposing a penalty for that breach; that is, [s 49](#) is a recognised exception to the Chapter III principle: *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 [CB](#). The exception in s 49 is regarded as an example of a matter being “non-justiciable” by the High Court: *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[105\]](#) [CB](#).

[1445.15] Judicial review

L Legislation cited in this paragraph

(CTH) [Parliamentary Privileges Act 1987](#) Section 9.

Apart from the Parliamentary Privileges Act 1987, the scope for judicial review of the exercise of parliamentary privileges is limited. A general warrant, issued under authority of one of the Houses of Parliament (that is, a warrant stating that a person has been adjudged by the House to be in contempt of Parliament), was accepted as conclusive in *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 [CB](#). Section 9 of the Parliamentary Privileges Act 1987 now prevents either House from issuing a general warrant where the House decides to imprison for a breach of its privileges and requires that the particulars said to constitute the breach be specified; so that, in an application for habeas corpus, a Court may determine whether the asserted particulars would, if true, constitute a breach of privilege; but even then, the Court may not look behind the warrant and must accept the facts as asserted in the warrant: *Stockdale v Hansard* (1839) 112 ER 1112 [CB](#); *Case of the Sheriff of Middlesex* (1840) 11 Ad & El 273; [113 ER 419](#); *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 [CB](#). For a discussion of these matters see further *Obeid v R* (2017) 96 NSWLR 155; [350 ALR 103](#); [\[2017\] NSWCCA 221](#); [BC201707234](#) [CB](#) (esp at [304] per Leeming JA).

(CTH) CONSTITUTION [1450] s 50 Rules and orders

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[1450] 50 Rules and orders

Each House of the Parliament may make rules and orders with respect to —

- (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
- (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

End of Document

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

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PART V POWERS OF THE PARLIAMENT [ss 51–60]

[1505] 51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

- (i) Trade and commerce with other countries, and among the States:
- (ii) Taxation; but so as not to discriminate between States or parts of States:
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
- (iv) Borrowing money on the public credit of the Commonwealth:
- (v) Postal, telegraphic, telephonic, and other like services:
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
- (vii) Lighthouses, lightships, beacons and buoys:
- (viii) Astronomical and meteorological observations:
- (ix) Quarantine:
- (x) Fisheries in Australian waters beyond territorial limits:
- (xi) Census and statistics:
- (xii) Currency, coinage, and legal tender:
- (xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:
- (xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
- (xv) Weights and measures:
- (xvi) Bills of exchange and promissory notes:
- (xvii) Bankruptcy and insolvency:

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

- (xviii) Copyrights, patents of inventions and designs, and trade marks:
- (xix) Naturalization and aliens:
- (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:
- (xxi) Marriage:
- (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:
- (xxiii) Invalid and old-age pensions:
- (xxiiiA) The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription) benefits to students and family allowances:

[Placitum xxiiiA insrt Act 81 of 1946 s 2]

- (xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:
- (xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:
- (xxvi) The people of any race for whom it is deemed necessary to make special laws:

[Placitum xxvi am Act 55 of 1967 s 2]

- (xxvii) Immigration and emigration:
- (xxviii) The influx of criminals:
- (xxix) External affairs:
- (xxx) The relations of the Commonwealth with the Islands of the Pacific:
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
- (xxxiv) Railway construction and extension in any State with the consent of that State:
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:

(xxxix) 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.

Section 51 Generally

[1505.5] Legislative powers

L Legislation cited in this paragraph

(CTH) [Australia Act 1986](#) s 2.

The following Imperial Acts extended the legislative powers of the Parliament: Whaling Industry (Regulation) Act 1934, s 15; Geneva Convention Act 1937, s 5; Emergency Powers (Defence) Act 1939, s 5; and Army and Air Force (Annual) Act 1940, s 3. See also the Australia Act 1986 s 2.

[1505.6] Implied limitations on legislative power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51.

The legislative power of the Parliament is subject to several implied limitations drawn from the High Court's reading of the Constitution as embodying certain concepts of government. These include the concept of a federal system in which power is divided between the Commonwealth and the States; the doctrine of the separation of judicial power; and the concept of representative government: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [108 ALR 681](#) at [698–702](#) ^{CB} per Brennan J and 721–2 per Deane and Toohey JJ. See also *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; [108 ALR 577](#) at [590–2](#) ^{CB} ALR per Mason CJ and 649–54 ALR per Gaudron J.

Because the legislative powers of the Parliament are declared, in [s 51](#), to be “subject to this Constitution”, Commonwealth laws which would defeat the implications drawn from the Constitution will be invalid: see eg *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, *above*, at ALR 664 per McHugh J; *Nationwide News Pty Ltd v Wills*, *above*, at ALR 740–1 per Gaudron J.

The task of the High Court, in interpreting a provision of the Constitution, is to expound its text and where necessary to ascertain what is implied in it: *Love v Commonwealth of Australia* [\(2020\) 375 ALR 597](#); [\[2020\] HCA 3](#); [BC202000584](#) at [\[8\]](#) ^{CB} per Kiefel CJ.

[1505.6A] Implications affecting common law rules

In *Theophanous v Herald & Weekly Times Ltd* [\(1994\) 124 ALR 1](#) ^{CB}, a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting) held that the implied freedom of discussion of political and governmental matters, derived from the representative character of the Constitution, operated so as to protect a publisher from the liability for defamation imposed by the common law (or by a State legislative codification of that common law), where the publisher had published material defamatory of a member of the Federal Parliament. In the words of Mason CJ, Toohey and Gaudron JJ (124 ALR at 12), “criticism of the views, performance and capacity of a member of Parliament and of the member's fitness for public office ... is at the very centre of the freedom of political discussion”.

“The law of defamation, whether common law or statute law, must conform to the implication of

freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of individuals must give way to the requirements of the Constitution”: at 23 per Mason CJ, Toohey and Gaudron JJ.

In *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80 ^{CB}, the same majority of the High Court held that the implied freedom of communication, derived from the Commonwealth Constitution and from the State Constitution, and necessary to “protect the efficacious working of representative democracy and government”, operated to protect a publisher against liability for defamation in respect of a publication about members of State Parliament — so long as the publisher could prove that it had not been aware of the falsity of the material in question, had not published the material recklessly and had acted reasonably.

The process by which the common law must adapt so as to accommodate constitutional requirements was further examined, this time by a unanimous High Court, in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ; 145 ALR 96; 71 ALJR 818; BC9702860 ^{CB}: see [1505.9].

Certain principles of constitutional liberty and security are part, however, of our common law inheritance: *Smethurst v Commissioner of Police* (2020) 376 ALR 575; [2020] HCA 14; BC202002866 at [126] ^{CB} per Gageler J.

[1505.7] The federal system

In its primary sense, the body politic described as “the Commonwealth” is a legal entity or right holder; it has a legal body or corpus like a body corporate and it represents the people who are its members: *Hocking v Director-General of the National Archives of Australia* [2020] HCA 19; BC202004673 at [213] ^{CB} per Edelman J. The Commonwealth Parliament may not single out the states for special burdens or disabilities not imposed on the rest of the community. For this reason, s 48 of the Banking Act 1945 which prohibited the private banks from conducting banking business for a State government or instrumentality, was held to be invalid in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ^{CB}:

“[T]o my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority” at 83 per Dixon J.

Similarly, the Conciliation and Arbitration (Electricity Industry) Act 1985, which prescribed a special procedure before the Commonwealth Conciliation and Arbitration Commission for the settlement of an identified industrial dispute involving several Queensland government authorities, was held invalid: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; 61 ALR 1 ^{CB}.

The Commonwealth cannot apply its legislation to the States where that legislation threatens the continued existence or independence of the States or a State: *Melbourne Corporation v Commonwealth*, above, at 66 per Rich J; at 75 per Starke J; *Victoria v Commonwealth* (1971) 122 CLR 353 at 424 per Menzies, Walsh and Gibbs JJ; *Queensland Electricity Commission v Commonwealth*, above, at 206; 61 ALR 1 per Gibbs J, 217 per Mason J, 226 per Wilson J, 231 per Brennan J, 247 per Deane J and 260 per Dawson J; *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; 108 ALR 577 at 613–14 ^{CB} per Brennan J and 675–7 per McHugh J.

The extent of the States’ immunity from Commonwealth legislation was examined in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 ^{CB}. A majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J

dissenting) held that the Commonwealth's legislative power over industrial arbitration and conciliation (s 51(xxxv)) was subject to an implied limitation with two elements: first, a prohibition against discrimination which involved placing special burdens or disabilities on the States; and, secondly, a prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments.

However, in *Austin v Commonwealth* (2003) 215 CLR 185; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) ^{CB}, Gaudron, Gummow and Hayne JJ (with whom Kirby J agreed at [281]) emphasised that discriminatory treatment, without more, would not attract the *Melbourne Corporation* doctrine. It was not enough that “the like was treated as the unlike and thereby the States were burdened in a ‘special way’” (at [123]). Instead, their Honours said (at [124]):

There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as “special burden” and “curtailment” of “capacity” of the States “to function as governments”. These criteria are to be applied by consideration not only of the form but also “the substance and actual operation” of the federal law ...

Both the Commonwealth and the States reciprocally have the benefit of the structured implication recognised in the *Melbourne Corporation* case; however, while it is one thing to acknowledge the reciprocal operation of the doctrine of inter-governmental immunities, it is quite another to find that limitation has been transgressed: *Spence v Queensland* [\(2019\) 367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[107\]–\[108\]](#) ^{CB} per Kiefel CJ, Bell, Gageler and Keane JJ.

See [\[2505.15\]–\[2505.30\]](#).

[1505.7A] Co-operative schemes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(vi).

Administrative bodies set up under Commonwealth law can exercise functions conferred by State law as part of a co-operative legislative scheme: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 563; [49 ALR 19](#); 5 IR 15; [BC8300098](#) ^{CB}; *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117 at 131; [72 ALR 161](#); 21 IR 165; [BC8701788](#) ^{CB}; *R v Hughes* (2000) 202 CLR 535; [171 ALR 155](#); [\[2000\] HCA 22](#); [BC200002055](#) ^{CB}.

State law cannot impose a duty upon a Commonwealth authority to perform a State function, unless the Commonwealth law authorises and thereby itself imposes the duty. In that event, the Commonwealth law, in so far as it imposes a duty to perform functions or powers purportedly conferred by State law, must be supported by a Commonwealth head of power: *R v Hughes*, *above*.

It may be that a Commonwealth administrative body or tribunal must have authority under Commonwealth law to exercise functions under State law (even if there is no duty to exercise those State functions). In *O'Donoghue v Ireland* (2008) 234 CLR 599; [244 ALR 404](#), at [\[23\]](#); [\[2008\] HCA 14](#); [BC200802740](#) ^{CB}, a majority of the High Court said that “It was accepted in *Hughes* that by force only of its own legislation a State could not unilaterally invest functions thereunder in an officer of the Commonwealth”. That formulation of the holding in *Hughes* does not limit it to situations where there is a duty to exercise the State function.

In contrast, the Commonwealth can confer a power on the executive of a State, without the consent of the State, at least if there is no duty to exercise that power: see *Aston v Irvine* (1955) 92 CLR 353, 364; 29 ALJR 411; [BC5500660](#) ^{CB}. In *O'Donoghue v Ireland*, *above*, the High Court upheld the

validity of provisions of the Extradition Act 1988 that conferred functions on State magistrates, because it held that the effect of s 4AAA(3) of the Crimes Act 1914 was that State magistrates were not under any duty to exercise those Commonwealth functions.

Further, in the context of some heads of power (such as the defence power — [s 51\(vi\)](#)), the Commonwealth may compel the performance by State officers of duties under federal law even without State approval: *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373; 2 AITR 273; 16 ALJR 109; [BC4200026](#) ^{CB}; *O'Donoghue v Ireland*, above, at [16], [45].

If the consent of a State is required before the Commonwealth can compel performance by State officers of duties under federal law (a matter that the Court left open: see [57]), the High Court has left open the question whether any such consent must be a State legislature, or whether it may be given by the State executive: *O'Donoghue v Ireland*, above, at [15]–[20], [46]–[47]. In that case, s 46 of the Extradition Act provided for the Governor-General to make arrangements with the Governor of a State for the performance, by persons holding office as magistrates, of the functions of a magistrate under the Act. In the absence of any duty to perform Commonwealth functions, the validity of that provision did not need to be determined.

A State law imposing a burden on the enjoyment of a Commonwealth statutory power would be inconsistent with the Commonwealth law conferring the power and therefore inoperative by force of s 109 of the Constitution: *Spence v Queensland* (2019) 367 ALR 587; [\[2019\] HCA 15](#); [BC201903864](#) at [\[101\]](#) ^{CB} per Kiefel CJ, Bell, Gageler and Keane JJ.

[1505.8] Separation of judicial power

The Commonwealth Constitution has been read by the High Court and the Privy Council as requiring a strict separation between the federal judicature and the other governmental branches of the Commonwealth — the Parliament and the Executive. Consequently, the Parliament cannot legislate so as to confer any part of the judicial power of the Commonwealth on a body which lies outside the federal judicature; nor can the Parliament legislate so as to confer non-judicial functions on the federal judicature: *New South Wales v Commonwealth* (1915) 20 CLR 54 ^{CB}; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ^{CB}; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ^{CB}; *Attorney-General (Cth) v R (Boilermakers Case)* (1957) 95 CLR 529 ^{CB}; *Harris v Caladine* (1991) 172 CLR 84; [99 ALR 193](#); 65 ALJR 280 ^{CB}; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [163 ALR 270](#); 73 ALJR 839; [BC9903189](#) ^{CB}.

[1505.9] Freedom of political communication

L Legislation cited in this paragraph
(CTH) Broadcasting Act 1942 Part IIID.
(CTH) Migration Act 1958 Pt 2A.
(CTH) Commonwealth of the Australia Constitution Act Ch III, 128, 24, 64, ss 7.
(CTH) Commonwealth Electoral Act 1918 s 302CA, s 329A.
(QLD) Vagrants, Gaming and Other Offences Act 1931 s 7(1)(d).
(QLD) Corrective Services Act 2006 s 132(1)(a), s 132(1)(d), s 200(2), s 3.
(CTH) Criminal Code s 471.12.
(CTH) Judiciary Act 1903 s 23(2).

(i) Introduction

The system of representative government established by the Constitution assumes a constitutional freedom to communicate on public affairs and political and economic matters. However, it does not specifically provide for it. But that freedom was recognised in *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; [108 ALR 577](#) ^{CB}; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [108 ALR 681](#) ^{CB} (*Nationwide News*).

Partly underlying the analysis undertaken by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, above, is (as pointed out by Gageler J in *Unions NSW v New South Wales* (2019) 264 CLR 595; [363 ALR 1](#); [\[2019\] HCA 1](#); [BC201900267](#) at [\[64\]](#) ^{CB}) the High Court's decision (particularly in the judgment of Dixon J in the *Communist Party Case*) (*Australian Communist Party v The Commonwealth* (1951) 83 CLR 1; [\[2951\] HCA 5](#) ^{CB}).

The subjects which are constitutionally protected against legislative interference by the Commonwealth extend to all political matters relating to other levels of government within the Australian system of government: *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, above, at 597 per Mason J, 618 per Deane and Toohey JJ and 656 per Gaudron J; at 725–6 per Deane and Toohey JJ.

Part IIID of the Broadcasting Act 1942, which prohibited the broadcasting of political advertisements during federal, State or Territory election campaigns, breached the constitutional freedom of communication on matters relating to the government of the Commonwealth and was, therefore, invalid: *Australian Capital Television Pty Ltd v Commonwealth (No 2)*, above. And s 299(1)(d)(ii) of the Industrial Relations Act 1988, which made it an offence to publish matter calculated to bring the Australian Industrial Relations Commission into disrepute, was invalid because it restricted the constitutional freedom to discuss matters relating to the government of the Commonwealth: *Nationwide News*, above per Brennan, Deane, Toohey and Gaudron JJ.

In *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; [124 ALR 1](#) ^{CB} (*Theophanous*), a majority of the High Court (Mason CJ, Deane, Toohey and Gaudron JJ; Brennan, Dawson and McHugh JJ dissenting) held that the implied freedom of communication will protect, against liability for defamation, a publisher of false and defamatory material about a candidate for the federal Parliament so long as the publisher proves that it was not aware of the falsity, did not publish the material recklessly and acted reasonably. The implication operates not only to constrain the legislative powers of the Parliament but also to prevent the invocation of State legislative and common law defamation laws.

The same result followed in relation to discussion of State political matters: see *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 at 232–3; [124 ALR 80](#); 68 ALJR 765; [BC9404651](#) ^{CB} (*Stephens*). See also *Muldowney v South Australia* (1996) 186 CLR 352; [136 ALR 18](#); 70 ALJR 515; [BC9601352](#) ^{CB}; *McClure v Mayor And Councillors of City of Stirling [No 2]* [\[2008\] WASC 286](#); [BC200810884](#) ^{CB}, at [81]–[82].

In *Cunliffe v Commonwealth* [1994] HCA 44; (1994) 182 CLR 272; 124 ALR 120 ^{CB}, a majority of the High Court (Brennan, Dawson, Toohey and McHugh JJ; Mason CJ, Deane and Gaudron JJ dissenting) held that a prohibition on unregistered persons providing (for reward) advice and assistance to a person seeking to enter Australia as an immigrant or a refugee did not offend the Constitution's implied guarantee of freedom of communication on political matters. For example, Brennan J said (at [33]; ALR at 156):

The immunity from legislative control which the Constitution implies in order to secure freedom of political discussion

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does not preclude the making of laws to control any activity the control of which might be politically controversial. The constitutional freedom of political discussion ensures freedom to engage in debate about the institutions of government and the exercise of any kind of governmental power but it does not impair, much less sterilise, the exercise of a power which might become the subject of political debate ... To some extent, Pt 2A may inhibit communications between a citizen and an alien but the freedom to be implied from the terms of the Constitution is not a general freedom of communication. ... Part 2A does not quell or chill any discussion about the control which the law imposes on the provision of services to aliens or about the manner in which that control is exercised. It is not apparent that Pt 2A inhibits communications of a political kind in any way but, if it does, the inhibition is manifestly incidental to the statutory protection of aliens.

The implied freedom of political discussion contained in [ss 7](#) and [24](#) is not offended by a Commonwealth law (eg, s 329A of the Commonwealth Electoral Act 1918) prohibiting the publication of material encouraging a voter to fill in a ballot paper other than in accordance with the instructions to voters: *Langer v Commonwealth* (1996) 186 CLR 302; [134 ALR 400](#); 70 ALJR 176; [BC9600207](#) ^{CB}. See also, in relation to State electoral laws, *Muldowney v South Australia* (1996) 186 CLR 352; [136 ALR 18](#); 70 ALJR 515; [BC9601352](#) ^{CB}.

(ii) *Lange's Case*

In *Lange v Australian Broadcasting Corporation* [1997] HCA 265; (1997) 189 CLR 520 145 ALR 96; 71 ALJR 818; [BC9702860](#) ^{CB} (*Lange*), in a joint judgment of the Court, the implied freedom of political communication was revisited. The Court held that the “constitutional defence” to defamation actions that was recognised in *Theophanous* should not be accepted, because the constitutional implication could not operate directly to alter private rights and immunities. The Court held that *Theophanous* and *Stephens* should be accepted as deciding that in Australia the common law rules of defamation must conform to the requirements of the Constitution, which preclude an unqualified application of the English common law of defamation in relation to the publication of defamatory matter concerning government and political matters: CLR at 555–6, 566. That implication was based closely on [ss 7](#) and [24](#) of the Constitution, rather than a more general implied concept of “representative government” underlying the Constitution: CLR at 557; compare *Australian Capital Television Pty Ltd v Commonwealth (No 2)* and *Nationwide News*. The focus on specific constitutional provisions reflected the view expressed by McHugh J in *McGinty v Western Australia* [1996] HCA 48; (1996) 186 CLR 140 at 231–5; [134 ALR 289](#); 70 ALJR 200; [BC9600206](#) ^{CB}.

In *Lange*, the Court said (at CLR 560; ALR 106–7):

... [ss 7](#) and [24](#) and the related sections of the Constitution necessarily protect that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors. Those sections do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power. As Deane J said in *Theophanous*, they are “a limitation or confinement of laws and powers [which] gives rise to a pro tanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a ‘right’ in the strict sense”. In *Cunliffe v Commonwealth*, Brennan J pointed out that the freedom confers no rights on individuals and, to the extent that the freedom rests upon implication, that implication defines the nature and extent of the freedom. His Honour said:

The implication is negative in nature: it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.

If the freedom is to effectively serve the purpose of [ss 7](#) and [24](#) and related sections, it cannot be confined to the election period. Most of the matters necessary to enable “the people” to make an informed choice will occur during the period between the holding of one, and the calling of the next, election. If the freedom to receive and disseminate information were confined to election periods, the electors would be deprived of the greater part of the information necessary to make an effective choice at the election.

The Court went on to explain the test for determining whether a law infringes the implied freedom as follows (at CLR 567–8; ALR 112):

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When a law of a State or federal parliament or a Territory legislature is alleged to infringe the requirement of freedom of communication imposed by [ss 7, 24, 64](#) or [128](#) of the Constitution, two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by [s 128](#) for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively “the system of government prescribed by the Constitution”). If the first question is answered “yes” and the second is answered “no”, the law is invalid.

The second limb of the above test was expressed preferably as an inquiry as to whether the impugned law is “reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with” representative and responsible government: see *Coleman v Power* (2004) 220 CLR 1; [209 ALR 182](#); [\[2004\] HCA 39](#); [BC200405576](#) at [\[93\]](#) ^{CB} per McHugh J (with whom, on this point, Gleeson CJ, Gummow, Kirby and Hayne JJ agreed).

In *Lange* the Court explained the scope of the common law defence of qualified privilege, as expanded to reflect the requirements of the Constitution. The Court said (at CLR 571–2, 574; ALR 115–16, 117–18):

... this Court should now declare that each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia. The duty to disseminate such information is simply the correlative of the interest in receiving it. The common convenience and welfare of Australian society are advanced by discussion — the giving and receiving of information — about government and political matters. The interest that each member of the Australian community has in such a discussion extends the categories of qualified privilege. Consequently, those categories now must be recognised as protecting a communication made to the public on a government or political matter. It may be that, in some respects, the common law defence as so extended goes beyond what is required for the common law of defamation to be compatible with the freedom of communication required by the Constitution. For example, discussion of matters concerning the United Nations or other countries may be protected by the extended defence of qualified privilege, even if those discussions cannot illuminate the choice for electors at federal elections or in amending the Constitution or cannot throw light on the administration of federal government. Similarly, discussion of government or politics at State or Territory level and even at local government level is amenable to protection by the extended category of qualified privilege, whether or not it bears on matters at the federal level. Of course, the discussion of matters at State, Territory or local level might bear on the choice that the people have to make in federal elections or in voting to amend the Constitution, and on their evaluation of the performance of federal ministers and their departments. The existence of national political parties operating at federal, State, Territory and local government levels, the financial dependence of State, Territory and local governments on federal funding and policies, and the increasing integration of social, economic and political matters in Australia make this conclusion inevitable. Thus, the extended category of common law qualified privilege ensures conformity with the requirements of the Constitution. The real question is as to the conditions upon which this extended category of common law qualified privilege should depend. ...

The Court continued:

Having regard to the interest that the members of the Australian community have in receiving information on government and political matters that affect them, the reputations of those defamed by widespread publications will be adequately protected by requiring the publisher to prove reasonableness of conduct. The protection of those reputations will be further enhanced by the requirement that the defence will be defeated if the person defamed proves that the publication was actuated by common law malice to the extent that the elements of malice are not covered under the rubric of reasonableness. In the context of the extended defence of qualified privilege in its application to communications with respect to political matters, “actuated by malice” is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose. ...

Whether the making of a publication was reasonable must depend upon all the circumstances of the case. But, as a general rule, a defendant's conduct in publishing material giving rise to a defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant's conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.

In *Levy v Victoria* (1997) 189 CLR 579; [146 ALR 248](#); 71 ALJR 837; [BC9703254](#) ^{CB}, the Court considered the validity of a State law that prevented a person from entering restricted areas used for duck-shooting. The plaintiff wished to enter that area in order to recover the bodies of ducks killed so that they could be displayed to television cameras as part of a protest against duck-shooting. The Court held that the relevant law was valid because it was appropriate and adapted to the protection of public safety, but it accepted that the conduct in question was within the realm of the constitutionally protected guarantee of freedom of political communication: at CLR 594–5, 613, 622–4, 631.

(iii) Subsequent cases

In *Coleman v Power* [\[2004\] HCA 39](#); (2004) 220 CLR 1209 ALR 182; [BC200405576](#) ^{CB}, the Court considered the operation of the implied freedom in relation to the distribution of a pamphlet accusing police (including one officer in particular, Constable Power) of corruption. When Power approached Coleman and asked for a copy of the pamphlet, Coleman cried out “This is Constable Brendan Power, a corrupt police officer”. Those words resulted in Coleman being charged with an offence against s 7(1)(d) the Vagrants, Gaming and Other Offences Act 1931 (Qld), which makes it an offence for a person to “use any threatening, abusive or insulting words to any person” if done “in any public place or so near to any public place than any person who might be therein, and whether any person is therein or not, could view or hear”. The validity of s 7(1)(d) was challenged on the basis that it infringed the implied political freedom. It was conceded before the High Court that s 7(1)(d) did burden political communication. The only issue was whether that burden satisfied the second limb of the *Lange* test (above at CLR 567–8). The High Court held (per McHugh, Gummow, Kirby and Hayne JJ; Gleeson CJ, Callinan and Heydon JJ dissenting) that the offence had not been committed. Gummow, Kirby and Hayne JJ, however, reached that conclusion primarily as a result of their interpretation of s 7(1)(d), although Gummow and Hayne JJ’s interpretation was “reinforced” by constitutional considerations: at [199]. Only McHugh J based his judgment squarely on the implied freedom of political communication: at [95]–[106].

The meaning (and significance) of malice in the context of the expanded test of qualified privilege was further examined in *Roberts v Bass* (2002) 212 CLR 1 at 29, 39–44; [194 ALR 161](#); [\[2002\] HCA 57](#); [BC200207519](#) ^{CB}.

The implied freedom of political communication confers a freedom from governmental action, but does not generate enforceable rights or freedoms that are not already cognisable by law: see *Lange v Australian Broadcasting Corporation*, above, CLR at 560; *Mulholland v Australian Electoral Commission* [\[2004\] HCA 41](#); (2004) 220 CLR 181 at 223–224, 298, 303; [209 ALR 582](#); [BC200405814](#) ^{CB}; *Levy v Victoria*, above, at CLR 622; *McClure v Australian Electoral Commission* (1999) 163 ALR 734 at 740–1; 73 ALJR 1086; [\[1999\] HCA 31](#); [BC9903413](#) ^{CB}.

In *ALPA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322; [219 ALR 403](#); 79 ALJR 1620; [\[2005\] HCA 44](#); [BC200506315](#) ^{CB}, a majority (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) rejected a submission that the implied freedom of political communication operated to invalidate a restriction on legal practitioners advertising their services in relation to personal injuries: at [412]–[413], [497], [520]. The majority also rejected an alternative argument that an implication

derived from [Ch III](#) invalidated that restriction on advertising, although that alternative argument was accepted by McHugh and Kirby JJ at [423], [489].

In *Wotton v Queensland* [2012] HCA 2; (2012) 246 CLR 1285 ALR 1; [BC201200756](#) ^{CB}, the Court dismissed a challenge to the validity of two provisions of the Corrective Services Act 2006 (Qld): s 132(1)(a) made it an offence for a person “to interview a prisoner, or obtain a written or recorded statement from a prisoner” (the term “prisoner” was defined to include a person released on parole), while s 200(2) of the Act provided that a parole order could contain conditions that the Parole Board considered reasonably necessary to ensure the prisoner’s good conduct or to stop the prisoner from committing an offence. The majority (French CJ, Gummow, Hayne, Crennan and Bell JJ) assumed that the provisions infringed the first limb of the *Lange* test (at [29]), but concluded that the provisions did not infringe the second limb:

- (a) The majority construed the offence provision in s 132(1)(a), for which there was an exception, in s 132(1)(d), if the chief executive gave written permission, as incidentally restricting political communication in pursuit of the object, in s 3 of the Act, of needing “to consider community safety and crime prevention through humane containment, supervision and rehabilitation of offenders”. In circumstances where a decision of the chief executive under s 132(1)(d) could, if inconsistent with the limitations on State legislative power, including constitutional limits, be subject to judicial review, the majority concluded that the law complied with the constitutional limitation on state legislative power: see at [22], [24], [31], [33].
- (b) The majority described the legitimate end of s 200(2) of the Act as being the imposition of conditions which the Parole Board considered reasonably necessary to ensure good conduct and to stop the parolee committing an offence. As with s 132(1)(a), the provision imposed an incidental burden on political communication, in circumstances where the Parole Board would, in imposing conditions, have to consider what was constitutionally permissible. Any decision of the Board with respect to conditions was judicially examinable under the Queensland judicial review legislation, such that resort to constitutional principles was unnecessary: at [32]–[33].

In separate judgments, Heydon J and Kiefel J concluded that neither provision imposed a burden of a nature that infringed the first limb of *Lange*. Heydon J at [54] described the requisite burden as one that must be “meaningful”: “That is, it must not be ‘insubstantial or *de minimis*’ — it must be ‘a real or an actual burden upon relevant communications’; it must be ‘a real impediment’; and it must be ‘an obstacle in some way’.”

Looked at from this perspective, neither s 132(1)(a) nor s 200(2) realistically threatened any freedom of communication about political and government affairs: at [56]–[61]. Kiefel J examined the issue of burden by reference to the concept of proportionality. Her Honour described the burden imposed by s 132(1)(a) as “proportionate” in that it did not prevent a prisoner from communicating with others on matters relating to government and politics; rather, it was directed only to the method by which the media and others obtained information or opinions from a prisoner. In other words, the provision went no further than was necessary in seeking to achieve the relevant objectives of the Act (at [88]) and was not excessive (at [90]). Section 200(2) imported a requirement of proportionality into the board’s decision making process, which would be subject to judicial review; accordingly, the burden imposed by the grant of power in s 200(2) also could not be said to be excessive: at [91].

On 27 February 2013, the High Court handed down two decisions on the implied freedom. In *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3; (2013) 295 ALR 19787 ALJR 289; [BC201300754](#) ^{CB}, a majority of the Court (constituted by six Justices) held that by-laws made by the first respondent, which prohibited persons preaching on any road and distributing printed matter on any road to any bystander or person passing by unless they obtained the Council’s permission, did not impermissibly infringe the implied freedom. It was common ground between the

parties that the by-law infringed the first limb of the test in *Lange*; and the majority concluded that the by-laws in question satisfied the second limb:

- (a) The majority judgments variously described the end sought to be achieved by the by-laws as the regulation of roads as a shared public resource (at [64] per French CJ), the prevention of the obstruction of roads (at [134], [140] per Hayne J), and ensuring the safety and convenience of users of roads (at [203], [221] per Kiefel and Crennan JJ, with whose reasons on this issue Bell J was in agreement (at [224])) which ends were legitimate.
- (b) The manner in which the by-laws sought to achieve those ends was compatible with the maintenance of the constitutionally prescribed system of government: the restrictions in the provisions were directed to unsolicited communications, were confined in their application to particular places and did not apply in a designated area or to surveys or opinion polls conducted, or literature distributed, by or with the authority of a candidate during the course of a local, State or federal government election or in the context of a referendum, and were directed to unsolicited communications, and where the grant of permission could not be based on approval or disapproval of the content of the communications sought to be made. See at [68] per French CJ, at [141] per Hayne J, at [212]–[213], [221] per Crennan and Kiefel JJ.

In *Monis v R; Droudis v R* (2013) 295 ALR 259; 87 ALJR 340; [2013] HCA 4; BC201300755^{CB}, the Court, again constituted by six Justices, was evenly divided on the question of whether s 471.12 of the Criminal Code Act 1995 infringed the implied freedom. The section prohibited use of a postal or similar service in a way that reasonable persons would regard as being, in all the circumstances, “offensive”. Mr Monis was charged with 13 offences under s 471.12 in relation to letters he wrote to parents and relatives of soldiers who were killed on active service in Afghanistan; Ms Droudis was charged with aiding and abetting some of those offences. Hayne J described the letters as, “in form”, offering condolences to the relatives of the deceased whilst also using “intemperate and extravagant language” to urge “the rejection of the policies which see Australian forces engaged in Afghanistan”; some of the letters “directly insulted those who had died”: at [78].

All members of the Court were of the view that s 471.12 imposed a burden on the freedom of communication on government and political matters: at [71] per French CJ, at [93], [171] per Hayne J, at [236] per Heydon J, at [343] per Crennan, Kiefel and Bell JJ. In separate judgments, French CJ, Hayne J and Heydon J concluded that the section failed to satisfy the second limb of the test in *Lange*, while in a joint judgment Crennan, Kiefel and Bell JJ reached the contrary conclusion. In accordance with s 23(2) of the Judiciary Act 1903, the appeals were dismissed.

In the Court of Criminal Appeal, Bathurst CJ and Allsop P had construed “offensive” in the context of s 471.12 as meaning “calculated or likely to arouse significant anger, significant resentment, outrage, disgust or hatred in the mind of a reasonable person in all the circumstances”: (2011) 256 FLR 28^{CB} at [44], [81]–[83]. All members of the Court accepted that this higher threshold definition was appropriate in the context of the provision: at [57], [59] per French CJ (with whose reasons Heydon J agreed (at [236])); [90]–[91], [162] per Hayne J; at [333] per Crennan, Kiefel and Bell JJ.

The joint judgment described the second limb of *Lange* as looking, “in the first place, to whether the law is proportionate to the end it seeks to serve”: at [347]. Construing “offensive” as referring only to communications of a higher degree of offensiveness, their Honours considered that the protective purpose of the section was directed to the misuse of postal services to effect an intrusion of seriously offensive material into a person’s home or workplace. In circumstances where it was not possible to further read down the degree of offensiveness of a communication which is to be the subject of the offence and retain a field of operation for the section consistently with its purpose, the section went no further than was reasonably necessary to achieve that purpose: at [348]. Nor, bearing in mind that the prohibition in s 471.12 was limited to communications which were of a seriously offensive nature,

did the section impose too great a burden on the implied freedom by the means it employed: at [351]–[352].

By contrast, having regard to the meaning of “offensive”, and the range of postal services to which s 471.12 applied, French CJ found it “difficult, if not impossible, to distinguish the purpose of s 471.12 from that of a law which makes it an offence to send or deliver offensive communications to anyone by any means”: at [73]. His Honour considered that the prevention of uses of postal or similar services which reasonable persons would regard as being, in all the circumstances, offensive, should not be regarded as a legitimate end “not least because its very breadth is incompatible with its implementation in a way that is consistent with the maintenance of that freedom of communication which is a necessary incident of the system of representative government prescribed by the Constitution”: at [73]. The application of the reasonable person test, applied to a high threshold definition of “offensive”, did not “prevent the application of the prohibition to communications on government or political matters in a range of circumstances, the limits of which were not able to be defined with any precision and which could not be limited to the outer fringes of political discussion”: at [74].

Hayne J reached the same conclusion, stating that the conclusions in *Lange* and *Coleman v Power* required the conclusion “that s 471.12 was too broad in its operation with respect to offensive use of a postal or similar service”: at [88]. The section was directed generally to preventing serious offence, not an object or end that was compatible with the maintenance of the constitutionally prescribed system of government: at [88], [97], [178]–[184]. His Honour was particularly concerned that the prohibition in s 471.12 extended to communications about a political matter “even if what is said is true”, or would, if defamatory, be covered by the defence of qualified privilege: at [88], [100], [207]–[214].

In his Honour’s separate reasons, Heydon J observed that the conclusion of invalidity, which he agreed was required by authority, was “so extraordinary as to cast doubt, and perhaps more than doubt, on the fundamental assumption and the chain of reasoning which led to it”: at [237]. His Honour echoed his comments in *Wotton* that consideration of the principles which had developed would only receive the close examination they required when “some litigant whose interests are damaged by the implied freedom in this Court, with leave if necessary, that the relevant authorities should be overruled”: at [251]; see *Wotton* at [40].

(iv) Later authorities

The Court in *McCloy v New South Wales* (2015) 257 CLR 178; [325 ALR 15](#); [\[2015\] HCA 34](#); [BC201509677](#) ^{CB} held that provisions of the Election Funding Expenditure and Disclosures Act 1981 (NSW) Pt 6 Div 4A (insofar as they prohibited property developers from making political donations and prohibited accepting political donations from a property developer) did not impermissibly burden the implied freedom of communication on governmental and political matters contrary to the Constitution. At [2] French CJ, Kiefel, Bell and Keane JJ derived the following propositions from previous decisions of the Court (including *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; [145 ALR 96](#); 71 ALJR 818; [BC9702860](#) ^{CB}):

1. The freedom under the Australian Constitution is a qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may “exercise a free and informed choice as electors.” It is not an absolute freedom. It may be subject to legislative restrictions serving a legitimate purpose compatible with the system of representative government for which the Constitution provides, where the extent of the burden can be justified as suitable, necessary and adequate, having regard to the purpose of those restrictions.

2. The question whether a law exceeds the implied limitation depends upon the answers to the following questions, reflecting those propounded in *Lange* as modified in *Coleman v Power*:

1. Does the law effectively burden the freedom in its terms, operation or effect?

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If “no”, then the law does not exceed the implied limitation and the enquiry as to validity ends.

2. If “yes” to question 1, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government? This question reflects what is referred to in these reasons as “compatibility testing”.

The answer to that question will be in the affirmative if the purpose of the law and the means adopted are identified and are compatible with the constitutionally prescribed system in the sense that they do not adversely impinge upon the functioning of the system of representative government.

If the answer to question 2 is “no”, then the law exceeds the implied limitation and the enquiry as to validity ends.

3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves what is referred to in these reasons as “proportionality testing” to determine whether the restriction which the provision imposes on the freedom is justified.

The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test – these are the enquiries as to whether the law is justified as suitable, necessary and adequate in its balance in the following senses:

suitable – as having a rational connection to the purpose of the provision;

necessary – in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;

adequate in its balance – a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

If the measure does not meet these criteria of proportionality testing, then the answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power. (footnotes omitted)

Gageler J agreed but delivered a separate judgment as did Gordon J and Nettle J.

As Gageler J noted (at [96] the same 1981 Act (ss 96D and 95G(6)) had earlier been challenged in *Unions New South Wales v New South Wales* (2013) 252 CLR 530; [304 ALR 266](#); [\[2013\] HCA 58](#); [BC201315812](#) ^{CB} and it was held by the Court that both provisions imposed impermissible burdens on the implied constitutional freedom.

In *Comcare v Banerji* ([2019](#) 372 ALR 42; 287 IR 302; [\[2019\] HCA 23](#); [BC201906868](#) at [20] ^{CB}) Kiefel CJ, Bell, Keane and Nettle JJ clarified that “the implied freedom of communication is not a personal right of free speech.” They said (ibid) that it is rather “a restriction on legislative power which arises as a necessary implication from ss 7, 24, 64 and 128 and related sections of the *Constitution* and, as such, extends only so far as is necessary to preserve and protect the system of representative and responsible government mandated by the *Constitution*. The distinction to be drawn (ibid) was “the effect of a law on an individual’s ... ability to participate in political communication” and “the law’s effect on political communication as a whole.” Gageler, Gordon and Edelman JJ separately delivered concurring judgments. Accordingly, imposition of sanctions on a public servant who published comments contrary to the Australian Public Service Code of Conduct, was not protected.

In *Spence v Queensland* ([2019](#) 367 ALR 587; [\[2019\] HCA 15](#); [BC201903864](#) ^{CB}), were Commonwealth and State electoral laws each purporting to apply to the making of gifts to political parties. Those laws included s 302CA of the Commonwealth Electoral Act 1918 and provisions of the

Electoral Act 1992 (Qld). It was held that the impugned Commonwealth law was invalid but not the impugned State electoral laws. Kiefel CJ, Bell, Gageler and Keane JJ (at [97]) held that the State laws imposed a burden on political communication but that this was justified. The Commonwealth law, however, was beyond power and inseverable. Nettle J dissented as did Gordon J. Edelman J, delivering a separate judgment also, agreed with the answers to the special case formulated by Gordon J.

Earlier in *Brown v Tasmania* (2017) 261 CLR 328; [349 ALR 398](#); [\[2017\] HCA 43](#); [BC201708656](#) ^{CB} it was held that various provisions of the so-called “Protestors’ Act” (Workplaces (Protection from Protestors) Act 2014 (Tas)) in their operation in respect of forestry land or business access areas in relation to forestry land were invalid as impermissibly burdening the implied freedom. Kiefel CJ, Bell and Keane JJ (at [88]) said that it is “necessary to keep firmly in mind that the implied freedom in [one] essential to the maintenance of the system of representative and responsible government for which the Constitution provides.” The implied freedom, they said (*ibid*) “protects the free expression of political opinion, including peaceful protest, which is indispensable to the exercise of political sovereignty by the people of the Commonwealth.”

In determining whether freedom is burdened they said (*ibid*) that “the inquiries posed by *Lange* are the indispensable means by which a legislative measure which is apt to impede the free flow of political communications may be justified.” They then said (at [90]):

Where a statute is said to impermissibly burden the freedom, the first enquiry is whether the statute in fact burdens the freedom. The extent of the burden is a matter which falls to be considered in relation to the assessments required by the second limb of *Lange*. The first enquiry requires consideration as to how the statute affects the freedom generally. It is not answered by reference to the operation of the statute in individual cases, although such evidence may provide useful examples of the statute’s practical effect, and therefore of the burden the statute may have on the freedom. This Court has said more than once that the freedom spoken of is not a personal right or freedom. The freedom is better understood as affecting communication on the subjects of politics and government more generally and as effecting a restriction on legislative power which burdens communications on those subjects. (footnotes omitted)

Nettle J (at [236]) said that he substantially agreed with their Honours saying (at [237]) a “law is [to be] taken to impose an effective burden on the implied freedom of political communication if it at all prohibits or limits political communication, unless perhaps the prohibition or limitation is so slight as to have no real effect.”

Gageler J also agreed with their Honours but delivered a separate judgment in which he said (at [181]) the “effect of a law on the making or content of political communications is ... gauged by nothing more complicated than comparing: the practical ability of a person or persons to engage in political communication with the law; and the practical ability of that same person or those same persons to engage in political communication without the law.”

Gordon J dissenting in part said of the implied freedom (at [312]–[313]) as follows:

Freedom of communication on matters of government and politics is an indispensable incident of the system of representative and responsible government which the Constitution creates and requires. The freedom is implied because ss 7, 24 and 128 of the Constitution (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and “between all persons, groups and other bodies in the community”.

313. The implied freedom operates as a constraint on legislative and executive power. It is a freedom from government action, not a grant of individual rights. The freedom that the Constitution protects is not absolute. The limit on legislative and executive power is not absolute. The implied freedom does not protect all forms of political communication at all

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the Constitution, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system (footnotes omitted).

Her Honour (at [315]–[317]) then spoke of “two questions”:

In determining whether a law impermissibly burdens the implied freedom, two questions must be answered.

First question

The first question asks: does the law effectively burden the freedom of communication about government or political matters either in its terms, operation or effect? Answering that question necessarily involves construing the law. That task is not a matter of evidence. It is a qualitative, not a quantitative, inquiry. And because of the integration of social, economic and political matters across federal, State and local politics, the freedom of political communication may be burdened by a State law.

Second question

The second question asks: if the law effectively burdens the freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. (footnotes omitted)

Edelman J dissented finding (at [442]) that the Protestors Act was valid in its entirety in the circumstances of the case.

It can now be regarded as settled that the approach to be adopted, when a question of freedom of political communication arises, is that which is set out in *McCloy v New South Wales*, above. This is made apparent further by the decision in *Clubb v Edwards, Preston v Avery* (2019) 366 ALR 1; [2019] HCA 11; BC201902725^{CB}. In issue in that case was s 185D of the Public Health and Wellbeing Act 2008 (Vic) and s 9(2) of the Reproductive Health (Access to Terminations) Act 2013 (Tas) which prohibited certain communications and activities within an access zone around premises at which abortions are provided. It was argued that these provisions impermissibly burdened freedom of communication implied in the Constitution. Kiefel CJ, Bell and Keane JJ said (at [4]) that this argument “falls to be resolved by application of the test of invalidity stated in *Lange v Australian Broadcasting Corporation*, as explained in *McCloy v New South Wales* and *Brown v Tasmania*.”

Briefly they set out the test (at [5]) as follows:

The test to be applied was adopted in *McCloy* by French CJ, Kiefel, Bell and Keane JJ, and it was applied in *Brown* by Kiefel CJ, Bell and Keane JJ and Nettle J. For convenience that test will be referred to as “the *McCloy* test”. It is in the following terms:

1. Does the law effectively burden the implied freedom in its terms, operation or effect?
2. If “yes” to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? (footnotes omitted)

In summary (at [102]) they held (in the *Chubb* appeal) that the “limited interference with the implied freedom [occasioned by the impugned provisions] is not manifestly disproportionate to the objectives

of the communication prohibition". Nettle J (at [215]) agreed with their Honours but for reasons differing in some respects from theirs.

Gageler J (at [132]) regarded that the challenge in the *Chubb* appeal was "doomed to fail: and otherwise wholly agreed with Gordon J. It was his view also (at [146]) that "political communication" was not involved in the case.

Gordon J agreed the appeals should be dismissed and in the course of doing so (at [333]) said that the argument is not concluded by saying someone was not engaged in political communication: if "a provision is invalid because it infringes the implied freedom and is *not* severable, then the provision is invalid in its entirety." Her Honour said (ibid) that "any such invalidity is not dependent on a person contending that they engaged in communication on governmental or political matters."

Edelman J, in a separate judgment, agreed in the result. Specifically (at [442]) he said in the *Chubb* appeal that the "submission that it was for the prosecution to prove that her speech was not political should not be accepted." However (at [453]), in contrast to Gordon J, he also specifically said that the constraint imposed by the implied freedom "is against the imposition of undue burdens on political communication" although (at [455]) he said that the freedom is not confined to communication by way of oral words — "sighs, symbols, gestures and images" are included.

See also *Smethurst v Commissioner of Police* (2020) 376 ALR 575; [2020] HCA 14; BC202002866 ^{CB} in which the Court held s 79(3) of the Crimes Act 1914, as it stood at 29 April 2018, invalid on the ground that it infringed the implied freedom.

LibertyWorks Inc v Commonwealth (2021) 391 ALR 188; [2021] HCA 18; BC202105113 ^{CB} concerned whether provisions of the Foreign Influence Transparency Scheme Act 2018 (Cth), which applied to "communications activity" by a person who acts on behalf of a "foreign principal", were invalid by reason of unjustified burden on the implied freedom of political communication. The impugned provisions imposed on such persons engaging in such activities a requirement to register themselves, and were thereafter subject to responsibilities to report certain information about themselves and their activities.

Kiefel CJ, Keane and Gleeson JJ delivered a joint judgment in which it was reasserted that the *McCloy* proportionality test had "consistently been maintained by a majority of this Court in each of the cases concerning the implied freedom since" *McCloy* (at [48]). Gageler J accepted that this approach was "precedent-mandated" (at [93]) but applied it in a different manner. Edelman J described the proportionality test as "the now accepted approach" and said that it "provides a transparent manner in which to determine whether a law which burdens political communication for some legitimate purpose has contravened the implied freedom of political communication" (at [199]–[200]). Gordon J did not directly comment on the proportionality test, but appeared not to favour it (at [134]). Steward J accepted that the structured proportionality test "can, in a given case, be used as analytical tools to test whether a given law is reasonably appropriate and adapted in the advancement of its purpose" and that its use in that case was "apt" (at [247]); however, his Honour went on to question the very existence of the implied freedom of political communication (at [298]–[304]).

The plurality found that the impugned law did "not place any burden on a person in Australia engaging in political communication on their own behalf, unaffected by any relationship with a foreign principal" (at [64]). The "only communication affected is that made under an arrangement with or at the direction of a foreign principal with the intention that it be used for the purpose of political or governmental influence", which was "only a small subset of political communication" (at [74]). Their Honours also found that the offence provisions of the law were "not directed to the making of political communication; rather they are directed to ensuring that the exposure of the relationship between the maker and the foreign principal is achieved" (at [72]).

The plurality found that the suitability element of the proportionality test was met in that there was “[c]learly” a rational connection between the impugned legislation’s purpose of minimising the risk of influence being exerted by foreign principals on Australia’s political or election processes and the requirement of registration (at [76]–[77]).

As to the necessity element of the proportionality test, the plurality found that “[r]egistration enables both the relationship between the person and their foreign principal and a description of the political communication undertaken by the person in that capacity to be matters of public record” and accordingly the necessity requirement was made out for both the obligations to be registered and to disclose relevant matters; disclosure alone was not enough (at [82]–[84]).

As to the adequacy of balance element, the plurality reaffirmed that “a law is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by the adverse effect on the implied freedom” and “a powerful public, protective purpose assumes a special importance” (at [85], citing *McCloy v New South Wales* (2015) 257 CLR 178; [325 ALR 15](#); [\[2015\] HCA 34](#); [BC201509677](#) at [\[86\]–\[87\]](#) ^{CB}; *Clubb v Edwards*, *Preston v Avery* (2019) 267 CLR 171; [366 ALR 1](#); [\[2019\] HCA 11](#); [BC201902725](#) at [\[101\]–\[102\]](#) ^{CB}; *Comcare v Banerji* (2019) 267 CLR 373; [372 ALR 42](#); [\[2019\] HCA 23](#); [BC201906868](#) at [\[38\]](#) and [\[42\]](#) ^{CB}). The impugned legislation had such a purpose, which was not outweighed by the legislation’s modest burden on the implied freedom.

Edelman J (at [245]) and Steward J (at [246]) concurred with the plurality. Gageler J, in dissent, found that the registration requirement was “incompatible” (avoiding the terminology of proportionality) with the freedom of political communication, in short because the registration requirement had “incidents which burden political communication by a registrant to a substantially greater extent than is necessary to achieve the sole identified legislative object of improving transparency” (at [92]). Gordon J reached a similar conclusion (at [188]–[191]).

[1505.9A] Discriminatory federal legislation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) 117, ss 51(ii), 92, 99.

“There is no general requirement contained in the Constitution that Commonwealth laws should have a uniform operation throughout the Commonwealth. There is, of course, the implication drawn from the federal structure erected by the Constitution that prevents the Commonwealth from legislating in a way which discriminates against the States by imposing special burdens or disabilities upon them or in a way which curtails their capacity to exercise for themselves their constitutional functions ... There are also specific provisions prohibiting discrimination or preference of one kind or another, but these are confined in their operation. [See, for example, [ss 51\(ii\)](#), [92](#), [99](#), [117](#).] [T]here is nothing in [the decisions of *Street v Queensland Bar Assn* (1989) 168 CLR 461 ; [88 ALR 321](#) ^{CB} and *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; [90 ALR 371](#) ^{CB}] which would support any general implication to be drawn from the Constitution that Commonwealth laws must not be discriminatory or must operate uniformly throughout the Commonwealth”: *Leeth v Commonwealth* [1992] HCA 29; (1992) 174 CLR 455; 107 ALR 672 at 679 per Mason CJ, Dawson and McHugh JJ.

“It would be offensive to the constitutional unity of the Australian people ‘in one indissoluble Federal Commonwealth’, recited in the first preamble to the Commonwealth of Australia Constitution Act 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties dependent on the locality of the court by which the offender is convicted and

sentenced ... On the other hand, where an offence against a law of the Commonwealth is defined to contain an element of locality within Australia, [the] law, which discriminates between conduct in one part of Australia and like conduct in another part must find support in the power under which the law is purportedly enacted”: *Leeth v Commonwealth*, above, at 685 per Brennan J.

“[T]here is to be discerned in the Constitution as a whole an assumption of the fundamental common law doctrine of legal equality which operates to confine the prima facie scope of the legislative powers which the Constitution vests in the Commonwealth ... The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment: *Leeth v Commonwealth*, above, at 696 per Deane and Toohey JJ. See also per Gaudron J at 706–7 (the judicial process, which is an essential feature of the judicial power of the Commonwealth, requires that like matters be treated in a like manner and that proper account be given to genuine differences).

SECTION 51(i) — TRADE AND COMMERCE WITH OTHER COUNTRIES, AND AMONG THE STATES

[1505.55] Trade and commerce

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(i), Section 51(i).

The width of the activities which falling the concept of “trade and commerce” was stressed in *W and A McArthur Ltd v Queensland* (1920) 28 CLR 530 [CB](#). “They are expressions of fact, they are terms of common knowledge, as well known to laymen as to lawyers, and better understood in detail by traders and commercial men than by judges”: at 546. In that case (at 547) the Court said “all the commercial agreements of which transportation is the direct and necessary result form part of trade and commerce.”

The power may be used to support environmental protection policies by prohibiting the export of a mineral whose extraction could damage the environment: *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; [9 ALR 199](#) [CB](#).

It may be used to regulate employment in the loading or unloading of ships involved in interstate and international trade: *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 [CB](#); *R v Wright; Ex parte Waterside Workers Federation of Australia* (1955) 93 CLR 528 [CB](#).

Section 51(i) will support legislation authorising direct Commonwealth participation in interstate and overseas trade and commerce activities: *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 [CB](#). The expression of s 51(i), as a power “with respect to ... trade and commerce” will further extend the range of activities which may be regulated by the Commonwealth: *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55 at 77.

Accordingly, the Commonwealth may regulate production of commodities intended for trade and commerce with other countries (*O’Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 [CB](#)) and the subsequent distribution or sale of those commodities which had formed part of that trade and commerce: *Crowe v Commonwealth* (1935) 54 CLR 69 [CB](#).

Section 51(i) also supported a Commonwealth law conferring on the Commonwealth Director of Public Prosecutions the function of prosecuting an offence against a State law where the offence related to the making of investments in another country “and thus to trade and commerce with other countries”: *R v Hughes* (2000) 202 CLR 535; [171 ALR 155](#); [BC200002055](#); [\[2000\] HCA 22](#) at [\[42\]](#) [CB](#).

By s 98 of the Constitution the power in [s 51\(i\)](#) extends to “navigation and shipping.”
[1505.11] “for the peace, order and good government of the Commonwealth”

On one analysis, this is formulaic. However, on another, it may be argued that a law which cannot be characterised as a lawful exercise of power is not one “for the peace, order and good government of the Commonwealth”. Compare, however, *Liyanage v The Queen* [1965] UKPC 39; [\[1967\] 1 AC 259](#) [\[1966\] 1 All ER 650](#).

[1505.60] Intrastate trade and commerce

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(i).

The power granted by s 51(i) has been read as assuming the division of trade and commerce into three categories: international, interstate and intrastate. The first two fall within the Commonwealth's legislative power, the last falls outside that power: *Wragg v New South Wales* (1953) 88 CLR 353 at 386. It may be observed that the framers of the Constitution “may not have envisaged the extent of the national markets which now exist”: *Betfair Pty Ltd v Racing New South Wales* (2012) 249 CLR 217; [286 ALR 221](#); [\[2012\] HCA 12](#); [BC201201677](#) at [\[126\]](#) [CB](#).

The Commonwealth may regulate those intrastate activities which are “inseparably connected” with interstate trade and commerce, as when traders made a single agreement to restrict interstate and intrastate trade in tyres: *Redfern v Dunlop Rubber Australia Ltd* (1964) 110 CLR 194 [CB](#). In some jurisdictions this is known as “commingling”. The Commonwealth may also regulate intrastate trade where the effective regulation or protection of interstate trade cannot be achieved without the regulation of intrastate trade, as in the regulation of air safety: *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 [CB](#).

However, this approach has only been accepted where there is a physical integration between intrastate trade and interstate and international trade; and any economic considerations, which might demonstrate that effective control of interstate trade requires control of intrastate trade because of the integration of the two, are constitutionally irrelevant: *Attorney-General (WA); Ex rel Ansett Transport Industries Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492; [12 ALR 17](#) [CB](#).

[1505.16] Characterisation

The principles governing characterisation of a Commonwealth law in order to determine whether it is within the scope of a legislative power conferred by s 51 are well settled: *Spence v Queensland* [\(2019\) 367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[57\]](#) [CB](#) per Kiefel CJ, Bell, Gageler and Keane JJ. Their Honours quoted from the judgment of Latham CJ in *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186; 22 ALJR 191; [1948] 2 ALR 89; [BC4800090](#) [CB](#), “it is in the first place obviously necessary to construe the law and to determine its operation and effect... and in the second place to determine the relation of that which the Act does to a subject matter in respect of which it is contended that the [Commonwealth] Parliament has power to make laws”.

SECTION 51(ii) — TAXATION; BUT SO AS NOT TO DISCRIMINATE BETWEEN STATES OR PARTS OF STATES

[1505.65] The nature of taxation

The drafting history of s 51(ii) is set out in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548; [300 ALR 26](#); [\[2013\] HCA 34](#); [BC201311629](#) at [\[17\]](#) [CB](#).

“[A] tax ... is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered ...”: *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 270 per Latham CJ. However, this is not an exclusive definition: “[T]here is no reason in principle a tax should not take a form other than the exaction of money or why the compulsory taxation of money under statutory powers could not be properly seen as taxation notwithstanding that it was by a non-public authority or for purposes which could not properly be described as public”: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 467; [82 ALR 385](#) at [389](#); *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; [268 ALR 232](#); [\[2010\] FCAFC 52](#); [BC201003449](#) [CB](#). The Court in *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530; [281 ALR 671](#); [\[2011\] HCA 40](#); [BC201107575](#) at [\[19\]](#) [CB](#) said that the statement of Latham CJ “in some respects requires further analysis” and referred to the *Roy Morgan Research* decision.

The voluntary payment of money to achieve rights in the nature of property should not be characterised as taxation. Where a fee is exacted in return for the granting of rights over a public resource that the grantee has chosen to acquire, that fee will generally not be characterised as a tax: see *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541; [273 ALR 553](#); [\[2010\] FCA 124](#); [BC201007065](#) at [\[81\]–\[82\]](#) [CB](#); *Harper v Minister for Sea Fisheries* (1989) 168 CLR 314; [88 ALR 38](#); [1989] HCA 47; [BC8902706](#) [CB](#). Appeal in the former case was dismissed by the Court: see *Queanbeyan City Council v ACTEW Corporation Ltd*, above.

[1505.70] Charge for services

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 53.

There is an indication itself, in the Constitution, [s 53](#), that a proposed law is not to be taken as one imposing taxation by reason only of its containing provisions for payment of “fees for services.”

To answer this description, a charge must be “a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment”: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470; [82 ALR 385](#) at [391](#). In that case a fee for immigration clearance imposed on Australian citizens entering Australia could not be accepted as a fee for services rendered to or at the request of the citizen. See also *Harper v Victoria* (1966) 114 CLR 361 at 377 and 382; *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 258; [1950] ALR 55 [CB](#); and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; [112 ALR 87](#) [CB](#). Compulsory exactions of money by a public authority for a public purpose and not a payment for services rendered, may support their characterisation as a tax but they may not always be determinative: *Ausnet Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439; [322 ALR 385](#); [\[2015\] HCA 25](#); [BC201507278](#) at [\[45\]](#) [CB](#).

Further, a law which levies an exaction on one group in the community to be expended for the benefit or advantage of another group in the community may be a law imposing taxation, the expenditure being properly described as for a public purpose: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480; [112 ALR 53](#) [CB](#). However, where a charge is imposed in substitution for an antecedent obligation, it is not a tax: see *Luton v Lessels* (2002) 210 CLR 333; [187](#)

[ALR 529](#); [\[2002\] HCA 13](#); [BC200201537](#) ^{CB}; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448; [268 ALR 232](#); [\[2010\] FCAFC 52](#); [BC201003449](#) ^{CB}.

A law authorising an exaction does not necessarily bear the legal character of a law imposing taxation merely because the exaction is in the form of a charge, the amount of which is not directly related to the cost of providing or the value of the particular services or facilities: *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133; [167 ALR 392](#) ^{CB}; *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541; [273 ALR 553](#); [\[2010\] FCA 124](#); [BC201007065](#) ^{CB}.

Under the legislation challenged in the former case, a charge was payable by an airline for air traffic services, rescue and fire fighting services, and meteorological services. The airline argued that the lack of relationship between the manner of calculation of the charges, the value to the airline of the services and the cost of providing the particular services to the airline meant that the charges were a tax. The Court rejected the argument on the basis that the object of the charges was not to raise revenue, but to recover the cost of providing the services across the entire range of users: at [92]. Accordingly, there was no warrant for concluding that the charges amounted to taxation on the ground that they exceeded the value to particular users of particular services or the cost of providing particular services to particular users: at [93].

[1505.75] Disguised taxation

A requirement that all vendors of petrol purchase (from local producers) a fixed proportion of power alcohol did not impose a tax, because it did not impose “a liability to the State, or to any public authority, or to any definite body or person authorised by law to demand or receive it”: *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108 at 125. However, legislation which expropriated all flour produced in a State and gave the producer the right to re-purchase the flour at a price above the expropriation price, while obliging the producer to store the flour at its own expense and risk, was held to impose a tax: *Attorney-General (NSW) v Homebush Flour Mills Ltd* (1937) 56 CLR 390 ^{CB}. The lack of legal obligation did not prevent this conclusion and this was quoted in *Knight v Secretary, Department of Justice* [\[2012\] VSC 613](#); [BC201209807](#) at [\[94\]](#) ^{CB}. The payment was exacted by “sanctions consisting in the detriments arising from the adoption by the taxpayer of the alternative left open by the legislation”: *Attorney-General (NSW) v Homebush Flour Mills Ltd*, above, at 413. See also *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 444–5.

[1505.80] Taxation distinguished from financial penalties

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 53.

Taxes are also distinguished from fines in [s 53](#) of the Constitution.

A tax is a payment “demanded as a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends”, while a penalty is a payment “claimed as solely a penalty for an unlawful act or omission, other than non-payment of or incidental to a tax”: *R v Barger* (1908) 6 CLR 40 at 99. See also *Re Dymond* (1959) 101 CLR 11 at 22.

This line of distinction was referred to by the Court in *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388; [211 ALR 18](#); [\[2004\] HCA 53](#); [BC200407491](#) at [\[47\]](#) ^{CB}.

[1505.85] Taxation distinguished from arbitrary exactions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii).

To be treated as a tax within s 51(ii) rather than an arbitrary exaction outside s 51(ii), the liability to pay money must “be imposed by reference to ascertainable criteria with a sufficiently general application and [not] as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation”: *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684; [59 ALR 431](#) at [434](#). Further, to be classified as a tax rather than an arbitrary exaction, the imposition must not be an “incontestable tax”. A person on whom the liability is imposed must have the opportunity to challenge the liability through some judicial process: *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 640–1; [52 ALR 53](#) at [64](#).

In *Attorney General (NT) v Emmerson* ([2014](#)) [307 ALR 174](#); 88 ALJR 522; [\[2014\] HCA 13](#); [BC201402411](#) at [\[53\]](#)  the matter was expressed as follows:

“Constitutional principles and common law values, rooted in British legal history, ... preclude the arbitrary exercise of sovereign power. For example, a financial exaction imposed by a legislature, such as a tax, must be clear both as to the identification of the taxpayer and as to the taxpayer’s liability to pay the tax. Delegation by a legislature to a member of the Executive of a discriminatory dispensing power in respect of such an exaction would offend against the operation of Powers.”

[1505.90] Links with Consolidated Revenue Fund

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 81.

“In Australia, the fact that a levy is directed to be paid into the Consolidated Revenue Fund has been regarded as a conclusive indication that the levy is exacted for public purposes ... But neither principle nor Australian authority provides any support for the converse proposition that an exaction is not a tax if it is not to be paid into the Consolidated Revenue Fund. The requirement imposed by [s 81](#) of the Constitution that all revenues or moneys raised or received by the Executive Government form one Consolidated Revenue Fund is not, and cannot constitute, a criterion for what is a tax. The purpose of [s 81](#) ... was to ensure that the revenues of the Crown, including taxes, were brought together in one Consolidated Revenue Fund ... under the control of Parliament. To hold that revenues or moneys that are not treated in accordance with the requirements of [s 81](#) cannot be taxes to which [s 81](#) applies is circuitous reasoning and deprives [s 81](#) of any effective content”: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 503–4; [112 ALR 53](#) at [60–1](#) per Mason CJ, Brennan, Deane and Gaudron JJ.

[1505.95] Characterisation of taxation laws

L Legislation cited in this paragraph

(CTH) [Financial Transaction Reports Act 1988](#) Section 24.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii).

The question whether a law is one with respect to taxation is to be determined “by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes”: *Fairfax v*

Federal Commissioner of Taxation (1965) 114 CLR 1 at 7. Inquiry into the justice or wisdom of the legislature's chosen measures is precluded: *AG (NT) v Emmerson* [2014] HCA 13; [BC201402411](#) at [80] [CB](#).

"In characterising a law the Court has regard to its operation, to what the law does in the way of creating rights and obligations, and how it operates within the permitted area of power. It matters not that the provisions which so operate may be intended to achieve some other purpose: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 [CB](#); *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; [9 ALR 199](#) [CB](#); *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; [40 ALR 609](#) [CB](#); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; [61 ALR 1](#) [CB](#)": *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 354; [73 ALR 161](#) at 175.

A law imposing a tax on the income of superannuation funds and offering an exemption to any fund which invested in public securities was a law with respect to taxation, despite its clear objective of controlling the funds' investment practices: "[T]he substance of the enactment is the obligation which it imposes and the only obligation imposed is to pay income tax": *Fairfax v Federal Commissioner of Taxation*, above at 13. See also *Osborne v Commonwealth* (1911) 12 CLR 321 at 344; *Moore v Commonwealth* (1951) 82 CLR 547 at 578.

In *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; [112 ALR 87](#) at [94](#) [CB](#), Mason CJ, Deane, Toohey and Gaudron JJ said, of a charge imposed on employers who did not make a minimum expenditure on training their employees "... the fact that the revenue-raising burden is merely secondary to the attainment of some other object or objects is not a reason for treating the charge otherwise than as a tax. One might as well suggest that a protective customs duty is not a tax because its primary object is the protection of a particular local manufacturing industry from overseas competition". In rejecting an argument that the charge was a penalty rather than a tax, Mason CJ, Deane, Toohey and Gaudron JJ said (CLR at 571; ALR at 95):

"Neither the Act nor the Administration Act mandates or proscribes conduct of any kind. The legislative provisions do not make it an offence to fail to spend the minimum training requirement; nor do they provide for the recovery of civil penalties for such a failure. Consequently, the charge is not a penalty because the liability to pay does not arise from any failure to discharge any antecedent obligations on the part of the person on whom the exaction falls ... The fact that the legislature has singled out those who do not spend the minimum training requirement as the class to bear the burden of the charge and to quantify the amount of the liability by reference to the shortfall does not deprive the charge of the character of a tax."

Section 24 of the Financial Transaction Reports Act 1988, which prohibits the opening or operation of a bank account in a false name, is a law with respect to taxation within [s 51\(ii\)](#): *Rogers v R* (1995) [130 ALR 635](#) [CB](#) (Court of Criminal Appeal, South Australia). Doyle CJ (with whose judgment Prior and Nyland JJ agreed) said (at 646) that there was, from the textual point of view, no connection between s 24 and the subject matter of taxation; but he accepted that the practical effect of the law was to make evasion of tax liability significantly more difficult. It followed that the purpose or object of the law was within the power conferred by [s 51\(ii\)](#). Further, the connection between s 24 and the subject of taxation was not too insubstantial or indirect; and the provision could not be said to go beyond what is reasonably necessary for the achievement of a legitimate end sought to be attained — so that it could be described as reasonably proportionate to the end in view.

For the same reasons, s 31(1) of the Financial Transaction Reports Act 1988, which makes it an offence for a person to split a cash transaction into two or more transactions so as to avoid the reporting obligation imposed by s 7 of the Act in relation to cash transactions involving \$10,000 or more, is a law with respect to taxation within [s 51\(ii\)](#) of the Constitution: *Leask v*

Commonwealth (1996) 187 CLR 579 at 612, 616, 638; [140 ALR 1](#) at [23](#), [26](#), [43](#) per Toohey, Gaudron, Kirby JJ.

The Court, however, has said that questions of characterization can turn on questions of degree and the “more the legal operation of [a] law is removed from the subject matter of the power, the more questions of degree will become important”: *Spence v State of Queensland* ([2019](#)) [367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[59\]](#) [CB](#).

[1505.100] Objects and subject of taxation

A law imposing a tax on the promoters of and other participants in tax evasion schemes, calculated by reference to the tax evaded by other taxpayers, is a valid law with respect to taxation: *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622; [52 ALR 53](#) [CB](#). It is no objection to the validity of a tax law that there was no connection between the objects of taxation (the person on whom liability to pay a tax was imposed) and the subject of taxation (the criteria according to which the tax liability was created): CLR at 636 and 653; ALR at 61 and 74–5. See also *Deputy Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 685; [59 ALR 431](#) at [435](#).

[1505.105] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii).

Under s 51(ii), the Commonwealth Parliament may impose a tax on State government payrolls: “[T]he power of the Parliament with respect to taxation is not in any wise excepted from the basic principle that a valid law made by the Parliament may bind the Crown in right of a State according to its terms”: *Victoria v Commonwealth* (1971) 122 CLR 353 at 383, (the *Payroll Tax* case). Similarly, the Commonwealth Parliament may impose a tax on State governments in respect of the “fringe benefits” which those governments paid to state ministers, members of parliament and judges: “[T]he States are subject to the Commonwealth Parliament’s exercise of the taxation power; they have no immunity from Commonwealth taxation”: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 356; [73 ALR 161](#) at [176–7](#). Nonetheless the Court in *Spence v State of Queensland* [\[2019\] HCA 15](#); [BC201903864](#) at [\[309\]](#) [CB](#) quoted Dixon J that: “The Constitution predicates [the] continued existence [of the States] as independent entities.”

[1505.110] Discrimination

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(ii).

[Section 51\(ii\)](#) requires that a law with respect to taxation prescribe the same rule and standards as between States and parts of States. If different standards are prescribed the [s 51\(ii\)](#) requirement is breached, “whether those standards are arbitrary or measured, whether dictated by a desire to benefit or to injure”: *Cameron v Federal Commissioner of Taxation* (1923) 32 CLR 68 at 76–7. Uniform standards which operate unequally in the several States because of differences between conditions existing in the several States do not offend against the [s 51\(ii\)](#) requirement: *Colonial Sugar Refining Co v Irving* [\[1906\] AC 360](#) [☞](#) at [367–8](#) [☞](#). See also *Conroy v Carter* (1968) 118 CLR 90; [\[1968\] ALR 545](#); [42 ALJR 96](#) [CB](#).

Hence, it has been said that a “law with respect to taxation, in general, does not discriminate in the sense spoken of in s 51(ii) if its operation is general throughout the Commonwealth even though, by reason of circumstances existing in one or more of the States, it may not operate uniformly: *Austin v Commonwealth* (2003) 215 CLR 185; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) [CB](#) at 241. This

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

was quoted in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548; [300 ALR 26](#); [\[2013\] HCA 34](#); [BC201311629](#) at [\[45\]](#) [CB](#).
[1505.115] “between States”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii).

The discrimination prohibited by s 51(ii) involves the selection of different States or parts of States in their character as States or parts of States, not in their character as (for example) ports: *Elliott v Commonwealth* (1936) 54 CLR 657 at 675, 678, 680 and 705. For a critique of this approach, see *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 265. Authority is not clear on the meaning to be given to a “part” of a State.

SECTION 51 (iii) — BOUNTIES ON THE PRODUCTION OR EXPORT OF GOODS, BUT SO THAT SUCH BOUNTIES SHALL BE UNIFORM THROUGHOUT THE COMMONWEALTH

[1505.120] Exclusive power

The power to grant bounties on the production of goods is exclusive to the Commonwealth: Commonwealth Constitution, s 90 [\[1800.5\]](#).

[1505.125] A governmental payment

A legislative requirement that vendors of petrol purchase a prescribed quantity of power alcohol from the producers of that commodity does not provide for the payment of a “bounty” on the production of power alcohol, because the purchase price of the power alcohol is not paid for or on behalf of a government or governmental authority: *Vacuum Oil Co Pty Ltd v Queensland* (1934) 51 CLR 108 at 120 and 125.

There is some doubt now about the remaining effect of this authority in light of observations in *Sportsbet Pty Ltd v State of New South Wales* [\[2012\] HCA 13](#) at [\[18\]](#). Nevertheless, the Full Federal Court found the analysis in the case helpful in *Rocklea Spinning Mills Pty Ltd v The Anti-Dumping Authority* [1995] FCA 210.

SECTION 51(iv) — BORROWING MONEY ON THE PUBLIC CREDIT OF THE COMMONWEALTH

[1505.130] The financial agreement

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 105A(5), s 51(iv).

[Section 105A\(5\)](#) declares that any agreement made between the Commonwealth and the States relating to the public debts of the States, and dealing with (inter alia) public borrowing, “shall be binding on the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution ... or in any law of the Commonwealth ...”. Consequently, any law made under s 51(iv) will be subject to the Financial Agreement 1927.

[1505.135] Protecting Commonwealth loans from state taxes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(iv).

The Parliament may legislate under s 51(iv) to protect interest paid to Commonwealth bond holders

from State taxation: *Commonwealth v Queensland* (1920) 29 CLR 1 at 21. See *Spence v State of Queensland* [2019] HCA 15; [BC201903864](#) at [355] ^{CB}.

SECTION 51(v) — POSTAL, TELEGRAPHIC, TELEPHONIC, AND OTHER LIKE SERVICES

[1505.140] Technological changes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(v).

The object of s 51(v) was “to place under federal authority the control of distant communication carried on according to a systematic plan”; and there is “ample justification for holding that wireless broadcasting is a telephonic service”: *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 at 282 and 284. Similarly, s 51(v) will support Commonwealth regulation of television broadcasting and receiving, and the establishment of a Commonwealth-owned television broadcaster: *Jones v Commonwealth* (1965) 112 CLR 206 ^{CB}. See also *Bayside City Council v Telstra Corporation Ltd* (2004) 216 CLR 595; [206 ALR 1](#); [2004] HCA 19; [BC200402132](#) at [145] ^{CB} per Callinan J.

[1505.145] Incidental matters

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(v).

Under s 51(v), the Commonwealth may regulate the corporate structure of the holders of television broadcasting licences: *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418 ^{CB}. Because the Commonwealth could prohibit the broadcasting of television services, it could permit or license that broadcasting subject to such conditions as the Parliament selected. Determining whether a law is incidental to the subject-matter of a power can be assisted by examining how the purpose of the law — what the law can be seen to be designed to achieve in fact — might relate the question of law to the subject-matter of the power: *Spence v State of Queensland* [2019] 367 ALR 587; [2019] HCA 15; [BC201903864](#) at [60] ^{CB}.

[1505.150] Political advertising

Because the Constitution guarantees members of the community a right to communicate on public affairs, the Parliament cannot legislate to prohibit the broadcasting of political advertisements during federal, State or Territory election campaigns: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; [108 ALR 577](#) ^{CB}.

SECTION 51(vi) — THE NAVAL AND MILITARY DEFENCE OF THE COMMONWEALTH AND OF THE SEVERAL STATES, AND THE CONTROL OF THE FORCES TO EXECUTE AND MAINTAIN THE LAWS OF THE COMMONWEALTH

[1505.155] Associated provisions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 114, s 119, s 51(xxxii), s 52(ii), s 68.

[Section 51\(xxxii\)](#) authorises the Parliament to legislate for “The control of railways with respect to transport for the naval and military purposes of the Commonwealth”; [s 68](#) vests “The command in chief of the naval and military forces of the Commonwealth ... in the Governor-General” [\[1640\]](#); s 52(ii) gives the Commonwealth exclusive power over, inter alia, the former colonial departments of

naval and military defence [\[1510.10\]](#); [s 114](#) precludes the States from raising or maintaining any naval or military force, except with the consent of the Commonwealth; and [s 119](#) imposes on the Commonwealth the obligation to “protect” every State against invasion and, on the application of the Executive Government of the State, against “domestic violence”. Given the conditions at the time the Constitution was promulgated, “invasion” would seem limited to physical invasion.

[1505.160] A concurrent power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 114, s 51(vi), s 52(ii).

Apart from the aspects of the defence power covered by [s 52\(ii\)](#) and [s 114](#), the power granted by [s 51\(vi\)](#) is not exclusive to the Commonwealth: *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 571 and 596.

[1505.165] A comprehensive power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(vi).

The words “naval and military” are not words of limitation: *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[137\]–\[138\]](#), [\[436\]](#), [\[588\]](#), [\[611\]](#) [\[CB\]](#). The defence power “is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public”: at [7] per Gleeson CJ. See also at [141]–[146] per Gummow and Crennan JJ (with whom Gleeson CJ and Heydon J agreed), at [436]–[443] per Hayne J and at [583] per Callinan J. See also *White v Director of Military Prosecutions* [\(2007\) 235 ALR 455](#); [\[2007\] HCA 29](#); [BC200704600](#) at [\[21\]](#) [\[CB\]](#).

The Commonwealth may rely on [s 51\(vi\)](#) in time of war to support economic regulations which could contribute to the successful prosecution of the war: *Farey v Burvett* (1916) 21 CLR 433 [\[CB\]](#).

[1505.170] A purposive power

The defence power “involves the notion of purpose or object”: a law will be characterised as a law with respect to the defence of the Commonwealth where “defence or war [is] the purpose to which the legislation [is] addressed”, which purpose is to “be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth”: *Stenhouse v Coleman* (1944) 69 CLR 457 at 471; *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[135\]–\[136\]](#) [\[CB\]](#). A law will usually be regarded as incidental to a power of this kind if it is designed to achieve a purpose related to the subject-matter of the power: *Spence v State of Queensland* [\(2019\) 367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[60\]](#) [\[CB\]](#).

[1505.175] Justiciability

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(vi).

The circumstances which can support an exercise of the defence power are frequently based on strategic and international political assessments, so that the relationship between the courts and the government which claims to rely on [s 51\(vi\)](#) is problematic. Judicial deference to the judgment of the Commonwealth Parliament was emphasised in *Farey v Burvett* (1916) 21 CLR 433 at 455, 448 and

449. But the High Court has at other times asserted its capacity to review the Parliament's claim of the defence necessity of legislation: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 262 and 264.

A resolution of these opposing views can be found in the formulation adopted by Fullagar J in *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177 at 265: Commonwealth legislation will be accepted as within [s 51\(vi\)](#) if "it could reasonably be regarded as a means towards attaining an object which is connected with defence". In *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) ^{CB}, the Court accepted that the question whether a control order was reasonably necessary to protect the public from a terrorist act was justiciable, and that the legislation calling for that judgment was supported by the defence power: see, in particular, at [104]–[110]; compare at [493]–[514] per Hayne J (dissenting).

[1505.180] Military discipline

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 51(vi), s 80.

It is now accepted that [s 51\(vi\)](#) will support Commonwealth legislation establishing a disciplinary code to be administered judicially but standing outside the provisions of [Ch III](#) of the Constitution, including the guarantee of trial by jury contained in [s 80](#): *Re Tracey; Ex parte Ryan* (1989) 166 CLR 540; [84 ALR 1](#); 63 ALJR 250; [16 ALD 730](#); *Re Nolan; Ex parte Young* (1991) 172 CLR 460; [100 ALR 645](#); 65 ALJR 486; [BC9102615](#) ^{CB}; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; [121 ALR 153](#); 68 ALJR 499; [BC9404630](#) ^{CB}; *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [209 ALR 311](#); [\[2004\] HCA 44](#); [BC200405815](#) ^{CB}; *White v Director of Military Prosecutions* ([2007](#)) [235 ALR 455](#); [\[2007\] HCA 29](#); [BC200704600](#) at [\[14\]](#), [\[39\]–\[40\]](#) ^{CB}.

There is some uncertainty as to the range of conduct that the Parliament may include in such a disciplinary code. One view is that the Parliament may provide that *any* conduct which constitutes an offence under the general law shall constitute a disciplinary offence if committed by a defence member: see, eg, *Re Tracey; Ex parte Ryan*, above, at CLR 544–5 per Mason CJ, Wilson and Dawson JJ; *Re Tyler; Ex parte Foley*, above, at ALR 156 per Mason CJ and Dawson J. Another view is that the Parliament can only make conduct a disciplinary offence where to do so can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline: *Re Nolan; Ex parte Young*, above, at CLR 477 per Brennan and Toohey JJ; *Re Tyler; Ex parte Foley*, above, at ALR 158 per Brennan and Toohey JJ. A third view is that the Parliament cannot confer on service tribunals authority to try and punish members of the armed forces for offences that are not exclusively disciplinary but are substantially the same as offences under the general law: *Re Nolan; Ex parte Young*, above, at CLR 497 per Gaudron J; *Re Tyler; Ex parte Foley*, above, at ALR 162 per Deane J; at ALR 163 per Gaudron J.

In *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [209 ALR 311](#); [\[2004\] HCA 44](#); [BC200405815](#) ^{CB}, a majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting) held that [s 51\(vi\)](#) empowered Parliament to make it a service offence for a member of the defence force to commit rape while on leave in a country other than the country in which that member was serving. McHugh J (with whom Hayne J agreed) said (at [36]) that:

[36] The difference between the views of Mason CJ, Wilson and Dawson JJ and on the other hand Brennan and Toohey JJ in these cases is the difference between the "service status" view of the jurisdiction and the "service connection" view of that jurisdiction. The "service status" view — which is now applied in the United States — gives a service tribunal jurisdiction over a person solely on the basis of the accused's status as a member of the armed forces. The "service connection" view of the jurisdiction requires a connection between the service and the offence ...

McHugh J observed that since *Tracey*, *Nolan* and *Tyler* “it seems to have been generally accepted — indeed it was accepted by the Judge Advocate in the present case — that the proper test is the ‘service connection’ test and not the ‘service status’ test”: at [37]. Callinan and Heydon JJ expressly agreed with McHugh J’s adoption of the “service connection” test, although they disagreed with its application on the facts: at [158].

In *White v Director of Military Prosecutions*, above, the applicant did not advance an argument based on absence of connection between the alleged offence and military discipline, so it was not necessary for the Court to consider the relevant test: see at [3] per Gleeson CJ and at [76] per Gummow, Hayne and Crennan JJ.

It is clear that [s 51\(vi\)](#) will not support Commonwealth legislation prohibiting the trial of a defence force member for a State offence where the member had been tried by a service tribunal for a service offence arising out of the same conduct: *Re Tracey; Ex parte Ryan*, above.

In *Haskins v Commonwealth of Australia* (2011) 244 CLR 22; [279 ALR 434](#); [\[2011\] HCA 28; BC201105899](#) at [\[21\]](#) ^{CB} the Court observed “that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a serious offence.” The Court said (ibid) that steps taken to punish service members “are not steps taken in the exercise of the judicial power of the Commonwealth.”

[1505.185] The defence power in peace-time

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(iv), s 51(vi).

The core of the defence power, which will be available even when Australia is not involved in or anticipating hostilities, will include “such matters as the enlistment (compulsory or voluntary) and training and equipment of men and women in navy, army and air force, the provision of ships and munitions, the manufacture of weapons and the erection of fortifications”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 254; [1951] ALR 129; (1951) 24 ALJR 485; [BC5100030](#) ^{CB}. It will support legislation:

- authorising the manufacture and sale of non-military uniforms, because this assists the maintenance of a capacity to produce military uniforms: *Attorney-General (Vic) v Commonwealth* (1935) 52 CLR 533 ^{CB} (the *Clothing Factory* case), but see *Commonwealth v Australian Commonwealth Shipping Board* (1926) 39 CLR 1 ^{CB};
- establishing a code of military discipline: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 540; [84 ALR 1](#);
- imposing a system of compulsory military service: *Krygger v Williams* (1912) 15 CLR 366 ^{CB}; *Giltinan v Lynch* (1971) 124 CLR 153 ^{CB}; and
- controlling commodities of military value to Australia: *Jenkins v Commonwealth* (1947) 74 CLR 400 ^{CB}; *Logan Downs Pty Ltd v FCT* (1965) 112 CLR 177 ^{CB}.

In the absence of war or an international emergency, the defence power will not support Commonwealth legislation proscribing a political party and excluding its members from participation in industrial affairs: *Australian Communist Party v Commonwealth*, above. However, in a deteriorating international political situation, [s 51\(vi\)](#) will support Commonwealth legislation restricting the capital raising activities of Australian businesses: *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177; [1952] ALR 821; (1952) 26 ALJR 321; [BC5200610](#) ^{CB}.

In *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) ^{CB}, the Court accepted that legislation empowering the Court to make a control order if such an order was reasonably necessary to protect the public from a terrorist act was supported by the defence power. There was some criticism in the judgments of any attempt to draw a clear distinction between peace-time and wartime, which, even if it was once appropriate, may no longer reflect international reality.

There is extensive discussion of [s 51\(iv\)](#) in that case by Kirby J at [220]–[268].

[1505.190] The defence power in war-time

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(vi).

When Australia is involved in significant hostilities, the secondary aspect of s 51(vi) may be invoked by the Commonwealth. This secondary aspect “extends to an infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection with defence. Examples now familiar are the prices of goods and the rationing of goods; rents and the eviction of tenants; the transfer of interests in land; and the conditions of employment in industry generally”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 254–5. In this context, s 51(vi) will support legislation:

- allowing the detention of any person thought by the Government to threaten Australia's defence: *Lloyd v Wallach* (1915) 20 CLR 299 ^{CB}; *Ex parte Walsh* [1942] ALR 359; [BC4200006](#) ^{CB}; *Little v Commonwealth* (1947) 75 CLR 94; [1947] ALR 483; (1947) 21 ALJR 292; [BC4700330](#) ^{CB};
- fixing the maximum prices of domestic commodities: *Farey v Burvett* (1916) 21 CLR 433 ^{CB}; *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 335 ^{CB} (the *Prices Regulation* case);
- controlling industrial employment: *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 335 ^{CB} (the *Women's Employment* case); *Reid v Sinderberry* (1944) 68 CLR 504 ^{CB}; and
- taking over the premises, staff, equipment and records of the States' taxation offices: *South Australia v Commonwealth* (1942) 65 CLR 373 ^{CB} (the *First Uniform Tax* case).

On the other hand, this secondary aspect of s 51(vi) will not support legislation controlling enrolment in Australian universities: *R v University of Sydney*; *Ex parte Drummond* (1943) 67 CLR 95 ^{CB}; legislation authorising seizure of the property of an organisation declared to be prejudicial to the war effort, and prohibiting the publication of any of its doctrines: *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 ^{CB}; and legislation prescribing standards for the lighting of industrial premises: *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 413 ^{CB} (the *Industrial Lighting* case).

[1505.195] Transition from war to peace

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(vi).

The secondary aspect of s 51(vi) does not disappear on the cessation of hostilities, but is “wound

down” as the transition is made from a war-time to a peace-time society: “The power must ... extend to sustaining for some reasonable interval of time the laws and regulations in force at the end of hostilities so as to enable the legislature to proceed with the task”: *Dawson v Commonwealth* (1946) 73 CLR 157 at 184.

Three years after the war, s 51(vi) still supported legislation requiring employers to give preference to former members of the armed services: *Wenn v A-G (Vic)* (1948) 77 CLR 84 [CB](#).

On the other hand, in 1949 s 51(vi) was held to be incapable of supporting legislation which regulated women's employment, rationed petrol and controlled residential accommodation: *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43 [CB](#); and in 1959, s 51(vi) was held to no longer support the legislatively-prescribed preference for ex-service personnel: *Illawarra District County Council v Wickham* (1959) 101 CLR 467 [CB](#).

As Kirby J said in *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[236\]](#) [CB](#) the “defence power waxes and wanes.”

SECTION 51(x) — FISHERIES IN AUSTRALIAN WATERS BEYOND TERRITORIAL LIMITS

[1505.200] Australian waters

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(x).

Australian waters within s 51(x) are not confined to waters within the territorial limits of Australia but are areas of the sea, the outward boundaries of which are determined by geographical and political considerations; and a proclamation by the Governor-General that waters up to 200 miles from the Australian coast were Australian waters brought those waters within s 51(x): *Bonser v La Macchia* (1969) 122 CLR 177 [CB](#).

[1505.205] Territorial limits

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(x), s 51(xxix), s 51(x).

Waters within 3 nautical miles of the Australian coast are within territorial limits for the purposes of s 51(x): *New South Wales v Commonwealth* (1975) 135 CLR 337; [8 ALR 1](#) [CB](#) (the *Seas and Submerged Lands* case). The Commonwealth has sovereignty over that area (*New South Wales v Commonwealth*, above) but the Parliament has no power under s 51(x) to make laws with respect to fisheries in that area: *Bonser v La Macchia* (1969) 122 CLR 177 [CB](#). This may now be doubted as fisheries in that area could raise an external affair under [s 51\(xxix\)](#). A Commonwealth law may be justified under more than one head of power. At the same time, however, a specific limitation contained within a head of power should not be able to be by-passed. [Section 51\(x\)](#) is not simply a law with respect to “fisheries in Australian waters”; it is “fisheries in Australian waters *beyond territorial limits*.” This apparent conflict is not yet resolved in authority.

[1505.210] Forfeiture of vessels used for illegal fishing

L Legislation cited in this paragraph

(CTH) [Fisheries Management Act 1991](#) s 106.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(x).

In *Re Director of Public Prosecutions; Ex parte Lawler* (1994) 179 CLR 270; [119 ALR 655](#) ^{CB}, the High Court held that s 106 of the Fisheries Management Act 1991 was supported by [s 51\(x\)](#) of the Constitution. Section 106 provided that, where a court convicted a person of the offence of using a foreign fishing boat for fishing within the Australian fishing zone, the court could order the forfeiture of the boat used in the commission of the offence. In the words of Mason CJ at 119 ALR 658, “the prescription of forfeiture of property used in the commission of a fisheries offence is within the power conferred by [s 51\(x\)](#) and that power extends to the prescription of forfeiture of that property, notwithstanding that the owner is innocent of complicity in the commission of the offence”. See also *Westpac Banking Corporation v Lenthall* (2019) 265 FCR 21; [366 ALR 136](#); [\[2019\] FCAFC 34](#); [BC201901353](#) at [\[107\]–\[133\]](#) ^{CB}.

SECTION 51(xii) — CURRENCY, COINAGE, AND LEGAL TENDER

[1505.215] Associated provisions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 115, 51(xiii).

[Section 115](#) provides that “[a] State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts”. Section [51\(xiii\)](#) authorises the Parliament to make laws with respect to, inter alia, “the issue of paper money”.

[1505.220] Scope of the power

“Both ‘coinage’ and ‘legal tender’ involve quite specific and narrow concepts, the former being concerned with coins as money and the latter with the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity”; while “‘currency’ [is] a term of wider meaning which appears wholly to overlap the subject-matter of ‘coinage’ and which, unlike it, would extend to paper money and its counterfeiting”: *Watson v Lee* (1979) 144 CLR 374 at 398–9; [26 ALR 461](#). The power extends to support a law requiring persons to report to the Government transactions involving the transfer of \$10,000 or more in currency: *Leask v Commonwealth* (1996) 187 CLR 579; [140 ALR 1](#) ^{CB} “To require significant cash transactions to be reported is plainly a means of gathering information upon the movement of currency. A law imposing that requirement imposes an obligation upon those dealing in currency with respect to their dealings. There is a clear connection between the subject matter of currency and the imposition of that obligation and the connection extends to matters incidental to the performance of the obligation”: *Leask v Commonwealth*, above, at 19 per Dawson J.

The expression “legal tender” is concerned with the prescription of that which is, at any particular time, to be a lawful mode of payment within a polity”: *Watson v Lee*, above, at 398 per Stephen J. This was quoted in *Travelex Ltd v Commissioner of Taxation* (2010) 241 CLR 510; [270 ALR 253](#); [\[2010\] HCA 33](#); [BC201007174](#) at [\[84\]](#) ^{CB}.

[1505.225] Foreign currency

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xii).

[Section 51\(xii\)](#) authorises the Parliament to make laws with respect to foreign currency as well as Australian currency: *Watson v Lee* (1979) 144 CLR 374; [26 ALR 461](#) ^{CB}; *Leask v*

Commonwealth (1996) 187 CLR 579; [140 ALR 1](#) at [10](#) ^{CB} per Brennan CJ. See also *Travelex Ltd v Commissioner of Taxation* [\[2010\] HCA 33](#); [BC201007174](#) ^{CB}.

[1505.230] Paper money

“[T]here is no substance in the argument that there is a constitutional bar against the issue by the Commonwealth of paper money as legal tender”: *Re Skyring's Application (No 2)* [\(1985\) 58 ALR 629](#) at [633](#). See also *Re Cusack* [\(1985\) 66 ALR 93](#); 60 ALJR 302 ^{CB}. There is no basis for any argument to the same effect: *Skyring, in the matter of Skyring* [\[2013\] FCA 997](#); [BC201313398](#) ^{CB}.

[1505.235] Cryptocurrency

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xii), s 51(xxix), s 51(i).

There is no authority on the relation (if any) between [s 51\(xii\)](#) and cryptocurrency. It is likely that cryptocurrency is so far outside what the framers of the Constitution were considering that it is not within [s 51\(xii\)](#) at all. But it could still constitute “currency”. If it falls outside this power, and is to be regulated, it must be under some other power such as s 51(i) (trade and commerce) or [s 51\(xxix\)](#) (external affairs).

SECTION 51(xiii) — BANKING, OTHER THAN STATE BANKING; ALSO STATE BANKING EXTENDING BEYOND THE LIMITS OF THE STATE CONCERNED, THE INCORPORATION OF BANKS, AND THE ISSUE OF MONEY

[1505.240] Banking

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xiii).

The essential characteristics of banking are “the collection of money by receiving deposits upon loan, repayable when and as expressly or impliedly agreed upon, and the utilisation of the money so collected by lending it again in such sums as required”: *Commissioners of State Savings Bank of Victoria v Permewan, Wright and Co Ltd* (1914) 19 CLR 457 at 470–1. See also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 63, 65, 69 and 97; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 194 and 257; *Australian Independent Distributors v Winter* (1964) 112 CLR 443, at 455; 38 ALJR 330; [BC6400670](#) ^{CB}; *Siminton v Australian Prudential Regulation Authority (No 2)* (2008) 168 FCR 122; [248 ALR 34](#); [\[2008\] FCAFC 88](#); [BC200804012](#) ^{CB}, at [50]–[62]. A new definition of banking may be needed to take account of modern developments in currency.

[Section 51\(xiii\)](#) will support legislation:

- controlling the corporate and financial structure of banks, of their management and staff, and the ownership of banks: 76 CLR 1 at 194, 195 and 196;
- the licensing of banks, including the prohibition of the carrying on of banking business by any bank: 74 CLR 31 at 69; 76 CLR 1 at 197, 302, 332, 334 and 392; and
- the creation of the Commonwealth Bank and a central or reserve bank: 74 CLR 31 at 49, 77–8 and 94; 76 CLR 1 at 191–2 and 393.

[Section 51\(xiii\)](#) also supports legislation prohibiting a natural person from carrying on banking business, or from using words associated with banking. It also supports provisions empowering a

court to issuing injunctions to enforce those prohibitions: *Siminton v Australian Prudential Regulation Authority (No 2)* (2008) 168 FCR 122; [248 ALR 34](#); [\[2008\] FCAFC 88](#); [BC200804012](#) ^{CB}, at [24]–[25].
[1505.245] State banking

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xiii), s 51(xx),.

State banking does not mean banking in a State; it means a State owned or controlled business of banking: *Bourke v State Bank of New South Wales* (1990) 170 CLR 276; [93 ALR 460](#); 64 ALJR 406 at 409–10; (1990) ATPR ¶41-033 ^{CB}; *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369; [233 ALR 389](#); [94 ALD 305](#); [\[2007\] HCA 9](#); [BC200701676](#) at [14] ^{CB}.

Banks established by the States are immune from Commonwealth legislation with respect to banking. The Commonwealth cannot legislate “with respect to the establishment, management and conduct of such banks by the State” or with respect to the customers of those banks; but the States have no immunity from [s 51\(xiii\)](#) in their capacity as customers of non-State banks: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ^{CB}.

The exclusion, from the ambit of [s 51\(xiii\)](#), of State banking operates to limit other Commonwealth legislative powers. It does not create a complete immunity from Commonwealth laws, but “the words of [s 51\(xiii\)](#) still require that, when the Commonwealth enacts a law which can be characterised as a law with respect to banking, that law does not touch or concern State banking, except to the extent that any interference with State banking is so incidental as not to affect the character of the law as one with respect to banking other than State banking”: *Bourke v State Bank of New South Wales* [1990] HCA 20 at [21] (1990) 170 CLR 276; [93 ALR 460](#); 64 ALJR 406 at 409–10; (1990) ATPR ¶41-033. Consequently, it seems s 18 of the Australian Consumer Law (ACL) (which proscribes misleading, deceptive and unconscionable conduct by, inter alia, financial corporations) cannot validly apply to a State bank in its business *within* the relevant State. See Competition and Consumer Act 2010 sch 2. The restriction in s 51(xiii) applies to all Commonwealth powers, meaning that it applied to a law enacted in reliance upon the corporations power ([s 51\(xx\)](#)) because, in its application to a State bank, that law was also a law with respect to banking.

[1505.250] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xiii).

The Commonwealth Parliament cannot use the power conferred by [s 51\(xiii\)](#) to prohibit private banks from acting as bankers for State governments: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ^{CB}. To discriminate against the States in this fashion prevents the Commonwealth legislation being characterised as a law with respect to banking (at 61); conversely, although the legislation will be a law with respect to banking, it will offend against an implied constitutional limitation that Commonwealth powers not be used to discriminate against the States or not be used to interfere with “the normal and essential functions of government”: 74 CLR 31 at 83 and 66.

SECTION 51(xiv) — INSURANCE, OTHER THAN STATE INSURANCE; ALSO STATE INSURANCE EXTENDING BEYOND THE LIMITS OF THE STATE CONCERNED

[1505.255] Insurance

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xiv).

The concept of insurance involves “the relationship of indemnity that exists between insurer and insured, rather than the source of that relationship ... so that it matters not whether the relationship arises by statute or by contract”: *R v Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 588. This formulation distinguishes such a relationship from one based on contract; a contract of insurance is not of the essence of insurance as such: see *HIH Casualty & General Insurance Ltd (In Liq) v Insurance Australia Ltd* [2005] VSC 342; [BC200506953](#) at [48] [CB](#).

[Section 51\(xiv\)](#) gives the Commonwealth power over the incorporation of bodies to carry on insurance; a system of mandatory registration for such bodies; detailed rules about their day-to-day operations, extending to such matters as security for and enforcement of the performance of insurers’ obligations to insured persons; the keeping and regular return of financial accounts and actuarial investigations; and the receivership or winding up of any insurer: *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 87–8. The power will support a Commonwealth law creating a statutory trust in favour of the spouse of a person whose life is insured under a life policy: *Commissioner for Probate Duties (Vic) v Mitchell* (1960) 105 CLR 126 [CB](#).

In *Australian Health Insurance Association Ltd v Esso Australia Ltd* [1993] FCA 376; 41 FCR 450116 ALR 253, the Full Federal Court held that the concept of insurance, as used in [s 51\(xiv\)](#), was sufficiently wide to include a scheme under which an employer undertook to meet health care costs incurred by its employees, in return for the payment of a premium which recouped one-fifth of the amount paid out by the employer. Black CJ said at ALR 260:

“When the term ‘insurance’ is used in the Constitution it cannot, in my opinion, be taken to be so restricted as to exclude from its scope transactions that have all the characteristics of insurance except the suggested need for the premium to be proportionate to the risk. That would involve a limitation on the scope of the power that could not have been intended because it would exclude from possible legislative regulation transactions having every outward appearance of insurance and serving, from the viewpoint of the policyholder, every function of insurance and involving the creation of rights indistinguishable from those created by a policy of insurance in respect of which the premiums were, in fact, proportioned to the risk.”

[1505.260] “Other than State insurance”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xiv).

“The expression ‘State insurance’ means the business of insurance conducted by an insurer owned or controlled by a State, that is to say, a business of State government insurance”: *Attorney-General (Vic) v Andrews* (2007) 230 CLR 369; [233 ALR 389](#); [94 ALD 305](#); [\[2007\] HCA 9](#); [BC200701676](#) at [5] [CB](#); *Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 284; [93 ALR 460](#); (1990) ATPR ¶41-033; [BC9002905](#) [CB](#); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 52, 65, 70 and 78; [1947] ALR 377; (1947) 21 ALJR 188; [BC4700100](#) [CB](#).

State insurance does not mean the market for insurance in a State, or a State’s regulatory scheme concerning insurance. State insurance means a State owned or controlled business that undertakes insurance of a certain kind. Section 51(xiv) does not show, and the historical material does not suggest, that it was proposed or regarded as necessary to confer on State insurance officers a monopoly in respect of any particular kind of insurance business: *Attorney-General (Vic) v Andrews*, above, at [6], [9]; compare at [84].

Section 51(xiv) does not confer on the States an exclusive power to make laws with respect to State insurance: *Attorney-General (Vic) v Andrews*, above, at [11], [78]. However, the restriction imposed in relation to State insurance applies to Commonwealth legislative power generally, provided that the law in question is a law with respect to (or with respect to matters including) insurance. Thus, a law supported by the corporations power (s 51(xx)) is subject to the restriction imposed by the provision to para (xiv) if it is also a law with respect to State insurance, except to the extent that any interference with State insurance is so incidental as not to affect the character of the law as one with respect to insurance other than state insurance: *Attorney-General (Vic) v Andrews*, above, at [12] [75], [79]; *Bourke v State Bank of New South Wales*, above, CLR at 289–91. Thus, in *Attorney-General (Vic) v Andrews*, above, Commonwealth licensing provisions that obliged Optus to make specified payments, and that excluded any State law with respect to workers' compensation after the licence came into force, did "not touch or concern insurance in any more than an incidental fashion" (at [83]) as they left Optus at liberty to decide whether to take out insurance to cover its possible liability to make payments under the Commonwealth Act, or to decide to remain a self-insurer.

See also discussion in *Environment Protection Authority v The Australian Sawmilling Co Pty Ltd (In Liq)* [2020] VSC 550; [BC202008503](#) at [143] ^{CB}. See further *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; [BC201900378](#) at [65] ^{CB}.

SECTION 51(xvi) — BILLS OF EXCHANGE AND PROMISSORY NOTES

[1505.265] Hire purchase agreements

L Legislation cited in this paragraph

(CTH) [Bills of Exchange Act 1909](#).

On the relationship between the Bills of Exchange Act 1909 and State legislation deferring the rights of a lender under a hire purchase agreement, see *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128 ^{CB}. If a Commonwealth law is intended as a complete statement of the law governing a particular matter, there is no room for a State (or Territory) law to apply to the same matter: at s 136. Quoted in *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428; [363 ALR 188](#); [2019] HCA 2; [BC201900378](#) at [65] ^{CB}.

SECTION 51(xvii) — BANKRUPTCY AND INSOLVENCY

[1505.190] Bankruptcy

"Bankruptcy ... is the creation of statute law ... The essential features of a bankruptcy system are sequestration and distribution — an initial taking into custody of an insolvent debtor's property, and the subsequent realisation and division among creditors": *R v Davison* (1954) 90 CLR 353 at 375–6. See also *Storey v Lane* (1981) 147 CLR 549 at 556–7; [36 ALR 129](#).

[1505.195] Scope of the power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xvii).

Under [s 51\(xvii\)](#) the Commonwealth Parliament has power "to declare what acts shall constitute acts of bankruptcy, to divest the bankrupt of his assets, to provide for the administration thereof and distribution among creditors; it may create offences in relation to the subject matter and attach sanctions to those offences; it may also create courts with jurisdiction in bankruptcy matters and prescribe the procedure and powers of those courts": *R v Federal Court of Bankruptcy; Ex parte*

Lowenstein (1938) 59 CLR 556 at 575. The power given by s 51(xvii) is plenary: *ibid*. Quoted by Flick J in *Rahman v Dubs (No 2)* [2012] FCA 1081; [BC201207630](#) at [11] [CB](#).

[1505.200] Examples of the power

The Parliament may penalise the failure, on the part of a bankrupt person, to maintain proper books of account during a period of 5 years preceding the person's bankruptcy; and may declare void settlements made within 5 years before the settlor's bankruptcy: *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 at 571–2. “It is for the legislature and not for this Court to say what provisions are necessary to achieve the objects sought and for what period of time books of account should be kept”: *ibid* per Starke J.

[1505.205] Crown rights as creditors

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xvii).

[Section 51\(xvii\)](#) authorises the Commonwealth to demand payment of Commonwealth taxes in priority to State taxes out of the estate of a bankrupt: *Victoria v Commonwealth* (1957) 99 CLR 575 [CB](#) (the *First Uniform Tax* case); and generally “excluding or reducing the priority of the Crown in right of the States in bankruptcy”: *Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508 at 529.

[1505.210] Insolvency

“[I]n a general sense, insolvency means inability to meet one's debts or obligations; in a technical sense, it means the condition or standard of inability to meet debts or obligations, upon the occurrence of which the statutory law allows a creditor to intervene, with the assistance of a court, to stop individual action by creditors and to secure administration of the debtor's assets in the general interest of creditors; the law generally allows the debtor to apply for the same administration”: *Attorney-General (British Columbia) v Attorney-General (Canada)* [1937] AC 391 [CA](#) at 402 [CA](#).

[1505.212] Ambulatory power

The provisions of laws made under s 51(xvii) were not intended to be stereotyped so as to confine the power of the Parliament to the legislative provisions existing in 1901 as to bankruptcy and insolvency: *Storey v Lane* (1981) 147 CLR 549 at 557–8 per Gibbs CJ. Quoted in *The Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479; [170 ALR 111](#); [\[2000\] HCA 14](#); [BC200001107](#) at [21] [CB](#).

SECTION 51(xviii) — COPYRIGHTS, PATENTS OF INVENTIONS AND DESIGNS, AND TRADE MARKS

[1505.213] Copyright

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xviii).

See generally Copyright Act 1968. A law imposing a financial levy on the manufacturers of blank sound tapes, and providing that the proceeds of the levy be paid to the owners of copyright in recorded music, is a law having a clear relevance to or connection with the subject of copyrights and is a valid law within [s 51\(xviii\)](#) of the Constitution: *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 520; [112 ALR 53](#) at 74 per Dawson and Toohey JJ. It is unlikely a law providing for compensation for a wrong done can be characterised as offending s

51(xxxi): at CLR 510. See *BMW Australia Ltd v Westpac Banking Corporation* (2019) 374 ALR 627; [2019] HCA 45; BC201911310 at [230] ^{CB}.

[1505.214] Patents

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xviii).

See generally Patents Act 1990. The boundaries of the power conferred by [s 51\(xviii\)](#) are not identified solely by identifying what in 1901 would have been treated as a copyright, patent, design or trademark. Such an approach fails to give sufficient allowance for the dynamism which, even in 1901, was inherent in any understanding of the terms used in [s 51\(xviii\)](#): *Grain Pool of Western Australia v Commonwealth* (2001) 202 CLR 479; 170 ALR 111; BC200001107; [2000] HCA 14 ^{CB} at [23] (*Grain Pool*). Compare *Storey v Lane* (1981) 147 CLR 549 at 557–8.

The *Grain Pool* case involved a challenge to the validity of two statutes conferring a right to grant “plant breeder’s rights” where the breeding of the plant variety constituted an invention for the purposes of [s 51\(xviii\)](#).

The evolution of the common law does not support caution against an over-broad construction of the term “patents of inventions”: *Grain Pool* at [33]. The collocation in [s 51\(xviii\)](#) represents a classification of the various species of intellectual or industrial property which had developed in the second half of the 19th century. Given the cross-currents and uncertainties in the common law and statute at the time of Federation it plainly is within the head of power in [s 51\(xviii\)](#) to resolve them and to determine that there be fresh rights in the nature of copyright, patents of inventions and designs and trade marks: *Grain Pool* at [41]. Thus, the products of “intellectual effort” to which the grant of power relates embrace a variable rather than a fixed constitutional criterion: *Grain Pool* at [42]. In the event, even in 1901, the grant of monopoly rights in respect of plant varieties was not outside the “central type” of the subject of “patents of invention”: *Grain Pool* at [36].

In *Grain Pool*, the Court rejected an argument that [s 51\(xviii\)](#) required that any law with respect to patents of inventions comprehend both novelty and inventiveness. In patent law, it was said, the distinction later drawn between lack of novelty (prior publication) and lack of inventiveness (obviousness) was not fully developed in 1901: *Grain Pool* at [51]–[53]. Further, while it may be accepted that there is a requirement of “novelty” in the constitutional concept of “invention”, that requirement may be satisfied by various legislative regimes, which need not display any fixed character: *Grain Pool* at [64].

Further, the Court rejected an argument that notions of exclusivity of use and exploitation were inherent in the notion of a patent: *Grain Pool* at [79]–[80].

The area of patents is considered extensively in *D’Arcy v Myriad Genetics Inc* (2015) 258 CLR 334; [2015] HCA 35; BC201509675 ^{CB}. The plurality (at [7]) express a note of caution about the limits of judicial law-making in allowing any new class of case to fall within a broad statutory concept set by the Patents Act 1990. Gageler and Nettle JJ (at [126]) specify that for a claimed invention to qualify as a patent “it must be something more than a mere discovery”. They add (ibid) that “the essence of invention inheres in its artificiality or distance from nature”.

[1505.215] Trade marks

L Legislation cited in this paragraph

(CTH) [Australian Bicentennial Authority Act 1980](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xviii).

See generally Trade Marks Act 1995. “[T]wo essential characteristics of a trade mark are (a) that it has the capacity to distinguish particular goods and services; and (b) that the proprietor of the mark has some connection with the goods and services.” The words “200 years”, the use of which was protected by the Australian Bicentennial Authority Act 1980, were “common words, having no capacity to distinguish the Authority or the activities in which it engages or which it promotes” and could not be supported by [s 51\(xviii\)](#): *Davis v Commonwealth* (1988) 166 CLR 79 at 96–7; [82 ALR 633](#).

The words of the statutory regime “reach[ed] too far” in their “extraordinary intrusion into freedom of expression” and thus were not reasonably and appropriately adopted to achieve the ends that lay within constitutional power: at CLR 100. Quoted in *Spence v State of Queensland* [\(2019\) 367 ALR 587](#); [\[2019\] HCA 15](#); [BC201903864](#) at [\[63\]](#) [CB](#).

[1505.220] Original meaning

The decision, in *Attorney-General (NSW) v Brewery Employee's Union* (1908) 6 CLR 469; 14 ALR 565 [CB](#), (the *Union Label* case), that the term “trade marks” must be understood in the light of its meaning in 1901, has been qualified: see *Davis v Commonwealth* (1988) 166 CLR 79 at 96–7; [82 ALR 633](#). See also *Storey v Lane* (1981) 147 CLR 549; [BC8100098](#) [CB](#) at 557–8.

SECTION 51(xix) — NATURALISATION AND ALIENS

[1505.225] Naturalisation

“[N]aturalisation ... is the passing from a state of alienage across the dividing frontier to a state of British nationality”: *Ex parte Walsh*; *Re Yates* (1925) 37 CLR 36 at 88. The change of a person's nationality to that of Australian citizen can only be achieved by Act of Parliament: *Pochi v Macphee* (1982) 151 CLR 101 at 111; [43 ALR 261](#). “[I]f the power ... to admit to Australian citizenship is within the power to make laws with respect to naturalisation, so must authority to withdraw that citizenship on specified conditions be also within that power”: *Meyer v Poynton* (1920) 27 CLR 436 at 441.

It is for the Parliament to create and define the concept of Australian citizenship: *Re Minister for Immigration and Multicultural Affairs*; *Ex parte Te* (2002) 212 CLR 162; [193 ALR 37](#); [\[2002\] HCA 48](#); [BC200206567](#) at [\[31\]](#), [\[58\]](#), [\[90\]](#), [\[108\]–\[109\]](#), [\[193\]–\[194\]](#), [\[204\]](#), [\[227\]–\[229\]](#) [CB](#); *Koroitamana v Commonwealth* [\(2006\) 227 ALR 406](#); 80 ALJR 1146; [\[2006\] HCA 28](#); [BC200604227](#) at [\[48\]](#) [CB](#).

[1505.230] Aliens

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xix).

(CTH) [Migration Act 1958](#).

An alien is a “person who was born outside Australia, whose parents were not Australians, and who has not been naturalised as an Australian” This was how an “alien” was defined in *Pochi v Macphee* (1982) 151 CLR 101 at 109–10; [43 ALR 261](#). It was held also that the person must not have been deprived of Australian citizenship by an act or process of denaturalisation: *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 183; [80 ALR 561](#).

The term “aliens” includes those who owe allegiance to another sovereign power or who, having no nationality, owe no allegiance to any sovereign power. A child born in Australia to parents who were

citizens of India and not Australian citizens or permanent residents is an alien: *Singh v Commonwealth* (2004) 222 CLR 322 ; [209 ALR 355](#); [\[2004\] HCA 43](#); [BC200405816](#) ^{CB}.

A child born in Australia to parents who were citizens of Fiji, where the child had a right to be registered as a citizen of Fiji but had not in fact been so registered, was an “alien” for the purposes of [s 51\(xix\)](#): see *Koroitamana v Commonwealth* [\(2006\) 227 ALR 406](#); 80 ALJR 1146; [\[2006\] HCA 28](#); [BC200604227](#) ^{CB}. “Within the limits of the concept of ‘alien’ in [s 51\(xix\)](#), it is for Parliament to decide who will be treated as having the status of alienage, who will be treated as citizens, and what the status of alienage, or non-citizenship, will entail”: at [11] per Gleeson CJ and Heydon J. In saying this, their Honours referred to *Singh v Commonwealth*, above, at [4].

It is open to Parliament to treat a stateless person as an alien for the purposes of [s 51\(xix\)](#): *Koroitamana*, above, at [15], [39]; *Al Kateb v Godwin* (2004) 219 CLR 562; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) at [\[1\]](#) ^{CB}.

In *Kenny v Minister for Immigration and Ethnic Affairs* (1993) 42 FCR 330; [115 ALR 75](#) at [90](#) ^{CB}, Gummow J accepted a submission to the effect that, by 2 April 1984 (when the Migration Act 1958 was amended), “the consequence of Australia’s emergence as a fully independent sovereign nation was that the term ‘alien’ in [s 51\(xix\)](#) of the Constitution had become synonymous with ‘non-citizen’.” See also *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [\(1992\) 110 ALR 97](#) at [112](#) ^{CB} per Brennan, Deane and Dawson JJ.

The power in [s 51\(xix\)](#) pursuant to which Parliament can enact legislation to treat the inhabitants of a territory as citizens also enables Parliament to treat the inhabitants of a territory that has become a new independent state as aliens. Thus, a person born in Papua at a time when Papua was administered by Australia as part of the Territory of Papua and New Guinea and who was, at the time of birth, an Australian citizen, could validly be deprived of that citizenship when Papua became independent: *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439; [218 ALR 483](#); [\[2005\] HCA 36](#); [BC200505501](#) ^{CB}.

The cases in this area must be seen in the light of the ruling in *Love v Commonwealth; Thoms v Commonwealth* [\[2020\] HCA 3](#); [BC202000584](#) ^{CB} in which *Singh v Commonwealth* and *Koroitamana v Commonwealth*, both above, and other authorities are considered.

Love holds that there is a class of persons who are not “aliens” within the meaning of [s 51\(xix\)](#): this class includes persons who are not citizens of Australia by birth, who are citizens of a foreign country but who are not naturalised as Australian citizens, but who are Aboriginal persons.

In issue in *Love* was whether two persons (Mr Love and Mr Thoms) who had lived in Australia for substantial periods of time as holders of visas permitting their residence, became unlawful non-citizens after their visas were cancelled under the Migration Act 1958 and liable to removal from Australia; if so, this would be on account of them having been convicted of offences carrying jail terms of 12 months or more thereby failing the character test under that Act. That is, if the Act could operate lawfully in their cases — that is, if they were aliens within [s 51\(xix\)](#). That was the power being relied upon by the Commonwealth in each case.

A majority (Bell, Nettle, Gordon and Edelman JJ) in separate judgments held that the power in [s 51\(xix\)](#) did not extend to allow the delegate of the Minister to exercise a power of cancellation under the Act in that neither of the persons was an “alien” providing, in the case of Mr Love, but not Mr Thoms, proof of Aboriginality was made out in the Federal Court. That meant, if made out, that the Act could not be relied upon under [s 51\(xix\)](#) to justify their removal of either.

Although it was acknowledged that they expressed their reasoning differently (see per Bell J at [81]), a clear statement in the matter was given by Nettle J (at [286]) as follows:

although each of the plaintiffs was born abroad and is a non-citizen, each has long resided in Australia, each is of Aboriginal descent, each identifies as a member of an Aboriginal community, and each has been recognised as a member of an Aboriginal community.

Bell J (at [81]) said she was authorised by the other members of the majority to say that “we agree that Aboriginal Australians ... are not within the reach of the ‘aliens’ power conferred by s 51(xix) of the *Constitution*”. Gordon J (at [295]) said whether “either plaintiff is an alien is a constitutional question, not a statutory question”. Edelman J (at [466]) said that “the constitutional concept of an alien is not co-terminous with any persons whom the Commonwealth Parliament chooses to make statutory citizens.”

In marked contrast, Kiefel CJ (at [5]) said it is “settled that it is for the Parliament, relying on s 51(xix), to create and define the concept of Australian citizenship and its antonym, alienage.” Her Honour together with Gageler and Keane JJ dissented. Gageler J (at [128]) said that “[m]orally and emotionally engaging as the plaintiffs’ argument is, the argument is not legally sustainable.” At [132] he said he could not “countenance the existence of a constitutional category of ‘non-citizen non-aliens’” and, at [133], he said also he could not be “party to a process of constitutional interpretation or constitutional implication which would result in the inference of a race-based constitutional limitation on legislative power.” Keane J (at [147]) said that neither plaintiff was born in Australia and each was a citizen of a foreign country; as, also, neither had been naturalised as an Australian citizen, each was in consequence within s 51(xix) as an alien.

The ruling in *Love* is significant and it remains to be seen what may be its long-term effects both on the Australian community generally and on the operation of the Migration Act and other laws in particular.

[1505.235] British subjects

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xix).

(CTH) [Australian Citizenship Act 1948](#).

Prior to the decision in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391; [182 ALR 657](#); [\[2001\] HCA 51](#); [BC200105242](#) ^{CB} (*Re Patterson*) with the establishment of separate Australian citizenship by the Nationality and Citizenship Act 1948 a British subject, who did not have Australian citizenship, could be dealt with as an alien under [s 51\(xix\)](#): *Pochi v Macphee* (1982) 151 CLR 101; [43 ALR 261](#) ^{CB}; *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178; [43 ALR 261](#); 62 ALJR 539; [BC8802624](#) ^{CB} (*Nolan*). However, in *Re Patterson*, a majority of the Court (McHugh, Gaudron, Kirby and Callinan JJ; Gleeson CJ, Gummow and Hayne JJ dissenting) overruled *Nolan*, above, in so far as it determined that a citizen of the United Kingdom who had entered Australia before the amendment in 1987 of the Australian Citizenship Act 1948, was an alien; prior to that amendment, a British subject, by definition, could not be an “alien”.

But, in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28; [203 ALR 143](#); [\[2003\] HCA 72](#); [BC200307491](#) ^{CB} the decision in *Re Patterson* was itself overruled, and the authority of *Nolan* was restored.

Shaw, above, is referred to at various points in the judgments *Love v Commonwealth* [2020] HCA 3; BC202000584 ^{CB}, in particular by Bell J at [60], with no evident disapproval.

There is subsequent discussion of the meaning of “aboriginality” in *Hackett (a pseudonym) v Secretary, Department of Communities and Justice* (2020) 379 ALR 248; [2020] NSWCA 83; BC202003687 ^{CB}.

Shaw was applied most recently in *Chetcuti v Commonwealth* (2021) 392 ALR 371; [2021] HCA 25; BC202107288 ^{CB}, see especially at [34]. There it was observed that not only was there no need to explore the applicability of the aliens power to a person “not born within the dominions and allegiance of the Imperial Crown who acquired under local naturalisation legislation in one part of the British Empire the status of a British subject not recognised in other parts”; “[e]ven less is there need to re-examine the present position of an Aboriginal Australian ... recently examined in *Love v Commonwealth*” ((2020) 270 CLR 152; 375 ALR 597; [2020] HCA 3; BC202000584 at [81] ^{CB}).

[1505.240] Scope of the power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xix).

(CTH) [Migration Act 1958](#) Pt 2A.

“The power to make laws with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it”: *Robtelmes v Brennan* (1906) 4 CLR 395 at 404. See also *Al-Kateb v Godwin* (2004) 219 CLR 562; 208 ALR 124; [2004] HCA 37; BC200404861 ^{CB}; *Re Woolley; Ex parte Applicants M276/2003* (2004) 210 ALR 369; 79 ALJR 43; [2004] HCA 49; BC200406534 ^{CB}; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; 208 ALR 271; [2004] HCA 36; BC200404860 ^{CB}.

Following the ruling in *Love v Commonwealth* [2020] HCA 3; BC202000584 ^{CB}, it is clear, however, by majority, that s 51(xix) does not give power to the Parliament to deal with Aboriginal persons (including Aboriginal persons not born here and not naturalised as citizens) as “aliens”. “The legislative power conferred by s 51(xix) with respect to ‘aliens’ is expressed in unqualified terms. It prima facie encompasses the enactment of a law with respect to non-citizens generally. It also prima facie encompasses the enactment of a law with respect to a particular category or class of non-citizens, such as non-citizens who are illegal entrants or non-citizens who are in Australia without having presented a visa or obtained an entry permit. Such a law may, without trespassing beyond the reach of the legislative power conferred by s 51(xix), either exclude the entry of non-citizens or a particular class of non-citizens into Australia or prescribe conditions upon which they may be permitted to enter and remain; and it may also provide for their expulsion and deportation”: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25–6; 110 ALR 97 at 113 per Brennan, Deane and Dawson JJ. These observations, as regards those persons claiming Aboriginality, must now be seen in light of the decision in *Love v Commonwealth*, above.

In *Cunliffe v Commonwealth* (1994) 182 CLR 272; 124 ALR 120 ^{CB}, all members of the High Court held that s 51(xix) supported Pt 2A of the Migration Act 1958. Part 2A provided for the registration of migration agents and subject to certain exceptions, prohibited an unregistered person from providing (for reward) advice and assistance to a person seeking to enter Australia as an immigrant or a

refugee. Because the law regulated the provision of immigration assistance to aliens and afforded aliens a measure of protection against exploitation, it had a sufficient connection with the aliens power, [s 51\(xix\)](#).

“The prohibitions or restrictions imposed by Pt 2A are not imposed on aliens, but their operation affects uniquely aliens who wish to give immigration assistance to, or make immigration representations on behalf of, aliens. The prohibitions or restrictions imposed by Pt 2A are not imposed on aliens, but their operation affects uniquely aliens who wish to make, who are making or who have made entrance applications”: *Cunliffe v Commonwealth*, above, *ALRat* 144 per Brennan J.

In *Commonwealth v AJL20* ([2021](#)) [391 ALR 562](#); [\[2021\] HCA 21](#); [BC202105363](#) ^{CB} the plurality observed that “[i]t has long been recognised that a law that provides for the executive detention of an alien, in order to prevent unauthorised entry into the Australian community or to facilitate removal from Australia, is also within the scope of s 51(xix)” (at [21]). Although the “amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of Ch III of the Constitution, involuntary detention being ordinarily within the exclusive province of the courts” (at [22]), “authority to detain (or to direct the detention of) an alien in custody for the purposes of expulsion or deportation” can “be conferred on the Executive [by the Parliament] without infringement of Ch III’s exclusive vesting of the judicial power of the Commonwealth in the courts which it designates” (*Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1 at 32; [110 ALR 97](#); [BC9202669](#) ^{CB}, cited in *AJL20* at [22]):

[25] Whether a law authorising or requiring detention is reasonably capable of being seen as necessary for the purpose of segregation pending receipt, investigation and determination of any visa application or removal of an unlawful non-citizen depends on the connection between the detention and segregation or removal [*Commonwealth v AJL20*].

SECTION 51(xx) — FOREIGN CORPORATIONS, AND TRADING OR FINANCIAL CORPORATIONS FORMED WITHIN THE LIMITS OF THE COMMONWEALTH

[1505.243] Generally

On the law relating to corporations see Corporations Act 2001. There is no reason to read s 51(xx) as granting power to deal only with classes of artificial legal entities having characteristics fixed at the time of federation: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[22\]](#) ^{CB}.

[1505.245] Foreign corporations

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xx).

An entity that is formed under the law of a foreign country and accorded a corporate legal personality, either by that law or by Australian law, is a foreign corporation for the purposes of [s 51\(xx\)](#) of the Constitution: see generally *New South Wales v Commonwealth* (1990) 169 CLR 482 at 498; [90 ALR 355](#); (1990) 64 ALJR 157; [BC9002907](#) ^{CB}; *R v Federal Court of Australia; Ex parte Western Australian National Football League Inc* (1979) 143 CLR 190 at 238; [23 ALR 439](#); 53 ALJR 273; (1979) ATPR ¶40-103. See also *New South Wales v Commonwealth* ([2006](#)) [231 ALR 1](#); 81 ALJR 34; [\[2006\] HCA 52](#); [BC200609129](#) at [\[77\]](#) ^{CB}; *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[20\]](#) ^{CB}.

[1505.250] Trading corporations

A trading corporation is a corporation whose trading activities form a sufficiently significant proportion of its overall activities so as to merit its description as a trading corporation: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; [23 ALR 439](#) ^{CB}. It is not necessary to show that trading is the corporation's predominant or characteristic activity, or that the corporation was formed for the purpose of trading: *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#) ^{CB}. However, the corporation's trading activities must be more than slight or merely incidental to some other principal activity, such as religion or education: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)*, above, ALR at 234. The "activities" test determines whether a corporation is a trading corporation or not: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[14\]](#) ^{CB}.

[1505.255] Examples

The corporations classified as trading corporations on this approach have included incorporated associations promoting and organising professional football in Western Australia and South Australia, and an incorporated association sponsoring a team of football players in one of those competitions: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; [23 ALR 439](#) ^{CB}; and a statutory authority, established by the State of Tasmania, which generated, distributed and sold electrical power as a public utility: *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#) ^{CB}. Queensland Rail, a statutory authority, having functions including "managing railways" was held to be a trading corporation in *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[41\]](#) ^{CB}.

[1505.260] "shelf companies"

Where a corporation has not yet commenced its activities, the stated purposes of its incorporation may be used to classify it as a trading corporation: *Fencott v Muller* (1983) 152 CLR 570; [46 ALR 41](#); 57 ALJR 317; (1983) ATPR 40–350 ^{CB}.

[1505.265] Meaning of "trading"

"Trading" includes those activities which produce revenue: the concept is not limited "to buying and selling at a profit; it extends to business activities carried on with a view to earning revenue"; and a prohibition on the distribution of profits to a corporation's members will not prevent it being characterised as trading, although it will be relevant to that characterisation: *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 235 and 236; [23 ALR 439](#). See also [1505.350] above.

[1505.270] Financial corporations

"[T]he words 'financial corporation'... describe a corporation which engages in financial activities or perhaps is intended so to do." Financial activities need not be the predominant activities of the corporation: if a corporation "engages in financial activities in the course of carrying on its primary or dominant undertaking", it will be classified as a financial corporation: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282 at 305; [44 ALR 1](#). It is a corporation's "predominant or characteristic" activity which must be focused on: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[72\]](#) ^{CB}. "Financial" activities include "transactions in which the subject of the transaction is finance (such as borrowing or lending money), as distinct from transactions (such as the purchase or sale of particular goods for a monetary consideration) in which finance, although involved in the payment of the price, cannot properly be seen as constituting the subject of the transaction": *Re Ku-ring-gai Co-op Building*

Society (No 12) Ltd (1978) 36 FLR 134; [22 ALR 621](#) at [642](#); (1978) ATPR 40–094 [CB](#). The constitutional phrase is one directed to identifying a business which deals in finance: *Finance Sector Union of Australia v Unimoni Pty Ltd* [\[2019\] FCA 1128](#); [BC201906471](#) at [\[79\]](#) [CB](#).

[1505.275] Examples

Adopting this approach, the High Court has classified as a financial corporation an agency established under State legislation to administer a superannuation fund for State government employees, because the agency engaged in substantial investment activities, such as making commercial and housing loans: *State Superannuation Board v Trade Practices Commission* (1982) 150 CLR 282; [44 ALR 1](#) [CB](#).

[1505.285] Corporations excluded from s 51(xx)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xx).

Amongst the corporations which will not be subject to the Commonwealth's power under [s 51\(xx\)](#) will be a corporation whose "principal activity [is] religion or education" and whose trading activity is "so slight and so incidental ... that it could not be described as a trading corporation" (*R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 234; [23 ALR 439](#)) and a corporation which is the holding company, a subsidiary, or a subsidiary of the holding company, of one of the three types of corporations listed in [s 51\(xx\)](#): *Actors and Announcers Equity Assn of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 195, 209 and 210; [40 ALR 609](#). This particular ruling could seem doubtful. A holding company of a s 51(xx) corporation may on occasion itself be a foreign trading or financial corporation and, for that reason, would seem to be a constitutional corporation on its own. The Authority in *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[38\]](#) [CB](#) was created as a distinct entity — "a separate right and duty bearing entity" which could own and possess property and had perpetual succession — and thus had "the full character of a corporation".

[1505.290] Obligations on persons other than corporations

"A law may be one with respect to a trading corporation although it casts obligations upon a person other than a trading corporation": *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 183, 194–5, 201, 212, 220 and 222; [40 ALR 609](#); *New South Wales v Commonwealth* [\(2006\) 231 ALR 1](#); 81 ALJR 34; [\[2006\] HCA 52](#); [BC200609129](#) at [\[293\]](#), [\[295\]](#), [\[327\]](#) [CB](#). "[W]hen in the legitimate exercise of the corporations power duties are imposed on corporations in relation to their trading activities, breach of which creates a civil liability, the power extends to the imposition of duties on natural persons, breach of which also creates a civil liability, not to engage in conduct which assists or facilitates a contravention by a corporation of duties thus imposed on it": *Fencott v Muller* (1983) 152 CLR 570 at 599; [46 ALR 41](#); 57 ALJR 317; (1983) ATPR 40–350. See also *United Firefighters Union of Australia v Country Fire Authority* [\(2015\) 315 ALR 460](#); [\[2015\] FCAFC 1](#); [BC201500011](#) [CB](#).

[1505.295] The width of the power conferred by s 51(xx)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51, s 51(xx).

In *New South Wales v Commonwealth* [\(2006\) 231 ALR 1](#); 81 ALJR 34; [\[2006\] HCA 52](#); [BC200609129](#) [CB](#), the High Court held that [s 51\(xx\)](#) supported a wide-ranging law for the regulation

of the industrial relations of constitutional corporations. That law created a national workplace relations system based on the corporations power that was intended to apply to a majority of Australia's employers and employees. Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ held that:

- A law may be characterised as a law with respect to more than one of the subject-matters set out in [s 51](#). To describe a law as “really”, “truly” or “properly” characterised as a law with respect to one subject-matter, rather than another, bespeaks fundamental constitutional error: at [73].
- Section [51\(xx\)](#) confers a power to make laws with respect to particular juristic persons. It is what was described in argument as “a persons power” — it is not “a power with respect to a function of government, a field of activity or a class of relationships”: at [173]. (But compare *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[38\]](#) [\[CB\]](#)).
- The following observations of Gaudron J in *Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346; [172 ALR 257](#); [\[2000\] HCA 34](#); [BC200003156](#) at [\[83\]](#) [\[CB\]](#) should be adopted: “[T]he power conferred by [s 51\(xx\)](#) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.”: at [178].
- “[T]here is no evident basis upon which a law which imposes a duty or liability, or confers a right or privilege, *only* on a constitutional corporation should not be characterised as a law with respect to constitutional corporations ... [L]aws regulating ‘the activities, functions, relationships and the business’ of a constitutional corporation, and laws creating ‘rights, and privileges belonging to such a corporation, [imposing] obligations on it and, in respect to those matters, [regulating] the conduct of those through whom it acts’ including its employees, and regulating ‘those whose conduct is or is capable of affecting its activities, functions, relationships or business’ would, on this test, be properly characterised as laws with respect to constitutional corporations”: at [181].
- “[T]he impugned provisions of the Amending Act which depend upon [s 51\(xx\)](#) either single out constitutional corporations as the object of statutory command (and in that sense have a discriminatory operation) or, like the legislation considered in *Fontana Films*, are directed to protecting constitutional corporations from conduct intended and likely to cause loss or damage to the corporation. In so far as the plaintiffs’ contentions required tests of distinctive character or discriminatory operation to be understood as inserting a new or different filter into the process of characterisation those contentions should be rejected. A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in *Fontana Films* or, as Gaudron J said in *Re Pacific Coal*, ‘laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations’ are laws with respect to constitutional corporations”: at [198] (footnotes omitted).
- As “it is within the corporations power for the Parliament to regulate employer-employee relationships and to set up a framework for this to be achieved, then it also is within power to authorise registered bodies to perform certain functions within that scheme of regulation. It also is within power to require, as a condition of registration, that these organisations meet requirements of efficient and democratic conduct of their affairs”: at [322].

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 149, 148, 153; [46 ALR 625](#); 57 ALJR 450; [BC8300075](#) ^{CB}; *Victoria v Commonwealth* (1996) 187 CLR 416 at 539; [138 ALR 129](#) at [188–9](#); 70 ALJR 680; [BC9603985](#) ^{CB}; *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; [40 ALR 609](#); 56 ALJR 366; [BC8200068](#) ^{CB}.

[1505.300] The narrow view of s 51(xx)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xx).

Following the decision in *New South Wales v Commonwealth* ([2006](#)) [231 ALR 1](#); 81 ALJR 34; [2006] HCA 52; [BC200609129](#) ^{CB}, it is clear that the narrow view of the scope of [s 51\(xx\)](#) that had previously been favoured by Justices to the effect that s 51(xx) only supported laws which relate to the trading and financial activities of trading and financial corporations has not prevailed: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169 at 182–3; [40 ALR 609](#). See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 117–8 and 202; [46 ALR 625](#); *Re Dingjan*; *Ex parte Wagner* (1995) 183 CLR 323; [128 ALR 81](#) at [95](#); 69 ALJR 284; [BC9506436](#) ^{CB}.

[1505.305] Laws supported under s 51(xx)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xx).

Amongst the aspects of corporate activities which have been held (or assumed) to fall within the scope of [s 51\(xx\)](#) are:

- the creation of a national industrial relations regime: *New South Wales v Commonwealth* ([2006](#)) [231 ALR 1](#); 81 ALJR 34; [2006] HCA 52; [BC200609129](#) ^{CB};
- the monopolistic or anti-competitive practices of trading and financial corporations: *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; [1972] ALR 3 ^{CB};
- the quality of goods and services supplied to consumers by foreign, trading and financial corporations: *R v Industrial Court*; *Ex parte CLM Holdings Pty Ltd* (1977) 136 CLR 235; [13 ALR 273](#) ^{CB}; *Fencott v Muller* (1983) 152 CLR 570; [46 ALR 41](#); 57 ALJR 317; (1983) ATPR 40–350 ^{CB};
- the protection of the business of trading corporations from secondary boycotts: *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169; [40 ALR 609](#) ^{CB}; see also *Victoria v Commonwealth* (1996) 187 CLR 416 at 557–8; [138 ALR 129](#) at [203–4](#) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); and
- the construction of a dam by an electricity authority: *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#) ^{CB}.

[1505.310] Incorporation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xx).

[Section 51\(xx\)](#) is a power “with respect to ‘formed corporations’”. That being so, the words ‘formed within the limits of the Commonwealth’ exclude the process of incorporation itself”; and [s 51\(xx\)](#) “is not a power to bring into existence the artificial legal persons upon which laws made under the power can operate”: *New South Wales v Commonwealth (The Immigration Case)* (1990) 169 CLR 482 at 498; [90 ALR 355](#). Absent referral of power under s 51(xxxvii), the trading or financial corporations formed within the limits of the Commonwealth to which s 51(xx) refers will typically be constituted and organised according to the law of a State — foreign corporations being constituted and organized according to the law of another jurisdiction: *Communications, Electrical, Electronics, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail* (2015) 256 CLR 171; [318 ALR 1](#); [\[2015\] HCA 11](#); [BC201502297](#) at [\[20\]](#) [CB](#).

SECTION 51(xxi) — MARRIAGE

[1505.315] The meaning of “marriage”

In the 19th century, “marriage” was defined as “the union of one man and one woman, for life to the exclusion of all others”: *Hyde v Hyde* (1866) LR [1 PD 130](#) [☞](#) at [133](#) [☞](#). The possibility of a wider view, sufficient to encompass an established de facto marriage, is canvassed in P H Lane, *Commentary on the Australian Constitution*, 1986, and in *Russell v Russell* (1976) 134 CLR 495 at 549; [9 ALR 103](#). But see Constitutional Commission, *Final Report*, 1988, p 672.

[1505.320] The primary aspects of marriage

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxi).

[Section 51\(xxi\)](#) authorises the Parliament to regulate the primary aspects of marriage, the “forms and requisites” of the relationship, the “conditions and circumstances in which men and women might enter into matrimony, the method of doing so and the consequences of incapacities, impediments and informalities”: *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 560 and 579 (the *Marriage Act* case).

[1505.325] Bigamy

L Legislation cited in this paragraph

(CTH) [Marriage Act 1961](#) Section 94.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxi).

Section 94 of the Marriage Act 1961 (Cth), which made bigamy a Commonwealth offence, is supported by [s 51\(xxi\)](#): it is a law with respect to “a marriage ceremony with no capacity to do so”: *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 547 (the *Marriage Act* case).

[1505.330] The secondary aspects of marriage

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxi).

[Section 51\(xxi\)](#) authorises the Parliament to regulate the secondary aspects of marriage, “the mutual rights and obligations of the spouses”, “the effect of marriage upon the relationship of those who marry and their children”, and “the personal relationships that are the consequences of

marriage”: *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 at 572, 574 and 580 (the *Marriage Act* case).

[1505.335] Legitimation

L Legislation cited in this paragraph

(CTH) [Marriage Act 1961](#) ss 89, 90.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxi).

Sections 89 and 90 of the Marriage Act 1961 (Cth), providing that a child born outside marriage should be legitimated by the subsequent marriage of the child's parents, are supported by [s 51\(xxi\)](#): *Attorney-General (Vic) v Commonwealth* (1962) 107 CLR 529 [CB](#) (the *Marriage Act* case).

[1505.340] Children

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxi).

[Section 51\(xxi\)](#) authorises the Parliament to confer jurisdiction on the Family Court of Australia, in proceedings between parties to a marriage, over “the custody, guardianship or maintenance of, or access to, a child of the marriage”, independent of any proceedings for such principal relief as dissolution of marriage.

[1505.343] Authorisation of sterilisation of children

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxi), s 51(xxii).

(CTH) [Family Law Act 1975](#) Pt VII.

The question of sterilisation of a child of a marriage arises out of the marriage relationship and the sterilisation of the child arises from the custody or guardianship of the child. It follows that [s 51\(xxi\)](#) and [s 51\(xxii\)](#) of the Constitution give the Parliament the power to legislate so as to confer jurisdiction on the Family Court to authorise the sterilisation of a child of a marriage: *Secretary, Dept of Health and Community Services v JWB* (1992) 175 CLR 218 at 261; [106 ALR 385](#) at [413](#) (Marion's case); *P v P* (1994) 181 CLR 583; [120 ALR 545](#) at [555](#) [CB](#). In the latter case, Mason CJ, Deane, Toohey and Gaudron JJ said;

“[Paragraph \(xxi\)'s](#) grant of legislative power with respect to ‘Marriage’ encompasses laws dealing with the protection or welfare of children of a marriage in so far as the occasion for such protection or welfare arises out of, or is sufficiently connected with, the marriage relationship. To a significant extent, the operation of [para \(xxi\)](#) overlaps [para \(xxii\)'s](#) express conferral of legislative power with respect to ‘parental rights, and the custody and guardianship of infants’ in relation to ‘Divorce and matrimonial causes’. The authorisation of medical treatment of an incapable child of a marriage, including medical treatment of the kind involved in *Marion's case* and in this case, is something which is directly related to the protection and welfare of the particular child and which arises out of, and is itself an aspect of, the relevant marriage relationship. To the extent that the relevant provisions of Pt VII of the Family Law Act confer jurisdiction to give or withhold such authorisation, they are a law with respect to marriage within [s 51\(xxi\)](#). Moreover, the relevant provisions of Pt VII are, in the context of that conferral of jurisdiction upon the Family Court, directly concerned with parental rights

and the custody and guardianship of infants in relation to divorce and matrimonial causes and are accordingly within the grant of legislative power contained in [s 51\(xxii\)](#).”

[1505.345] Parties to proceedings

The Parliament may confer jurisdiction on the Family Court to determine proceedings for the custody of a child of a marriage brought by either the surviving party to the marriage or “any other person”, after the death of the child's custodial parent (*Vitzdamm-Jones v Vitzdamm-Jones* (1981) 148 CLR 383; [33 ALR 537](#) ^{CB}); or between the two parties to a marriage on the one hand and the grandmother of the child of the marriage on the other: *V v V* (1985) 156 CLR 228; [60 ALR 522](#) ^{CB}.

[1505.350] State child welfare legislation

L Legislation cited in this paragraph

(CTH) [Family Law Act 1975](#) Section 10(3).

Section 10(3) of the Family Law Act 1975 (Cth), which gave effect to a custody of the Family Court notwithstanding an earlier order under state child welfare legislation, is beyond the power of the Commonwealth Parliament: *R v Lambert; Ex parte Plummer* (1980) 146 CLR 447; [32 ALR 505](#) ^{CB}.

[1505.355] Ex-nuptial children

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxi).

The power conferred by [s 51\(xxi\)](#) extends only to a natural or adopted child of the marriage between the parties: *Russell v Russell* (1976) 134 CLR 495; [9 ALR 103](#) ^{CB}. See also *Cormack v Salmon* (1984) 156 CLR 170; [56 ALR 245](#) ^{CB}; *Re Cook; Ex parte C* (1985) 156 CLR 249; [60 ALR 661](#) ^{CB}; *Re F; Ex parte F* (1986) 161 CLR 376; [66 ALR 193](#) ^{CB}.

[1505.360] The reference of power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxvii).

(NSW) [Commonwealth Powers \(Family Law - Children\) Act 1986](#).

(QLD) [Commonwealth Powers \(Family Law - Children\) Act 1990](#).

(SA) [Commonwealth Powers \(Family Law\) Act 1986](#).

This limitation has largely been removed by a reference of power to the Commonwealth by five of the states, so as to invoke the power conferred on the Parliament by [s 51\(xxxvii\)](#). The reference authorises the Parliament to legislate generally with respect to the maintenance of children, the payment of expenses in relation to children or child bearing and the custody and guardianship of, and access to, children; but does not include matters relating to child welfare under specified state child welfare legislation nor, apart from the Victorian reference, the matter of the adoption of children. The relevant legislation is:

Commonwealth Powers (Family Law — Children) Act 1986 (NSW);

Commonwealth Powers (Family Law — Children) Act 1990 (Qld);

Commonwealth Powers (Family Law) Act 1986 (SA);

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

Commonwealth Powers (Family Law) Act 1987 (Tas);

Commonwealth Powers (Family Law — Children) Act 1986 (Vic).

[1505.365] Property

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxi), s 51(xxii).

Neither [s 51\(xxi\)](#) nor [s 51\(xxii\)](#) will support Commonwealth legislation which would “deprive a third party of an existing right” or impose on that third party “a duty which it would not otherwise be liable to perform”: *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354; [33 ALR 631](#). The Parliament may authorise a Family Court official to execute a transfer of a husband's shares in a family company in favour of his wife; but cannot authorise the Family Court to order a company and directors of that company who are not parties to the marriage to register a transfer of the husband's shares in the company to the wife: *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337; [33 ALR 631](#) [CB](#).

The Parliament may authorise the Family Court to order a husband not to exercise his votes as a director and shareholder in a family company so as to frustrate the wife's access to property legally owned by the company: *R v Dovey; Ex parte Ross* (1979) 141 CLR 526; [23 ALR 531](#) [CB](#).

SECTION 51(xxii) — DIVORCE AND MATRIMONIAL CAUSES; AND IN RELATION THERETO, PARENTAL RIGHTS, AND THE CUSTODY AND GUARDIANSHIP OF INFANTS

[1505.370] Matrimonial causes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxii).

Traditionally, a “matrimonial cause” included court proceedings for the dissolution of marriage, for a declaration of nullity of a purported marriage, for judicial separation, for restitution of conjugal rights and for jactitation of marriage: Divorce and Matrimonial Causes Act 1857 (UK), s 6. The juxtaposition, in s 51(xxii), of the terms “divorce”, “matrimonial causes” and “custody” indicates that the expression “matrimonial causes” has a restricted meaning: *Lansell v Lansell* (1964) 110 CLR 353 at 368; *Russell v Russell* (1976) 134 CLR 495 at 537–8; [9 ALR 103](#).

[1505.375] Ancillary relief

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [1505.340], [1505.365], s 51(xxi), s 51(xxii).

Proceedings for the settlement of property, for the payment of spousal maintenance or for the guardianship and custody of or access to children are not “matrimonial causes” in their own right: they may be dealt with under [s 51\(xxii\)](#) as proceedings ancillary or incidental to principal relief, such as proceedings for annulment or dissolution of marriage; or they may be dealt with under [s 51\(xxi\)](#), as arising out of the marriage relationship: *Russell v Russell* (1976) 134 CLR 495 at 538–9; [9 ALR 103](#); see [\[1505.340\]](#) and [\[1505.365\]](#).

SECTION 51(xxiii) — INVALID AND OLD-AGE PENSIONS

[1505.380] Not a general welfare power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxiii).

The Parliament is empowered by [s 51\(xxiii\)](#) to appropriate moneys for the purpose of invalid and old age pensions, “but it has no general power to legislate for social services”: *Attorney-General (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237 at 282. “The word ‘pensions’ denotes money payments”: *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 259.

SECTION 51(xxiiiA) — THE PROVISION OF MATERNITY ALLOWANCES, WIDOWS’ PENSIONS, CHILD ENDOWMENT, UNEMPLOYMENT, PHARMACEUTICAL, SICKNESS AND HOSPITAL BENEFITS

[1505.385] Alteration

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Paragraph (xxiiiA).

Paragraph (xxiiiA) was inserted by the Constitution Alteration (Social Services) 1945 No 81 of 1946, s 2.

[1505.390] Cash payments and services

The terms “allowances”, “pensions” and “endowment” appear to be limited to cash payments, while the term “benefits” covers “provisions made to meet needs arising from special conditions ... or from particular situations or pursuits ... whether the provision takes the form of money payments or the supply of things or services”, and includes any “pecuniary aid, service, attendance or commodity made available for human beings under legislation designed to promote social welfare or security”: *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 259, 260 and 279. See also *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 280; [69 ALR 631](#).

[1505.395] Limited to Commonwealth benefits etc

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxiiiA).

[Section 51\(xxiiiA\)](#) authorises the Commonwealth Parliament to legislate only “with respect to the providing by the Commonwealth of the benefits mentioned in the paragraph”; so that Parliament cannot require the states to provide, or prevent the states from providing, the forms of allowances, pensions, benefits and endowment referred to in [s 51\(xxiiiA\)](#); although there might be an inconsistency between Commonwealth and state laws relating to such matters, which would render invalid the relevant parts of the state law: *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 243–4 and 279. “[N]o express power is conferred on the Parliament to make laws to regulate the manner of performance of medical or dental services”: *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 557; [31 ALR 369](#). See also *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279; [69 ALR 631](#).

In *Williams v The Commonwealth* ([2012](#)) [288 ALR 410](#); 86 ALJR 713; [\[2012\] HCA 23](#); [BC201204253](#) [CB](#), Hayne J and Kiefel J both considered, and rejected, the argument that the Funding Agreement at issue, which related to the provision of chaplaincy services, could be supported by s 51(xxiiiA). Applying the reasoning in *Alexandra Private Hospital*, Hayne J considered that the provision of payment for a chaplain to a school was not a form of “benefits to students” because it did not involve

“the provision of material aid in satisfaction of human wants”: at [285]; see also Kiefel J at [574]. The other members of the court in *Williams* did not specifically address this question. For further discussion of *Williams* see [\[1605.5\]](#) below.

[1505.400] Prohibition on civil conscription

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxiiiA).

“[T]he prohibition contained in the words ‘but so as not to authorise any form of civil conscription’ in [s 51\(xxiiiA\)](#) applies only to the reference in the paragraph to the provision of ‘medical and dental services’; but if medical or dental services are provided in the form of, for example, sickness or hospital benefits, that provision must not authorise any form of civil conscription of such services: *Alexandra Private Geriatric Hospital Pty Ltd v Commonwealth* (1987) 162 CLR 271 at 279; [69 ALR 631](#).

[1505.405] Meaning of civil conscription

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxiiiA).

Section 7A of the Pharmaceutical Benefits Act 1947 (Cth), which obliged a medical practitioner to use a form supplied by the Commonwealth when prescribing certain listed drugs, infringed the prohibition on civil conscription contained in [s 51\(xxiiiA\)](#), which protected the providers of medical and dental services against not only compulsory enrolment in full time civilian service but also against compulsion to “engage in a particular occupation, perform particular work or perform work in a particular way”: *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 249. However, the prohibition is not infringed when the Parliament compels any medical practitioner, who opts to deliver a medical service which is to be financed by the Commonwealth, to deliver that service in accordance with a government-specified procedure — the prohibition “does not refer to compulsion to do, in a particular way, some act in the course of carrying on practice or performing a service, when there is no compulsion to carry on this practice or perform the service”: *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 557; [31 ALR 369](#). Accordingly, participating proprietors of Commonwealth-funded nursing homes (funded as a sickness and hospital benefit to their residents) can be required to conform to Commonwealth standards on bed numbers, the selection of residents, the fees to be charged to residents, the keeping of financial accounts and regular inspection of premises. Nevertheless, the prohibited “civil conscription” may be found not only in a law legally obliging practitioners to perform a service but also in a law which, because of economic or other pressure, places a practitioner under “practical compulsion” to perform that service: *General Practitioners Society in Australia v Commonwealth* (1980) 145 CLR 532 at 550, 565, 566; [31 ALR 369](#). The existence of practical compulsion to conform to professional standards in respect of any services provided does not constitute civil conscription in circumstances where there is no compulsion, legal or practical, to perform a professional service: *Wong v Commonwealth* (2009) 236 CLR 573; [252 ALR 400](#); [\[2009\] HCA 3](#); [BC200900209](#) at [\[209\]](#) ^{CB} and [\[226\]](#).

See also the discussion in *Wong v Commonwealth* (2009) 236 CLR 573; [252 ALR 400](#); [\[2009\] HCA 3](#); [BC200900209](#) at [\[209\]](#) ^{CB} at [18]–[54] and [174]–[192] of the use of extrinsic and historical material in interpreting [s 51\(xxiiiA\)](#).

SECTION 51(xxiv) — THE SERVICE AND EXECUTION THROUGHOUT THE COMMONWEALTH OF THE CIVIL AND CRIMINAL PROCESS AND THE JUDGMENTS OF THE COURTS OF THE STATES

[1505.410] Purpose of s 51(xxiv)

“The nature of this power, as well as the prior history of the subject to which it relates, provides strong ground for interpreting it as enabling the federal legislature to regulate the manner in which officers of the law in one state should act with reference to the execution of the process of another state. It is a legislative power given to the central legislature for the very purpose of securing the enforcement of the civil and criminal process of each state in every other state”: *Aston v Irvine* (1955) 92 CLR 353 at 364.

[1505.415] Deportation of offenders

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxiv).

In *Aston v Irvine* (1955) 92 CLR 353 [CB](#), the High Court said that s 18 of the (now repealed) Service and Execution of Process Act 1901 (Cth), which authorised a magistrate or justice of the peace in a state or territory of the Commonwealth to order the deportation of a person to another state or territory in response to a warrant issued from that other state or territory, was a valid law within [s 51\(xxiv\)](#); as was s 19 of the Act, which provided that a judge might review any order made by a magistrate or justice of the peace under s 18.

[1505.420] Not limited to judicial process

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxiv).

(CTH) [Service and Execution of Process Act 1992](#) s 76.

(NSW) [New South Wales Crime Commission Act 1985](#) New South Wales Crime Commission Act (NSW).

In *Ammann v Wegener* (1972) 129 CLR 415 [CB](#), the High Court held that the civil and criminal process which might be served and executed pursuant to a law made under [s 51\(xxiv\)](#) was not limited to the process of a court; accordingly, process which required a witness to appear and give evidence at a committal proceeding before a magistrate might be served and executed under s 16 of the (now repealed) Service and Execution of Process Act 1901 (Cth). Whether “the power extended to the process of Royal Commissions and tribunals which were not courts in the strict sense” was queried: 129 CLR 415 at 441.

In *Dalton v NSW Crime Commission* (2006) 226 ALR 570; 80 ALJR 860; [\[2006\] HCA 17; BC200603094](#) [CB](#), the High Court held that [s 51\(xxiv\)](#) supported s 76 of the Service and Execution of Process Act 1992. That section had been relied upon to support the service of a summons issued by the New South Wales Crime Commission upon a witness in Victoria. That summons was issued as part of the investigative process of the commission, not as part of the criminal process. Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ upheld the validity of s 76, holding that the words “civil and criminal” in s 51(xxiv) are not words of limitation: at [28]. They held that the term “process” in s 51(xxiv) is not limited to litigation conducted in the courts — that is, there may be “civil and criminal process” which is “of the States” but not “of the courts”: at [34]. The court declined to attempt to define the meaning of the word “process”. It was enough for the purposes of the case to decide that a summons issued under the New South Wales Crime Commission Act (NSW) was sufficiently analogous to subpoenas issued by courts so as to fall within the concept of a “process of the State”: at [48]–[53].

SECTION 51(xxv) — THE RECOGNITION THROUGHOUT THE COMMONWEALTH OF THE LAWS, THE PUBLIC ACTS AND RECORDS, AND THE JUDICIAL PROCEEDINGS OF THE STATES

[1505.425] Associated provision

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 118.

[Section 118](#) of the Constitution requires “full faith and credit” to be given throughout the Commonwealth to the laws, public Acts and records, and judicial proceedings of every state.

SECTION 51(xxvi) — THE PEOPLE OF ANY RACE FOR WHOM IT IS DEEMED NECESSARY TO MAKE SPECIAL LAWS

[1505.430] Alteration

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Paragraph (xxvi).

Paragraph (xxvi) was amended by the Constitution Alteration (Aboriginals) 1967 No 55 of 1967 s 2. The alteration had the effect of deleting the bracketed words, as indicated below: “The people of any race [, other than the aboriginal race in any State,] for whom it is deemed necessary to make special laws:”.

[1505.435] Special legislation for Aboriginal people

As a consequence of the 1967 alteration, “[i]t is now competent for the Parliament to make special laws with respect to the people of the Aboriginal race”: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186; [39 ALR 417](#). The power need not be exercised with respect to all persons of the race in question: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [46] and [83].

[1505.440] The Aboriginal race

The “Aboriginal race” refers to all Australian Aboriginal people, including any subgroup: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 180 and 274; [46 ALR 625](#). The biological element of “race” is necessary but not sufficient: “Physical similarities, and a common history, a common religion or spiritual beliefs and a common culture are factors that tend to create a sense of identity among members of a race and to which others have regard in identifying people as members of a race”; and “a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognised by the Aboriginal community as an Aboriginal”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 244 and 274; [46 ALR 625](#). “[T]he weight of authority is against the adoption of a merely genetic notion of the meaning of the word ‘Aboriginal’ and favours the following of ordinary usage”, relying on “social factors such as self-recognition as Aboriginal and recognition by the Aboriginal community”: *Queensland v Wyvill* (1989) 90 ALR 611 at [617](#).

[1505.445] Adversely discriminatory or repressive laws

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvi).

It has been said that “the primary object of the power is beneficial”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 242; [46 ALR 625](#) at [791](#).

It is not clear whether [s 51\(xxvi\)](#) would support a repressive or adverse discriminatory law. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 209; [39 ALR 417](#) at [447](#); 56 ALJR 625; [BC8200052](#) ^{CB}, it was said that a law under s 51(xxvi) “may be benevolent or repressive”. However, in *Kruger v Commonwealth* (1997) 190 CLR 1 at 111; [146 ALR 126](#) at [193](#); 71 ALJR 991; [BC9703253](#) ^{CB} (*Kruger*), Gaudron J said it was “arguable that that power only authorizes laws for the benefit of ‘the people of [a] race for whom it is deemed necessary to make special laws’”. Gummow J observed that s 51(xxvi) had permitted detrimental as well as beneficial legislation “at least in its original form”: *Kruger* at CLR 155; ALR 228.

In *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [152 ALR 540](#); 72 ALJR 722; [BC9800961](#) ^{CB}, it was argued that [s 51\(xxvi\)](#) authorises only beneficial legislation. Gummow and Hayne JJ rejected that argument (at [90]–[94]). Brennan CJ and McHugh J did not decide the question (at [20]). Gaudron J said that the power may embrace adversely discriminatory as well as beneficial laws, but said that at present it was unlikely that a law disadvantaging a race would be within power (at [44]). Kirby considered that the power did not authorise laws discriminating against a race (at [152]). The position is therefore not settled.

[1505.450] Cultural heritage

L Legislation cited in this paragraph

(CTH) [World Heritage Properties Conservation Act 1983](#) 11, Sections 8.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvi).

Sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth), which protect sites that are part of Australia's heritage and of particular significance to the people of the Aboriginal race, are supported by [s 51\(xxvi\)](#): *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#) ^{CB}. “[T]he cultural heritage of a people is so much of a characteristic or property of the people to whom it belongs that it is inseparably connected with them, so that a legislative power with respect to the people of a race, which confers powers to make laws to protect them, necessarily extends to the making of laws protecting their cultural heritage”: *Commonwealth v Tasmania*, above, CLR at 159.

[1505.451] Native title

L Legislation cited in this paragraph

(CTH) [Native Title Act 1993](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvi).

The Native Title Act 1993 (Cth), which recognises and protects native title while providing that such title may be extinguished by certain governmental acts, is supported by [s 51\(xxvi\)](#): “... the Native Title Act is ‘special’ in that it confers uniquely on the Aboriginal and Torres Strait holders of native title (the ‘people of any race’) a benefit protective of their native title ... The special quality of the law thus appears. Whether it was ‘necessary’ to enact that law was a matter for the Parliament to decide and, in the light of *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [107 ALR 1](#) ^{CB} [which recognised native title as part of the common law of Australia] there are no grounds on which this court could review the Parliament's decision, assuming it had the power to do so: *Western Australia v Commonwealth* (1995) 183 CLR 373 at 462; [128 ALR 1](#) at [44](#) per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[1505.455] Special laws

L Legislation cited in this paragraph(CTH) [Racial Discrimination Act 1975](#) 12, Sections 9.(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvi).(CTH) [World Heritage Properties Conservation Act 1983](#) 11, Sections 8.

Sections 9 and 12 of the Racial Discrimination Act 1975 (Cth), were outside the power granted by [s 51\(xxvi\)](#), because those sections “prohibit discrimination generally on the ground of race; that is, they protect the persons of any race from discriminatory action by reason of their race”: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 187; [39 ALR 417](#).

To be a special law, legislation must select a particular race for its benefits or penalties, but there is no requirement that the law must be with respect to all members of the race: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [46] and [83].

Sections 8 and 11 of the World Heritage Properties Conservation Act 1983 (Cth) comprise “special law” because there is “a special need to protect the sites for [Aborigines], a need which differs from, and in one sense transcends, the need to protect it for mankind”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 159; [46 ALR 625](#).

“[T]he special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race, not by reference to the circumstances which led the parliament to deem it necessary to enact the law. A special quality appears when the law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race. The law may be special even when it confers a benefit generally, provided the benefit is of special significance or importance to the people of a particular race”: *Western Australia v Commonwealth* (1995) 183 CLR 373; [128 ALR 1](#) at [43–4](#) [CB](#) per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

[1505.460] The “necessity” of the special law**L** Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvi).

The necessity of a special law is to be determined by the parliament, and is not justiciable: “The opinion of parliament that it is necessary to make a special law need not be evidenced by an express declaration to that effect; it may appear from the law itself”: *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 187; [39 ALR 417](#). In *Western Australia v Commonwealth* (1995) 183 CLR 373 at 460–2; [128 ALR 1](#) at [43](#), Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ stated that, subject to the “possibility of manifest abuse of the races power”, the judgment whether a particular law was “necessary” was for the parliament.

In *Kartinyeri v Commonwealth* (1998) 195 CLR 337; [152 ALR 540](#); 72 ALJR 722; [BC9800961](#) at [\[82\]](#) [CB](#), Gummow and Hayne JJ noted that it may be that the character of a law within s 51(xxvi) will be denied to a law enacted in a manifest abuse of that power of judgment. In the same case, Gaudron J said that there must be some material upon which the parliament may reasonably form a judgment that there is a difference necessitating some special legislative measure: at [39].

Section 51(xxvii) — Immigration and emigration**[1505.465] Associated provision**

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xix).

[Section 51\(xix\)](#) authorises the Parliament to make laws with respect to “naturalisation and aliens”.
[1505.470] Immigration

“In its ordinary meaning immigration implies leaving an old home in one country to settle in a new home in another country, with a more or less defined intention of staying there permanently or for a considerable time”: *Ah Sheung v Lindberg* [1906] VLR 323 at 332. However, the power will also support controlling the entry of persons into Australia whether for temporary or for permanent residence here: *Ex parte de Braic* (1971) 124 CLR 162 at 164. See also *R v Macfarlane*; *Ex parte O’Flanagan* (1923) 32 CLR 518 [CB](#).

“‘Immigrants’ include persons who are intending settlers in a country other than their own and seek to enter (or do enter) that country and to remain in it for the purpose of making a permanent home there, or who, having entered another country without any original intention to settle there, do in fact endeavour to remain in that country as members of the community. Control of immigration involves control of the admission of such persons and determination whether such admission is to be allowed to be permanent or only temporary”: *O’Keefe v Calwell* (1949) 77 CLR 261 at 276–7; [1949] ALR 381; (1949) 22 ALJR 576; [BC4900670](#) [CB](#).

The power may also extend to a person born in Australia who has made a permanent home abroad, where that person is not “a constituent part of the Australian Community”: *Donohoe v Wong Sau* (1926) 36 CLR 404 at 408.

[1505.475] Scope of the power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxvii).

“[T]he subject matter of the power is immigration, not immigrants ... Although the distinction is well taken, it cannot be pushed too far. A law about immigrants may be, and very often will be, a law about immigration”: *R v Director-General of Social Welfare (Vic)*; *Ex parte Henry* (1975) 133 CLR 369 at 381; [8 ALR 233](#).

“[I]t is now well settled that the concept of immigration extends beyond the actual act of entry into Australia to the process of absorption into the Australian community and that [s 51\(xxvii\)](#) confers legislative power in respect of both”: (1975) 133 CLR 369 at 376. See also *R v Forbes*; *Ex parte Kwok Kwan Lee* (1971) 124 CLR 168 at 172.

A law made under [s 51\(xxvii\)](#) may operate “at the time of entry and because of that entry”, and may take the form of conditions attached upon entry, to persist until the immigrant has been fully absorbed into the Australian community: (1975) 133 CLR 369 at 373–4. Such conditions may prevent absorption into the community: see *R v Forbes*; *Ex parte Kwok Kwan Lee* (1971) 124 CLR 168; [1971] ALR 715; [BC7100130](#) [CB](#).

[1505.480] Absorption into Australian community

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xix), s 51(xxvii).

The constitutional power under [s 51\(xxvii\)](#), to affect the position of an immigrant, will be lost once the person “becomes a member of the Australian community”: *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 64, 109–11 and 137. See also *R v Director-General of Social Welfare (Vic)*; *Ex parte Henry* (1975) 133 CLR 369 at 373, 374 and 382; [8 ALR 233](#).

The contrary view (“once an immigrant always an immigrant”), now clearly rejected, is set out in *Ex parte Walsh; Re Yates* (1925) 37 CLR 36 at 80 and 127–8; [1925] ALR 46; [BC2500003](#) ^{CB}; *Koon Wing Law v Calwell* (1949) 80 CLR 533 at 560–7; [1950] ALR 97; (1949) 24 ALJR 25; [BC4900640](#) ^{CB}.

Absorption into the community is irrelevant to the scope of the aliens power in [s 51\(xix\)](#). “[W]hile absorption reflects the fact that an activity of immigration has come to an end, it may coexist, and commonly coexists, with a legal status of alienage. Resident aliens may be absorbed into the community, but they are still aliens”: *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162; [193 ALR 37](#); [\[2002\] HCA 48](#); [BC200206567](#) at [\[42\]](#) ^{CB} and see also at [\[134\]](#), [\[211\]](#).

SECTION 51(xxix) — EXTERNAL AFFAIRS

[1505.485] Matters external to Australia

L Legislation cited in this paragraph
(CTH) Commonwealth of the Australia Constitution Act s 4(6)(a), s 51(xxix),.
(CTH) Seas and Submerged Lands Act 1973 .
(CTH) Navigation Act 1912 .
(CTH) Crimes Act 1914 ss 50BA, 50BC.
(CTH) Criminal Code s 102.5.
(CTH) Foreign Acquisitions and Takeovers Act 1975 s 21A.

The power contained in [s 51\(xxix\)](#) “extends ... to any affair which in nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole. For this purpose, the continent of Australia and the island of Tasmania are, in my opinion, bounded by the low-water mark on the coast”: *New South Wales v Commonwealth* (1975) 135 CLR 337 at 360; [8 ALR 1](#) (the *Seas and Submerged Lands* case). Consequently, the *Seas and Submerged Lands Act 1973* (Cth), which deals with the legal status of the territorial sea and the continental shelf of Australia, is a law with respect to “external affairs” within [s 51\(xxix\)](#). Similarly, provisions in the *Navigation Act 1912* (Cth), protecting shipwrecks on or near the coast of Australia, are supported by [s 51\(xxix\)](#): *Robinson v Western Australia Museum* (1977) 138 CLR 283 at 335, 342; [16 ALR 623](#). The provisions of the *War Crimes Act 1942* (Cth), as amended in 1988, declared that certain conduct in Europe during World War II constituted a crime punishable in Australia. Because these provisions attach legal consequences under Australian law to events outside Australia, they are a law with respect to external affairs within [s 51\(xxix\)](#): *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 528–31, 632–5, 695–6, 712–14; [101 ALR 545](#) per Mason CJ, Dawson, Gaudron, McHugh JJ.

In *Horta v Commonwealth* (1994) 181 CLR 183; [123 ALR 1](#) ^{CB}, the High Court held, in a unanimous judgment, that Commonwealth legislation establishing a cooperative regime for the exploitation of petroleum resources beneath the continental shelf between Australia and New Zealand was

supported by [s 51\(xxix\)](#). The legislation dealt with matters external to Australia; and, even if (as the minority had held in *Polyukhovich v Commonwealth*) some additional connection with Australia was required, that requirement was clearly satisfied here: see *Horta v Commonwealth* (1994) 181 CLR 183 at 194; [123 ALR 1](#) at [5–6](#). See also *Victoria v Commonwealth* (1996) 187 CLR 416 at 485; [138 ALR 129](#) at [145](#) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). In *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[153\]](#) ^{CB}, part of the challenged legislation, which empowered courts to make control orders to protect the public (defined to include the public in foreign countries) was upheld on the basis that it related to matters or things that lie outside the geographical limits of Australia. There was no suggestion in that case that some criteria additional to geographic externality needed be satisfied.

In *R v Hughes* (2000) 202 CLR 535; [171 ALR 155](#) ; [BC200002055](#); [\[2000\] HCA 22](#) at [\[42\]](#) ^{CB}, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ held that [s 51\(xxix\)](#) would support Commonwealth legislation authorising the Director of Public Prosecutions to prosecute an offence created by State law, where the offence related to investments in the United States — because the legislation related “to matters territorially outside Australia, but touching and concerning Australia”.

The “geographic externality” aspect of the external affairs power can also support laws that operate within Australia, if it does so by reference to facts that are sufficiently connected to matters external to Australia.

In *XYZ v Commonwealth* (2006) 227 CLR 532; [227 ALR 495](#); 80 ALJR 1036; [\[2006\] HCA 25](#); [BC200604187](#) ^{CB}, the validity of ss 50BA and 50BC of the Crimes Act 1914, which criminalised acts of child sex tourism by Australian citizens or residents while outside Australia, was challenged. A majority of the court (Gleeson CJ, Gummow, Hayne and Crennan JJ) upheld the challenged laws on the basis that the external affairs power enabled the Commonwealth to make laws with respect to matters, persons or things physically external to Australia, irrespective of any further connection with the country: at [10], [30], [38], [49]. Callinan and Heydon JJ dissented from that view and considered that the first three cases noted above should be overruled (at [206]). Kirby J did not decide whether geographical externality was sufficient, but he expressed some doubt on that point (at [114], [117]).

In *Ul-Haque v R* [\[2006\] NSWCCA 241](#); [BC200611461](#) at [\[7\]–\[9\]](#) ^{CB}, [25], the New South Wales Court of Criminal Appeal (in an interlocutory appeal) held that s 51(xxix) supported a terrorism charge in Australia because the conduct the subject of the charge involved conduct that was geographically external to Australia. That provided a sufficient connection to the external affairs power, despite the fact that the elements of the offence in question (s 102.5 of the Commonwealth Criminal Code) did not require any connection with matters external to Australia; and, indeed, expressly operated in relation to conduct whether inside or outside Australia.

In *Wight v Pearce* (2007) 157 FCR 485; [\[2007\] FCA 26](#); [BC200700216](#) ^{CB}, the operation of the power to prohibit the acquisition of urban land within Australia under s 21A of the Foreign Acquisitions and Takeovers Act 1975, as extended by s 4(6)(a) to natural persons who are not ordinarily resident in Australia, was upheld on the basis of the external affairs power because “[t]o say that a person is not ordinarily resident in Australia means that ordinarily that person is outside the geographical limits of Australia”: at [40]. The external affairs power applied despite the fact that the acquisition of land with which s 21A is concerned occurs within Australia: at [43]–[46].

[1505.490] Relations with other countries

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix).

“The relations of the Commonwealth with all countries outside Australia, including other dominions of the Crown, are matters which fall directly within the subject of external affairs”: *R v Sharkey* (1949) 79 CLR 121 at 136–7. Consequently, the parliament can render it an offence for a person to “excite disaffection against the Government or Constitution of any of the King’s Dominions”, as in s 24A(1)(c) of the Crimes Act 1918. Similarly, s 104(3) of the Navigation Amendment Act 1979, which repeals, within Australia, provisions of the Merchant Shipping Act 1894 (UK), is supported by [s 51\(xxix\)](#): *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351; [58 ALR 29](#) ^{CB}. In *XYZ v Commonwealth* (2006) 227 CLR 532; [227 ALR 495](#); 80 ALJR 1036; [\[2006\] HCA 25](#); [BC200604187](#) at [\[138\]–\[139\]](#) ^{CB}, Kirby J upheld the validity of legislation that criminalised acts of child sex tourism by Australian citizens or residents while outside Australia on the basis that the international responses to child sex tourism showed that it was a matter that would affect Australia’s relations with other countries: compare Callinan and Heydon JJ at [\[208\]–\[212\]](#). In *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[151\]](#) ^{CB}, Gummow and Crennan JJ said that “[t]he pursuit and advancement of comity with foreign governments and the preservation of the integrity of foreign states may be a subject matter of a law with respect to external affairs”, and attributed that same view to Gleeson CJ in *XYZ v Commonwealth* (2006) 227 CLR 532; [227 ALR 495](#); 80 ALJR 1036; [\[2006\] HCA 25](#); [BC200604187](#) at [\[18\]](#) ^{CB}.

[1505.495] Implementation of treaties

The Parliament may legislate to implement, for Australia, any international obligation which the Commonwealth Government had assumed under a bona fide international treaty, regardless of the subject matter of the obligation: *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#) ^{CB}. “[A] treaty obligation stamps the subject of the obligation with the character of an external affair unless there is some reason to think that the treaty had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament”: 158 CLR 1 at 218–19. See also *Richardson v Forestry Commission* (1988) 164 CLR 261; [77 ALR 237](#) ^{CB}; *R v Tang* (2008) [249 ALR 200](#); 82 ALJR 1334; [\[2008\] HCA 39](#); [BC200807527](#) ^{CB}.

[1505.500] Identifying an international obligation

The existence of an international obligation on Australia is a question of fact, which the court is obliged to decide; but, the existence of such an obligation depends upon the international community’s construction of the treaty or convention and the operation which that community would attribute to the treaty or convention in particular circumstances: *Queensland v Commonwealth* (1989) 167 CLR 232 at 241; [86 ALR 519](#). Accordingly, where an area in Queensland had been accepted by the World Heritage Committee for listing under the Convention for the Protection of the World Cultural and National Heritage, that acceptance determined the area’s status for the international community and was “conclusive of Australia’s international duty to protect and conserve it”: 167 CLR 232 at 242.

[1505.505] Federal clauses

Article 34 of the World Heritage Convention, requiring the central government in a federal system to implement the convention only where such implementation came “under the legal jurisdiction of the federal or central legislative power”, should not be read as denying the obligatory nature of the Commonwealth’s commitments under the Convention but as emphasising, in express terms, the Commonwealth’s obligations: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 136, 178, 228 and 263; [46 ALR 625](#).

[1505.510] Conformity to the treaty

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix).

To be regarded as an implementation of a treaty to which Australia is a party, the legislation must be “reasonably capable of being viewed as appropriate or adapted to” the terms of the treaty, so that “the legislative judgment could reasonably be made or that there is a reasonable basis for making it”: *Richardson v Forestry Commission* (1988) 164 CLR 261 at 347 and 295–6; [77 ALR 237](#).

In *R v Tang* ([2008](#) [249 ALR 200](#); 82 ALJR 1334; [\[2008\] HCA 39](#); [BC200807527](#) ^{CB}), the High Court held that the definition of slavery in s 270.1 of the Commonwealth Criminal Code fell within the definition of slavery in the International Convention to Suppress the Slave Trade and Slavery (1926) 212 UNTS 17; [1927] ATS 11, Art 1. The relevant definition in the Code was materially identical to the definition in the Convention, save that it incorporated some inclusive words relating to the situation where slavery results from a debt or contract. The relevant provisions of Div 270 were held to be reasonably capable of being considered appropriate and adapted to give effect to Australia's obligations under the Convention. They were therefore sustained by the external affairs power.

It is not an essential requirement for the validity of legislation implementing a treaty that the legislation comply with all the obligations assumed under the treaty: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 268; [46 ALR 625](#) (Deane J). “Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention”: *Victoria v Commonwealth* (1996) 187 CLR 416 at 489; [138 ALR 129](#) at [148](#) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

However, where an international obligation is expressed in qualified terms, it will be necessary for the implementing legislation to observe that qualification. So, where an ILO Convention obliged Australia to eliminate discrimination on employment on various grounds and on any additional grounds nominated by Australia after consultation with employers and employees, the High Court held that any law which proscribed a ground of discrimination on which there had been no consultation would derive no support from [s 51\(xxix\)](#) of the Constitution: *Victoria v Commonwealth* (1996) 187 CLR 416 at 531; [138 ALR 129](#) at [182](#) (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[1505.511] Consistency with international law

It is no objection to the validity of a law implementing a treaty, to which Australia is a party, that the treaty is inconsistent with the requirements or constraints of international law, or that Australia's entry into and implementation of the treaty may involve Australia in a breach of international law: *Horta v Commonwealth* (1994) 181 CLR 183 at 195; [123 ALR 1](#) at [6–7](#) per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[1505.515] Non-obligatory treaties

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix).

A treaty obligation is “sufficient, though not necessary” to invoke [s 51\(xxix\)](#): *Richardson v Forestry Commission* (1988) 164 CLR 261 at 332; [77 ALR 237](#). See also *Commonwealth v Tasmania* (1983) 158 CLR 1 at 123–4, 130, 131, 170 and 171; [46 ALR 625](#).

[1505.520] Bona fide treaty

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxix).

[Section 51\(xxix\)](#) cannot be invoked to implement a treaty which “had been entered into merely to give colour to an attempt to confer legislative power upon the Commonwealth Parliament” and “was demonstrated to be no more than a device to attract legislative power”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 219 and 259; [46 ALR 625](#). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 216 and 260; [39 ALR 417](#); *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 642, 658, 669 and 687.

[1505.525] Matters of international concern

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix).

In the absence of an international treaty, there is some suggestion in the authorities that [s 51\(xxix\)](#) will support legislation dealing with a matter of international concern: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 131–2, 171, 220 and 258; [46 ALR 625](#). In concluding whether a matter is one of international concern, the High Court must “form its own impression of the facts, in part on the basis of judicial notice”: 158 CLR 1 at 102. See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 219–20; [39 ALR 417](#). “However, unless standards are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern ... whether the enlivening factor be an obligation or a concern it is necessary to define it with some precision in order to ascertain the scope of the power”: *Polyukhovich v Commonwealth* (1991) 172 CLR 501; [101 ALR 545](#) at [576–7](#) ^{CB} per Brennan J.

In *XYZ v Commonwealth* (2006) 227 CLR 532; [227 ALR 495](#); 80 ALJR 1036; [\[2006\] HCA 25](#); [BC200604187](#) at [\[224\]–\[225\]](#) ^{CB} Callinan and Heydon JJ argued that “international concern” should not be accepted as providing a proper foundation for the operation of [s 51\(xxix\)](#). Kirby J left the question open, stating that the “suggestion that the constitutional validity of federal laws could be demonstrated by showing that they were made with respect to a ‘matter of international concern’ is still undeveloped in Australia”, but noting that this argument may “assign insufficient attention to the appearance of the word ‘external’ in connection with the word ‘affairs’”: at [127]. Indeed, while not deciding the point, Gummow, Hayne and Crennan JJ also noted that there were “unsettled questions concerning the use of the notion of international concern”. Their Honours appeared to regard “international concern” as a concept that had its origins as a limitation upon power, which had been misused as a criterion of power. They did not, however, need to decide that question: at [51]–[53].

[1505.530] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) [World Heritage Properties Conservation Act 1983](#).

The World Heritage Properties Conservation Act 1983 (Cth) did not “inhibit or impair the continued existence of a state or its capacity to function” so as to offend an implied limitation on the Commonwealth’s legislative power, despite the Act’s prohibition of a wide range of activities on land owned by the State of Tasmania: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 139; [46 ALR 625](#). Nor did the Lemonthyme and Southern Forests (Commission of Inquiry) Act 1987 (Cth) impair Tasmania’s legislative and executive functions, notwithstanding that the Act prohibited activities on land comprising some 4.5% of the area of Tasmania: *Richardson v Forestry Commission* (1988) 164

CLR 261 at 305 and 337; [77 ALR 237](#). And it was no objection to the constitutional validity of the Act that it placed a burden on Tasmania to which other states were not subject: the international obligation created by the World Heritage Convention to protect areas of world heritage significance “necessarily falls to be discharged with respect to particular properties”; and to protect those properties did “not invalidly discriminate against the state in whose territory the property is situated”: 164 CLR 261 at 294.

SECTION 51(xxxi) — THE ACQUISITION OF PROPERTY ON JUST TERMS FROM ANY STATE OR PERSON FOR ANY PURPOSE IN RESPECT OF WHICH THE PARLIAMENT HAS POWER TO MAKE LAWS

[1505.535] A comprehensive protection of property interests

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51, Section 51(xxxi).

[Section 51\(xxxi\)](#) of the Constitution is, first and foremost, a head of legislative power: *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 187.2; [119 ALR 577](#); [1994] HCA 9; [BC9404619](#) ^{CB} (Deane and Gaudron JJ); *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [1998] HCA 8; [BC9800074](#) at [\[44\]](#) ^{CB} (Toohey J). Reference to that paragraph as a “guarantee” is, therefore, apt to mislead: *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [1998] HCA 8; [BC9800074](#) at [\[126\]](#) ^{CB} (McHugh J).

Nevertheless, [s 51\(xxxi\)](#) has “assumed the status of a constitutional guarantee of just terms [which] was to be given the liberal construction appropriate to such a constitutional provision”: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[43\]](#) ^{CB}; *Clunies-Ross v Commonwealth* (1984) 155 CLR 193 at 202; [55 ALR 609](#). Any Commonwealth law, although supported by one of the other paragraphs of s 51, must conform to [s 51\(xxxi\)](#) to the extent that the law is properly characterised as a law with respect to the acquisition of property: *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 318, 315; [1943] ALR 278 ^{CB}; *Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 371–2.

In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 188; [119 ALR 577](#); [1994] HCA 9; [BC9404619](#) ^{CB}, Deane and Gaudron JJ (and to similar effect see also Dawson and Toohey JJ at 193) explained that:

[T]he indirect operation of par. (xxxi) does not extend beyond abstracting from other grants of legislative power authority to make laws which can properly be characterized as laws with respect to the acquisition of property ... [U]nless a law can be fairly characterized, for the purposes of par (xxxi), as a law with respect to the acquisition of property, that paragraph cannot indirectly operate to exclude its enactment from the prima facie scope of another grant of legislative power.

See also the discussion of the way that [s 51\(xxxi\)](#) abstracts from other legislative powers in *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[185\]–\[186\]](#) ^{CB}; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[135\]](#) ^{CB}.

[1505.537] Acquisitions outside the protection of s 51(xxxi)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51, s 51(i), s 51(ii), s 51(x), s 51(xvii), s 51(xxxi), s 51(xxxix),

s 61.

(CTH) [Circuit Layouts Act 1989](#).

A Commonwealth law with respect to the acquisition of property may fall outside [s 51\(xxxi\)](#) because it is a law of a kind that is clearly within some other head of legislative power. For example, a law sequestrating the property of a bankrupt will be a law with respect to bankruptcy within [s 51\(xvii\)](#) and not a law with respect to the acquisition of property within [s 51\(xxxi\)](#) (*Attorney-General (Cth) v Schmidt* (1961) 105 CLR 361 at 372), and a law forfeiting a prohibited import will be characterised as a law with respect to trade and commerce with other countries within [s 51\(i\)](#) and not a law within [s 51\(xxxi\)](#): *Burton v Honan* (1952) 86 CLR 169 at 180–1; [1952] ALR 553 ^{CB}. Because the taxation power in [s 51\(ii\)](#) authorises the compulsory acquisition of money for public purposes, a law that relates to the imposition of taxation will be unlikely to be characterised as a law with respect to the acquisition of property within [s 51\(xxxi\)](#): *Attorney-General (Cth) v Schmidt*, above, at 372; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 456–7; [26 ALR 185](#). See also *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[358\]](#) ^{CB} (Crennan J).

In *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; [119 ALR 577](#) ^{CB}, the High Court decided that legislation passed by the Parliament in 1992 to limit the Commonwealth's liability to refund amounts of tax paid by swimming pool manufacturers pursuant to 1986 legislation (held invalid in *Mutual Pools & Staff Pty Ltd v FCT* (1992) 173 CLR 450; [104 ALR 545](#); 66 ALJR 222 ^{CB}) was a law with respect to taxation within [s 51\(ii\)](#) (or, according to Brennan and McHugh JJ, a law supported by [s 51\(xxxix\)](#) and [s 61](#)) and was not an exercise of the power conferred by [s 51\(xxxi\)](#). It followed that the 1992 legislation could not be impugned as a law for the acquisition of property otherwise than on just terms. (The 1992 legislation provided that the Commonwealth was only liable to refund amounts paid under the invalid 1986 legislation where the manufacturer claiming the refund declared that it had not, at the time of paying of the tax, passed the tax on to purchasers of swimming pools, or that it had refunded to purchasers any tax passed on.)

In *Re DPP; Ex parte Lawler* (1994) 179 CLR 270; [119 ALR 655](#) ^{CB}, the High Court held that a Commonwealth law, providing for the forfeiture of a boat used in the commission of an offence against Australian fisheries control legislation, did not offend [s 51\(xxxi\)](#) even where the boat in question was the property of an “innocent third party”. The forfeiture provision was properly characterised as a law with respect to fisheries within [s 51\(x\)](#) of the Constitution and was not a law for the acquisition of property within [s 51\(xxxi\)](#). Similarly, a law providing for statutory liens to secure the effectiveness of charges relating to aircraft, attaching to and authorising the detention and sale of the aircraft, was not a law for the acquisition of property: *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133; [167 ALR 392](#) at [\[99\]–\[101\]](#) ^{CB}.

In *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134; [121 ALR 577](#) ^{CB}, the High Court held that the Circuit Layouts Act 1989 (Cth) did not effect an acquisition of property within [s 51\(xxxi\)](#), even though it could be said to impact on proprietary rights. The Act authorised the creator of an original circuit layout to bring proceedings to protect its intellectual property in the layout against any person who, without authority, sold the layout. The court decided that the Act was a law with respect to copyrights, patents of inventions and designs and trade marks, within [s 51\(xvii\)](#) of the Constitution. Six Justices said (at 595):

“It is of the essence of that grant of legislative power that it authorises the making of laws which create, confer and provide for the enforcement of, intellectual property rights in original compositions, inventions, designs, trade marks and other products of intellectual effort. It is of the nature of such laws that they confer such rights on authors, inventors and designers, other originators and

assignees and that they conversely limit and detract from the proprietary rights which would otherwise be enjoyed by the owners of affected property. Inevitably, such laws may, at their commencement, impact upon existing proprietary rights. To the extent that such laws involve an acquisition of property from those adversely affected by the intellectual property rights which they create and confer, the grant of legislative power contained in [s 51\(xvii\)](#) manifests a contrary intention which precludes the operation of [s 51\(xxxi\)](#)."

The High Court also made the point (at 595) that a law which was concerned with the adjustment of competing rights, claims or obligations in a particular area of activity (as the Circuit Layouts Act was) was unlikely to be characterised as a law with respect to the acquisition of property. Six Justices said (at CLR 161; ALR at 595):

... a law which is not directed towards the acquisition of property as such but which is concerned with the adjustment of competing rights, claims or obligations or persons in a particular relationship or area of activity is unlikely to be susceptible of legitimate characterisation as a law with respect to the acquisition of property for the purposes of [s 51](#) of the Constitution.

A law which permits a court to impose a restraint on access to property until such time as it is determined whether that property was obtained in contravention of a prohibition is clearly incidental to the prohibition. If the regulating authority was required to provide just terms for the restraint, it would defeat the purpose of the restraint itself: *Siminton v Australian Prudential Regulation Authority* (No 2) (2008) 168 FCR 122; [248 ALR 34](#); [\[2008\] FCAFC 88](#); [BC200804012](#), at [\[29\]](#) [CB](#).

In *JT International SA v The Commonwealth* [\(2012\) 291 ALR 669](#); [97 IPR 321](#); [\[2012\] HCA 43](#); [BC201207608](#) [CB](#), the Commonwealth contended that s 51(xxxi) had no operation where the acquisition of property without compensation was "no more than a necessary consequence or incident of of a restriction on a commercial trading activity ... reasonably necessary to prevent or reduce harm caused by that trading activity to members of the public, or public health". A majority of the court upheld the Tobacco Plain Packaging Act 2011 (Cth) on the basis that its provisions did not affect an acquisition of property. Accordingly, did not have to consider this broader proposition. Justice Gummow stated that it was sufficient to say that "propositions of the width put by the Commonwealth have not so far been endorsed by decisions of this Court" and that "whether such propositions should be accepted would require most careful consideration on an appropriate occasion": at [158]; see also at [189] per Hayne and Bell JJ; at [307] per Crennan J; at [344] per Kiefel J.

[1505.540] Acquisition of property in the territories

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 51, s 51(xxxi), s 51(xxix),.

(CTH) [Northern Territory \(Self-Government\) Act 1978](#) Section 50.

In *Teori Tau v Commonwealth* (1969) 119 CLR 564; [1971] ALR 190 [CB](#), the High Court held that, because [s 122](#), the territories power, is expressed in plenary terms, the Commonwealth Parliament has a power as wide as that of the states to legislate for compulsory acquisition of property in a territory; and when doing so, the parliament is not constrained by s 51(xxxi).

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[86\]](#) [CB](#) (French CJ), [189] (Gummow and Hayne JJ), [287] (Kirby J) (Heydon and Crennan JJ not deciding) held that *Teori Tau* should be overruled and that s 51(xxxi) applies to Commonwealth laws passed pursuant to [s 122](#) of the Constitution.

Previously, in *Newcrest Mining (WA) Ltd v BHP Minerals Ltd* (1997) 190 CLR 513; [147 ALR 42](#) ^{CB}, Gaudron, Gummow and Kirby JJ had said that *Teori Tau* should be overruled on the basis that the “just terms” guarantee in s 51(xxxi) applied to laws made under [s 122](#). Alternatively, their Honours said (and in this they were joined by Toohey J) that if a Commonwealth law operating in a territory could be characterised as a law with respect to one of the matters in [s 51](#) as well as a law within [s 122](#), that law would be subject to s 51(xxxi). On that basis, Toohey, Gaudron, Gummow and Kirby JJ held that the National Parks and Wildlife Conservation Act 1975 was a law with respect to external affairs within s 51(xxix) as well as a law for the government of the Northern Territory and so attracted the guarantee of “just terms” in s 51(xxxi).

Section 50 of the Northern Territory (Self-Government) Act 1978 provides that the power of the Legislative Assembly does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms. This provision requires the application of decisions which have construed [s 51\(xxxi\)](#) to laws made by the Territory Assembly, subject to the possibility that some difference may flow from the fact that the legislative power of the Territory Assembly is not conferred by reference to enumerated heads of power: *Attorney-General (NT) v Chaffey* [\(2007\) 237 ALR 373](#); [\[2007\] HCA 34](#); [BC200706043](#) at [\[3\]–\[4\]](#) ^{CB}.

[1505.543] Relationship between s 51(xxxi) and s 96 of the Constitution

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi), s 96.

A State can acquire land or other property, by resumption or otherwise, on any terms authorised by its Parliament, whether just or unjust. If a State Act provides for resumption of land on terms which are thought not to be just, that is of no consequence legally: it cannot affect in any way the validity of the State Act or of what is done under it: see *Pye v Renshaw* (1951) 84 CLR 58 at 79–80; [1951] ALR 880; (1951) 25 ALJR 519; [BC5100230](#) ^{CB}.

However, [s 51\(xxxi\)](#) may have an indirect operation upon State law via [s 96](#) of the Constitution, because [s 51\(xxxi\)](#) limits the circumstances in which the Commonwealth can grant funds to the States subject to a requirement that the States exercise their legislative power to acquire property without providing just terms. For discussion of this issue, see [\[1830.30\]](#) below.

[1505.545] Property

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi).

(CTH) [Health Insurance Act 1973](#).

(CTH) [Petroleum \(Submerged Lands\) Act 1967](#).

(CTH) [Fisheries Act 1952](#) s 20.

Because [s 51\(xxxi\)](#) is “a provision of a fundamental character designed to protect citizens from being deprived of their property by the Sovereign State except upon just terms ... the meaning of property ... must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system”: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 285; [1944] ALR 89 ^{CB}. Accordingly, “property” in [s 51\(xxxi\)](#) extends to a right to possession, and “to every species of valuable right and interest including real and personal property, incorporeal

hereditaments such as rents and services, rights of way, rights of profit or use in land of another, and choses in action”: 68 CLR at 290. A wide approach to the meaning of “property” in [s 51\(xxxi\)](#) was endorsed in *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[131\]](#) and [\[189\]](#) [CB](#); *Attorney-General (NT) v Chaffey* (2007) 237 ALR 373; [\[2007\] HCA 34](#); [BC200706043](#) [CB](#); *Victoria v Commonwealth* (1996) 187 CLR 416 at 559; [138 ALR 129](#); 66 IR 392; [BC9603985](#) [CB](#); *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; [243 ALR 1](#); [\[2008\] HCA 7](#); [BC200801217](#), at [\[49\]](#) [CB](#); *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[87\]–\[93\]](#) [CB](#) (French CJ), [\[293\]–\[297\]](#) (Kirby J), [\[356\]](#) (Crennan J).

In *Telstra Corporation Ltd v Commonwealth*, above at [\[44\]](#), the High Court said that “In many cases, including at least some cases concerning [s 51\(xxxi\)](#) [\[70\]](#), it may be helpful to speak of property as a ‘bundle of rights’. At other times it may be more useful to identify property as ‘a legally endorsed concentration of power over things and resources’. Seldom will it be useful to use the word ‘property’ as referring only to the subject matter of that legally endorsed concentration of power.”

In *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297; [119 ALR 629](#); [BC9404637](#) [CB](#), the High Court held that a right to bring an action to recover damages for injury caused through another’s negligence was a species of “property” protected by [s 51\(xxxi\)](#): see per Mason CJ, Deane and Gaudron JJ at 632–3; per Brennan J at 638–9; per Toohey J at 645; per McHugh J at 650.

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#); [BC9703255](#) [CB](#) the High Court extended its earlier decision in *Georgiadis v Australian and Overseas Telecommunications Corp*, above, to conclude that a cause of action affected by a bar imposed by a statute of limitations “still has sufficient substance to answer the constitutional description of ‘property’ in [s 51\(xxxi\)](#) of the Constitution”: CLRat 534 (per Gummow and Kirby JJ).

In *Health Insurance Commission v Peverill* (1994) 179 CLR 226; [119 ALR 675](#) [CB](#) a majority of the High Court (Mason CJ, Deane, Dawson, Toohey, Gaudron, McHugh JJ; Brennan J dissenting on this point) held that the amount of Medicare benefit payable, under the Health Insurance Act 1973 (Cth), to a medical practitioner who had provided services to a patient was a form of property within [s 51\(xxxi\)](#) of the Constitution. However, that property was susceptible to legislative alteration or extinction without any infringement of [s 51\(xxxi\)](#). See also the reasoning of the majority in *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [BC9800990](#); [\[1998\] HCA 24](#) [CB](#), to the effect that rights conferred on an exploration permit holder, under the Petroleum (Submerged Lands) Act 1967, were inherently susceptible of extinguishment — assuming that those rights might otherwise qualify as “property” for the purposes of [s 51\(xxxi\)](#). Likewise, the right to compensation under workers’ compensation legislation may be defined in the legislation in such a way as to be the amount prescribed from time-to-time, such that an alteration in the prescribed amount after an injury has occurred does not acquire any “property” as, properly construed, there was no accrued right to receive compensation at the previous rate: *Attorney-General (NT) v Chaffey*, above, at [\[19\]–\[20\]](#), [\[30\]](#).

There are, however, cases where subsequent legislative modifications that remove existing statutory rights and interests may infringe rights that are properly regarded as “property” (such as, eg, the rights of copyright and patent owners): see *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; [147 ALR 42](#); [\[1997\] HCA 38](#); [BC9703570](#) [CB](#); *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [\[1998\] HCA 8](#); [BC9800074](#) at [\[182\]–\[187\]](#) [CB](#); *JT International SA v The Commonwealth* (2012) 291 ALR 669; 86 ALJR 1297; [\[2012\] HCA 43](#); [BC201207608](#) [CB](#). For example, in *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151; [119 ALR 108](#) at [116](#) [CB](#), Black CJ and Gummow J assumed that the rights of the respondents to

fish for prawns, conferred by a plan of management issued pursuant to s 20 of the Fisheries Act 1952, were “property” for the purposes of [s 51\(xxxi\)](#) of the Constitution. As the Court said in *Telstra Corporation Ltd v Commonwealth*, *above*, at [49], “references to statutory rights as being ‘inherently susceptible of change’ must not be permitted to mask the fact that ‘[i]t is too broad a proposition... that the contingency of subsequent legislative modification or extinguishment removes all statutory rights and interests from the scope of [s 51\(xxxi\)](#)’. Instead, analysis of the constitutional issues must begin from an understanding of the practical and legal operation of the legislative provisions that are in issue.”

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[87\]–\[93\]](#) [\[CB\]](#), the Court accepted that the fee simple granted pursuant to the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) was “property” for the purpose of [s 51\(xxxi\)](#), notwithstanding that any such fee simple was subject to close regulation under that Act: at [101]–[102] (French CJ), [171] (Gummow and Hayne JJ) and [289] (Kirby J, agreeing with Gummow and Hayne JJ on this issue); [452] (Kiefel J); cf [413], [417] and [441] (Crennan J).

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[147\]](#) [\[CB\]](#), Hayne, Kiefel and Bell JJ, and Heydon J (dissenting) accepted that licences to take bore water were a species of property (despite the fact that the majority held that the cancellation of those licences did not involve an acquisition of property).

[1505.550] Acquisition

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 50, s 51(xxxi),.

(CTH) [Competition and Consumer Act 2010](#) ss 152AL(3), 152AR, Section 81.

(CTH) [World Heritage Properties Conservation Act 1983](#).

(CTH) [Health Insurance Act 1973](#).

(CTH) [Fisheries Act 1952](#) s 20.

(CTH) [Protection of Movable Cultural Heritage Act 1986](#).

(CTH) [Seafarers Rehabilitation and Compensation Act 1992](#) s 54.

(NSW) [Water Act 1912](#).

(NSW) [Water Management Act 2000](#).

[Section 51\(xxxi\)](#) is concerned with compulsory acquisition, and not acquisition by agreement: *John Cooke & Co Pty Ltd v Commonwealth* (1924) 34 CLR 269 at 282. The acquisition need not be by the Commonwealth, so that acquisition by a State under a Commonwealth law will invoke the requirements of [s 51\(xxxi\)](#): *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 [\[CB\]](#) (*Magennis*).

Further, what must be acquired is “property”, not a benefit of a non-proprietary kind: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 at 165–166 and 198; [108 ALR 577](#); 66 ALJR 695; [BC9202654](#) [\[CB\]](#); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480 at 499 and 528; [112 ALR 53](#); [1993] HCA 10; [BC9303610](#) [\[CB\]](#); *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, 247–248, 282–283; [46 ALR 625](#); [1983] HCA

21; [BC8300075](#) ^{CB}; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[81\]–\[83\]](#) ^{CB} (French CJ, Gummow and Crennan JJ) and [\[132\]](#) and [\[147\]](#) (Hayne, Kiefel and Bell JJ); *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[90\]](#) ^{CB} (French CJ); *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 172; [119 ALR 577](#); [1994] HCA 9; [BC9404619](#) ^{CB} (Mason CJ), 185 (Deane and Gaudron JJ), 195 (Dawson and Toohey JJ).

The conferral on a lessee of the right to demand an interest in land against the lessor of that land is an acquisition of property within [s 51\(xxxi\)](#): *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 at 404, 407–8, 423 and 452; [26 ALR 185](#). Acquisition of property will result where an advantage or benefit (corresponding to that which is lost by the property holder) is conferred on any other person or entity. So, in *Smith v ANL Ltd* (2000) 204 CLR 493; [176 ALR 449](#) ^{CB}, a majority of the High Court held that there was an acquisition of property where Commonwealth legislation had the effect of extinguishing a seafarer's common law cause of action (in negligence) against the owner of the ship on which he had suffered his injury — regardless of whether the owner was the Commonwealth or a private entity.

An obligation, imposed on the manufacturers of blank sound tapes, to pay a levy to the owners of copyright in recorded music, would be regarded as an acquisition of property from the manufacturers within [s 51\(xxxi\)](#), if that obligation were not characterised as a tax: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 511; [112 ALR 53](#) at [67](#) per Mason CJ, Brennan, Deane and Gaudron JJ.

[Section 81](#) of the Trade Practices Act 1974 (Cth), which authorises the Federal Court to order a person who has acquired shares in or assets of a corporation in contravention of [s 50](#) of the Act to dispose of all or any of the shares or assets so acquired or to declare that the acquisition is void, does not involve an acquisition of property within [s 51\(xxxi\)](#). [Section 81](#) takes its character from the object which it serves, namely enforcing compliance with the law: *Trade Practices Commission v Gillette Co (No 1)* (1993) 45 FCR 366; [118 ALR 280](#) at [275](#); ATPR 41–267 ^{CB}. See also *WSGAL Pty Ltd v Trade Practices Commission* (1994) 51 FCR 115; [122 ALR 673](#); ATPR 41–314 ^{CB} (Full Federal Court).

An acquisition will involve more than a series of restrictions on the use of property, as in the restrictions imposed on the Tasmanian Government by the World Heritage Properties Conservation Act 1983 (Cth) and its associated legislation. Such restrictions did not give to “the Commonwealth nor anyone else ... a proprietary interest of any kind in the property” nor was there “a vesting of possession in the Commonwealth”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145, 181, 247–8; [46 ALR 625](#).

However, a contraction in what otherwise would be the measure of liability in respect of a cause of action or other right may constitute an “acquisition” for the purposes of [s 51\(xxxi\)](#): *Attorney-General (NT) v Chaffey* ([2007](#)) [237 ALR 373](#); [\[2007\] HCA 34](#); [BC200706043](#) at [\[21\]](#) ^{CB}; *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [\[1998\] HCA 8](#); [BC9800074](#) at [\[15\]](#), [\[56\]](#), [\[81\]–\[83\]](#) and [\[128\]](#) ^{CB}; *Smith v ANL Ltd* (2000) 204 CLR 493; [176 ALR 449](#); [\[2000\] HCA 58](#); [BC200006928](#) at [\[7\]](#), [\[20\]](#) [\[23\]](#), [\[89\]–\[91\]](#) ^{CB}.

[Section 51 \(xxxii\)](#) cannot be invoked so as to prevent a government department using, in the course of its administration, confidential information supplied to the department: *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Dept of Community Services and Health* (1991) 28 FCR 291; [99 ALR 679](#) ^{CB}. “If there is property in confidential information, it remained in the applicant whose proprietary interest was not, even in a broad sense, acquired by the Commonwealth”: *Smith Kline*, above, FCR at 306; ALR at 694.

In *Health Insurance Commission v Peverill* (1994) 179 CLR 226; [119 ALR 675](#) ^{CB}, the High Court held that legislation reducing retrospectively the amount of benefits payable to a medical practitioner under the Health Insurance Act 1973 (Cth) did not amount to an acquisition of property within [s 51\(xxxi\)](#) of the Constitution. Mason CJ, Deane and Gaudron JJ accepted that the practitioner's right to payment was a form of property for the purpose of [s 51\(xxxi\)](#), but held that the amending Act was not an acquisition but a genuine legislative adjustment of competing claims, a variation of statutory rights "which, as a general rule, are inherently susceptible of variation". Brennan J held that the practitioner's claim to payment of benefits was not property but a claim whose content remained, until payment, within the unfettered control of the Parliament. In separate judgments, Dawson, Toohey and McHugh JJ held that the practitioner's claim was a form of property (a chose in action) but that the reduction in value of that claim did not amount to an acquisition of property by the Commonwealth. McHugh J said that the right created by the Health Insurance Act 1973 was one that could be legislatively altered or abolished without infringement of [s 51\(xxxi\)](#).

In *Minister for Primary Industry and Energy v Davey* (1993) 47 FCR 151 at 162–3; [119 ALR 108](#) at [118–19](#), the Full Federal Court held that a reduction in the quantity of prawns which all licence-holders were entitled to catch, by an amendment to a Plan of Management issued pursuant to s 20 of the Fisheries Act 1952 (Cth), was not an acquisition of property within [s 51\(xxxi\)](#) of the Constitution: no proprietary benefit was conferred on the Commonwealth or on a third party, so there was no "acquisition" and any rights originally conferred on the licence-holders were a statutory creation that was always subject to alteration. "The making of such amendments is not a dealing with the property; it is the exercise of powers inherent at the time of its creation and integral to the property itself": FCR at 165; ALR at 121. See also *Bienke v Minister for Primary Industries* (1996) 63 FCR 567; [135 ALR 128](#) ^{CB}, where the Full Federal Court held that the compulsory surrender of units of fishing capacity effected by a legislative scheme was not an acquisition of property within [s 51\(xxxi\)](#) because no proprietary benefit accrued to the Commonwealth or any third party by reason of the compulsory restructuring plan.

In *Waterhouse v Minister for the Arts and Territories* (1993) 43 FCR 175; [119 ALR 89](#) ^{CB}, the Full Federal Court held that the Protection of Movable Cultural Heritage Act 1986 (Cth) did not effect an acquisition of property within [s 51\(xxxi\)](#). The Act provided that a protected object was forfeited if its removal from Australia was attempted without a permit; and gave the minister a discretion to grant or refuse a permit. Although refusal of a permit might place the owner of an object at a commercial disadvantage, it did not follow that there was an acquisition by the Commonwealth of an interest in the object; nor did the legislation effect an indirect acquisition of an element of the proprietary interest of the owner of the object: FCR at 183, 184; ALR at 96–7, 97–8 per Black CJ and Gummow J.

In *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297; [119 ALR 629](#) ^{CB}, a majority of the High Court (Mason CJ, Brennan, Deane and Gaudron JJ; Dawson, Toohey and McHugh JJ dissenting) held that s 44 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988 purported to effect an acquisition of property without providing just terms and was therefore invalid. Section 44 provided that no action for damages lay against the Commonwealth in respect of an injury suffered by a Commonwealth employee in the course of his or her employment — being an injury for which the Commonwealth would otherwise have been liable. The majority decided that, in its application to a cause of action that was not statute-barred, s 44 extinguished a valid cause of action against the Commonwealth and thereby acquired the property represented by that cause of action. Mason CJ, Deane and Gaudron JJ said that the term "acquisition" in [s 51\(xxxi\)](#) extended to the extinguishment of a vested cause of action, at least where the extinguishment results in a direct financial benefit or financial gain to the potential defendant and the cause of action has arisen under the general law: CLR at 305; ALR at 634.

In *Commonwealth v Mewett* (1997) 191 CLR 471; [146 ALR 299](#); [BC9703255](#) ^{CB}, the High Court held

that [s 51\(xxxi\)](#) of the Constitution operated to protect a cause of action in negligence against the Commonwealth, barred by the applicable state statute of limitation, against extinguishment by s 44 of the Commonwealth Employees' Rehabilitation and Compensation Act 1988.

In *Smith v ANL Ltd* (2000) 204 CLR 493; [176 ALR 449](#) ^{CB}, a majority of the High Court held that s 54 of the Seafarers Rehabilitation and Compensation Act 1992, the effect of which (in combination with a transitional provision) was to terminate a person's common law cause of action six months after the Act commenced operation, effected an acquisition of the property represented by the cause of action. Dealing with the submission that s 54 simply adjusted the limitation period for the cause of action, Gleeson CJ said that the effect of the legislation was to modify the appellant's pre-existing common law right and confer a corresponding benefit on the respondent; and "modification of a right to bring an action in circumstances where a corresponding advantage accrued to the party against whom action may be brought, would ordinarily involve an acquisition of property": at [7]. Gaudron and Gummow JJ saw the legislation as acquiring the appellant's common law cause of action and replacing it with a right to bring an action within six months; s 54 operated to bring about an acquisition of property and the substitute action did not provide just terms: at [45].

In *Commonwealth v Western Mining Corp Resources Ltd* (1998) 194 CLR 1; [152 ALR 1](#); [BC9800990](#); [\[1998\] HCA 24](#) ^{CB}, a majority of the High Court held that a Commonwealth law reducing the area in respect of which the respondent was entitled to explore for petroleum (the reduction having been agreed between Australia and Indonesia as part of the settlement of a dispute between the two countries in relation to sovereignty over the Timor Gap) did not effect an "acquisition" of the respondent's property within s 51(xxxi) of the Constitution. Brennan CJ and Gaudron J said that the modification or extinguishment of the permit holder's rights conferred no correlative benefit on the Commonwealth or any other person. McHugh J held that, because the rights under the permit were purely statutory and had no basis in the general law, those rights could be extinguished without effecting an acquisition of property, even if the extinguishment conferred a benefit on the Commonwealth. Gummow J said that, from the time when the permit was granted, the rights attached to the permit were defined by the Act as it stood from time to time; and it followed that any proprietary rights arising under the permit were liable to defeasance without any acquisition of property.

In *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; [243 ALR 1](#); [\[2008\] HCA 7](#); [BC200801217](#), at [\[51\]–\[54\]](#) ^{CB}, the High Court held that the access regime that required Telstra to provide its competitors with access to its national copper wire telecommunications network did not involve an acquisition of property. At the time that Telstra's predecessor acquired that infrastructure, that predecessor was wholly owned by the Commonwealth. The vesting of the infrastructure took place within a regulatory regime established by the Telecommunications Act 1997 which gave other carriers the right to interconnect their facilities to the infrastructure. Accordingly, Telstra's rights were always subject to a statutory access regime which permitted other carriers to use the assets in question. Accordingly, the provisions of the Trade Practices Act 1974 ([ss 152AL\(3\)](#) and [152AR](#)) that provided access rights did not impair the bundle of rights owned by Telstra in such a way as to amount to an acquisition of property within the meaning of [s 51\(xxxi\)](#).

In *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) ^{CB}, the plaintiffs alleged that a five-year lease on the Maningrida land granted to the Commonwealth by s 31 of the Northern Territory National Emergency Response Act 2007 (Cth) (the NER Act) constituted an acquisition of property and that the acquisition was required to be but was not on just terms within the meaning of [s 51\(xxxi\)](#) of the Constitution. By s 35 of the NER Act, the Commonwealth was given exclusive possession of the land during the terms of the lease, subject to certain exceptions, and s 34 specifically provided that any interests in the land that existed prior to the commencement of the lease were preserved until the expiry of the lease. Section 60(2) of the NER Act relevantly provided that if an act under a lease granted pursuant to s 31 would result in an

acquisition of property other than on just terms to which [s 51\(xxxi\)](#) of the Constitution applies, the Commonwealth was liable to pay “a reasonable amount of compensation”. Absent agreement, the person claiming compensation was empowered to institute proceedings to recover it in a court of competent jurisdiction. By majority, the High Court held that the NER Act did acquire the Plaintiffs’ property, but that s 60(2) also provided compensation constituting just terms: at [104] (French CJ), [199]–[202] (Gummow and Hayne JJ), [324]–[331] (Heydon J), [463]–[469] (Kiefel J).

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51; BC200911041](#) [CB](#), the High Court held that the replacement of the plaintiffs’ bore licences under the Water Act 1912 (NSW) with aquifer access licences under the Water Management Act 2000 (NSW), which entitled them to extract less water than had been the case under the bore licences, did not involve an acquisition of property. That followed because, at least since 1966, under NSW law the right to the use, flow and control of groundwater was vested in the State: at [72]–[73], [84], [108], [144]. Accordingly, the State obtained no benefit or advantage relating to the ownership or use of property from the reduction in the plaintiffs’ entitlement to groundwater: at [81], [84], [149]–[154]. There was therefore no “acquisition”, as distinct from “taking”, of property: at [82], [147]–[150].

In *JT International SA v The Commonwealth* [\(2012\) 291 ALR 669](#); 86 ALJR 1297; [\[2012\] HCA 43; BC201207608](#) [CB](#), a majority of the High Court held that the Commonwealth did not acquire property pursuant to the Tobacco Plain Packaging Act. Although there was some impairment of the plaintiffs’ statutory intellectual property rights, such as amounted to a “taking” of their property, the legislation did not give the Commonwealth a legal interest in the packaging, or create a relationship of a proprietary nature between the Commonwealth and the packaging: at [44] per French CJ; at [141]–[154] per Gummow J; at [187]–[188] per Hayne and Bell JJ; at [283]–[295] per Crennan J.

[1505.551] Obligation to pay money

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi).

“In a case where an obligation to make a payment is imposed as genuine taxation, as a penalty for proscribed conduct, as compensation for a wrong done or damages for an injury inflicted, or as a genuine adjustment of the competing rights, claims or obligations of persons in a particular relationship or area of activity, it is unlikely that there will be any question of an “acquisition of property” within [s 51\(xxxi\)](#) of the Constitution ... On the other hand, the mere fact that what is imposed is an obligation to make a payment or to hand over property will not suffice to avoid [s 51\(xxxi\)](#)’s guarantee of ‘just terms’ if the direct expropriation of the money or other property itself would have been within the terms of the subsection. Were it otherwise, the guarantee of the section would be reduced to a hollow facade”: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480 at 510; [112 ALR 53](#) at [66](#) per Mason CJ, Brennan, Deane and Gaudron JJ.

[1505.555] Just terms

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi).

Although “the terms of acquisition are, within reason, matters for legislative judgment and discretion”: *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 291; [1944] ALR 89 [CB](#); nevertheless [s 51\(xxxi\)](#) “requires the terms actually to be just and not merely to be terms which the Parliament may consider to be just”: *P J Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 397.

It has been said that the requirement of “just terms” demands a balance between the interests of the individual and those of the community: “Unlike ‘compensation’, which connotes full money equivalence, ‘just terms’ are concerned with fairness”: *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 569. However, in *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297 at 310–11; [119 ALR 629](#) at [638](#); [BC9404637](#) ^{CB}, Brennan J said:

In determining the issue of just terms, the court does not attempt a balancing of the interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it be shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.

Similarly, in *Smith v ANL Ltd* (2000) 204 CLR 493; [176 ALR 449](#); [BC200006928](#); [\[2000\] HCA 58](#) at [\[9\]](#) ^{CB}, Gleeson CJ said:

The guarantee contained in [s 51\(xxxi\)](#) is there to protect private property. It prevents expropriation of the property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by [s 51\(xxxi\)](#) it must pay for them, or in some other way provide just terms of acquisition.

The general requirement is that the terms on which property is acquired should reflect the property's market value, “the price which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the property at the date of the acquisition”: *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 507, 546. However, the property's particular value to its former owner must be taken into account: *Johnston Fear & Kingham v Commonwealth* (1943) 67 CLR 314 at 323; [\[1943\] ALR 278](#) ^{CB}; *Minister for the Navy v Rae* (1945) 70 CLR 339 at 344–7; 51 ArgLR 177; *Minister of State for the Army v Parbury Henty & Co Pty Ltd* (1945) 70 CLR 459 at 491–2, 515; 46 SR (NSW) 7. The amount paid must be fair and reasonable in all the circumstances: *Andrews v Howell* (1941) 65 CLR 255 at 264, 269, 282, 288; [\[1941\] ALR 185](#); (1941) 15 ALJR 127; [BC4100023](#) ^{CB}; *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269 at 280–281, 295; [\[1946\] ALR 209](#); (1946) 20 ALJR 78; [BC4600032](#) ^{CB}; *McClintock v Commonwealth* (1947) 75 CLR 1 at 24; [\[1947\] ALR 530](#); (1947) 21 ALJR 326; [BC4700290](#) ^{CB}; *Bank of NSW v Commonwealth* (1948) 76 CLR 1 at 216, 228, 300; [\[1948\] 2 ALR 89](#); (1948) 22 ALJR 191; [BC4800090](#) ^{CB}; *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495 at 569; [\[1948\] 1 ALR 145](#); [BC4800070](#) ^{CB}; *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[190\]](#) ^{CB}.

A statutory provision that provides for the payment of “reasonable compensation” as determined by a court amounts to provision of just terms: *Wurridjal v Commonwealth* (2009) 237 CLR 309; [252 ALR 232](#); [\[2009\] HCA 2](#); [BC200900208](#) at [\[104\]](#) ^{CB} (French CJ), [\[196\]](#)–[\[197\]](#) and [\[199\]](#) (Gummow and Hayne JJ), [\[304\]](#) (Kirby J, although his Honour held that in some context such a provision may be insufficient to give “just terms” were monetary compensation is not adequate), [\[324\]](#) (Heydon J), [\[463\]](#) (Kiefel J). See also *Telstra Corporation Ltd v Commonwealth* (2008) 234 CLR 210; [243 ALR 1](#); [\[2008\] HCA 7](#); [BC200801217](#) at [\[41\]](#)–[\[42\]](#) ^{CB}; *Western Mining Corporation Ltd v Commonwealth* (1994) 50 FCR 305 at 343; [121 ALR 661](#); [BC9406844](#) ^{CB}; *Commonwealth v Western Mining Corporation Ltd* (1996) 67 FCR 153 at 190, 200; [136 ALR 353](#); [BC9601162](#) ^{CB}; *Minister for Primary Industry & Energy v Davey* (1993) 47 FCR 151 at 167; [119 ALR 108](#); [BC9305118](#) ^{CB}.

In *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#);

[BC200911041](#) at [\[87\]–\[88\]](#), [\[156\]](#) ^{CB}, the Court found it unnecessary to consider whether there is an implied constitutional right to payment of just terms were [s 51\(xxxi\)](#) is contravened.

[1505.560] Adjudication of just terms

While the terms of an acquisition may be determined administratively, it is inconsistent with the requirement for “just terms” that such an administrative determination be conclusive: *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 at 99 and 109. Vesting exclusive jurisdiction to determine the terms of acquisition in a specially-constituted Federal Court of Claims is an invalid attempt to oust the original jurisdiction of the High Court to hear and determine suits to which the Commonwealth is a party: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 276, 323 and 368.

SECTION 51(xxxv) — CONCILIATION AND ARBITRATION FOR THE PREVENTION AND SETTLEMENT OF INDUSTRIAL DISPUTES EXTENDING BEYOND THE LIMITS OF ANY ONE STATE

[1505.565] Conciliation and arbitration

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxxv).

[Section 51\(xxxv\)](#) does not give the Parliament a general power to legislate on the topic of industrial relations. Laws made under this provision “cannot be laws simply for the prevention and settlement of ... industrial disputes; they must be laws for the prevention and settlement thereof by means of conciliation and arbitration”: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389 at 401. The Parliament must allow the conciliator or arbitrator substantial autonomy: “It must be given a discretion as to means having regard to the end, the prevention and settlement of industrial disputes by conciliation and arbitration. If the Act commanded that the Commission fix wages by reference to a basic wage it would, I consider, be invalid”: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 269.

Conciliation is “the coming together of ... parties for the discussion of questions with a view to amicable settlement”, and arbitration is “a means of settling a dispute by reference to a third party ... when the contentents have failed to agree”: *Australian Railways Union v Victorian Railways Cmr* (1930) 44 CLR 319 at 358 and 355. Arbitration may be “constituted not by the choice of the parties, but by public authority”: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1 at 44.

[1505.570] No common rule

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv).

Employees and employers who are not parties to an industrial dispute cannot be bound by the arbitrated award which settles that dispute. Accordingly, s 41(1) of the Commonwealth Conciliation and Arbitration Act 1904–1949 (Cth), which authorised the Arbitration Court to declare any term of an award to be a “common rule of any industry” in which the dispute arose, was invalid because the binding of persons not parties to the settled dispute was “foreign to arbitration”: *R v Kelley; Ex parte Victoria* (1950) 81 CLR 64 at 82. However, [s 51\(xxxv\)](#) may support legislation to prevent “industrial disputes which fall short of being threatened, impending or probable disputes”, and may authorise conciliation and arbitration to prevent industrial disputes, independent of the identification of any

dispute, “whether paper or real”: *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 320 and 328; [84 ALR 80](#).

[1505.575] Disputes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxv), s 51(xxxv).

The power in [s 51\(xxxv\)](#) requires a disagreement between parties in an industrial relationship, rather than a mere disruption of that relationship (through strikes or lock-outs, for example). “[A] disagreement may cause a strike, a lock-out, and disturbance and dislocation of industry; but these are the consequences of the industrial dispute, and not the industrial dispute itself, which lies in the disagreement”: *Caledonia Collieries Ltd v Australasian Coal and Shale Employees’ Federation (No 1)* (1930) 42 CLR 527 at 552. Such disputes may be created by one party delivering a log of claims to the other party: “[T]he foundation of the system of creating ... disputes by logs of demand is the doctrine that the essential quality of an industrial dispute is not the suspension of industrial relations but disagreement, difference of dissidence”: *Metal Trades Employers Assn v Amalgamated Engineering Union* (1935) 54 CLR 387 at 429.

To support the legislative power in [s 51\(xxv\)](#), the dispute must be genuine, arising out of a genuine claim which has been resisted, and not merely a device to invoke the Commonwealth power. Initially, the genuineness of the dispute must be determined by the arbitrator, but “it remains a question of fact for this court to determine on an application for relief by way of prerogative writ ... Although it is for the court to decide the question for itself, it will give considerable weight to a decision of the Commission so far as the decision turns on the facts, the degree of weight depending on the circumstances”: *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178 at 183–4; [60 ALR 641](#).

For a wider view of the scope of [s 51\(xxxv\)](#), sufficient to support legislation which would preserve interstate industrial peace rather than merely restore it where it has broken down, see *Re Federated Storemen and Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* (1989) 166 CLR 311 at 320–1, 327–8; [84 ALR 80](#). See also *Victoria v Commonwealth* (1996) 187 CLR 416; [138 ALR 129](#) ^{CB}.

[1505.580] The ambit of a dispute

The award made by an arbitrator in settlement of a dispute cannot go outside the ambit of the matters in dispute between the parties, an ambit which will usually be settled by the terms of a trade union's log of claims and the employers' response. “If the provisions are outside [the] ambit or scope [of the log of claims] they cannot be characterised as a settlement of the dispute”: *R v Holmes; Ex parte Victorian Employers Federation* (1980) 145 CLR 68 at 76; [31 ALR 487](#).

However, the arbitrator may be justified, in travelling beyond the apparent ambit of dispute, by the consideration “that an appropriate and enduring solution of the dispute calls for an award in terms different from those contained in the log of claims”: *R v Gaudron; Ex parte Uniroyal* (1978) 141 CLR 204 at 211; [18 ALR 395](#). An additional award provision, not claimed by the disputants, may be made where that provision is “reasonably necessary or proper for the effective determination of the dispute between the parties and to secure the maintenance of the award provisions”: *R v Spicer; Ex parte Seamen's Union of Australia* (1957) 96 CLR 341 at 351.

[1505.585] Extending beyond one state

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv).

To invoke the power outlined in [s 51\(xxxv\)](#), a dispute must “(1) be industrial, and (2) exist in one state and (3) extend beyond the limits of one state”: *R v Foster: Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 302. Accordingly, a dispute extending from one state into a territory will satisfy this requirement: *Lamshed v Lake* (1958) 99 CLR 132 at 143. The reference to “extending” is read as a reference to a current status rather than to a process. “The industrial disputes referred to in the Constitution ... are industrial disputes which at the moment do in fact extend beyond the limits of any one state, that is, which cover Australian territory that is not confined to the limits of any one state”: *R v Commonwealth Court of Conciliation and Arbitration* (1914) 18 CLR 224 at 243 (*Builders Labourers Case*).

It is the dispute, and not merely the industry, which must extend beyond one state. Even though employees in one state have struck in support of employees in the same industry in another state, there will not be the necessary industrial dispute extending beyond one state unless each group of employees is in dispute with its employers: *Caledonia Collieries Ltd v Australasian Coal and Shale Employees’ Federation (No 1)* (1930) 42 CLR 527 at 555. The subject matter of the dispute between employees and employers must be identical. There must be “a common cause” or “a community of interest between all the employees in [more than one state] for the same cause”: *R v Commonwealth Court of Conciliation and Arbitration (Builders Labourers Case)* (1914) 18 CLR 224 at 255 and 265. There will not be an industrial dispute extending beyond one state where there are only “separate and unconnected industrial questions necessarily depending on local considerations”: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Australian Workers’ Union* (1957) 99 CLR 505 at 511. The “common cause” will usually be established by the adoption of a log of claims on behalf of employees in different states and the refusal of that log of claims by the employers in those states. See, for example, *R v Ludeke; Ex parte Queensland Electricity Commission* (1985) 159 CLR 178; [60 ALR 641](#) ^{CB}, where a log of claims served in several states and territories formed the basis for the necessary industrial dispute, notwithstanding that the union’s immediate purpose had been to attract federal jurisdiction in relation to a Queensland dispute.

The necessary “community of interest: or unifying factor that will turn a series of disputes in different States into a dispute extending beyond one State will often be found in the existence of an identifiable industry. In *Re Australasian Meat Industry Employees’ Union; Ex parte Aberdeen Beef Co Pty Ltd* (1993) 176 CLR 154 ^{CB}, the High Court found that there was an industrial dispute extending beyond one State arising out of a log of claims made by a union of employees on 30 employers involved in the processing of meat — six in Queensland, one in South Australia and the balance in New South Wales. In a joint judgment, six members of the court (Mason CJ, Brennan, Deane Dawson, Toohey and Gaudron JJ) said at 160, it was not significant that the activities carried on in the respective States did not coincide: the parties were engaged in a single industry and that gave them a sufficient “community of interest”.

The community of interest may be found in some other factor. In *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 ^{CB}, a majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting) held that there was an industrial dispute within [s 51\(xxxv\)](#) between several unions of employees and several state governments and their agencies. Even if the several states were not engaged in a common industry, the nexus which combines several demands into a single industrial dispute “may also be found in the calling or vocation in which the participants are engaged”: above at 31.

[1505.590] Industrial relationship

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv).

A dispute between employers in the airline industry about the wages each should pay to its employees is not an “industrial dispute” because there is “no industrial relation between them”: *R v Portus; Ex parte Australian Air Pilots’ Assn* (1953) 90 CLR 320 at 327. A demarcation dispute between unions over the recruitment of new members, irrespective of their place of employment, will fall outside the [s 51\(xxxv\)](#) power; but a demand, made on an employer and a union by another union, that the employer should only employ members of the latter union and that the former union should not seek to recruit new members from amongst employees of the employer, was capable of generating an industrial dispute: *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Australian Paper Mills Employees’ Union* (1943) 67 CLR 619 [CB](#). See also *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Transport Workers’ Union of Australia* (1969) 119 CLR 529 at 539.

An industrial dispute may exist between a trade union and employers in the same industry who employ no members of the trade union, where the dispute concerns the conditions on which union members should be employed: *Burwood Cinema Ltd v Australian Theatrical and Amusement Employees Assn* (1925) 35 CLR 528 [CB](#). “[A]bsolute definiteness of the individuals engaged in the dispute cannot be essential, for in industrial disputes claims and demands are usually made for the benefit of ‘the ever changing body of workmen that constitute the trade’ ... The nexus is to be found in the industry or in the calling or vocation in which the participators are engaged: 35 CLR 528 at 548. See also *Metal Trades Employers Assn v Amalgamated Engineering Union* (1935) 54 CLR 387 at 417. Conversely, a demand by employers on a union in the same industry, that the union should be bound as to the conditions of employment of non-union labour in that industry, cannot give rise to an industrial dispute within [s 51\(xxxv\)](#); the respondent union lacked the relationship with the third party, non-unionists, possessed by the respondent employers in the Metal Trades case: *R v Graziers’ Assn of New South Wales; Ex parte Australian Workers’ Union* (1956) 96 CLR 317 [CB](#).

[1505.595] Industry

The restrictive view, that an industrial dispute could only arise in an industry which involved “the production or distribution of wealth [through] co-operation of capital and labour” (*Federated School Teachers Assn of Australia v Victoria* (1928) 41 CLR 569 at 575), was unequivocally rejected in *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297; [47 ALR 225](#) [CB](#). The words “industrial disputes” must “be given their popular meaning — what they convey to the man in the street”, so that they include “disputes between employees and employers about the terms of employment and the conditions of work”: 153 CLR 297 at 312. Consequently, an “industrial dispute” may arise between a trade union of social workers and employers, involved in delivering welfare services to unemployed people (*R v Coldham; Ex parte Australian Social Welfare Union*, above), and between state school teachers and state governments: *Re Lee; Ex parte Harper* (1986) 160 CLR 430; [65 ALR 577](#) [CB](#).

[1505.600] Industrial issue

[L](#) Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv).

The conventional and narrow view was that the subject matter of an industrial dispute was limited to matters relating “to the employer-employee relationship so that the subject-matter of demands by either party which are, for example, of a political or social or managerial nature will not be industrial matters”: *R v Portus; Ex parte ANZ Banking Group* (1972) 127 CLR 353 at 373. Accordingly, a claim, made by public transport employees on their employers, that the employers should not require an employee to operate alone a tram or bus on a route formerly serviced by two-person crews, related to “managerial prerogatives” and could not create an industrial dispute (*R v Commonwealth*

Conciliation Arbitration Commission; Ex parte Melbourne and Metropolitan Tramways Board (1966) 115 CLR 443 ^{CB}), and a claim by a union of employees, that employers deduct union membership fees from their employees' wages and pay those fees to the union, related to an aspect of the relationship between employees (a "workers' matter") and could not create an industrial dispute: *R v Portus; Ex parte ANZ Banking Group* (1972) 127 CLR 353 ^{CB}.

This restrictive view has now been unequivocally rejected. In *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117; [72 ALR 161](#) ^{CB}, the High Court held that a dispute about the recruitment of labour at a coal mine was an "industrial dispute" within [s 51\(xxxv\)](#): "[M]anagement and labour have a mutual interest in many aspects of the operation of a business enterprise. Many management decisions, once viewed as the sole prerogative of management, are now correctly seen as directly affecting the relationship of employer and employee and constituting an 'industrial matter': 163 CLR 117 at 135. Disputes over "manning" levels related to the volume and type of work to be performed by employees, and disputes over the recruitment of a competent and reliable workforce directly affected the conditions of work of employees in the areas of occupational health and safety: "Employees, as well as management, have a legitimate interest in both these matters": 163 CLR 117 at 135.

[1505.605] Intergovernmental immunities

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv).

The state governments, as employers, have no constitutional immunity from the industrial conciliation and arbitration system established by the Commonwealth Conciliation and Arbitration Act 1904 (Cth): *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ^{CB}. However, the Commonwealth Parliament cannot legislate under [s 51\(xxxv\)](#) so as to place "special burdens or disabilities" on the states, by denying to it certain procedural advantages made available to other employers involved in arbitral proceedings: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; [61 ALR 1](#) ^{CB}. Such discrimination against a state or states conflicts with "the constitutional concept of the Commonwealth and the states as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised state governments": 159 CLR 192 at 218. It has been suggested that "implications which are necessarily drawn from the federal structure of the Constitution itself" might prevent the Commonwealth Parliament subjecting the state governments to the control of the federal industrial arbitration system in relation to their employment of central departmental employees: *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 297 at 313; [47 ALR 225](#). On the other hand it has been suggested that, in the absence of discrimination against a state, the Commonwealth's exercise of the [s 51\(xxxv\)](#) power "will not transgress the implied limitations on Commonwealth legislative power": *Re Lee; Ex parte Harper* (1986) 160 CLR 430; [65 ALR 577](#) ^{CB}. The apparent conflict between those suggestions was resolved in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 ^{CB}. A majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson J dissenting) held, at 26 and 27, that the Commonwealth's legislative power over industrial arbitration and conciliation, [s 51\(xxxv\)](#), was subject to an implied limitation with two elements: first, a prohibition against discrimination which involved placing special burdens or disabilities on the States; and, secondly, a prohibition against laws of general application which operated to destroy or curtail the continued existence of the States or their capacity to function as governments: above at 25. Otherwise, the States as employers had no immunity from laws passed under [s 51\(xxxv\)](#): above at 14. The court held that the Commonwealth could authorise the Australian Industrial Relations Commission to settle a dispute between the States and their employees, other than those engaged "at the higher levels of government"; above at 27; over the minimum conditions of their employment. But the Commission

could not be authorised to determine, in settlement of such a dispute, the number of State government employees nor a State's redundancy processes. The conditions of employment at "higher levels" of government (departmental heads and ministerial staff, for example) and the determination of who should be employed or made redundant at all levels of employment were "critical to a State's capacity to function as a government", the majority justices said: above at 26, 27.

See also *Victoria v Commonwealth* (1996) 187 CLR 416; [138 ALR 129](#) ^{CB}, where the High Court held that provisions in the Industrial Relations Act 1988 (Cth) imposing obligations on employers with respect to equal pay, termination of employment and parental leave could validly apply to the States as employers, except with respect to the employment at the higher levels of government.

[1505.606] Contempt of the Industrial Relations Commission

The Parliament cannot make it an offence to publish matter calculated to bring the Australian Industrial Relations Commission into disrepute, regardless of the truth or otherwise of the matter published, because such a prohibition restricts the constitutional freedom to discuss matters relating to the government of the Commonwealth: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; [108 ALR 681](#) ^{CB} per Brennan, Deane, Toohey and Gaudron JJ; or because the prohibition is not reasonably proportionate to protecting the reputation and authority of the Commission: *Nationwide News Pty Ltd v Wills*, above per Mason CJ, Dawson and McHugh JJ.

SECTION 51(xxxvi) — MATTERS IN RESPECT OF WHICH THIS CONSTITUTION MAKES PROVISION UNTIL THE PARLIAMENT OTHERWISE PROVIDES

[1505.610] Associated provisions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) 10, 22, 24, 29, ss 3, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 7, 73, 96, 97.

The sections of the Constitution which "make provision until the Parliament otherwise provides" include [ss 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 73, 96](#) and [97](#).

[1505.615] Effect of s 51(xxxvi)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxvi), s 96.

"In all such cases [apart from [s 96](#)] the Constitution makes directly an interim provision for the subject-matter and [s 51\(xxxvi\)](#) operates to confer power on the Parliament to make thereafter such provisions with respect thereto as from time to time may appear appropriate": *Victoria v Commonwealth* (1957) 99 CLR 575 at 604 (the *Second Uniform Tax* case).

SECTION 51(xxxvii) — MATTERS REFERRED TO THE PARLIAMENT OF THE COMMONWEALTH BY THE PARLIAMENT OR PARLIAMENTS OF ANY STATE OR STATES, BUT SO THAT THE LAW SHALL EXTEND ONLY TO STATES BY WHOSE PARLIAMENTS THE MATTER IS REFERRED, OR WHICH AFTERWARDS ADOPT THE LAW

[1505.625] Form of reference

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxvii).

(VIC) [Terrorism \(Commonwealth Powers\) Act 2003](#).

The use of the term “matters” permits a reference of power to be expressed in broad and general terms. It is “an entirely erroneous inference without foundation” to limit the power which may be referred under [s 51\(xxxvii\)](#) to the power to enact a law in the form of a described and defined statute. “It seems absurd to suppose that the only matter that could be referred was the conversion of a specific bill into a law”: *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 224–5.

Modern references commonly take the form of a reference to a specific statutory text, together with a separate subject-matter reference that allows some amendment of that statutory text: see, eg, *Terrorism (Commonwealth Powers) Act 2003* (Vic), discussed in *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[446\]–\[457\]](#) ^{CB}. See also *Corporations (Commonwealth Powers) Act 2001* (Vic).

Provisions in Commonwealth legislation that purport to prevent the Commonwealth from amending a referred text without the consent of the states are very likely invalid: see *Thomas v Mowbray*, above, at [212], [456]; compare at [607].

[1505.630] Reference may be terminable

“There is no reason to suppose that the words ‘matters referred’ cannot cover matters referred for a time which is specified or which may depend on a future event even if that event involves the will of the state Governor-in-Council and consists in the fixing of a date by proclamation”: *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 226; *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1 at 38 and 52.

[1505.635] Repeal of reference

A state parliament may, it seems, repeal a reference of power: “We do not ... express any final opinion upon it ... [but] it is the general conception of English law that what Parliament may enact it may repeal”: *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 at 226; *Graham v Paterson* (1950) 81 CLR 1 at 18 and 25.

[1505.640] Not an exclusive power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

A reference of power by a state parliament to the Commonwealth Parliament does not divest the state parliament of legislative power over the subject matter: *Graham v Paterson* (1950) 81 CLR 1 ^{CB}. However, legislation passed by the Commonwealth Parliament may displace state legislation by virtue of [s 109](#) of the Constitution: *R v Public Vehicles Licensing Appeal Tribunal; Ex parte Australian National Airways Ltd* (1964) 113 CLR 207 ^{CB}.

SECTION 51(xxxviii) — THE EXERCISE WITHIN THE COMMONWEALTH, AT THE REQUEST OR WITH THE CONCURRENCE OF THE PARLIAMENTS OF ALL THE STATES DIRECTLY CONCERNED, OF ANY POWER WHICH CAN AT THE ESTABLISHMENT OF THIS CONSTITUTION BE EXERCISED ONLY BY THE PARLIAMENT OF THE UNITED KINGDOM OR BY THE FEDERAL COUNCIL OF AUSTRALASIA

[1505.645] Current state requests

L Legislation cited in this paragraph

(CTH) CONSTITUTION [1505] s 51 Legislative powers of the Parliament

(NSW) Constitutional Powers (Coastal Waters) Act 1979 .
(NSW) Australia Acts (Request) Act 1985 .
(CTH) Coastal Waters (State Powers) Act 1980 .
(QLD) Australia Acts (Request) Act 1985 .
(SA) Constitutional Powers (Coastal Waters) Act 1979 .
(TAS) Australia Acts (Request) Act 1985 .
(TAS) Constitutional Powers (Coastal Waters) Act 1979 .
(VIC) Constitutional Powers (Coastal Waters) Act 1980 .
(VIC) Australia Acts (Request) Act 1985 .
(WA) Constitutional Powers (Coastal Waters) Act 1979 .
(WA) Australia Acts (Request) Act 1985 .

The following state Acts have been passed to request the exercise of powers by the Commonwealth Parliament:

New South Wales: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;

Queensland: Coastal Waters (State Powers) Act 1980; Australia Acts (Request) Act 1985;

South Australia: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;

Tasmania: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985;

Victoria: Constitutional Powers (Coastal Waters) Act 1980; Australia Acts (Request) Act 1985;

Western Australia: Constitutional Powers (Coastal Waters) Act 1979; Australia Acts (Request) Act 1985.

[1505.650] A broad interpretation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxviii).

“[T]he primary subject to which [s 51\(xxxviii\)](#) was addressed was the perceived need to ensure that legislative powers necessary for the purposes of the new nation could be exercised locally notwithstanding that, prior to federation, they were beyond the competence of local legislatures”. Accordingly, [s 51\(xxxviii\)](#) should be given a broad interpretation reflecting its “national purpose of a fundamental kind”, which is that of “plugging gaps which might otherwise exist in the overall plenitude of the legislative powers exercisable by the Commonwealth and state parliaments under the Constitution”: *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 378 and 379; [88 ALR 12](#).

[1505.655] Not territorially limited

The words “within the Commonwealth” refer to the location of the exercise of the designated legislative power and not to the area of operation of the laws made in the exercise of that power; so that the Parliament may, at the request of the states directly concerned, legislate extra-territorially: *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 376–8; [88 ALR 12](#).

[1505.660] Power to alter state constitutions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 106, s 51(xxxviii).

(CTH) [Coastal Waters \(State Powers\) Act 1980](#) s 5(c).

“[T]he continuance of the Constitution of a state pursuant to [s 106](#) is subject to any Commonwealth law enacted pursuant to the grant of legislative power in [s 51\(xxxviii\)](#)”: *Port MacDonnell Professional Fishermens Assn Inc v South Australia* (1989) 168 CLR 340 at 381; [88 ALR 12](#). Accordingly, s 5(c) of the Coastal Waters (State Powers) Act 1980 (Cth), providing that the legislative powers of the states extend to the making of certain laws outside the coastal waters of the state, is a valid exercise of the power conferred by [s 51\(xxxviii\)](#).

SECTION 51(xxxix) — 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

[1505.665] Matters incidental to legislative powers

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51, s 51(i) to (xxxviii), s 51(xxxix), Section 51(xxxix).

In relation to the legislative powers of the Parliament, [s 51\(xxxix\)](#) is, it seems, largely superfluous. The Parliament's power to make laws on specific subject matters, conferred by [s 51\(i\) to \(xxxviii\)](#), “extends to matters incidental to those laws. That is, of necessity, included in the power granted ... Though the incidental power would have been exercisable without [[s 51\(xxxix\)](#)], the subsection makes assurance doubly sure”: *C G Crespín & Son v Colac Co-op Farmers Ltd* (1916) 21 CLR 205 at 214. “Section 51(xxxix) ... has been treated (somewhat unnecessarily or superfluously, as I think, see *Le Mesurier v Connor* (1929) 42 CLR 481 ^(CB)) as including not only what attends, or arises in, the exercise of legislative power but also what is incidental to the subject-matter of each of the powers conferred by the other paragraphs of [s 51](#). The description of the subject-matter of those powers is of course brief, but independently of [s 51\(xxxix\)](#) the description would be interpreted as including all matters that are incidental thereto”: *Australian Coastal Shipping Commission v O'Reilly* (1962) 107 CLR 46 at 54.

[1505.670] Punishing conduct directed against the Executive Government

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [Section 51(xxxix)].

“[\[Section 51\(xxxix\)\]](#) seems to me to put beyond doubt the power of the Parliament to make laws as to frauds on the Commonwealth and for punishment of those who have been guilty of such frauds or have conspired to commit them ... Frauds on the Commonwealth, and the punishment of such

frauds, as well as protection from such frauds, are, in my opinion, ‘matters incidental to the execution’ of the powers vested by the Constitution in the Government of the Commonwealth, as well as those vested in the Parliament; and it follows that the Parliament may make laws making such frauds punishable as crimes”: *R v Kidman* (1915) 20 CLR 425 at 450.

[1505.675] Internal security

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix).

“Under [[s 51\(xxxix\)](#)] the Commonwealth Parliament may make laws to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers ... not only against physical attack and interference, but also against utterance of words intended to excite disaffection against the Government”: *Burns v Ransley* (1949) 79 CLR 101 at 109–10. “Laws which are directed to the protection and maintenance of the legal and political organisation of the Commonwealth and of the Commonwealth in its legal and political relations may properly be enacted under [[s 51\(xxxix\)](#)]”: *R v Sharkey* (1949) 79 CLR 121 at 135. On the other hand, Dixon J expressed the view (at 148) that this protective legislative power was implicit in the establishment of the Commonwealth: “The power is not expressly given but arises out of the very nature and existence of the Commonwealth as a political institution”. See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 188; *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 357; [73 ALR 161](#).

[1505.680] National enterprises

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), s 61.

“There is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of [s 51\(xxxix\)](#) and [s 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”: *Victoria v Commonwealth* (1975) 134 CLR 338 at 397; [7 ALR 277](#) (the AAP case). Legislation regulating and protecting the Australian Bicentennial Authority is supported by [s 51\(xxxix\)](#). It is within the executive power of the Commonwealth for the executive government “to recognise and celebrate its own origins in history ... and legislation which is incidental to it falls within [s 51\(xxxix\)](#)”: *Davis v Commonwealth* (1988) 166 CLR 79 at 104; [82 ALR 633](#).

[1505.685] Matters incidental to judicial power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [1705].

As with the Commonwealth's principal legislative powers, the power given to the Parliament to define the jurisdiction of any federal court other than the High Court and to invest state courts with federal jurisdiction (conferred by s 77(i) and (iii) of the Constitution: see [\[1705\]](#)) will carry with it a substantial incidental legislative power: see *R v Murphy* (1985) 158 CLR 596 at 614; [61 ALR 139](#).

[1505.690] Execution of judgments

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix).

“[T]he Parliament can, in the exercise of the power given by [s 51\(xxxix\)](#), enable this court, in a proceeding by the Commonwealth to recover money owing by a state to it under the financial agreement, to pronounce a judgment that is unconditional, and can enact laws for the enforcement of that judgment against the state”: *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 at 177.

[1505.695] Discovery in federal proceedings

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) Section 64.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix).

Section 64 of the Judiciary Act 1903 (Cth), to the extent that it removes the right of state to resist discovery in proceedings brought within federal jurisdiction, is supported by [s 51\(xxxix\)](#): *Griffin v South Australia* (1924) 35 CLR 200 [CB](#).

[1505.700] No power to extend jurisdiction of High Court

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), s 76.

“[Section 51\(xxxix\)](#) does not extend the power to confer original jurisdiction on the High Court contained in [s 76](#)”: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265.

[1505.705] No power to reconstitute state court

The reconstitution of a state court or of the organisation through which its powers and jurisdiction are exercised cannot be considered to be a matter incidental to the exercise of any federal jurisdiction vested in it, and therefore is not supported by s 51(xxxix): *Le Mesurier v Connor* (1929) 42 CLR 481 [CB](#).

[1505.710] Ancillary power to invest federal jurisdiction in state courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix).

The extent to which [s 51\(xxxix\)](#) may confer ancillary power on the Parliament to invest state courts with federal jurisdiction is a question unresolved by the High Court of Australia, being subject to a number of conflicting opinions: see *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 452; *Lorenzo v Carey* (1921) 29 CLR 243 at 252; *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 105 and 115–16; *Le Mesurier v Connor* (1929) 42 CLR 481 at 498 and 514.

(CTH) CONSTITUTION [1510] s 52 Exclusive powers of the Parliament

Practice & Procedure High Court & Federal Court of Australia

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[1510] 52 Exclusive powers of the Parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to —

- (i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:
- (ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:
- (iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Section 52(i)

[1510.5] The seat of government

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 125, s 52(i).

(CTH) [Seat of Government Act 1908](#).

(CTH) [Seat of Government Acceptance Act 1909](#).

The seat of government of the Commonwealth was to be determined by the Parliament in accordance with [s 125](#) of the Constitution: see [\[1125\]](#). That determination was made under the Seat of Government Act 1908 (Cth) and the Seat of Government Acceptance Act 1909 (Cth). The seat of government is a place located within but not co-extensive with the Australian Capital Territory. The “power under the first limb of s 52(i) extends only ... to laws on the subject of the seat of government as a specific and separate topic of legislation to be distinguished from more general topics which may affect a place in which the seat of government is or is to be”: *Spratt v Hermes* (1965) 114 CLR 226 at 258. The whole power to legislate for the government of the Australian Capital Territory is found in [s 122](#) of the Constitution: 114 CLR 226 at 241, 258, 264, 269, 273 and 280. In *Svikart v Stewart* (1994) 181 CLR 548 at 561; [125 ALR 554](#) at [560](#); 69 ALJR 35 at 39, Mason CJ, Deane, Dawson and

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McHugh JJ said that “the power to make laws with respect to the seat of government would seem to be concerned with its political or constitutional aspects, rather than with the government of the territory which it occupies”.

[1510.10] Places acquired by the Commonwealth

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 52(i).

The term “places acquired by the Commonwealth for public purposes” at least covers areas of land in which the Commonwealth holds the fee simple, and which have been acquired and are used for defence purposes: *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 [CB](#); *R v Phillips* (1970) 125 CLR 93 [CB](#). A “place” is “an area of the earth's surface”, a “location or site” or a “fixed locality”: *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 at 97. The acquisition of a five-year leasehold interest does not involve the acquisition of a place within s 52(i): *Bevelon Investments Pty Ltd v City of Melbourne* (1976) 135 CLR 530; [12 ALR 391](#) [CB](#).

[1510.15] Exclusive power over Commonwealth places

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 52(ii).

[Section 52\(ii\)](#) gives to the Parliament an exclusive power to legislate generally with respect to acquired places, so that any law regulating conduct in such a place is a law with respect to the place. Accordingly, after Commonwealth acquisition of a place, state legislation cannot apply to or in relation to that place, regardless of the subject matter of that legislation and the date of the legislation's enactment: *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89 [CB](#); *R v Phillips* (1970) 125 CLR 93 [CB](#). As to whether state legislation will revive when a place ceases to be a Commonwealth place, see *Attorney-General (NSW) v Stocks and Holdings (Constructors) Pty Ltd* (1970) 124 CLR 262 [CB](#).

[1510.16] Power exclusive of state, but not territory, power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 52(i).

The exclusive power conferred by [s 52\(i\)](#) over places acquired by the Commonwealth for public purposes is a legislative power which is exclusive of the legislative power of the States: *Svikart v Stewart* (1994) 181 CLR 548 at 560; [125 ALR 554](#) at [559](#); 69 ALJR 35 at 38–9 per Mason CJ, Deane, Dawson and McHugh JJ. There is nothing in the Constitution, their Honours said (ALR at 561) that would inhibit [s 122](#) of the Constitution so as to prevent the Commonwealth Parliament conferring power on a Territory legislature to legislate with respect to Commonwealth places in the Territory. See also Brennan J, ALR at 562–3.

[1510.17] State taxing laws and Commonwealth places

L Legislation cited in this paragraph

(VIC) [Stamps Act 1958](#).

In *Allders International Pty Ltd v Cmr of State Revenue* (1996) 186 CLR 630; [140 ALR 189](#) [CB](#), a

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majority of the High Court held that the Stamps Act 1958 (Vic) was invalid to the extent that it purported to impose duty on a lease instrument relating to land within a Commonwealth place. The fact that the Stamps Act was of general application and was not limited in its operation to a Commonwealth place did not prevent the Act being characterised as a law with respect to a Commonwealth place. The test was whether the Commonwealth Parliament could enact such a law under s 52(i): if it could, then the State law could not apply in, or in relation to, a Commonwealth place in the State. See, in particular, *McHugh, Gummow and Kirby JJ*, CLR at 676–7.

[1510.20] Commonwealth legislation

L Legislation cited in this paragraph

(CTH) [Commonwealth Places \(Application of Laws\) Act 1970](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 52(i).

In 1970, the Commonwealth Parliament legislated to adopt, as Commonwealth law applicable to Commonwealth places in any state, the provisions of that state's laws as they stand from time to time. This adoption is subject to some exceptions, designed to avoid constitutional limitations peculiar to the Commonwealth Parliament. For example, State taxation laws were not picked up and applied as Commonwealth law. See *Commonwealth Places (Application of Laws) Act 1970* (Cth).

After the High Court's decision in *Alders International Pty Ltd v Cmr of State Revenue* (1996) 186 CLR 630; [140 ALR 189](#) ^{CB} [1510.17], the Commonwealth Parliament enacted the *Commonwealth Places (Mirror Taxes) Act 1998*, which adopted, as Commonwealth law applicable to Commonwealth places in a particular State, State taxing laws as they stand from time to time and which are excluded from operating in Commonwealth places by s 52(i).

Section 52(ii)

[1510.35] Transferred departments

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [1649].

(NSW) [Anti-Discrimination Act 1977](#).

The departments transferred by the Constitution are listed in s 69: see [\[1649\]](#). The references to those departments include any successors to the transferred departments; in particular, the Australian Postal Commission, established by the *Postal Services Act 1975* (Cth) as the successor to the department responsible for posts, is not subject in its employment practices, to the *Anti-Discrimination Act 1977* (NSW): *Australian Postal Commission v Dao* [\(1985\) 3 NSWLR 565](#); [63 ALR 1](#) ^{CB}.

[1510.40] Subject matter

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ix), s 51(v), s 51(vi), s 51(vii), Section 52(ii).

“[Section 52\(ii\)](#) relates to the control of matters relating to transferred departments ... Power to legislate with respect to the subject matters with which such departments deal is conferred ... not by [s 52\(ii\)](#) but by [s 51\(v\)](#) — posts etc, [s 51\(vi\)](#) — defence, [s 51\(vii\)](#) — lighthouses etc, and [s 51\(ix\)](#) — quarantine. These provisions would be quite unnecessary if [s 52\(iii\)](#) conferred exclusive, and

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therefore complete, legislative powers in relation to those subject matters": *Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 571.

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[\(CTH\) CONSTITUTION \[1515\] s 53 Powers of the Houses in respect of legislation](#)

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[1515] 53 Powers of the Houses in respect of legislation

Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Section 53 Generally

[1515.5] Not justiciable

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 53, s 54, 56.

[Section 53](#) refers, in its procedural requirements, to “proposed laws”. This section and [s 54](#) are “merely directory” and relate “only to the order of business between the two houses in dealing with

the progress of Bills”: *Osborne v Commonwealth* (1911) 12 CLR 321 at 352. “[Section 53](#) is a procedural provision governing the intramural activities of the Parliament. The traditional view is that this court does not interfere in those activities ... The traditional view accords both with the text of [s 53](#), which speaks of ‘proposed laws’ rather than ‘laws’, and with the intention manifested in the Convention Debates”: *Western Australia v Commonwealth* (1995) 183 CLR 373; [128 ALR 1](#) at [61](#) [CB](#) per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

In *Combet v Commonwealth* [\(2005\) 221 ALR 621](#); 80 ALJR 247; [\[2005\] HCA 61](#); [BC200507894](#) at [\[141\]](#) [CB](#), Gummow, Hayne, Callinan and Heydon JJ said that [ss 53, 54](#) and [56](#) “regulate the relations between the two Houses of the Federal Parliament in respect of money Bills. They are directed, therefore, to steps taken *within* the Houses of Parliament before the law is made”. Their Honours said, at [155], that it was “unnecessary to decide whether a dispute about the application of those aspects of ss 53 and 54 could give rise to a matter to be decided by this court”. See also *Permanent Trustee Australia Ltd v Cmr of State Revenue* (2004) 220 CLR 388; [211 ALR 18](#); [\[2004\] HCA 53](#); [BC200407491](#) at [\[40\]–\[41\]](#) [CB](#).

[1515.10] Ordinary annual services of the Government

This term is treated as covering such matters as salaries for public employees, maintenance of buildings and equipment and other recurrent expenditure, whose appropriation is authorised by the annual Appropriation Act No 1; while other expenditure (for works, buildings, sites, etc; for grants to the states; and for new policies not authorised by special legislation) is authorised by the annual Appropriation Act No 2: D C Pearce, ‘The Legislative Power of the Senate’, in L Zines (ed), *Commentaries on the Australian Constitution* (1977), pp 119 and 132. In *Combet v Commonwealth* [\(2005\) 221 ALR 621](#); 80 ALJR 247; [\[2005\] HCA 61](#); [BC200507894](#) at [\[148\]–\[154\]](#) [CB](#), Gummow, Hayne, Callinan and Heydon JJ discussed the history and meaning of the phrase the “ordinary annual services of Government”.

[1515.15] Rejection of money bills

“[T]he Senate may reject any proposed law, even one which it cannot amend”; “[E]ven in the case of money bills [the Senate] has the right freely to request amendments or to reject outright”: *Victoria v Commonwealth* (1975) 134 CLR 81 at 143 and 168; [7 ALR 1](#) (the *PMA* case).

(CTH) CONSTITUTION [1520] s 54 Appropriation Bills

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[1520] 54 Appropriation Bills

The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Section 54 Generally

[1520.5] Not justiciable

See [\[1515.5\]](#).

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(CTH) CONSTITUTION [1525] s 55 Tax Bill

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[1525] 55 Tax Bill

Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Section 55 Generally

[1525.5] Purpose of s 55

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 53, s 55.

“The paragraph is clearly to protect the house representing the states from being faced with the alternative of rejecting a tax bill necessary for the adjustment of finances, or passing it with the addition of some matter of policy independent of taxation, to which they might be emphatically opposed”: *Buchanan v Commonwealth* (1913) 16 CLR 315 at 328. “The purpose of [s 55](#) was to protect the Senate from any possible abuse of the restriction placed upon it by [s 53](#), which provides that the Senate may not amend proposed laws imposing taxation. The protection consists in ‘guarding the Senate from compulsive acquiescence in one tax by the moral necessity of passing another distinct tax’ (*Harding v FCT* (1917) 23 CLR 119 at 134 per Isaacs J)”: *Resch v FCT* (1942) 66 CLR 198 at 222.

[1525.10] Application of s 55

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 55.

(CTH) [Migration Act 1958](#) s 34A.

The prohibition in the first paragraph of [s 55](#) has been extended “to laws in the form which they stand from time to time after enactment, that is to say ... to Acts of Parliament on the statute book”: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 471; [82 ALR 385](#). Consequently, the insertion of s 34A (imposing a tax on persons entering Australia) into the Migration Act 1958 by the Migration Amendment Act 1987 was held to offend [s 55](#) because it attempted “to bring about something which the Constitution directly and in terms forbids and which is not within the competence of the Parliament to achieve”: CLR at 472. See also *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 177 CLR 480; [112 ALR 53](#) at [64](#) per Mason CJ, Brennan, Deane and Gaudron JJ.

[1525.15] Imposing taxation

L Legislation cited in this paragraph

(CTH) [Income Tax Assessment Act 1936](#) s 218, s 218.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 55.

A law will impose taxation where it authorises “a compulsory exaction of money by a public authority for public purposes, enforceable by law”; but taxation is to be distinguished from a payment (even if compulsory) for services rendered and a financial penalty: *Matthews v Chicory Marketing Board* (1938) 60 CLR 263 at 270. A payment for services rendered must be “a fee or charge exacted for particular identified services provided or rendered individually to, or at the request or direction of, the particular person required to make the payment”; and a demand that Australian citizens pay a ‘prescribed fee for immigration clearance’ on exercising their legal right to re-enter Australia cannot properly be seen as such a fee or charge: *Air Caledonie International v Commonwealth* (1988) 165 CLR 462 at 470; [82 ALR 385](#). A financial penalty is distinguished from taxation because the former is “claimed as solely a penalty for an unlawful act or omission”, while the latter is “demanded as a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends”: *R v Barger* (1908) 6 CLR 40 at 99. See also *Re Dymond* (1959) 101 CLR 11 at 22. The creation, by the Income Tax Assessment Act 1936 (Cth) s 218, of a charge in favour of the Commissioner of Taxation over money due to a taxpayer does not involve the imposition of taxation. Section 218 merely provides an additional mechanism whereby the commissioner may recover tax which is already due. Consequently, the section does not offend [s 55](#): *Deputy Cmr of Taxation v GIO (NSW)* (1992) 109 ALR 159 at [168–9](#) per Wilcox J; affirmed on this point in *Deputy Cmr of Taxation v GIO (NSW)* (1993) 45 FCR 284; [117 ALR 61](#) at [77](#) ^(CB).

[1525.20] Dealing with the imposition of taxation

According to Fullagar J (with whom Dixon CJ, Kitto and Windeyer JJ agreed), the term “dealing with the imposition of taxation” comprehends legislative provisions creating the legal liability to pay the tax, specifying the persons on whom the liability falls and defining the extent of that liability, but does not include “provisions for administration and machinery; the appointment and powers and duties of a commissioner of taxation, the making of returns and assessments, the determination of questions of law and fact relating to liability, the collection and recovery of tax, the punishment of offences, stand on a different footing”: *Re Dymond* (1959) 101 CLR 11 at 20–1. See also *MacCormick v FCT* (1984) 158 CLR 622 at 644; [52 ALR 53](#); *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 341–2; [73 ALR 161](#).

[1525.25] Drafting of taxation legislation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 55.

“By reason of the provisions of [s 55](#) it has been the invariable practice since the establishment of the Commonwealth, when Parliament has proposed to levy a tax on any subject of taxation, to pursue that object by means of two separate Acts, the one of which actually imposes the tax and fixes the rate of tax, and the other of which provides for the incidence, assessment and collection of the tax, and for a variety of incidental matters. It is common to refer to the latter Act as the Assessment Act, and to the former as the Taxing Act”: *Re Dymond* (1959) 101 CLR 11 at 18. See also *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 341; [73 ALR 161](#).

[1525.30] One subject of taxation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 55.

(CTH) [Fringe Benefits Tax Act 1986](#).

[Section 55](#) “is concerned with political relations, [it] must be taken as contemplating broad distinctions between possible subjects of taxation based on common understanding and general conceptions, rather than on any analytical or logical classification”: *Resch v FCT* (1942) 66 CLR 198 at 223. “The test, in deciding whether the subject of taxation imposed by an Act is single, is in our opinion that stated by Isaacs J in *Harding v FCT* (1917) 23 CLR 119 at 135, namely whether, ‘looking at the subject-matter which is dealt with as if it were a unit by Parliament, it can then, in the aspect in which it has been so dealt with, be fairly regarded as a unit or whether it then consists of matters necessarily distinct and separate’ ... Although the court is bound to insist on compliance with the requirements of [s 55](#) so that the section achieves its purpose of enabling the Senate to confine its consideration in each case to a taxing statute dealing with a single subject of taxation, in applying the test stated above, the court will naturally give weight to Parliament’s understanding that its Tax Act deals with one subject of taxation. This is because the application of the test involves what is in substance a question of fact and judgment. The court should not resolve such a question against the Parliament’s understanding with the consequence that the statute is constitutionally invalid, unless the answer is clear”: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 344; [73 ALR 161](#). See also *Austin v Commonwealth* (2003) 215 CLR 185; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) at [\[190\]–\[201\]](#) ^{CB}. An Act which deals with the taxation of income and the taxation of capital receipts does not deal with more than one subject of taxation: the distinction between profits of a capital nature and profits in the nature of income is not maintained in the Income Tax Assessment Act, nor is it “a discrimination which the legislature is bound to regard”: *Resch v FCT* (1942) 66 CLR 198 at 225. The Fringe Benefits Tax Act 1986 (Cth), which imposes a tax on employers in respect of fringe benefits provided to their employees and a tax on state governments in respect of fringe benefits provided to their employees and to members of state parliaments, does not deal with more than one subject of taxation. So far as the tax on private and public employers is concerned, “a tax with more than one object may nevertheless deal only with one subject of taxation”; and the Act’s extension of the term “employee” to include a state member of Parliament did not, “[a]s a matter of common understanding”, introduce an additional subject of taxation: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 351 and 353; [73 ALR 161](#).

[1525.35] Duties of excise

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 55.

A duty of excise is a tax upon persons in relation to goods — that is, articles of commerce or things

which, even if not saleable or without any discernible sale value, may be the subject of trading or commercial transaction: *Mutual Pools & Staff Pty Ltd v FCT* (1992) 173 CLR 450; [104 ALR 545](#) at [558](#); 66 ALJR 222 at 229 [CB](#) per Dawson, Toohey and Gaudron JJ. A tax on land (or on any other thing or activity) does not become a duty of excise through Parliament deeming the subject matter of the tax to be goods: 104 ALR at 558–9; 66 ALJR at 229–30 per Dawson, Toohey and Gaudron JJ. Accordingly, the inclusion, in a law imposing sales taxes, of a tax on swimming pools constructed in situ (that is, a land tax) involved a breach of the last clause of [s 55](#), notwithstanding a legislative provision deeming the swimming pool to be goods; and, as a consequence, the provisions imposing the tax on swimming pools constructed in situ were invalid: *Mutual Pools & Staff Pty Ltd v FCT* (1992) 173 CLR 450; [104 ALR 545](#); 66 ALJR 222 [CB](#).

End of Document

(CTH) CONSTITUTION [1530] s 56 Recommendation of money votes

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

Alexander Flecknoe-Brown

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[1530] 56 Recommendation of money votes

A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

End of Document

(CTH) CONSTITUTION [1535] s 57 Disagreement between the Houses

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2009

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[1535] 57 Disagreement between the Houses

If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

Section 57 Generally

[1535.5] Justiciability

“The court, in my opinion, not only has the power but, when approached by a litigant with a proper interest to do so, has the duty to examine whether or not the lawmaking process prescribed by the Constitution has been followed and, if it has not, to declare that which has emerged with the appearance of an Act, though having received the royal assent, is not a valid law of the

Commonwealth”: *Victoria v Commonwealth* (1975) 134 CLR 81 at 118; [7 ALR 1](#) (the *PMA* case). See also *Western Australia v Commonwealth* (1975) 134 CLR 201 at 276; [7 ALR 159](#); 50 ALJR 68.

[1535.10] Mandatory procedures

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 57.

“The nature and importance of the powers conferred by [s 57](#) are such as to suggest that they may only be exercised in the circumstances which that section carefully defines. The words of [s 57](#) admit of no other conclusion — the powers are in terms granted only if the events mentioned have occurred; the happening of those events is made by the section a condition precedent to the exercise of the powers”: *Victoria v Commonwealth* (1975) 134 CLR 81 at 156; [7 ALR 1](#) (the *PMA* case). However, the omission of any of the conditions precedent will not vitiate a double dissolution and the subsequent general election. The newly elected Parliament would be “quite unaffected by whatever may or may not have preceded that dissolution”: 134 CLR at 178

[1535.15] Three month interval

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 57.

The interval of 3 months referred to in the first paragraph of [s 57](#) must elapse between the time when the Senate first rejects, fails to pass, or passes with unacceptable amendments, the relevant proposed legislation and the time when the House of Representatives passes that legislation for a second time: *Victoria v Commonwealth* (1975) 134 CLR 81; [7 ALR 1](#) [CB](#) (the *PMA* case).

[1535.20] Fails to pass

The Senate will be taken to have “failed to pass” proposed legislation when it has omitted to pass the proposed legislation after allowing a reasonable period for consideration of or deliberation upon that legislation, when it can be said “that the time has arrived for the Senate to take a stand with respect to the Bill”. “... [I]t will be the conduct of the Senate itself and not the conduct or opinions or anticipatory statements of individual senators, whatever may be their party standing or party authority, which can have any relevance to the question whether, the situation having been reached where the Senate is called upon to give an answer on the Bill, it has failed to pass it”: *Victoria v Commonwealth* (1975) 134 CLR 81 at 122; [7 ALR 1](#) (the *PMA* case).

[1535.25] Section 57 available for multiple Bills

A double dissolution may be proclaimed in respect of more than one Bill and a joint sitting may deliberate on and pass more than one Bill: *Cormack v Cope* (1974) 131 CLR 432; [3 ALR 419](#) [CB](#).

[1535.30] No requirement for prompt dissolution

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 57.

There is no requirement that the [s 57](#) power to dissolve both houses simultaneously be exercised promptly once the necessary preliminary steps have been fulfilled. “[I]t would be quite inappropriate that [the court] should conjecture as to when delay by [the Governor-General] exceeds the limits of reasonableness and becomes undue delay”: *Western Australia v Commonwealth* (1975) 134 CLR 201 at 252; [7 ALR 159](#); 50 ALJR 68.

End of Document

(CTH) CONSTITUTION [1540] s 58 Royal assent to Bills

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[1540] 58 Royal assent to Bills

When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Recommendation by Governor-General — The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Section 58 Generally

[1540.5] Reservation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 58, Section 74.

[Section 74](#) of the Constitution requires the Governor-General to reserve, for the Queen's assent, legislation which would limit appeals from the High Court to the Privy Council. Two such Bills have been reserved and, following royal assent, have effectively eliminated appeals to the Privy Council: see [\[1690.5\]](#). For a list of other Bills reserved pursuant to [s 58](#), see Attorney-General's Department, *The Australian Constitution Annotated*, 1980, p 190.

[1540.10] Return of Bills

The power of the Governor-General to return a Bill to the Parliament with a recommendation for amendment was intended to have a very limited operation — to enable “inaccuracies or discrepancies [which] have crept into” legislation to be corrected with a minimum of formality: J Quick and R Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, p 692; R D Lumb, *The Constitution of the Commonwealth of Australia Annotated* (4th ed), 1986, p 229.

End of Document

(CTH) CONSTITUTION [1545] s 59 Disallowance by the Queen

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[1545] 59 Disallowance by the Queen

The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Section 59 Generally

[1545.5] No exercise of power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 59.

No laws have been disallowed under [s 59](#): see Attorney-General's Department, *The Australian Constitution Annotated*, 1980, p 192.

End of Document

(CTH) CONSTITUTION [1550] s 60 Signification of Queen's pleasure on Bills reserved

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[1550] 60 Signification of Queen's pleasure on Bills reserved

A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

Section 60 Generally

[1550.5] Royal assent

Only one reserved Bill has failed to receive the royal assent — the Customs Tariff (British Preference) Bill 1906 (Cth). In giving or withholding royal assent to reserved Bills, the Queen would act on the advice of her Australian ministers: Balfour Declaration 1926; Statute of Westminster 1931 (UK).

End of Document

(CTH) CONSTITUTION [1605] s 61 Executive power

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CHAPTER II THE EXECUTIVE GOVERNMENT [ss 61–70]

[1605] 61 Executive power

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.

Section 61 Generally

[1605.5] Executive power of the Commonwealth

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51, s 61, ss 81, 83.

(CTH) [Financial Management and Accountability Act 1997](#) s 44(1).

In *Davis v Commonwealth* (1988) 166 CLR 79 at 108–109; [82 ALR 633](#); [1988] HCA 63; [BC8802637](#) ^{CB}, Brennan J said that “an act done in execution of an executive power of the Commonwealth is done in execution of one of three categories of powers or capacities: a statutory (non-prerogative) power or capacity, a prerogative (non-statutory) power or capacity, or a capacity which is neither a statutory nor a prerogative capacity”. French CJ adopted the same taxonomy in *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) at [\[127\]](#) ^{CB}, although his Honour added that “The collection of statutory and prerogative powers and non-prerogative capacities form part of, but do not complete, the executive power. They lie within the scope of s 61, which is informed by history and the common law relevant to the relationship between the Crown and the Parliament”.

The distinction between “prerogative power” and “a capacity which is neither a statutory nor a prerogative capacity” is a distinction between executive powers that are enjoyed by the Crown alone (which, in accordance with Blackstone’s taxonomy, are prerogative powers) and those capacities that the Executive has in common with any natural person: Zines, “The inherent executive power of the Commonwealth” (2005) 16 *PLR* 279 at 280; Blackstone, *Commentaries on the Laws of England*

(1765) Bk 1, Ch 7 at 232; cf Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 424. See also Winterton, “The Relationship between Commonwealth Legislative and Executive Power” (2004) 25 *Adelaide Law Review* 21 at 29–30.

In *Pape*, Gummow, Crennan and Bell JJ did not refer to executive capacities, holding instead that Commonwealth executive power includes both those powers commonly identified as prerogative powers and the “undertaking of action appropriate to the position of the Commonwealth as a polity created by the Constitution and having regard to the spheres of responsibility vested in it”: *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) at [\[214\]](#) [\[CB\]](#).

To similar effect, in *Davis v Commonwealth* (1988) 166 CLR 79 at 93–94; [82 ALR 633](#); [\[1988\] HCA 63](#); [BC8802637](#) [\[CB\]](#), Mason CJ, Deane and Gaudron JJ said that “The Constitution distributes the plenitude of executive and legislative powers between the Commonwealth and the states. On this footing, s 61 confers on the Commonwealth all the prerogative powers of the Crown except those that are necessarily exercisable by the states under the allocation of responsibilities made by the Constitution itself. Thus the existence of Commonwealth executive power in areas beyond the express grant of legislative power will ordinarily be clearest where Commonwealth executive or legislative action involves no real competition with state executive or legislative power. [T]he commemoration of the Bicentenary is pre-eminently the business and the concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power”: see also *Barton v Commonwealth* (1974) 131 CLR 477 at 498; [3 ALR 70](#); 48 ALJR 161; [BC7400022](#) [\[CB\]](#) (Mason J).

In *Pape*, the High Court considered that it was unnecessary to attempt to determine the outer limits of executive power: at [\[226\]](#)–[\[227\]](#). However, at [\[220\]](#), Gummow, Crennan and Bell JJ stated that, in the absence of a constraint having its source in the position of the Executive Governments of the States, there was “no good reason to treat the executive power recognised in [s 61](#) of the Constitution as being, in matters of raising and expenditure of public moneys, any less than that of the executive of the United Kingdom at the time of the inauguration of the Commonwealth”. The other member of the majority, French CJ, said that “The constitutional support for expenditure for national purposes, by reference to the executive power, may arguably extend to a range of subject areas reflecting the established practice of the national government over many years, which may well have relied upon [ss 81](#) and [83](#) of the Constitution as a source of substantive spending power. It is not necessary for present purposes to define the extent to which such expenditure, previously thought to have been supported by [s 81](#), lies within the executive power.”: at [\[9\]](#). It was sufficient to decide the case for French CJ to embrace Mason J’s formulation from the AAP Case to the effect that s 61 and s 51(xxxix) of the Constitution confer on the Commonwealth Executive “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”: *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) at [\[129\]](#) [\[CB\]](#), quoting AAP Case (1975) 134 CLR 338 at 397; [7 ALR 277](#); 50 ALJR 157; [BC7500055](#) [\[CB\]](#) (Mason J). Gummow, Crennan and Bell JJ also expressly embraced that formulation: at [\[228\]](#). That formulation was sufficient to support the validity of Commonwealth expenditure under the Tax Bonus for Working Australians Act (No 2) 2009.

Before the High Court’s decision in *Williams v The Commonwealth* [\(2012\) 288 ALR 410](#); 86 ALJR 713; [\[2012\] HCA 23](#); [BC201204253](#) [\[CB\]](#), the traditional view was that the Executive power of the Commonwealth extended to spending money for any purpose for which funds have been appropriated by the Parliament, and that the words “the purposes of the Commonwealth” in s 81 of the Constitution were not words of limitation: see *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) at [\[185\]](#) [\[CB\]](#) (Gummow, Crennan and Bell JJ). As Sir Robert Garran said in evidence to the Royal Commission on the Constitution, “After all, when you have once had the power of raising the money, the power of spending it is one with which you may very easily

entrust the Parliament.”: *Report of the Royal Commission on the Constitution* (1929), Minutes of Evidence, Pt 1, p 72, quoted with approval in *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) at [\[236\]](#) ^{CB} (Gummow, Crennan and Bell JJ).

The plaintiff in *Williams* challenged a contract that that the Commonwealth made with a private service provider for the delivery of “chaplaincy services” in schools operated by the Queensland State Government (the Funding Agreement). No Act of Parliament conferred power on the Commonwealth to contract and expend public money in this way. Accordingly, the lawfulness of the contract and payments depended upon the whether they were supported by [s 61](#) of the Constitution. A majority of the court (Heydon J dissented) held that the Funding Agreement was invalid.

The Commonwealth advanced a range of arguments in support of the validity of the Funding Agreement. The broadest argument was that the executive power in all of its aspects extended to the subject matter of grants of legislative power to the Commonwealth Parliament: at [26] per French CJ, at [125] per Gummow and Bell JJ. The Chief Justice rejected the argument, on the basis that the specification of the subject matters of legislative power was not intended, and could not be relied on, to give content to the executive power: at [27], [30]. Justices Gummow and Bell JJ also rejected the proposition that “the spending power of the executive power was co-extensive with those activities which could be the subject of legislation supported by any head of power in [s 51](#) of the Constitution”, both because it was too broad and because it would distort the relationship between Chapters I and II of the Constitution: at [134]–[136].

Justice Hayne did not decide this broader issue, on the basis that it was large and complex and was not necessary to resolve for the purposes of this case: at [288]. In circumstances where the Commonwealth advanced two heads of power to support the Funding Agreement, Kiefel J did not consider it necessary to resolve the issue either (at [569]), although her Honour did consider the Commonwealth’s alternative argument that there was no relevant limitation on it in relation to the spending of money. Without expressly addressing the Commonwealth’s broad argument, Crennan J considered that expenditure by the Executive “often” required statutory authority beyond Appropriation Acts. Although there were recognised exceptions to that necessity, her Honour did not consider that entry into the Funding Agreement and payments thereunder fell within the exceptions or were otherwise within the scope of [s 61](#): at [534]. Justices Gummow and Bell JJ were also of this view, describing the Funding Agreement as relating to matters within the competence of the States in circumstances where there was no situation in respect of which only the Commonwealth was in a position to provide a prompt response: at [143]–[146]; see also at [594] per Kiefel J.

A related argument put by the Commonwealth was that it possessed capacities in common with other legal persons, including the capacity to spend money lawfully available to be spent or to enter into contracts. The Chief Justice rejected that argument, finding no basis in law for the proposition that the Commonwealth was “just another legal person like a private corporation or a natural person with contractual capacity”: at [37]; Gummow and Bell JJ noted in this context that the Commonwealth’s argument appeared to assume “that the executive branch has a legal personality distinct from the legislative branch, with the result that the Executive is endowed with the capacities of an individual”, a proposition that their Honours rejected: at [154], see also at [204]–[212] per Hayne J, at [518] per Crennan J. In French CJ’s opinion the argument also overlooked that the exercise of Commonwealth executive power in this capacity could impact on the executive power of the States: at [38], a difficulty that, as noted above, Gummow and Bell JJ and Kiefel J emphasised, as did Hayne J and Crennan J: at [251], [522]. The fact that the money the Executive was spending was public money was a further point of distinction that Gummow and Bell JJ, Crennan J and Kiefel J, drew between the Executive and any other legal person: at [150]–[152], [519]–[520], [577].

A further argument of the Commonwealth was that the contract could have been authorised or required by an exercise of the legislative power of the Commonwealth under s 51. In rejecting this

argument, French CJ stated that “[t]he location of the contractual capacity of the Commonwealth in a universe of hypothetical laws which would, if enacted, support its exercise, is not a means by which to judge its scope”: at [36], see also Gummow and Bell JJ at [137]. Justice Crennan similarly considered that if the fact that the Parliament *could* pass valid legislation were sufficient authorisation for any expenditure by the Commonwealth Executive and, in this case, if the possibility of enabling legislation permitted the Commonwealth to enter into the funding agreement, it would ignore “the restrained approach to the prerogative power that Brennan J adopted in *Davis* and disregarded the constitutional relationship between the Executive and Parliament affecting spending”: at [544].

Justices Hayne and Kiefel undertook a consideration of the specific legislative powers that the Commonwealth advanced, namely ss 51(xx) and 51(xxiiiA), and held that the contract could not be supported by legislation enacted pursuant to either of those powers: at [269]–[286] per Hayne J, at [570]–[575] per Kiefel J. In circumstances where the Commonwealth Parliament could not have authorised payments under the Agreement, Hayne J held that the executive could not validly undertake an obligation to make them: at [188].

Each of the judges in the majority rejected the Commonwealth’s contention that the expenditure was expressly authorised by s 44(1) of the Financial Management and Accountability Act 1997 (Cth), which provides that a Chief Executive must manage the affairs of an agency “in a way that promotes proper use of the Commonwealth resources for which the Chief Executive is responsible”. Justices Gummow and Bell JJ, with whom French CJ and Kiefel J agreed, characterised this provision as directed to the prudent conduct of financial administration, as opposed to a source of power to spend that which is to be administered: at [102]–[103], and at [71] per French CJ, at [596] per Kiefel J; see also at [260] per Hayne J, at [545]–[547] per Crennan J.

The executive power of the Commonwealth includes the power to request a foreign state to surrender a fugitive offender alleged to have committed an offence against the laws of Australia: *Barton v Commonwealth* (1974) 131 CLR 477; [3 ALR 70](#) ^{CB}.

[1605.10] Prerogative powers

Powers of the Commonwealth which derive from the common law powers of the Crown include “the prerogatives of foreign affairs, such as making treaties, requesting extradition, and appointing diplomats, the war prerogative, the power to declare peace, prerogatives relating to the stationing and control of the armed forces, and powers to build recreational facilities, to conduct inquiries, and to conclude contracts. Of course, the Commonwealth has also inherited the immunities, preferences and exceptions of the Crown, such as the priority of Crown debts and freedom from distress for rent”: Winterton, *Parliament, the Executive and the Governor-General*, 1983, p 49.

As to the prohibition in the *Bill of Rights* 1688 (1 Will & Mar Sess 2 c 2) on executive dispensation with law, and the effect of that statute on prerogative powers, see *Port of Portland Pty Ltd v Victoria* (2010) 177 LGERA 415; [272 ALR 449](#); [\[2010\] HCA 44](#); [BC201009266](#) at [\[9\]–\[13\]](#) ^{CB}; *Cadia Holdings Pty Ltd v New South Wales* (2010) 269 ALR 204 at [220–221](#), [232](#); 84 ALJR 588; [\[2010\] HCA 27](#); [BC201006062](#) ^{CB}. See also *Fitzgerald v Muldoon* [\[1976\] 2 NZLR 615](#) ^{CB}.

[1605.15] Separation of powers

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), s 61.

Despite the separation of powers doctrine, the exercise of the executive power of the Commonwealth is, it appears, subject to direct legislative control by the Parliament, the source of the Parliament’s power being [s 51\(xxxix\)](#). “The Parliament is sovereign over the Executive and whatever is within the

competence of the Executive under [s 61](#), including or as well as the exercise of the prerogative within the area of the prerogative attached to the Government of Australia, may be the subject of legislation of the Australian Parliament”: *Victoria v Commonwealth* (1975) 134 CLR 338 at 406; [7 ALR 277](#) (the AAP case). See also Constitutional Commission, *Final Report*, 1988, 356. For the contrary view, see J E Richardson, “The Executive Power of the Commonwealth”, in L Zines (ed) *Commentaries on the Australian Constitution*, 1977, p 82.

[1605.20] Co-operative schemes

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

Administrative bodies set up under Commonwealth law can exercise functions conferred by state law as part of a co-operative legislative scheme: *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535 at 563; [49 ALR 19](#); 5 IR 15; [BC8300098](#) ^{CB}; *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117 at 131; [72 ALR 161](#); 21 IR 165; [BC8701788](#) ^{CB}; *R v Hughes* (2000) 202 CLR 535; [171 ALR 155](#); [\[2000\] HCA 22](#); [BC200002055](#) ^{CB}. However, a Commonwealth administrative body or tribunal must have authority under Commonwealth law to exercise functions under state law, because were a state unilaterally to attempt to give state functions to such a body that attempt would fail by reason of [s 109](#) of the Constitution: *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd*, above, CLR at 127.

(CTH) CONSTITUTION [1610] s 62 Federal Executive Council

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[1610] 62 Federal Executive Council

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Section 62 Generally

[1610.5] Membership

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 64.

It is a well-established practice to appoint to the Executive Council only those persons who have been appointed ministers of state under [s 64](#). Appointments are made for an unlimited term, but only those members of the Executive Council who are currently ministers of state for the Commonwealth are summoned to attend Council meetings.

[1610.10] Meetings

Meetings of the Executive Council are summoned by the Governor-General or by the Vice-President of the Executive Council, a minister appointed to that position by the Governor-General. The practice is to require a quorum of the Governor-General (or the Vice-President of the Council) and two ministers, or three ministers. If present, the Governor-General presides; in the absence of the Governor-General, the Vice-President or most senior minister presides.

[1610.15] Business

Decisions of the Executive Council provide “the formal legal act which gives effect to the advice tendered to the Crown by the ministers of the Crown”: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 179.

“The business [of the Executive Council] is of a purely formal nature. What is presented is a recommendation, known as a Minute, that something which is required, by the Constitution or by statute, to be done or made by the Governor-General in Council be so done or made. This Minute is signed by the responsible minister and is accomplished by an explanatory memorandum. Once the

recommendation is approved, the Governor-General marks the Minute 'Approved' and signs it. Some other instruments, for example, Regulations, may have to be made": Constitutional Commission, *Final Report*, 1988, p 334.

[1610.20] Justiciable

Although decisions of the Cabinet appear to be immune from judicial review, no such immunity attaches to the Executive Council: *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170; [38 ALR 439](#) ^{CB}; *Minister for Arts Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274; [75 ALR 218](#) at [223–4](#) and [227](#) ^{CB}; *Coutts v Commonwealth* (1985) 157 CLR 91 at 114; [59 ALR 699](#).

End of Document

(CTH) CONSTITUTION [1615] s 63 Provisions referring to Governor-General

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[1615] 63 Provisions referring to Governor-General

The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Section 63 Generally

[1615.5] Governor-General in Council

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 32, s 64, s 67, s 72.

The functions conferred on the Governor-General in Council include the issuing of writs for a general election of the House of Representatives ([s 32](#)), the establishment of departments of state ([s 64](#)), the appointment of public servants ([s 67](#)) and the appointment of federal judges and their removal: [s 72](#).

[1615.10] Governor-General alone

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 128, s 5, s 57, s 58, s 64, s 68.

The functions vested in the Governor-General alone include the dissolution of the House of Representatives ([s 5](#)), the dissolution of the Senate and the House of Representatives simultaneously and the convening of a joint sitting ([s 57](#)), the assent to legislation passed through the Senate and the House of Representatives ([s 58](#)), the appointment of ministers of state to “hold office during the pleasure of the Governor-General” ([s 64](#)), “the command in chief of the naval and military forces of the Commonwealth” ([s 68](#)), and the submission to the electorate of a proposal to alter the Constitution, passed by one house but not by the other: [s 128](#).

[1615.15] Responsible government

According to the Constitutional Commission, “the different forms in which vice-regal power is conferred does not affect the application of the principles of responsible government. In each case ministers of the government accept the responsibility, and in each case the Governor-General acts

(CTH) CONSTITUTION [1615] s 63 Provisions referring to Governor-General

on ministerial advice”: Constitutional Commission, *Final Report*, 1988, p 85. The same point was made by Jacobs J: “[N]ot only the Governor-General as the medium through which the Queen exercises her executive and prerogative powers but also the Queen herself acts on the advice of her Australian ministers in all matters appertaining to the government of the Commonwealth. Neither the Queen nor the Governor-General acts personally”: *Western Australia v Commonwealth* (1975) 134 CLR 201 at 278; [7 ALR 159](#); 50 ALJR 68.

End of Document

(CTH) CONSTITUTION [1620] s 64 Ministers of State

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Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

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[1620] 64 Ministers of State

The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in Parliament — After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Section 64 Generally

[1620.5] Responsible government

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44, s 44(iv), s 64.

[Section 44](#) of the Constitution reinforces the requirement of [s 64](#), that ministers be members of Parliament: it declares that the disqualification from membership of Parliament expressed in [s 44\(iv\)](#), of a person holding “an office of profit under the Crown”, is not to “apply to the office of any of the Queen's Ministers of State for the Commonwealth”.

[1620.10] Assistant ministers

“Salaried office bearers in the executive government who are also members of Parliament “must be appointed to administer a department [to avoid] risking disqualification from ... parliamentary office ... This inhibition does not preclude the appointment of assistant ministers. It means merely that an assistant minister needs to be appointed to administer a department of state in his own right, albeit a small and unimportant department which may have been created solely for the purpose of avoiding the constitutional hazards”: E Campbell, “Ministers, Public Servants and the Executive Branch”, in G Evans (ed), *Labor and the Constitution 1972–1975*, 1977, pp 136 and 146–7.

End of Document

(CTH) CONSTITUTION [1625] s 65 Number of Ministers

Practice & Procedure High Court & Federal Court of Australia

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[1625] 65 Number of Ministers

Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Section 65 Generally

[1625.5] Number of ministers

L Legislation cited in this paragraph

(CTH) [Ministers of State Act 1952](#) s 4.

The Parliament has otherwise provided: Ministers of State Act 1952 (Cth), s 4, limits the number of ministers of state to a maximum of 30.

End of Document

(CTH) CONSTITUTION [1630] s 66 Salaries of Ministers

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Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[1630] 66 Salaries of Ministers

There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Section 66 Generally

[1630.5] Salaries of ministers of state

L Legislation cited in this paragraph

(CTH) [Ministers of State Act 1952](#).

The Parliament has otherwise provided: see Ministers of State Act 1952 (Cth).

End of Document

(CTH) CONSTITUTION [1635] s 67 Appointment of civil servants

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[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > [CHAPTER II THE EXECUTIVE GOVERNMENT \[ss 61–70\]](#)

[1635] 67 Appointment of civil servants

Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Section 67 Generally

[1635.5] Appointment and removal of public servants

L Legislation cited in this paragraph

(CTH) [Public Service Act 1922](#).

The Parliament has otherwise provided: see Public Service Act 1922.

(CTH) CONSTITUTION [1640] s 68 Command of naval and military forces

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[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > [CHAPTER II THE EXECUTIVE GOVERNMENT \[ss 61–70\]](#)

[1640] 68 Command of naval and military forces

The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Section 68 Generally

[1640.5] “The role is ... essentially a titular one”:

Coutts v Commonwealth (1985) 157 CLR 91 at 109; [59 ALR 699](#).

End of Document

(CTH) CONSTITUTION [1645] s 69 Transfer of certain departments

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[CONSTITUTION](#) > [CHAPTER II THE EXECUTIVE GOVERNMENT \[ss 61–70\]](#)

[1645] 69 Transfer of certain departments

On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth: —

Posts, telegraphs, and telephones:

Naval and military defence:

Lighthouses, lightships, beacons, and buoys:

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

End of Document

(CTH) CONSTITUTION [1650] s 70 Certain powers of Governors to vest in Governor-General

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[1650] 70 Certain powers of Governors to vest in Governor-General

In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

End of Document

(CTH) CONSTITUTION [1675] s 71 Judicial power and Courts

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Last updated: March 2022

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > CHAPTER III THE JUDICATURE [ss 71–80]

CHAPTER III THE JUDICATURE [ss 71–80]

[1675] 71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Section 71 Generally

[1675.3] Major functions of the High Court

The major functions of the High Court are, as to the original jurisdiction, the disposition of certain matters arising under or involving the interpretation of the Constitution and, as to the appellate jurisdiction, the court's role, subject to the grant of special leave, is as the final court of general appeal for the whole country: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[34\]](#); [\[2008\] HCA 28](#); [BC200804501](#) ^{CB}. The High Court's role is not, however, confined to the above matters: see *MZXOT* at [\[173\]–\[175\]](#). Thus “an argument that this Court's general constitutional and appellate jurisdiction (including the importance of the appellate function in respect of State Supreme Courts) cannot be exercised effectively without an implied power to remit matters falling within its original jurisdiction ... is wrong and must fail”: at [\[192\]](#).

[1675.5] Judicial power to be vested in courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 101, s 71, s 72.

(CTH) [Racial Discrimination Act 1975](#).

The judicial power of the Commonwealth may be committed only to the three classes of courts listed in [s 71](#) of the Constitution — the High Court, federal courts created by the Parliament, and state and territory courts vested by the Parliament with federal jurisdiction.

The Parliament cannot vest the judicial functions of issuing injunctions and declarations and imposing penalties in the Inter-State Commission, constituted by [s 101](#) of the Constitution: *New South Wales v Commonwealth* (1915) 20 CLR 54 [CB](#) (the *Wheat* case). The Parliament cannot vest the judicial functions of punishing breaches of industrial awards in an arbitration court, whose members are appointed otherwise than in accordance with [s 72](#) of the Constitution, because “the federal Constitution is specific that judicial power shall be vested in courts, that is, courts of law in the strict sense”: *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 467.

“[I]t is beyond the competence of the Parliament to invest with any part of the judicial power any body or person except a court created pursuant to [s 71](#) and constituted in accordance with [s 72](#) or a court brought into existence by a state”: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 269.

The registration and enforcement provisions of the Racial Discrimination Act 1975 (Cth), which provided for the registration of a determination of the Human Rights and Equal Opportunity Commission with the Federal Court and the enforcement of the registered determination as an order of the court, purported to confer judicial power on the Commission; and, because the Commission was not a court within [Ch III](#) of the Constitution, the enforcement provisions were invalid: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; [127 ALR 1](#); 69 ALJR 191; 58 IR 48 [CB](#). The enforcement provisions combined to give to a determination of the Commission the characteristics of a judicial decision — the provisions “combine to make a determination of the Commission binding, authoritative and enforceable [and] invalidly purport to invest judicial power in the Commission”: 127 ALR at 20 per Deane, Dawson, Gaudron and McHugh JJ; see also *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; [248 ALR 494](#), at [\[205\]–\[207\]](#); [\[2008\] FCAFC 104](#); [BC200804402](#) [CB](#).

[1675.5A] Characteristics of a “court”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 71, s 75(iii), s 77(iii).

(SA) [Liquor Licensing Act 1997](#) s 28A.

“It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court”: *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [229 ALR 223](#); 80 ALJR 1606; [\[2006\] HCA 44](#); [BC200606891](#) at [\[64\]](#) [CB](#) (*Forge*).

A court must satisfy minimum characteristics of independence and impartiality: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [206 ALR 315](#); [\[2004\] HCA 31](#); [BC200403588](#) at [\[29\]](#) [CB](#); *Forge* at [41], [64], [181], [238]. It must be, and be seen to be, institutionally independent and impartial: *Forge* at [78]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532; [242 ALR 191](#); [\[2008\] HCA 4](#); [BC200800373](#), at [\[10\]](#) [CB](#), [161]; *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; [248 ALR 494](#) at [\[227\]](#); [\[2008\] FCAFC 104](#); [BC200804402](#) [CB](#).

The content of the minimum characteristics of independence and impartiality differ depending upon the place of a court in the court hierarchy: *Forge* at [83]–[84]. The question whether a body satisfies the minimum characteristics of a court does not always admit of an easy answer, and much will often depend on the powers and functions of the body, the provisions for appeal and review of its decisions, its pre- and post-federation history, and the nature of the constitutional or legislative institutional arrangements and safeguards for securing independence and impartiality. There must be

some legislative or constitutional provision for tenure of some kind, precluding removal from office merely because the executive desires it: *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)*, above, at [228]–[233].

South Australia v Totani (2010) 271 ALR 662 ^{CB} suggests that, in addition to independence and impartiality, defining characteristics of a court may include “fairness and adherence to the open-court principle” (at [62] (French CJ)), or a requirement to act in accordance with “ordinary judicial processes” (at [426] per Crennan and Bell JJ), such that invalidity may result where there is departure “in a significant degree from the methods and standards that have characterised the exercise of judicial power” in the past (at [144] per Gummow J).

The Licensing Court of South Australia is a “court of a State” for the purposes of [s 77\(iii\)](#). That Court was constituted by a District Court judge designated by the Governor, who could vary or revoke a proclamation designating the judge as the Licensing Court judge at any time (although tenure as a District Court judge was protected). The Licensing Court was required to act without undue formality, was not bound by the rules of evidence, and probably did not have power to punish contempt (being protected instead by the general supervisory function of the Supreme Court): *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [252 ALR 471](#); [\[2009\] HCA 4](#); [BC200900210](#) at [\[113\]–\[131\]](#) ^{CB}. The Court emphasised that the above features did not prevent the Licensing Court from being a “court of a State”, particularly having regard to the long history of inferior courts in Australia. See also *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85 at 141; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) ^{CB} (Kenny J).

In *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; [252 ALR 471](#); [\[2009\] HCA 4](#); [BC200900210](#) ^{CB}, the Court went on to reject a challenge to the validity of s 28A of the Liquor Licensing Act 1997 (SA), which required the Liquor and Gambling Commissioner, the Licensing Court and the Supreme Court to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence. “Criminal intelligence” was defined as information relating to actual or suspected criminal activity the disclosure of which could reasonably be expected to prejudice criminal investigations or to enable the discovery of the existence of a confidential source. The challenge to s 28A was dismissed because the Court held that it was for the court to decide whether the information classified by the Commissioner of Police met the criteria in the definition of “criminal intelligence”. The Court was not required to accept the information classified by the Commissioner as “criminal intelligence” and then to treat it accordingly. Further, the section did not deprive the court of the discretion to determine what weight to attach to such evidence or what steps were sufficient to maintain confidentiality. For those reasons, s 28A did not operate to deny to the Licensing Court the character of an independent and impartial tribunal as required by Ch III: see at [136], [143]–[149]. However, had it done so, the consequence would have been that s 28A was invalid, and not that the Licensing Court was no longer a “court of a State” that could be invested with federal jurisdiction pursuant to [s 77\(iii\)](#): see at [153]–[154].

The conditions which must exist for courts in this country to administer justice according to the law are inconsistent with some forms of external control of those courts appropriate to the exercise of authority by public officials and administrators: *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* (2008) 234 CLR 532; [242 ALR 191](#); [\[2008\] HCA 4](#); [BC200800373](#), at [\[10\]](#) ^{CB}.

A single body may be a court for some statutory purposes, but not a court for the purpose of Chapter III: *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*, above, at [225]; *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497, at [515](#); [69 ALR 125](#).

The parliament may not make a law investing federal jurisdiction in a body that is not a federal court created by the parliament or that is not a “court” of a state or territory. While the constitution and organisation of state courts is a matter for state legislatures, as the Federal Parliament has no power

to alter either the constitution or the organisation of a state court, in a sense the Federal Parliament must take a state court “as it finds it”. “It does not follow, however, that the description which state legislation may give to a particular body concludes the separate constitutional question of whether that body is a ‘court’ in which federal jurisdiction may be invested. It is only in a ‘court’, as that word is to be understood in the Constitution, that federal jurisdiction may be invested”: *Forge* at [61]; *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*, above, at [226]; *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, at 58, 59, 64, 66, 71; [40 ALR 673](#); 56 ALJR 588; [BC8200070](#) [CB](#).

Accordingly, state laws cannot authorise a tribunal to exercise judicial power in relation to the Commonwealth, because proceedings against the Commonwealth involve the exercise of federal judicial power (by reason of [s 75\(iii\)](#)) and thus can only occur in the three classes of courts listed in [s 71](#): see *Skiwing Pty Ltd (t/as Stockland Property Management) v Trust Company of Australia (t/as Stockland Property Management)* (2006) 66 NSWLR 77; [234 ALR 398](#); [\[2006\] NSWCA 276](#); [BC200608070](#) [CB](#); *Commonwealth v Anti-Discrimination Tribunal (Tasmania)*, above.
[1675.5B] State supreme courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Chapter III.

[Chapter III](#) requires that there be a body fitting the description “the Supreme Court of a State”; it is beyond the legislative power of a state so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description: *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [229 ALR 223](#); 80 ALJR 1606; [\[2006\] HCA 44](#); [BC200606891](#) at [\[57\]](#), [\[63\]](#) [CB](#); *Kable v DPP(NSW)* (1996) 189 CLR 51; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) [CB](#).

A defining characteristic of State Supreme Courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition, mandamus and certiorari (at least on grounds of jurisdictional error). A privative provisions in State legislation which purports to strip the Supreme Court of a State of that authority is beyond the power of the State legislature because it purports to remove a defining characteristic of the Supreme Court of the State: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [262 ALR 569](#); [\[2010\] HCA 1](#); [BC201000230](#) at [\[55\]](#) [CB](#).

[1675.5C] Acting judges

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

(NSW) [Supreme Court Act 1970](#) s 37.

In *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [229 ALR 223](#); 80 ALJR 1606; [\[2006\] HCA 44](#); [BC200606891](#) [CB](#) (*Forge*), the High Court confirmed that [Ch III](#) requires that a state supreme court invested with federal jurisdiction be a “court”, which in turn requires it to satisfy minimum criteria of independence and impartiality: at [41], [64], [181], [238]. However, the appointment of acting judges pursuant to s 37 of the Supreme Court Act 1970 (NSW) does not necessarily compromise the independence and impartiality of the Supreme Court. While the fact of a renewable appointment does undermine independence and impartiality, other arrangements and safeguards (including judicial oaths, removal only on the address of parliament, remuneration fixed by an independent tribunal) can adequately secure independence and impartiality: at [43], [269]. The

appointment of Foster AJ (who was a retired Federal Court judge) as the trial judge in the case in question was valid.

While the appointment as acting judges of serving judges of other courts, or retired judges, is unlikely to have an adverse effect on institutional integrity, Gummow, Hayne and Crennan JJ indicated in *Forge* at [97] that:

[97] ... [T]he appointment of a legal practitioner to act as a judge for a temporary period, in the expectation that that person would, at the end of appointment, return to active practice, may well present more substantial issues. The difficulty of those issues would be intensified if it were to appear that the use of such persons as acting judges were to become so frequent and pervasive that, as a matter of substance, the court as an institution could no longer be said to be composed of full-time judges having security of tenure until a fixed retirement age. As was said in *Bradley*, there may come a point where the series of acting rather than full appointments is so extensive as to distort the character of the court.

Their Honours continued (at [101]):

[101] Whether, or when, the institutional integrity of the court is affected depends, then, upon consideration of much more than the bare question: how many acting judges have been appointed? Regard must be paid to who has been appointed, for how long, to do what, and, no less importantly, why it has been thought necessary to make the acting appointments that have been made. Those alleging invalidity in the present matter did not seek to make a case founded in any examination of the circumstances that led either to the successive appointments of Foster AJ, or any of the other appointments made at or about the time of his appointments ...

See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 at 164; [206 ALR 315](#); [\[2004\] HCA 31](#); [BC200403588](#) ^{CB}.

[1675.6] Cross-vesting scheme

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

Commonwealth and state legislation establishing the cooperative cross-vesting of state jurisdiction in federal courts and federal jurisdiction in state courts was not consistent with the separation of the judicial power of the Commonwealth required by [Ch III](#) of the Constitution and was invalid. [Chapter III](#) of the Constitution contains an exhaustive definition of the jurisdiction which may be vested in a federal court, and such courts cannot be invested with state jurisdiction: *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [163 ALR 270](#); [\[1999\] HCA 27](#); [BC9903189](#) ^{CB}.

[1675.7] Delegation of judicial power

The Commonwealth Parliament may authorise a federal court to delegate, to officers of the court, the power to exercise aspects of judicial power, provided that the judges of the court retain major responsibility for exercising that power and exercise effective supervision over the officers: *Harris v Caladine* (1991) 172 CLR 84; [99 ALR 193](#); 65 ALJR 280 ^{CB}.

Similarly, the Parliament may authorise a state court, invested with federal jurisdiction, to exercise that jurisdiction through an officer of the court who is an integral part of the court's organisation: *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 58–9; [40 ALR 673](#). See the discussion of Hospital Contribution Fund in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [229 ALR 223](#); 80 ALJR 1606; [\[2006\] HCA 44](#); [BC200606891](#) at [\[60\]](#) ^{CB}.

[1675.10] Courts not to be given non-judicial power

L Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) ch III, s 71.(CTH) [Criminal Code](#) Division 104.(CTH) [Corporations Act 2001](#) Section 596A.

Functions which lie outside the judicial power of the Commonwealth may not be committed by the parliament to the courts listed in [s 71](#) of the Commonwealth Constitution.

The function of giving an advisory opinion on the validity of Commonwealth legislation is not part of the judicial power of the Commonwealth and, accordingly, cannot be vested in the High Court: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 [CB](#).

The parliament cannot vest a completely discretionary (and therefore non-judicial) power in a state court: *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 [CB](#). Nor can it vest a power that is to be exercised by reference to unspecified policy considerations: *Yanner v Minister for Aboriginal and Torres Strait Islander Affairs* (2001) 108 FCR 543; [181 ALR 490](#); [\[2001\] FCA 36](#); [BC200100113](#) at [\[114\]](#) [CB](#); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188–90; [104 ALR 317](#); 66 ALJR 171; [BC9102603](#) [CB](#).

“[T]he Constitution does not allow the use of courts established by or under [ch III](#) for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto”: *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254 at 271–2.

Division 104 of the Criminal Code, which empowered courts to make control orders to protect the public from terrorist acts, was not invalid because the power it conferred was judicial power: *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) [CB](#).

Section 596A of the Corporations Act 2001 did not confer the power to issue a summons for a compulsory examination of the affairs of a corporation that was not under some form of external administration: *Thomas v Mowbray*, above, at [88]–[90]. If it did so apply, it was unconstitutional because it purported to confer administrative functions on a court that were not incidental to any judicial process: *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501; [237 ALR 753](#); [\[2007\] FCA 13](#); [BC200700080](#) at [\[107\]–\[110\]](#) [CB](#).

[1675.15] The judicial power of the Commonwealth**L** Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 71.(CTH) [Corporations Act 2001](#) ss 596A, 596B.

Judicial power is incapable of precise or exhaustive definition, principally because there are many positive features that are essential to the exercise of judicial power which nevertheless are not conclusive of its existence: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188–9; [104 ALR 317](#); 66 ALJR 171; [BC9102603](#) [CB](#); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 257, 267; [127 ALR 1](#); 69 ALJR 191; [BC9506412](#) [CB](#); *Cominos v Cominos* (1972) 127 CLR 588 at 606; [1972–73] ALR 581; (1972) 46 ALJR 593; [BC7200710](#) [CB](#); *Nicholas v R* (1998) 193 CLR 173 at 233, 256; [151 ALR 312](#); (1998) 72 ALJR 456; [BC9800075](#) [CB](#).

No single combination of necessary or sufficient factors identifies judicial power: *Attorney-General (Commonwealth) v Alinta* (2008) 233 CLR 542; [242 ALR 1](#); [\[2008\] HCA 2](#); [BC200800208](#) ^{CB}.

The concept of “judicial power” “seems ... to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law”: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394. The classical definition was offered by Griffith CJ: “[T]he words ‘judicial power’ as used in [s 71](#) of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action”: *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357. In the same vein, Kitto J offered the following description:

“[A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons”: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

For a recent discussion of the constituent components of the judicial power of the Commonwealth see the reasons of French CJ and Gageler J in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* [\(2013\) 295 ALR 596](#); 87 ALJR 410; [\[2013\] HCA 5](#); [BC201301035](#) ^{CB} at [27]–[29].

Many powers are “chameleon” powers that take their character from the nature of the body in which the power is reposed: *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* [\(2007\) 234 ALR 618](#); [61 ACSR 487](#); [\[2007\] HCA 23](#); [BC200703852](#) at [16], [36], [70]–[72] ^{CB}; *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) ^{CB}; *White v Director of Military Prosecutions* [\(2007\) 235 ALR 455](#); [\[2007\] HCA 29](#); [BC200704600](#) at [48] ^{CB}; *Pasini v United Mexican States* (2002) 209 CLR 246; [187 ALR 409](#); [\[2002\] HCA 3](#); [BC200108692](#) at [59] ^{CB}; *Lutton v Lessels* (2002) 210 CLR 333; [187 ALR 529](#); [\[2002\] HCA 13](#); [BC200201537](#) at [188] ^{CB}; *HA Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547; [156 ALR 563](#); 72 ALJR 1339; [BC9804341](#) at [15] ^{CB}; *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189; [104 ALR 317](#); 66 ALJR 171; [BC9102603](#) ^{CB}; *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628, 632; [36 ALR 275](#); 55 ALJR 651; [BC8100100](#) ^{CB}; *R v Davison* (1954) 90 CLR 353 at 368–9; [1954] ALR 877; (1954) 28 ALJR 285; [BC5400290](#) ^{CB}; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; [128 ALR 81](#); 69 ALJR 284; [BC9506436](#) ^{CB}.

When a power is reposed in a court, that is a strong indicator that the power must be exercised judicially, which is in turn a significant factor in characterising the power: *R v Hegarty; Ex parte City of Salisbury* (1981) 147 CLR 617 at 628; [36 ALR 275](#); 55 ALJR 651; [BC8100100](#) ^{CB}; *R v Joske; Ex parte Shop Distributive & Allied Employees Association* (1976) 135 CLR 194 at 215–16; [10 ALR 385](#); 51 ALJR 105; [BC7600076](#) ^{CB}, citing *R v Davison* (1954) 90 CLR 353; [1954] ALR 877; (1954) 28 ALJR 285; [BC5400290](#) ^{CB}; see also *King v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2001) 109 FCR 447; [183 ALR 213](#); [\[2000\] FCA 1900](#); [BC200007994](#) at [67] ^{CB}.

If a power must be exercised in the public interest, or where considerations of policy have an

important part to play in a decision, that is a strong indicator that the power is not judicial power: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 191; [104 ALR 317](#); [6 ACSR 269](#); [BC9102603](#) ^{CB}; *Visnic v ASIC* (2007) 234 ALR 413; [61 ACSR 512](#); [\[2007\] HCA 24](#); [BC200703853](#) at [\[14\]–\[15\]](#) ^{CB}; *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board*, above, at [24]. Note, however, that in *Thomas v Mowbray*, above, at [80]–[93], Gummow and Crennan JJ addressed the topic of policy considerations in determining the nature of a particular power, and said, at [88], that:

[88] Courts are now inevitably involved on a day-to-day basis in the consideration of what might be called “policy”, to a degree which was never seen when earlier habits of thought respecting [Ch III](#) were formed. Care is needed in considering the authorities in this field. The vantage point from which the issues were presented is significant. ...

Further, in *Attorney-General (Commonwealth) v Alinta*, above, the High Court again emphasised that the fact that policy considerations are taken into account is not necessarily conclusive in the characterisation of a power.

For a discussion of the role of historical considerations in identifying judicial power, see *White v Director of Military Prosecutions*, above, at [45]–[52], including at [48], where Gummow, Hayne and Crennan JJ identified several difficulties with unconditional acceptance of “the historical approach”, including that “the modern regulatory state arrived after 1900” with the result that “modern federal legislation creates rights and imposes liabilities of a nature and with a scope for which there is no readily apparent analogue in the pre-federation legal systems of the colonies”. Historical considerations ultimately played a large role in the decision of the court that the exercise of judicial power by military tribunals did not infringe [Ch III](#): see at [57]–[58]. In *Saraceni v Jones* (2012) 246 CLR 251; [291 ALR 188](#); [\[2012\] HCA 38](#); [BC201207282](#) ^{CB}, the court, constituted by Gummow, Hayne and Bell JJ concluded that the conferral of power on courts to order the compulsory examination of persons who were deemed capable of giving information about the affairs of a company was an action “of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system”: at [3]. On that basis, the court rejected the applicant’s argument that ss 596A and 596B of the Corporations Act 2001 (Cth) involved the impermissible conferral on a court of a function that was not within or incidental to the judicial power of the Commonwealth.

[1675.20] Characteristics of judicial power

L Legislation cited in this paragraph

(CTH) [Corporations Act 2001](#) Corporations Law, s 206F.

(NSW) [Commercial Arbitration Act 1984](#) s 53.

(VIC) [Crimes Act 1958](#) Section 464M.

(CTH) [Income Tax Assessment Act 1936](#) Section 246A(1).

(CTH) [Bankruptcy Act 1966](#) s 139ZQ, s 139ZS.

(CTH) [Administrative Decisions \(Judicial Review\) Act 1977](#).

Certain features of governmental powers are taken as indicative, rather than decisive, of the character of that power:

- A claim by workers that their existing relationship with employers should be altered, as in a log of claims, was a claim for new rights; so that its settlement through the making of an

industrial award was not an exercise of arbitral power: *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 462.

- On the other hand, the imposition of penalties to enforce a determination is part of the judicial power. "If the legislature sets up a tribunal to summon one side at the call of the other, to adjudicate between them, and to enforce its adjudication by a determination which may be in favour of either side, then the tribunal is exercising judicial power": *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 at 453.
- The wider the discretion conferred on a decision-making body the more likely is it that the power will be seen as one to create new rights and therefore non-judicial: *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144 [CB](#); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 [CB](#); compare *Silk Brothers Ltd v State Electricity Commission of Victoria* (1943) 67 CLR 1 [CB](#).
- However, the power to alter existing rights and obligations may be characterised as judicial, as with the power to vary a contract under money-lending, rent control or moratorium legislation, the power to dissolve marriages or the power to vary or cancel contractual obligations whose performance has been rendered impossible or onerous. In such a case, legislation confers new rights, and the enforcement of those new rights is an exercise of judicial power: *Peacock v Newtown Marrickville & General Co-op Building Society (No 4) Ltd* (1943) 67 CLR 25 at 46.
- The Industrial Court's power, of its own motion, to disallow trade union rules which were tyrannical or oppressive to members was essentially a power to re-arrange legal relations and therefore non-judicial: *R v Spicer; Ex parte Australian Builders Labourers' Federation* (1957) 100 CLR 277 [CB](#).
- The Industrial Court's power, on the application of a trade union member, to determine whether the union's rules conformed to statutory criteria was judicial: "[U]nder the old section the court by its own act — the act of disallowance — nullified the rule whereas under the new section it determined judicially whether the rule was antecedently nullified by virtue of the provision": *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union* (1960) 103 CLR 368 at 376–7.
- An essentially creative function, such as the power of the Industrial Court to make such order as it thought fit to rectify invalidity in the affairs of a trade union, may nevertheless be characterised as judicial — the function of creating new rights is not necessarily alien to judicial power; nor is it an objection that the function is novel and still requires the development of standards; and the function was consequential on the undeniably judicial function of declaring that the affairs of the union had involved invalidity: *R v Joske; Ex parte Shop Distributive and Allied Employees' Assn* (1976) 135 CLR 194 at 216, 218; [10 ALR 385](#).
- The power to determine finally and conclusively questions of fact, the power to state a question of law for the opinion of the High Court, subjection to the appellate jurisdiction of the High Court — all these were taken to support the conclusion that the Taxation Board of Appeal was invalidly vested with judicial power: *British Imperial Oil Co Ltd v FCT* (1925) 35 CLR 422 [CB](#).
- However, when the board was reconstituted as the Taxation Board of Review, whose determinations on questions of fact were not to be final, and which was subject to an appeal to the High Court in its original jurisdiction, the board was held not to be exercising judicial power: *Shell Co of Australia Ltd v FCT* (1930) 44 CLR 530 [CB](#).
- "[A]scertainment or determination of facts ... does not belong exclusively to the judicial power": *Rola Co (Australia) Pty Ltd v Commonwealth* (1945) 69 CLR 185 at 211.

- “[T]here is no substance in the suggestion that an industrial tribunal cannot interpret laws, awards and other legal instruments. A tribunal could not discharge its arbitral functions if it were unable to form an opinion on a matter of interpretation. The formation of views and opinions on matters of interpretation in arbitral proceedings does not in itself amount to an usurpation of judicial power”: *Re Cram; Ex parte Newcastle Wallsend Coal Co Pty Ltd* (1987) 163 CLR 140 at 149; [72 ALR 173](#); *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618; [61 ACSR 487](#); [\[2007\] HCA 23](#); [BC200703852](#) at [\[27\]–\[28\]](#) [\[CB\]](#).
- Functions whose character may be equivocal, such as the function of making a voluntary sequestration order, will be characterised as judicial if the legislation defining and conferring the function invests the function with the trappings of a judicial function: *R v Davison* (1954) 90 CLR 353 at 366–71; see also *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 189–91; [104 ALR 317](#); 66 ALJR 171; [BC9102603](#) [\[CB\]](#).
- The functions conferred on the Corporations and Securities Panel by the Corporations Law, of determining whether “unacceptable conduct” has occurred in the acquisition of shares and of making remedial orders consequential on that determination, do not involve the judicial power of the Commonwealth: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167; [104 ALR 317](#) [\[CB\]](#). This is because the panel does not adjudicate on a dispute about existing rights and obligations but creates new rights and obligations arising from any orders the panel might make; in making its determination, the panel is bound to take into account “considerations of commercial policy” rather than applying the law to past events or conduct (104 ALR at 326) and the panel’s determinations and orders were not “binding” in the same sense as a judicial determination would be, because they were subject to judicial review: 104 ALR at 327. See also *Attorney-General (Commonwealth) v Alinta* (2008) 233 CLR 542; [242 ALR 1](#); [\[2008\] HCA 2](#); [BC200800208](#) [\[CB\]](#) (reaching the same conclusion on new legislation governing the Corporations and Securities Panel).
- That fact that a body considers whether a contravention of the law has occurred as a step in the discharge of its functions does not necessarily render those functions judicial: *Attorney-General (Commonwealth) v Alinta* (2008) 233 CLR 542; [242 ALR 1](#); [\[2008\] HCA 2](#); [BC200800208](#) [\[CB\]](#).
- “[P]arliament can, if it chooses, legislate with respect to rights and obligations by vesting jurisdiction in courts to make orders creating those rights or imposing those liabilities ... Leaving aside problems that might arise because of the subject-matter involved or because of some prescribed procedure not in keeping with the judicial process, where a discretionary authority is conferred upon a court and the discretionary authority is to be exercised according to legal principle or by reference to an objective standard or test prescribed by the legislature and not by reference to policy considerations or other matters not specified by the legislature, it will be possible to conclude that the determination by the court gives effect to rights and obligations for which the statute provides and that the determination constitutes an exercise of judicial power”: *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 190–1; [104 ALR 317](#) at [327](#); 66 ALJR 171; [BC9102603](#) [\[CB\]](#). See also *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 360; [128 ALR 81](#); 69 ALJR 284; [BC9506436](#) [\[CB\]](#).
- Commercial arbitration of a dispute, which would otherwise be the subject of proceedings in the Federal Court, does not involve an exercise of the judicial power of the Commonwealth by the arbitrator; the arbitrator’s authority comes from agreement rather than legislation; the arbitration proceedings are not compulsive (even though the proceedings in the Federal Court may be stayed pursuant to s 53 of the Commercial Arbitration Act 1984 (NSW)); and the arbitrator cannot call on the coercive force of the state to implement its award: *Q H Tours Ltd v Ship Design & Management (Aust) Pty Ltd* (1991) 33 FCR 227; [105 ALR 371](#) at [386](#) [\[CB\]](#) per Foster J.

- Section 464M of the Crimes Act 1958 (Vic), authorising a magistrate to order the fingerprinting of a person suspected of committing an offence does not involve an exercise of judicial power, nor is it incidental to that power: the section does not involve the resolution of a dispute between parties as to their pre-existing rights; and the procedure prescribed under s 464M is not that applicable to judicial proceedings; s 464M is that of an investigative facility designed to assist the police to collect evidence: *Grollo v Bates* (1994) 125 ALR 492; 53 FCR 218; 75 A Crim R 271 ^{CB} (perinfeld J).
- Section 246A(1) of the Income Tax Assessment Act 1936, which authorises the Commissioner of Taxation to require a person to furnish information and produce documentation, as listed in the notice, said to be relevant to a person's applicant's liability to income tax, is wholly administrative in character and involves no exercise of the judicial power of the Commonwealth: *F H Faulding & Co Ltd v FCT* (1994) 126 ALR 561; 94 ATC 4867; 35 ALD 291 ^{CB} (per Cooper J).
- [Section 139ZQ](#) of the Bankruptcy Act 1966 (Cth), which authorises the Official Receiver to issue a notice requiring the repayment to a bankrupt's trustee of money received as a result of a transaction void as against the trustee, does not provide for the exercise by the Official Receiver of the judicial power of the Commonwealth: *Re McLernon; Ex parte SWF Hoists & Industrial Equipment Pty Ltd v Prebble* (1995) 58 FCR 391; [130 ALR 609](#) ^{CB} (Federal Court of Australia, per Carr J). The issuing of such a notice would be subject to review by the Federal Court in a hearing *de novo* under [s 139ZS](#) of the Act and under the [Administrative Decisions \(Judicial Review\) Act 1977](#). Further, in deciding to issue the notice, the Official Receiver was not deciding existing rights conclusively but was creating new rights.
- ASIC's power to disqualify persons from managing corporations for up to 5 years (under s 206F of the Corporations Act 2001) was not judicial power, notwithstanding the fact that a very similar power was conferred upon courts including the Federal Court: *Visnic v ASIC* (2007) 234 ALR 413; [61 ACSR 512](#); [\[2007\] HCA 24](#); [BC200703853](#) at [\[12\]–\[13\]](#) ^{CB}.
- The power of the Companies Auditors and Liquidators Disciplinary Board to suspend the registration of liquidators did not involve judicial power, because that board did not determine guilt or impose punishment, did not settle disputes about existing rights, and could not enforce its own decisions. To the extent that the board was required to form an opinion as to existing rights, that was no more than a step that was necessary to its ultimate conclusion: *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 234 ALR 618; [61 ACSR 487](#); [\[2007\] HCA 23](#); [BC200703852](#) at [\[6\]](#), [\[17\]–\[29\]](#) ^{CB}.

[1675.25] Incidental powers and functions

The vesting of the judicial power of the Commonwealth in the High Court brings with it such powers as are incidental and necessary to the exercise of the jurisdiction. What is incidental and necessary has not been, and perhaps cannot be, exhaustively detailed. A power of contempt is included, as is a power to stay orders. A broad power to protect the procedures of the court against abuse may also be included: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [33] [193]–[197]; [\[2008\] HCA 28](#); [BC200804501](#) ^{CB}.

The function of approving schemes to reorganise trade unions, following a decision that the union's rules were invalid, is incidental to the judicial function of adjudicating on the validity of the rules and may, accordingly, be vested in a federal court: *R v Joske; Ex parte Shop Distributive and Allied Employees' Assn* (1976) 135 CLR 194; [10 ALR 385](#) ^{CB}.

Similarly, although the function of making rules of court is legislative in character, it may be vested in a court: *R v Davison* (1954) 90 CLR 353 at 369. However, the rules of court which may be made by a

federal court are confined to matters of practice and procedure: *Harrington v Lowe* (1996) 136 ALR 42 at 49 (per Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

[1675.30] Persona designata

L Legislation cited in this paragraph

(CTH) [Aboriginal and Torres Strait Islander Heritage Protection Act 1984](#) s 10(1)(c).

(CTH) [Telecommunications \(Interception and Access\) Act 1979](#) ss 18, 20.

The separation of judicial power does not preclude a justice of the High Court or a judge of any federal court from exercising non-judicial powers or being appointed to a non-judicial office in her or his personal capacity, provided that the judge consents to the conferral of the functions, and the functions to be performed by the judge in her or his personal capacity are compatible with the performance of judicial functions and do not involve the undertaking of an essentially political function, acting in accordance with ministerial policy or the giving of advisory opinions to the executive: *Grollo v Palmer* (1995) 184 CLR 348; [131 ALR 225](#); [1995] HCA 26; [BC9502448](#) ^{CB}; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; [138 ALR 220](#); 70 ALJR 743; [1996] HCA 18; [BC9604085](#) ^{CB}; *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241; [248 ALR 456](#), at [64] [119]; [\[2008\] FCAFC 128](#); [BC200805498](#) ^{CB}.

Consent to the conferral of a function may be inferred from a course of conduct; in particular, by exercise of the power or function in question: *O'Donoghue v Ireland* (2008) 234 CLR 599; [244 ALR 404](#), at [\[65\]](#); [\[2008\] HCA 14](#); [BC200802740](#) ^{CB}.

In the context of Commonwealth laws relating to criminal matters, s 4AAA of the Crimes Act 1914 (Cth) may operate to convert provisions that on their face appear to impose duties into provisions that should be interpreted as conferring powers upon individuals persona designata: see *O'Donoghue v Ireland*, *above*.

The appointment of a judge of the Federal Court as a President or Deputy President of the Administrative Appeals Tribunal is made in personal capacity, and for that reason does not offend the separation of powers doctrine despite the fact that the functions of the tribunal are administrative rather than judicial: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, at [584–585](#); 46 FLR 409; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, *above*, (CLR at 17–18); *Hussain v Minister for Foreign Affairs*, *above*, at [64].

The appointment of a Federal Court judge to the Administrative Appeals Tribunal is not incompatible with the judge holding office as a Chapter III judge, even if the judge presides over a hearing in which the tribunal is required to conduct itself in a manner that does not comply with ordinary principles of procedural fairness (including by proceeding in the absence of a party and his or her legal representatives, and on the basis of evidentiary material that is not disclosed to the party or his or her representatives, pursuant to ss 39A and 39B of the Administrative Appeals Tribunal Act 1975): see *Hussain v Minister for Foreign Affairs*, *above*, at [150]–[151].

On the other hand, the appointment of a Federal Court judge as a reporter to prepare a report to the Minister under s 10(1)(c) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 is inconsistent with the separation of judicial power because the functions involved in making such a report is closely connected with the functions of the executive government, and involves the making of political decisions and the tendering of advice to the minister on legal questions, and for those reasons is incompatible with the independence of the judiciary: *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; [138 ALR 220](#); 70 ALJR 743; [BC9604085](#) ^{CB}.

The non-judicial function of issuing warrants authorising interception of telecommunications is validly committed, by ss 18 and 20 of the Telecommunications (Interception) Act 1979 (Cth), to judges of the Federal Court, because the function is committed to those judges in their personal capacity: *Hilton v Wells* (1985) 157 CLR 57; [58 ALR 245](#) ^{CB}; *Jones v Commonwealth* (1987) 71 ALR 497 ^{CB}. In *Grollo v Palmer*, above, the High Court held that the conferral of the power to issue intercept warrants on judges of the Federal Court, who had consented to be nominated and declared by the Minister to be eligible, was conferred on each judge as a designated person detached from the court. The function of issuing interception warrants is not incompatible with the judges' status and independence or inconsistent with their exercise of judicial power. Nor is that function inconsistent with the maintenance of public confidence in the discharge by the judiciary of its responsibilities in the exercise of the judicial power of the Commonwealth.

For further discussion of functions that are incompatible with the exercise of federal judicial power (in the context of the functions that can be conferred upon state courts, rather than in the persona designata context), see *Kable v DPP (NSW)* (1996) 189 CLR 51; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) ^{CB}: [1675.52].

[1675.35] Parliamentary privilege

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 49.

The power of each of the houses of Parliament to punish for contempt of Parliament, being supported by [s 49](#) of the Constitution, forms a clear exception to the separation of judicial power: *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157 ^{CB}.

[1675.40] Courts martial and military tribunals

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 51(vi), s 72, s 80.

(CTH) [Defence Force Discipline Act 1982](#) s 114.

"To ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army or air force. But they do not form part of the judicial system administering the law of the land": *R v Cox; Ex parte Smith* (1945) 71 CLR 1 at 23.

Although a service tribunal exercises judicial power, it does not exercise the judicial power of the Commonwealth; the power of the Parliament to make laws with respect to defence, conferred by [s 51\(vi\)](#), contains a power to enact a disciplinary code and to impose on those administering that code a duty to act judicially: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 540; [84 ALR 1](#).

However, the question of the extent or comprehensiveness of any such disciplinary code remains unsettled. In *Re Nolan; Ex parte Young* (1991) 172 CLR 460; [100 ALR 645](#) ^{CB}, Mason CJ and Dawson J at ALR 649 held there was no practical limit to the kind of conduct of members of the armed services which can be regulated by such a code and dealt with by military tribunals; Brennan and Toohey JJ at ALR 657 held that such a code could only deal with matters which related to the maintenance and enforcement of service discipline; and Deane, Gaudron and McHugh JJ at ALR 663, 664 and 668 held that, in peace-time, such a code could not deal with conduct of a type commonly penalised under ordinary criminal law. See also *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; [121 ALR 153](#) ^{CB}, where a majority of the court (Mason CJ, Brennan, Dawson and Toohey JJ)

held that the Commonwealth Parliament could enact a disciplinary code for the defence forces, to be administered judicially but standing outside the provisions of [Ch III](#) of the Constitution, including the guarantee of trial by jury contained in [s 80](#) of the Constitution.

In *Re Aird; Ex parte Alpert* (2004) 220 CLR 308; [209 ALR 311](#); [\[2004\] HCA 44](#); [BC200405815](#) ^{CB}, a majority of the High Court (Gleeson CJ, McHugh, Gummow and Hayne JJ; Kirby, Callinan and Heydon JJ dissenting) held that [s 51\(vi\)](#) empowered parliament to make it a service offence for a member of the defence force to commit rape while on leave in a country other than the country in which that member was serving. The applicant in this case did not challenge the view that, if s 51(vi) applied to support the law that created the offence, it could be tried outside of [Ch III](#).

In *White v Director of Military Prosecutions* [\(2007\) 235 ALR 455](#); [\[2007\] HCA 29](#); [BC200704600](#) ^{CB}, the High Court declined an invitation to overrule *Re Tracey*, *Re Nolan* and *Re Tyler*. The court rejected a submission that service tribunals could exercise judicial power only with respect to matters that involved conduct that could not be charged and tried in the ordinary civil courts, or that such tribunals could exercise judicial power only in relation to “exclusively disciplinary” offences. See also *Commonwealth v Westwood* [\(2007\) 241 ALR 381](#); [\[2007\] FCA 1282](#); [BC200706820](#) at [\[61\]–\[62\]](#) ^{CB}.

In *Lane v Morrison* (2009) 239 CLR 230; [258 ALR 404](#); [\[2009\] HCA 29](#); [BC200907723](#) ^{CB}, the High Court unanimously held that s 114 of the Defence Force Discipline Act 1982 (Cth), which established the Australian Military Court, was invalid. The Court was empowered to make binding and authoritative decisions of guilt and determinations about punishment for service offences without further intervention from within the chain of command of the armed forces. The Court held that the Australian Military Court was not a [Ch III](#) court, its members not being appointed in the manner specified, and given the security of tenure required by, [s 72](#) of the Constitution. However, the Australian Military Court purported to exercise the judicial power of the Commonwealth, because its decisions were not subject to automatic internal military review, thereby taking it outside the exception to the Boilermakers principles for military justice.

[1675.45] Public service tribunals

L Legislation cited in this paragraph

(CTH) [Public Service Act 1922](#).

The disciplinary tribunals established by the Public Service Act 1922 (Cth) do not offend the separation of judicial power: *R v White; Ex parte Byrnes* (1963) 109 CLR 665 ^{CB}.

[1675.47] Detention

“It would ... be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain certain citizens in custody [because] the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the extensively judicial function of adjudging and punishing criminal guilt”: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [110 ALR 97](#) at [114](#); 67 ALJR 125; [BC9202669](#) ^{CB} per Brennan, Deane and Dawson JJ (*Chu Kheng Lim*).

In *Fardon v A-G (Qld)* (2004) 223 CLR 575; [210 ALR 50](#); [\[2004\] HCA 46](#); [BC200406384](#) ^{CB} (*Fardon*), Gummow J suggested a reformulation of that rule, stating that save for “exceptional cases”, “the involuntary detention of a citizen by the state is permissible only as a consequential step in the adjudication of the criminal guilt of that citizen for past acts”: at [80].

In *Kruger v Commonwealth* (1997) 190 CLR 1 at 110; [146 ALR 126](#) at [192](#); [1997] HCA 27; [BC9703253](#) ^{CB} (*Kruger*), Gaudron J explained that “the existence of so many acknowledged

exceptions to the immunity”, and the many different purposes of those exceptions, told “against the implication of a constitutional rule that involuntary detention can only result from a court order”.

In *Al-Kateb v Godwin* (2004) 219 CLR 562; [208 ALR 124](#); [\[2004\] HCA 37](#); [BC200404861](#) at [\[258\]](#) ^{CB}, Hayne J (with whom Heydon J agreed) referred to Gaudron J’s remarks with approval, stating that the line drawn in “*Chu Kheng Lim* is a line which is difficult to identify with any certainty. It is a line which appears to assume that there is only a limited class of cases in which executive detention can be justified. And that assumption is at least open to doubt”. Similarly, in *Re Woolley; Ex parte Applicants M276/2003* [\(2004\) 210 ALR 369](#); 79 ALJR 43; [\[2004\] HCA 49](#); [BC200406534](#) at [\[57\]](#) ^{CB} (*Re Woolley*), McHugh J likewise agreed with Gaudron J’s remarks and concluded that “it is going too far to say that, subject to specified exceptions, detention by the Executive is *always* penal or punitive and can only be achieved as the result of the exercise of judicial power”.

Legislation that authorised courts (including federal courts) to make control orders did not involve “detention in custody” for the purposes of the above principle, notwithstanding the fact that such orders could result in a substantial deprivation of liberty. Such orders can be made by a federal court even in the absence of any adjudication of criminal guilt: *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[18\]](#), [\[114\]–\[116\]](#) ^{CB}.

Even if the principle in *Chu Kheng Lim* is good law, there are many exceptions to it. They include detention while police investigate whether to lay charges (*R v McKay* [\(1998\) 135 ACTR 29](#) at [32–3](#); 148 FLR 212; [BC9806363](#) ^{CB}), immigration detention pending removal or deportation (*Chu Kheng Lim*; *Al-Kateb v Godwin*), detention as a result of infectious disease or mental illness (*Chu Kheng Lim* at CLR 28), and detention pending extradition: *Vasiljkovic v Commonwealth* [\(2006\) 228 ALR 447](#); 80 ALJR 1399; [\[2006\] HCA 40](#); [BC200605842](#) at [\[108\]](#), [\[113\]](#) ^{CB} (*Vasiljkovic*). They may also include detention pursuant to the defence power: *Al-Kateb v Godwin* at [61]; *Kruger* at CLR 110; *Lloyd v Wallach* (1915) 20 CLR 299; [BC1500023](#) ^{CB}; *Ex parte Walsh* [1942] ALR 359; [BC4200006](#) ^{CB}; *Little v Commonwealth* (1947) 75 CLR 94; [1947] ALR 483; (1947) 21 ALJR 292; [BC4700330](#) ^{CB}.

The categories of exception to the criminal guilt implication are not closed: *Fardon* at [83], [154]–[155], [215]; *Chu Kheng Lim* at CLR 55; *Kruger* at CLR 109–10; *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; [208 ALR 271](#); [\[2004\] HCA 36](#); [BC200404860](#) at [\[121\]](#) ^{CB}; *Kable v DPP (NSW)* (1996) 189 CLR 51 at 121; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) ^{CB}; *Vasiljkovic* at [37], [108], [183].

The exceptions “can be explained only by the fact that the *purpose* of the detention in those ‘exceptional’ cases is not punitive or penal in nature”: *Re Woolley* at [60]. Exceptions may therefore be recognised where a law that authorises detention is sufficiently connected to a head of power, and the detention that the law authorises is not imposed for the purpose of “punishment”: *Chu Kheng Lim* at CLR 33, 71; *Al-Kateb v Godwin* at [4], [44].

[1675.50] Retrospective criminal laws

The question whether a Commonwealth law, retrospectively declaring conduct to be a crime, amounts to a legislative usurpation of judicial power was considered by the High Court in *Polyukhovich v Commonwealth* (1991) 172 CLR 501; [101 ALR 545](#) ^{CB}. Mason CJ, Dawson and McHugh JJ held that the issue was settled by *R v Kidman* (1915) 20 CLR 425 ^{CB}, where the court had decided that the Commonwealth Parliament did have power to legislate retrospectively. In any event, Mason CJ, Dawson and McHugh JJ said, there was no relevant difference between a court’s function in an ordinary case involving a criminal law, and its function in a case involving a retrospective criminal law: neither the court’s fact-finding function nor its law-applying function was usurped in the latter type of case. However, Mason CJ, Dawson and McHugh JJ would

have regarded a “bill of attainder” (an Act of Parliament declaring an identified person guilty of a crime) as a breach of the separation of judicial power.

Deane and Gaudron JJ held that a retrospective criminal law usurped the function of determining whether the conduct of the accused amounted to a crime because it directed the courts to find that conduct amounted to a crime when in fact, at that time, it did not.

Toohy J held that a retroactive criminal law would only violate the separation of judicial power if the retroactive law could not be justified on the basis that it rendered criminal some conduct which was morally reprehensible but, for some technical reason, not criminal at the time when it occurred. A law retrospectively declaring acts of genocide to be criminal could not be condemned on that basis.

For a discussion of the different ways in which the word “retrospectivity” is used see *Chang v Laidley Shire Council* (2007) 154 LGERA 297; [237 ALR 482](#); [\[2007\] HCA 37](#); [BC200707215](#) at [\[111\]–\[117\]](#) [\[CB\]](#); and at [118] where Hayne, Heydon and Crennan JJ said:

[118] ... an Act “is not retrospective because it interferes with existing rights. Most Acts do. There is no presumption that interference with existing rights is not intended; but there is a presumption that an Act speaks only as to the future.”

See also *Plewa v Chief Adjudication Officer* [\[1995\] 1 AC 249](#) [\[CB\]](#) at [257](#) [\[CB\]](#); [\[1994\] 3 WLR 317](#) [\[CB\]](#); *Coleman v Shell Co of Australia* (1943) 45 SR (NSW) 27 at 30–1; 62 WN (NSW) 21.

[1675.52] Preventive detention

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Chapter III.

It is not clear whether the Commonwealth can enact legislation that provides for preventive detention in custody by the state divorced from any adjudication of criminal guilt. In *Fardon v A-G (Qld)* (2004) 223 CLR 575; [210 ALR 50](#); [\[2004\] HCA 46](#); [BC200406384](#) [\[CB\]](#) (*Fardon*), Gummow and Kirby JJ indicated that the Commonwealth could not enact such a law, but their comments were unnecessary for the decision in that case, and the other members of the court reserved the position.

[Chapter III](#) does not prevent a state from empowering its supreme court to make orders for preventive detention, at least provided that the court discharges those functions in accordance with ordinary judicial procedures: *Fardon* at [19], [34], [220]–[221], [227]–[233].

However, state legislation which authorises a state supreme court to order the preventive detention of a specified person (the Act having no general application and being directed at one person only) confers on that court a power whose exercise is incompatible with the exercise of judicial power and is invalid: see *Kable v DPP (NSW)* (1996) 189 CLR 51; [138 ALR 577](#); 70 ALJR 814; [BC9604181](#) [\[CB\]](#) (*Kable*).

In *Kable* the invalidity of the state legislation was said to flow from the fundamental incompatibility of the function conferred by the State legislation with the proper exercise of federal judicial power. Toohey J said that, because the Supreme Court was simultaneously exercising the judicial power of the Commonwealth (matters arising under the court having been agitated in the course of the preventive detention proceeding), the legislation required the Supreme Court to exercise the judicial power of the Commonwealth in a manner which was inconsistent with traditional judicial process: 138 ALR 577 at 605, 608. Gaudron J said that [Ch III](#) of the Constitution provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, the State parliaments cannot, therefore, confer powers on State courts which are repugnant to or

incompatible with those courts' exercise of the judicial power of the Commonwealth: 138 ALR 577 at 611. McHugh J also described State courts as part of an integrated system of State and federal courts for the exercise of federal judicial power as well as State judicial power (138 ALR 577 at 621); and said that no parliament could legislate in a way that might undermine the role of those courts as repositories of federal judicial power — that is the parliaments cannot invest functions in a State Supreme Court that are incompatible with the exercise of federal judicial power: 138 ALR 577 at 622. Further, State courts which exercise federal jurisdiction must be, and be perceived to be, independent of the legislature and the government: 138 ALR 577 at 623. The State legislation here in question offended those principles. Gummow J also referred to an integrated Australian legal system with, at its apex, the exercise by the High Court of the judicial power of the Commonwealth (138 ALR 577 at 644) and concluded that the function of ordering preventive detention of the specified individual conferred on the State Supreme Court was incompatible with the exercise of that court's federal jurisdiction: 138 ALR 577 at 644.

[1675.54] Act of state doctrine and international relations

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 61.

There are some aspects of the discharge of the executive power of the Commonwealth, concerning in particular the interaction between the executive and foreign nations, that cannot be made the subject of review in Australian courts, either because they are not justiciable or because such review would infringe the act of state doctrine: see, eg, *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30 at 44; [78 ALR 449](#); [10 IPR 385](#); [BC8802610](#) ^{CB}; *Petrotimor v Commonwealth* (2003) 126 FCR 354 at 423–49; [197 ALR 461](#); [\[2003\] FCAFC 3](#); [BC200300101](#) ^{CB}; *Ali v Commonwealth* [\[2004\] VSC 6](#); [BC200400039](#) ^{CB}; *Habib v Commonwealth* (2010) 183 FCR 62; [265 ALR 50](#); [\[2010\] FCAFC 12](#); [BC201000811](#) at [\[5\]](#) ^{CB}; *Buttes Gas & Oil Co v Hammer (No 3)* [\[1982\] AC 888](#) [☐]; [\[1981\] 3 All ER 616](#); [\[1981\] 3 WLR 787](#) [☐] ^{CB}; *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [\[2002\] 2 AC 883](#) [☐]; [\[2002\] 3 All ER 209](#); [\[2002\] 2 WLR 1353](#) [☐] ^{CB}. “Every sovereign State is bound to respect the independence of every other sovereign State, and the Courts of one country will not sit in judgment on the acts of government of another done within its own territory”: *Potter v Broken Hill Co Pty Ltd* (1906) 3 CLR 479 at 495; [\[1906\] VLR 292](#) ^{CB}.

Some of the authorities suggest that, in circumstances where this doctrine applies, there is no “matter” for the purposes of [Ch III](#): *Petrotimor v Commonwealth*, above; *Aye v Minister for Immigration and Citizenship* [\(2009\) 111 ALD 546](#); [\[2009\] FCA 978](#); [BC200907926](#) at [\[44\]](#), [\[47\]](#) ^{CB}.

However, in Australia, the discharge of the executive power conferred by [s 61](#) of the Constitution in a manner that affects private rights and obligations can be made the subject of judicial review, and any question as to the limits of Commonwealth power will be justiciable notwithstanding the common law act of state doctrine: see *Habib v Commonwealth* (2010) 183 FCR 62; [265 ALR 50](#); [\[2010\] FCAFC 12](#); [BC201000811](#) at [\[25\]–\[30\]](#) ^{CB}, [\[128\]–\[132\]](#); *Re Dittford; Ex parte DCT (NSW)* (1988) 19 FCR 347; [83 ALR 265](#) ^{CB} per Gummow J; cf *Aye v Minister for Immigration and Citizenship* [\(2009\) 111 ALD 546](#); [\[2009\] FCA 978](#); [BC200907926](#) at [\[51\]–\[52\]](#) ^{CB}.

In *Hicks v Ruddock* (2007) 156 FCR 574; [239 ALR 344](#); [\[2007\] FCA 299](#); [BC200701311](#) ^{CB}, the Federal Court declined to strike out an application for habeas corpus and judicial review of decisions of the Commonwealth not to exercise its protective duty to seek the release of the applicant from his internment in Guantanamo Bay in the United States of America. The Commonwealth argued that the claim had no reasonable prospect of success because it was contrary to the act of state doctrine,

which requires a court of one nation to abstain from hearing proceedings which might require it to pass judgment on the legality of acts of a foreign sovereign government, but the court was not satisfied that the matter attracted that doctrine (at the stage the proceeding had reached). It was not enough to attract the doctrine that a matter might have implications for military or foreign policy: at [31].

In *Desai v Keelty* (2009) 180 FCR 559; [2009] FCA 1280; BC200910247, [33]–[38] ^{CB}, the Federal Court found that an application for an order that the Commonwealth Government apply diplomatic pressure to another State, or take steps in the United Nations or Commonwealth of Nations, was not justiciable, and therefore did not give rise to a “matter”. See also *Thorpe v Commonwealth* (No 3) (1997) 144 ALR 677 at 690–692; 71 ALJR 767; [1997] HCA 21; BC9702631 ^{CB}.

[1675.55] Interference with exercise of jurisdiction

L Legislation cited in this paragraph

(CTH) [Migration Act 1958](#) Section 54R.

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III.

(SA) [Liquor Licensing Act 1997](#) s 28A, s 38A.

(NSW) [Criminal Assets Recovery Act 1990](#) s 10, s 10(2)(b), Section 10(3)(b).

(SA) [Serious and Organised Crime \(Control\) Act 2008](#) s 14.

Section 54R of the Migration Act 1958 (Cth), which provided that a court was not to order the release of certain persons detained by the Commonwealth was held to be inconsistent with [Ch III](#) of the Constitution: “In terms s 54R is a direction by the Parliament to the courts as to the manner in which they are to exercise their jurisdiction. It is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including [Ch III](#) itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which [Ch III](#) vests exclusively in the Courts which it designates”: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; (1992) 110 ALR 97 at 121–2 ^{CB} per Brennan, Deane and Dawson JJ.

The decisions of the High Court have not gone so far as to recognise the existence of a “due process” requirement from the text and structure of [Ch III](#): *Thomas v Mowbray* (2007) 233 CLR 307; 237 ALR 194; [2007] HCA 33; BC200706044 at [111] ^{CB}; *APLA Ltd v Legal Services Cmr* (NSW) (2005) 224 CLR 322; 219 ALR 403; [2005] HCA 44; BC200506315 at [247] ^{CB}; compare *Nicholas v R* (1998) 193 CLR 173; 151 ALR 312; [1998] HCA 9; BC9800075 at [74] ^{CB} per Gaudron J. It may be, however, that legislation that required a court exercising federal jurisdiction to depart to a significant degree from the methods and standards that have characterised judicial activities in the past may be repugnant to [Ch III](#): see *Thomas v Mowbray*, above, at [111].

As a general proposition, legislation which purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction would be apt impermissibly to impair the character of the courts as independent and impartial tribunals: *Gypsy Jokers Motorcycle Club Inc v Cmr of Police* (2008) 234 CLR 532; 242 ALR 191; [2008] HCA 4; BC200800373, at [39] ^{CB}; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 36–37; 110 ALR 97; 67 ALJR 125; BC9202669 ^{CB}.

However, legislation that requires a court not to disclose to one or more of the parties evidence tendered by another party, which requirement operates if the disclosure would be likely to have a consequence specified in the legislation (for example, causing prejudice to ongoing police investigations) is not incompatible with Chapter III, at least provided that the court is empowered to determine for itself whether the disclosure of the evidence would have the specified consequence. Such legislation does not impair the institutional integrity of the court, and does not involve an impermissible legislative direction to the court: *Gypsy Jokers Motorcycle Club Inc v Cmr of Police*, above, at [7], [36], [173]–[174]. See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638; 87 ALJR 458; [2013] HCA 7; BC201301075 ^{CB}.

In *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501; 252 ALR 471; [2009] HCA 4; BC200900210 ^{CB}, the High Court rejected a challenge to the validity of s 28A of the Liquor Licensing Act 1997 (SA), which required the Liquor and Gambling Commissioner, the Licensing Court and the Supreme Court to take steps to maintain the confidentiality of information classified by the Commissioner of Police as criminal intelligence. “Criminal intelligence” was defined as information relating to actual or suspected criminal activity the disclosure of which could reasonably be expected to prejudice criminal investigations or to enable the discovery of the existence of a confidential source. The challenge to s 28A was dismissed because the Court held that it was for the court to decide whether the information classified by the Commissioner of Police met the criteria in the definition of “criminal intelligence”. The Court was not required to accept the information classified by the Commissioner as “criminal intelligence” and then to treat it accordingly. Further, the section did not deprive the court of the discretion to determine what weight to attach to such evidence or what steps were sufficient to maintain confidentiality. For those reasons, s 38A did not operate to deny to the Licensing Court the character of an independent and impartial tribunal: see at [136], [143]–[149]. See also *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638; 87 ALJR 458; [2013] HCA 7; BC201301075 ^{CB}.

In *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; 261 ALR 220; [2009] HCA 49; BC200910134 ^{CB}, the High Court (by majority) held that s 10 of the Criminal Assets Recovery Act 1990 (NSW) was invalid. Section 10(2)(b) of that Act provided that the NSW Crime Commission could apply ex parte to the Supreme Court for an asset restraining order to prevent dealings with specified property pending the making of an asset forfeiture order. Section 10(3)(b) required the Supreme Court to make the restraining order if satisfied by affidavit evidence that there were reasonable grounds for suspecting that the property derived from serious crime. A person could apply to have assets excluded from the restraining order, but such an application could be granted only if the person proved the assets were not fraudulently or illegally acquired. There was no express right in the Act to apply to have the restraining order dissolved. French CJ held that s 10 was invalid because it deprived the Supreme Court of the power to determine whether procedural fairness required that notice be given to the party affected before a restraining order was made, and responded that decision in the Crime Commission, which distorted the institutional integrity of the Court (at [4], [55]–[56]). Gummow and Bell JJ (with whom French CJ agreed) held that s 10 engaged the Supreme Court in an activity repugnant to the judicial process because it conscripted the Court to a process that required the mandatory ex parte sequestration of property upon suspicion of wrongdoing, with no effective curial enforcement of the duty of full disclosure on ex parte applications (at [97]–[98]). Heydon J (with whom Gummow and Bell JJ agreed) held that the detailed statutory regime excluded the general powers and procedures of the Supreme Court that would otherwise have permitted the Court to entertain an application to dissolve the ex parte restraining order once the affected party had received notice of its grant (at [159]–[160]). But for that conclusion, Heydon J would have agreed with Hayne, Crennan and Kiefel JJ that s 10 was valid (their Honours, in dissent, applying *Electric Light & Power Supply Corp Ltd v Electricity Commission* (NSW) (1956) 94 CLR 554 at 559–560; [1956] ALR 614; BC5600180 ^{CB} to support the conclusion

that the NSW legislature, by conferring power on the court, took the court with all its ordinary rules of procedure, including the power to dissolve an *ex parte* order (at [127]–[128]).

In *South Australia v Totani* (2010) 271 ALR 662 ^{CB}, the High Court applied the *Kable* principle (which proscribes legislation that is repugnant to or incompatible with the institutional integrity of State courts which can be invested with federal jurisdiction) in holding that s 14 of the Serious and Organised Crime (Control) Act 2008 (SA) was invalid. That section provided that the Magistrate's Court *must*, on application by the Commissioner of Police, make a control order against a person if satisfied that the person is a member of a declared organisation (being an organisation declared by the Attorney-General under s 10 of the Act if the Attorney-General is satisfied that its members were involved in serious criminal activities and that it represented a risk to public safety). The control order could be issued without notice to any person, and it was required to prohibit the defendant from associating with members of declared organisations except as specified in the order. A majority (Heydon J dissenting) held that the obligation imposed on the Magistrates Court by s 14 to make a control order in the specified circumstances was incompatible with the institutional integrity of that court because s 14 required it to act as a vehicle for implementing policies of the executive government. French CJ referred to “the dominance of the executive act of declaration and the finding of facts behind it in determining for all practical purposes the outcome of the control order” (at [81]). Gummow J said that s 14 “supplements the exercise by the Attorney-General of the politically accountable function of making a declaration, which involves the conscription of the Magistrates Court to effectuate that political function” (at [142]). Crennan and Bell JJ held that the court's judicial power was “so confined and so dependent on the Executive's determination in the declaration that it departed from the ordinary judicial processes of an independent and impartial tribunal” (at [436]). Hayne J said that s 14 permitted “the Executive to enlist the Magistrates Court to create new norms of behaviour for those particular members who are identified by the Executive as meriting application for a control order” (at [236]).

[1675.56] Attaching legislative consequences to judicial decisions

In a number of cases, the High Court has rejected arguments to the effect that the attachment by a State Parliament of statutory consequences to judicial decisions constitutes a usurpation by the Parliament of judicial power contrary to Ch III. In *Re Macks; Ex parte Saint* (2000) 204 CLR 158; [176 ALR 545](#); [\[2000\] HCA 62](#); [BC200007445](#) ^{CB}, for example, a majority of the court upheld the validity of State legislative provisions which declared the rights and liabilities of persons to be and to have always been the same as if each ineffective judgment of the Federal Court or the Family Court (by reason of the court's decision in *Re Wakim; Ex parte McNally*) had been a valid judgment of a State Supreme Court. In separate judgments, the members of the majority (Kirby J dissenting) characterised the impugned provisions as using the orders of the Federal Court and Family Court as a point of historical reference only, to create new rights and liabilities: the legislation did not purport to validate the ineffective judgments of the Federal Court and Family Court. Accordingly, it could not be said that the provisions involved an attempted interference with the jurisdiction of a federal court, or conferral of jurisdiction on a State Supreme Court which was repugnant to Ch III: at [31] per Gleeson CJ; at [74]–[76] per Gaudron J, at [111]–[113] per McHugh J; at [208] per Gummow J; at [366]–[367] per Hayne and Callinan JJ. See also *R v Humby; Ex parte Rooney* (1973) 129 CLR 231; [2 ALR 297](#); 47 ALJR 738; [BC7300056](#) ^{CB}; *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625; 86 ALJR 595; [\[2012\] HCA 19](#); [BC201202647](#) ^{CB}.

The court adopted a similar analysis in relation to the legislative regime applying to a small number of prisoners in New South Wales who, by reason of being the subject of a non-release recommendation when sentenced, are subjected to particular limitations on the determination of a minimum term and any subsequent release on parole: see *Elliott v R* (2007) 234 CLR 38; [239 ALR 651](#); [\[2007\] HCA 51](#); [BC200709514](#) ^{CB}; *Crump v New South Wales* (2012) 286 ALR 658; 86 ALJR 623; [\[2012\] HCA 20](#); [BC201202648](#) ^{CB}.

In *Mineralogy Pty Ltd v Western Australia* (2021) 393 ALR 551; 95 ALJR 832 [2021] HCA 30; BC202109693 ^{CB} the plaintiff challenged provisions of a Western Australian law which deprived certain arbitral awards of their legal effect. The legislation was said to be targeted to past events and it had the purpose and effect of being “to remove any liability of the defendant to the plaintiffs in damages” (at [82]). On that footing the law was said either to impair the institutional integrity of a state court such as to make it unsuitable as a repository of federal jurisdiction, or to amount impermissibly to an exercise of state judicial power by a state parliament. However, as Edelman J put it, there were no extant legal proceedings to the resolution of which the impugned law was addressed; the purpose of the law was to “provide cascading layers of protection for the financial position of the State of Western Australia rather than to resolve a judicial dispute”; and as a result the law bore “the character of provisions which extinguish rights of the plaintiffs” (at [159]). Hence the court held that the substantive operation and effect of the impugned law was no more than (per the plurality) “to ascribe new legal consequences to past events and thereby to alter substantive legal rights”, which is a permissible exercise of state legislative power (at [84]). No occasion arose to consider “the large question of whether the integrated nature of the judicial system prescribed by Ch III might preclude the exercise of judicial power directly by a State Parliament, as distinct from by a repository of State statutory power subject to the constitutionally entrenched supervisory jurisdiction of a State Supreme Court” (at [87]).

[1675.57] Parens patriae jurisdiction

L Legislation cited in this paragraph

(CTH) [Family Law Act 1975](#) Pt VII.

The jurisdiction conferred on the Family Court by Pt VII of the Family Law Act 1975 (Cth), to authorise medical treatment including the sterilisation of an incapable child of a marriage, corresponds with the traditional parens patriae jurisdiction and is part of the judicial power of the Commonwealth: *P v P* (1994) 181 CLR 583; [120 ALR 545](#) at [561](#) ^{CB}.

[1675.60] Warrants to intercept telecommunications

L Legislation cited in this paragraph

(CTH) [Telecommunications \(Interception and Access\) Act 1979](#) ss 45, 46.

Sections 45 and 46 of the Telecommunications (Interception) Act 1979 (Cth) authorise an eligible judge of the Federal Court to issue a warrant, on the application of one of several law enforcement agencies, authorising the interception of identified telecommunications. In *Grollo v Palmer* (1995) 184 CLR 348; [131 ALR 225](#); [1995] HCA 26; [BC9502448](#) ^{CB}, a majority of the High Court (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ, McHugh J dissenting) held that the conferral did not breach the separation of judicial power. The court was unanimous in holding that the power conferred by ss 45 and 46 was not part of the judicial power of the Commonwealth because it did not involve an adjudication to determine the rights of parties; and that the power to issue warrants was conferred on each eligible judge as a designated person rather than as a member of the court. The majority justices held that the conferral of the power on eligible judges was not incompatible with the judge's performance of his or her judicial functions or with the discharge by the judiciary of its responsibilities to exercise judicial power.

(CTH) CONSTITUTION [1680] s 72 Judges' appointment, tenure and remuneration

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[1680] 72 Judges' appointment, tenure and remuneration

The justices of the High Court and of the other courts created by the Parliament —

- (i) Shall be appointed by the Governor-General in Council:
- (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:
- (iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years. The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office

as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

[s 72 am Act 83 of 1977 s 2]

Section 72 Generally

[1680.5] Former life tenure

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 72, s 72(ii), para (iii).

Prior to its alteration by the Constitution Alteration (Retirement of Judges) 1977, [s 72](#) consisted only of the first four paragraphs, so that it concluded with para (iii). In *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 [CB](#) the High Court held that [s 72](#), in its unaltered form, required that every justice of the High Court and of every other court created by the Parliament should, subject to the power of removal contained in [s 72\(ii\)](#), be appointed for life.

[1680.10] Maximum age for federal judges

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 72.

(CTH) [Family Law Act 1975](#) s 23A.

Pursuant to the power conferred by [s 72](#), the Parliament has made "a law fixing an age that is less than seventy years as the maximum age for Justices" of the Family Court of Australia. That maximum age is 65 years: Family Law Act 1975 (Cth), s 23A. No law has been made by the Parliament fixing a maximum age for justices of the Federal Court of Australia, so that [s 72](#) fixes the maximum age for such justices at 70 years.

[1680.15] State and territory courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 72.

The language of [s 72](#) clearly has no application to the judges of state courts: *Le Mesurier v Connor* (1929) 42 CLR 481 at 495–6; 36 ALR 41 at 44–5; [BC2900008](#) [CB](#); *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 63; [40 ALR 673](#) at [683–4](#); 56 ALJR 588; [BC8200070](#) [CB](#); *Kable v DPP (NSW)* (1996) 189 CLR 51 at 80–1, 101–2, 115; [138 ALR 577](#) at [593–5](#), [621–2](#); 70 ALJR 814; [BC9604181](#) [CB](#); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45; [229 ALR 223](#); 80 ALJR 1606; [\[2006\] HCA 44](#); [BC200606891](#) at [\[255\]](#) [CB](#) (*Forge*).

The High Court has held that it similarly has no application to the judges of territory courts: *Re Governor Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; [165 ALR 171](#); [\[1999\] HCA 44](#); [BC9905445](#) [CB](#); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [206 ALR 315](#); [\[2004\] HCA 31](#); [BC200403588](#) at [\[31\]](#) [CB](#). See also *Forge* at [\[38\]](#).

[1680.20] Acting judges

(CTH) CONSTITUTION [1680] s 72 Judges' appointment, tenure and remuneration

See [\[1675.5C\]](#).

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(CTH) CONSTITUTION [1685] s 73 Appellate jurisdiction of High Court

Practice & Procedure High Court & Federal Court of Australia

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Alexander Flecknoe-Brown

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[1685] 73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences —

- (i) Of any Justice or Justices exercising the original jurisdiction of the High Court:
- (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:
- (iii) Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Section 73 Generally

[1685.3] Power on appeal

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

The jurisdiction to hear and determine appeals under [s 73](#) does not exceed the jurisdiction or capacity of the court appealed from: *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268; [254 ALR 637](#); [\[2009\] HCA 18](#); [BC200903186](#) at [\[39\]](#) ^{CB}; *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 109; [\[1932\] ALR 22](#); [BC3200041](#) ^{CB}.

The appellate function conferred by [s 73](#) authorises the High Court to determine the correctness or otherwise of the decision under appeal in the light of the evidence and issues as they were before the court whose decision is in question: *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268; [254 ALR 637](#); [\[2009\] HCA 18](#); [BC200903186](#) at [\[39\]](#) [CB](#); *Mickelberg v R* (1989) 167 CLR 259 at 274, 298; [86 ALR 321](#); 63 ALJR 481.

[1685.5] Appeal from non-determinative judgments

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

(CTH) [Federal Court of Australia Act 1976](#) s 25(6).

An appeal will lie to the High Court from a decision of a State Court of Criminal Appeal on a question of law arising in a trial on indictment and referred to the Court of Criminal Appeal by the Attorney-General following the accused's acquittal or the Crown's abandonment of the indictment: *Mellifont v A-G (Qld)* (1991) 173 CLR 289; [104 ALR 89](#); 66 ALJR 107 [CB](#). The Attorney-General's reference is regarded as arising out of the proceedings on the indictment, not divorced from the ordinary administration of the law, enabling the Court of Criminal Appeal to correct an error of law at the trial. It is, accordingly, an exercise of judicial power and the decision as a judgment or order within the meaning of [s 73](#): 104 ALR at 98. The decision to the contrary in *Saffron v R* (1953) 88 CLR 523 [CB](#) is now regarded as wrongly decided and will not be followed.

Similarly, an appeal will lie to the High Court from a decision of the Full Court of the Federal Court under [s 25\(6\)](#) of the Federal Court of Australia Act 1976 (Cth), which gives the Full Court jurisdiction to determine a case stated or a question reserved for its consideration by a single judge of the court; and the decisions to the contrary in *Fisher v Fisher* (1986) 161 CLR 438 [CB](#) and *Swiss Aluminium Australia Ltd v FCT* (1987) 163 CLR 421 [CB](#) will not be followed: *Mellifont v A-G (Qld)* (1991) 173 CLR 289; [104 ALR 89](#) at [97](#); 66 ALJR 107 [CB](#) per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ. See also *O'Toole v Charles David Pty Ltd (No 2)* (1991) 171 CLR 232 at CLR 244; [96 ALR 1](#) per Mason J, at 283 per Deane, Gaudron and McHugh JJ, at 302–3 per Dawson J and at 309 per Toohey J.

[1685.7] Exhaustive statement of appellate jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix), s 51(xxx), s 73, s 76(ii).

(CTH) [Nauru \(High Court Appeals\) Act 1976](#).

There are many cases which establish that, with a possible exception relating to appeals from territory courts (see [1685.30]), the appellate jurisdiction conferred by [s 73](#) is exhaustive: see *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264; (1921) 27 ALR 193; [BC2100041](#) [CB](#); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 268; [1956] ALR 163; (1956) 29 ALJR 658; [BC5600120](#) [CB](#); *Attorney-General (Cth) v R* (1957) 95 CLR 529 at 538; [\[1957\] AC 288](#) [CB](#); [1957] ALR 489; [BC5700080](#) [CB](#); *Mellifont v A-G (Qld)* (1991) 173 CLR 289 at 300; [104 ALR 89](#); 66 ALJR 107; [BC9102613](#) [CB](#).

In *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [\[2005\] HCA 42](#); [BC200506306](#) [CB](#), it was argued that [s 73](#) is not an exhaustive statement of the High Court's appellate jurisdiction, so

that legislation passed pursuant to [s 51\(xxix\)](#) (external affairs) and [s 51\(xxx\)](#) (relations with Pacific islands) could confer additional appellate jurisdiction on the High Court. A majority of the court determined that the [Nauru \(High Court Appeals\) Act 1976](#) conferred original jurisdiction under [s 76\(ii\)](#) of the Constitution, so the question whether s 73 was exclusive did not require determination. Of the justices whose reasoning required them to examine the question, Callinan and Heydon JJ held that s 73 was exhaustive (at [288]), while Kirby J held that it was not (at [177]). While they were not required to consider the question, Gummow and Hayne JJ nevertheless expressed the view that, with the possible exception of appeals from the Territories, s 73 is an exhaustive statement of the High Court's appellate jurisdiction (at [109], [119]). Gleeson CJ appeared to favour the same view (at [3]).

[1685.8] Jury verdicts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

"Decisions of this court, which are based upon [s 73](#) of the Constitution, have established that, although an appeal does lie from every judgment, decree, order, or sentence of a Supreme Court, yet in deciding an appeal from a judgment founded on a jury's verdict or findings this Court stands in the position which the court below stood at the time when it was pronounced. If the court below takes a general verdict or findings from a jury and if, after having done so, it has no authority under the law governing its procedure to interfere with the verdict or findings of the jury or to disregard them but is required to give effect to them, then this court stands in a like position and cannot go behind the verdict or findings.": see *McDonnell and East Ltd v McGregor* (1936) 56 CLR 50 at 53–54; [1936] ALR 324; [BC3600023](#) ^{CB}, quoted with approval in *Keramianakis v Regional Publishers Pty Ltd* (2009) 237 CLR 268; [254 ALR 637](#); [\[2009\] HCA 18](#); [BC200903186](#) at [\[38\]](#) ^{CB}.

Section 73(i)

[1685.10] Appeals from original jurisdiction of the High Court

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 34, ss 75, 76.

The High Court's jurisdiction to hear and determine appeals from justices exercising the original jurisdiction of the court is limited in s 34 of the Judiciary Act 1903 (Cth). Sections 75 and 76 of the Judiciary Act limit the court's appellate jurisdiction in relation to criminal trials in the High Court.

Section 73(ii)

[1685.15] Appeals from other federal courts

L Legislation cited in this paragraph

(CTH) [Federal Court of Australia Act 1976](#) s 33.

(CTH) [Family Law Act 1975](#) s 95.

There are three other federal courts: the Federal Court of Australia, the Industrial Relations Court of Australia and the Family Court of Australia. The High Court's jurisdiction to hear and determine appeals from the Federal Court of Australia and the Industrial Relations Court of Australia is limited: Federal Court of Australia Act 1976 (Cth), [s 33](#); Industrial Relations Act 1988 (Cth), s 432. The High Court's jurisdiction in relation to appeals from the Family Court of Australia is defined in the Family Law Act 1975 (Cth), s 95.

[1685.20] Appeals from other courts exercising federal jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73, s 77(iii).

(CTH) [Judiciary Act 1903](#) s 35, s 39(2), s 39(2)(c).

The Parliament may invest any state court with federal jurisdiction: Constitution, [s 77\(iii\)](#). Such an investiture has been made by the Judiciary Act 1903 (Cth), s 39(2). The High Court's jurisdiction to hear and determine appeals from such courts is limited in the Judiciary Act, s 39(2)(c) (read with s 35). Such appeals may be brought by special leave of the High Court. Pursuant to [s 73](#) of the Constitution and s 39(2)(c) of the Judiciary Act, the High Court may grant special leave to appeal from a decision of a court of summary jurisdiction exercising federal jurisdiction: *Prentice v Amalgamated Mining Employees Assn of Victoria and Tasmania* (1912) 15 CLR 235; 18 ALR 343 [CB](#); *Goward v Commonwealth* (1957) 97 CLR 355; [1957] ALR 825 [CB](#); *Bavcevic v Commonwealth* (1957) 98 CLR 296 [CB](#).

[1685.25] Appeals from state courts

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 35.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

The High Court's jurisdiction to hear and determine appeals from state supreme courts is limited by the Judiciary Act 1903 (Cth), s 35. Such appeals may be brought by special leave of the High Court.

Where a judge of a state supreme court exercises jurisdiction as a persona designata (for example, as an elections tribunal), an appeal does not lie pursuant to [s 73](#) of the Constitution from that judge to the High Court: *Holmes v Angwin* (1906) 4 CLR 297 [CB](#); *C A Macdonald Ltd v South Australian Railways Cmr* (1911) 12 CLR 221 [CB](#). Compare *Webb v Hanlon* (1939) 61 CLR 313 [CB](#); *Kahn v Board of Examiners* (1939) 62 CLR 422 [CB](#); *Medical Board of Victoria v Meyer* (1937) 58 CLR 62 [CB](#).

[1685.27] Entrenched jurisdiction of state supreme courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73(ii).

The supervisory jurisdiction of state supreme courts to review jurisdictional errors (as opposed to review for non-jurisdictional error) cannot be removed by state privative clauses, because [s 73\(ii\)](#) requires there to be a body fitting the description "the Supreme Court of a State". It is beyond the legislative power of a state so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description. A defining characteristic of state supreme courts is the power to confine inferior courts and tribunals within the limits of their authority to decide by granting relief in the nature of prohibition, mandamus and certiorari (at least on grounds of jurisdictional error). A privative provision in state legislation which purports to strip the Supreme Court of a state of that authority is beyond the power of the state legislature because it purports to remove a defining characteristic of the Supreme Court of the state: *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [262 ALR 569](#); [2010] HCA 1; [BC201000230](#) at [\[55\]](#) [CB](#); *Public Service*

Association of South Australia Inc v Industrial Relations Commission of South Australia (2012) 289 ALR 1; 128 ALD 463; [2012] HCA 25; BC201204986 ^{CB}.
[1685.30] Appeals from territory courts

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 122, s 73, s 77.

(CTH) [Judiciary Act 1903](#) s 35AA.

(CTH) [Federal Court of Australia Act 1976](#) s 24(2).

The Supreme Court of a federal territory is not a federal court or a court exercising federal jurisdiction within [s 73](#) of the Constitution. “[W]hen [Ch III](#) of the Constitution is read as a whole ... the words ‘court exercising federal jurisdiction’ in [s 73](#) refer to a state court which the Parliament has invested with federal jurisdiction pursuant to the power conferred by [s 77](#) ... and the Supreme Court of a territory is not such a court ... It is a territorial court created by the Parliament pursuant to [s 122](#) of the Constitution and not a ‘federal court’ within the meaning of [Ch III](#)”: *Capital TV and Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 613–14.

However, the Parliament can create a statutory right to appeal from the courts of the territories in the exercise of its general legislative power under [s 122](#) of the Constitution: *Porter v R*; *Ex parte Yee* (1926) 37 CLR 432 ^{CB}; *Spratt v Hermes* (1965) 114 CLR 226 ^{CB}. Such a right is created by the Judiciary Act 1903 (Cth), s 35AA (appeals from the Supreme Court of the Northern Territory); and is, it seems, implicitly conferred (subject to the special leave of the High Court) by the Federal Court of Australia Act 1976 (Cth), [s 24\(2\)](#) (Supreme Courts of the Australian Capital Territory, Christmas Island, Cocos (Keeling) Islands, Norfolk Island).

The existence of the exception relating to territory appeals appears likely to receive reconsideration following *Re Wakim*; *Ex parte McNally* (1999) 198 CLR 511; [163 ALR 270](#); [\[1999\] HCA 27](#); [BC9903189](#) at [\[111\]](#) ^{CB}; see *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [\[2005\] HCA 42](#); [BC200506306](#) at [\[119\]](#) ^{CB}; *Northern Territory v GPO* (1999) 196 CLR 553; [161 ALR 318](#); [\[1999\] HCA 8](#); [BC9900714](#) at [\[92\]](#), [\[125\]](#), [\[256\]–\[257\]](#) ^{CB}; *Re Governor, Goulburn Correctional Centre*; *Ex parte Eastman* (1999) 200 CLR 322; [165 ALR 171](#); [\[1999\] HCA 44](#); [BC9905445](#) at [\[25\]–\[26\]](#), [\[66\]](#) ^{CB}.

[1685.32] “Appeals” from Nauru

L Legislation cited in this paragraph

(CTH) [Nauru \(High Court Appeals\) Act 1976](#) s 5.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73, s 76(ii).

In *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [\[2005\] HCA 42](#); [BC200506306](#) ^{CB}, the High Court (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ; Callinan and Heydon JJ dissenting) held that [s 5](#) of the Nauru (High Court Appeals) Act 1976 validly conferred jurisdiction upon the High Court to review decisions of the Supreme Court of Nauru. While that Act used terminology consistent with the conferral of appellate jurisdiction (see at [39]–[40]), Gleeson CJ, McHugh, Gummow and Hayne JJ (Kirby, Callinan and Heydon JJ contra: CLR at [152], [164], [282], [288]) held that the Act in fact conferred original jurisdiction upon the High Court consistently with [s 76\(ii\)](#) of the Constitution. Accordingly, the court did not need to decide whether [s 73](#) was exhaustive of the appellate jurisdiction that could be conferred upon the High Court.

The nature of an appeal to the High Court from the Supreme Court of Nauru arose for consideration in *Clodumar v Nauru Lands Committee* (2012) 288 ALR 208; 86 ALJR 697; [2012] HCA 22; BC201204267 ^{CB}. See the discussion at [1700.40].

[1685.35] Exceptions and regulations

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

“[T]he Parliament has a power of making exceptions from the subject matter of the appellate jurisdiction of the High Court ... Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by [s 73](#)”: *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 544. “The Parliament of the Commonwealth is ... empowered by [s 73](#) of the Constitution to except altogether from the appellate jurisdiction of this court part of the judgments, decrees, orders and sentences of the courts mentioned in the first two paragraphs and of the Inter-State Commission. But it is not thereby empowered to take away completely the whole of its jurisdiction to hear any appeal from these judgments, decrees, orders and sentences. The appeals that can be taken away are at most exceptions from such appeals”: *Cockle v Isaksen* (1957) 99 CLR 155 at 168.

[1685.37] Requirement for special leave to appeal

L Legislation cited in this paragraph

(CTH) [Federal Court of Australia Act 1976](#) Section 33(3).

(CTH) [Judiciary Act 1903](#) s 35(2).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 73.

[Section 33\(3\)](#) of the Federal Court of Australia Act 1976 (Cth) and s 35(2) of the Judiciary Act 1903 (Cth), which preclude appeals from the Full Federal Court and the Supreme Court of a state, respectively, unless the High Court gives special leave to appeal, are consistent with [s 73](#) of the Constitution: *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194; [103 ALR 117](#) ^{CB}. The restraint on the power of the Parliament to establish exceptions to and regulations of the High Court's appellate jurisdiction, expressed in the second paragraph of [s 73](#), prevents the Parliament depriving the court of jurisdiction to hear and determine the appeals referred to in that paragraph; but the second paragraph does not confer on a litigant a right to appeal as of course, free from a requirement of a grant of leave or special leave to appeal: at 125.

The function of determining special leave applications is an exercise of judicial power, because it is an accepted and long-standing curial procedure. It involves a hearing and a determination in the form of a curial order; and, where the application is refused, it brings to an end the litigation between the parties: at 103 ALR 131.

[1685.40] No power to receive fresh evidence

“The authorities in this court stand clearly for the proposition that the reception of fresh evidence is not a part of the appellate jurisdiction of the court ... [T]he court has no power to receive the further evidence which the applicants seek to adduce. That conclusion should not be understood as denying the capacity of Parliament to confer on the court power to receive fresh evidence in appeals, at least in those appeals which involve the exercise of federal jurisdiction”: *Mickelberg v R* (1989) 167 CLR 259 at 266 and 271; [86 ALR 321](#); *Eastman v R* (2000) 203 CLR 1; [172 ALR 39](#); [\[2000\] HCA 29](#);

(CTH) CONSTITUTION [1685] s 73 Appellate jurisdiction of High Court

[BC200002716](#) . See also *Ronald v Harper* (1910) 11 CLR 63 ; *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 ; *Davies v R* (1937) 57 CLR 170 ; *Grosalik v Grant (No 2)* (1947) 74 CLR 355 ; *Crouch v Hudson* (1970) 44 ALJR 312 .

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(CTH) CONSTITUTION [1690] s 74 Appeal to Queen in Council

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[1690] 74 Appeal to Queen in Council

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Section 74 Generally

[1690.5] Limitation of appeals

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 74.

(CTH) [Privy Council \(Limitation of Appeals\) Act 1968](#).

(CTH) [Privy Council \(Appeals from the High Court\) Act 1975](#).

The Parliament has exercised the power conferred by the final sentence of [s 74](#): Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth). These Acts have eliminated all appeals from the High Court to the Privy Council, other than appeals raising questions as to the limits inter se of the constitutional powers of the Commonwealth and states or of two or more states.

[1690.10] Certificates for appeal to Privy Council

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 74.

Only one certificate in an inter se matter has been granted under [s 74](#), in *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182 [CB](#). “Although the jurisdiction to grant a certificate stands in the Constitution, such limited purpose as it had has long since been spent. The march of events and the legislative changes that have been effected — to say nothing of national sentiment — have made the jurisdiction obsolete. Indeed an exercise of the jurisdiction now would involve this court in passing the responsibility for final decision to the Privy Council in that class of constitutional case which the Constitution marked out above all others as the class of case which should be reserved for the final decision of this court — and this at a time when, as a result of the legislative changes already referred to, no other constitutional cases can be taken to the Privy Council”: *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461 at 465; [58 ALR 108](#).

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(CTH) CONSTITUTION [1695] s 75 Original jurisdiction of High Court

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[1695] 75 Original jurisdiction of High Court

In all matters —

- (i) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv) Between States, or between residents of different States, or between a State and a resident of another State:
- (v) In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

Section 75(i)

[1695.5] General

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(a), Section 44(2).

Section 38(a) of the Judiciary Act 1903 (Cth) makes exclusive to the High Court the jurisdiction in “matters arising directly under any treaty”. Section 44(2) of the Judiciary Act authorises the High Court to remit such a matter, or any part of that matter, to the Federal Court or a state or territory court.

For an analysis of the circumstances in which a matter may “arise under a treaty” see the commentary at [5180.5]–[5180.15].

[1695.10] “Arising under any treaty”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(i), s 75(iii), 75(v), s 76(ii).

(CTH) [Nauru \(High Court Appeals\) Act 1976](#).

As to when a matter may be said to arise under a treaty, see *Bluett v Fadden* (1956) 56 SR (NSW) 254. In that case, McLelland J noted that, in Australia, a treaty made by the Crown did not itself have legislative effect and could not be the subject of judicial cognisance until it had received legal sanction and carried into operation by appropriate legislative action. It was the legislation which created justiciable rights, so that rights could only be said to arise under the implementing legislation and not under the treaty. McLelland J said at 261 that [s 75\(i\)](#) must be taken to refer to cases where the decision of the case depends upon the interpretation of a treaty.

However, in *R v Donyaddeh* [\(1993\) 115 ACTR 1](#) at 6, Miles CJ disagreed with the views expressed in *Bluett v Fadden*, above, and held that a matter could only arise under a treaty where “the right, duty or liability in question ‘owes its existence’ to the treaty or depends upon the treaty for its enforcement, or has its source in the treaty”; it was “not enough that recourse is to be had to the treaty in order to decide the matter in issue”.

In *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [\[2005\] HCA 42](#); [BC200506306](#) ^{CB}, it was argued that the jurisdiction conferred on the High Court by the [Nauru \(High Court Appeals\) Act 1976](#) arose under a treaty within the meaning of s 75(i) of the Constitution. The court did not rule upon that argument, as it held that that Act conferred jurisdiction under [s 76\(iii\)](#) of the Constitution.

In *Thomas v Mowbray* (2007) 233 CLR 307; [237 ALR 194](#); [\[2007\] HCA 33](#); [BC200706044](#) at [\[106\]](#) ^{CB}, Gummow and Crennan JJ gave as examples of circumstances in which there may be no “matter” because determination of the controversy would require adjudication of obligations and undertakings which depend entirely on political sanctions and understandings “agreements and understandings between governments in the Australian federation and between Australia and foreign governments”.

In *Plaintiff M61/2010E v Commonwealth* [\(2010\) 272 ALR 14](#); 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#) at [\[51\]](#) ^{CB}, the court held that it had jurisdiction under [s 75\(iii\)](#) and [75\(v\)](#) of the Constitution, but also stated that it may have had jurisdiction under “[s 75\(i\)](#) (as matters arising under any treaty — the Refugees Convention and the Refugees Protocol)”.

Section 75(iii)

[1695.25] A source of liability?

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii).

(CTH) [Judiciary Act 1903](#) ss 56, 64.

It is not settled whether the liability of the Commonwealth to suit arises from [s 75\(iii\)](#) or from the provisions of the Judiciary Act 1903, in particular ss 56 and 64. The view that Commonwealth liability to suit derives from ss 56 and 64 is supported by a considerable body of authority: see *Werrin v Commonwealth* (1937) 59 CLR 150 at 166; [1938] ALR 268; [BC3800035](#) ^{CB}; *Suehle v Commonwealth* (1967) 116 CLR 353; [1967] ALR 572; (1967) 41 ALJR 23; [BC6700350](#) ^{CB}; *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397 at 419–20; [1956] ALR 549; (1956) 30 ALJR 159; [BC5600680](#) ^{CB}; *Maguire v Simpson* (1977) 139 CLR 362 at 404, 478; [18 ALR 469](#); 52

ALJR 125; [BC7700111](#) ^{CB}; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155 at 216–17; [119 ALR 577](#); 68 ALJR 216; [BC9404619](#) ^{CB}. The contrary view was, however, suggested by *Commonwealth v New South Wales* (1923) 32 CLR 200 at 210–14.

In *Commonwealth of Australia v Mewett* (1997) 191 CLR 471; [146 ALR 299](#); 71 ALJR 1102; [BC9703255](#) ^{CB}, Gummow and Kirby JJ (at CLR 549), with whom Brennan CJ agreed (at CLR 491) held that the liability of the Commonwealth in tort is created by the common law, but that [s 75\(iii\)](#) of the Constitution denies any operation to the doctrines of Crown or executive immunity that might otherwise have been pleaded in defence to a claim against the Commonwealth in tort. By contrast, Dawson J (at CLR 496–502), with whom Toohey J (at CLR 512–13) and McHugh J (at CLR 532) relevantly agreed, considered that Commonwealth liability in tort depends upon ss 56 and 64 of the Judiciary Act.

[1695.27] “the Commonwealth, or a person suing or being sued on behalf of the Commonwealth”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii).

(CTH) [Judiciary Act 1903](#) s 38, s 38(c), (d), s 39B(1A)(a).

In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [177 ALR 329](#); [\[2001\] HCA 1](#); [BC200100154](#) ^{CB}, in their joint judgment, Gleeson CJ, Gaudron and Gummow JJ held that ASIC, a corporation established by Commonwealth law, was “the Commonwealth” for the purposes of [s 75\(iii\)](#) of the Constitution and s 39B(1A)(a) of the Judiciary Act 1903. Their Honours reasoned as follows:

- the words “the Commonwealth” are of sufficient width to include a corporation which is an agency or instrumentality of the Commonwealth: at [39];
- ASIC is a clear example of a corporation established by a law of the Commonwealth which answers the description of “the Commonwealth” in [s 75\(iii\)](#) of the Constitution: at [40];
- s 39B(1A)(a) of the Judiciary Act 1903 defines the jurisdiction of the Federal Court with respect to a limited class of the matters mentioned in [s 75\(iii\)](#): at [40];
- the omission from s 39B(1A)(a) of the phrase “or a person suing ... on behalf of the Commonwealth” does not indicate an intention by the parliament to exclude a body such as ASIC from the grant of jurisdiction: at [41];
- that phrase was included in [s 75\(iii\)](#) in order to ensure that the jurisdiction conferred extended to cases in which the Commonwealth itself was not the nominal plaintiff or defendant; and did not operate as a reason for reading the references to the Commonwealth in the Constitution in a restricted sense: at [42].

The reference to a person suing or being sued “on behalf of” either the Commonwealth or a state is not confined to those officials who represent the relevant entity for the purposes of litigation (such as the Attorney-General or a nominal defendant authorised for that purpose). The phrase extends to all cases where a cause of action is vested in a person, or lays against a person, in the person's official capacity and as agencies or emanations of the Commonwealth; and it covers “the enforcement of actionable rights and liabilities of officers and agencies in their official and governmental capacity”, when in substance they form part of or represent the Commonwealth: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 358, 363, 367; [\[1948\] 2 ALR 89](#); (1948) 22 ALJR 191; [BC4800090](#) ^{CB} per Dixon J; see also Rich and Williams JJ, CLR at 275–6 and Starke J, CLR at 321–

2. In *Inglis v Commonwealth Trading Bank of Australia* (1969) 119 CLR 334 at 336; [1970] ALR 241; (1969) 43 ALJR 330; [BC6900200](#) ^{CB}, Barwick CJ observed that:

... largeness rather than narrowness of approach is appropriate. If in reality the Commonwealth is before the court in the litigation, no matter of form or nomenclature can be allowed to deny the court jurisdiction to hear and determine the rights asserted against it.

In the same case, Kitto J said:

The decisive question is not whether the activities and functions with which the respondent is endowed are traditionally governmental in character, though their possession of a traditional or generally accepted governmental character may well help in the ascertainment of the legislative intention. The question is rather what intention appears from the provisions relating to the respondent in the relevant statute: is it, on the one hand, an intention that the Commonwealth shall operate in a particular field through a corporation created for the purpose; or is it, on the other hand, an intention to put into the field a corporation to perform its functions independently of the Commonwealth, that is to say otherwise than as a Commonwealth instrument, so that the concept of a Commonwealth activity cannot realistically be applied to that which the corporation does?

The Commonwealth Trading Bank was held to be “the emanation by which the Commonwealth operates in the field of general banking” and when sued is “sued on behalf of the Commonwealth”: *Inglis v Commonwealth Trading Bank of Australia*, above, CLR at 342. Where the Commonwealth Savings Bank is sued for recovery of money due under an agreement, it is “sued on behalf of the Commonwealth”: *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 643–4; [67 ALR 535](#); 60 ALJR 691; [BC8601374](#) ^{CB}. For the same reasons, if the bank sues, it is “suing on behalf of the Commonwealth”: *Maguire v Simpson* (1977) 139 CLR 362 at 368; [18 ALR 469](#); 52 ALJR 125; [BC7700111](#) ^{CB}.

The principles relating to whether a body is within the shield of the Crown are not conclusive as to whether a person is sued on behalf of the Commonwealth: see *Bank of New South Wales v Commonwealth*, above, CLR at 359; *Maguire v Simpson*, above, CLR at 406; *Re Residential Tenancies Tribunal (NSW)*; *Ex parte Defence Housing Authority* (1997) 190 CLR 410 at 458, 464–5; [146 ALR 495](#); 71 ALJR 1254; [BC9703511](#) ^{CB}.

In *State Bank of New South Wales v Commonwealth Savings Bank of Australia*, above, CLR at 648; ALR at 541, Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ stated that the reference to “a person suing or being sued on behalf of the Commonwealth” in [s 75\(iii\)](#) of the Constitution had the same meaning as it did in s 38 of the Judiciary Act. It follows that the references in s 38(c) and (d) of the Judiciary Act to persons suing or being sued on behalf of the relevant entity (Commonwealth or state) should be read as covering the enforcement of actionable rights by and against officers and employees in their official and governmental capacity, when in substance they act as agents of the Commonwealth or the state or form part of or represent the Commonwealth or the state. In deciding whether an entity falls within these provisions, the court had regard to a range of factors, although it said (CLR at 648; ALR at 540) that the issue of executive control was “obviously an issue of central importance”. Such control could, however, be demonstrated through the power to appoint directors, demonstrating that indirect control may suffice. Other factors to which the court had regard included the absence of corporators, the public character of the entities objectives, scrutiny by the auditor-general, and payment of profits into consolidated revenue.

Federal jurisdiction exists in a proceeding to which the Commonwealth is a party simply because the Commonwealth is a party: *Re McJannet*; *Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620, at 653; [132 ALR 198](#); [1995] HCA 31; [BC9501518](#) ^{CB}; *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; [248 ALR 494](#), at [210]; [\[2008\] FCAFC 104](#); [BC200804402](#) ^{CB}.
[1695.30] Original jurisdiction cannot be excluded

L Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii), s 75(v).

The original jurisdiction conferred by [s 75\(iii\)](#) cannot be excluded: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[73\]](#) [CB](#). For example, that jurisdiction cannot be excluded by legislation purporting to confer exclusive jurisdiction on another court to determine the compensation payable by the Commonwealth on a compulsory acquisition of property: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 [CB](#).

Nor can the jurisdiction conferred by [s 75\(iii\)](#) be excluded by a law purporting to direct that no court, including the High Court, shall release from custody a person whom the Executive of the Commonwealth has imprisoned: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [\(1992\) 110 ALR 97](#) at [121](#) [CB](#) per Brennan, Deane and Dawson JJ.

Subject to the existence of a “matter”, certiorari may issue in the exercise of jurisdiction conferred by s 75(iii) of the Constitution, despite the fact that that remedy is not mentioned in [s 75\(v\)](#): see *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) [CB](#); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[80\]](#) [CB](#).

[1695.31] Exclusive jurisdiction**L** Legislation cited in this paragraph(CTH) [Judiciary Act 1903](#) s 38(c), 38(d), s 44(2), s 44(2A).(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii).

Section 38(c) and 38(d) of the Judiciary Act 1903 (Cth) make exclusive to the High Court part of its original jurisdiction under [s 75\(iii\)](#) of the Constitution — namely, jurisdiction in all suits between the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, and a State, or a person suing or being sued on behalf of a State. It follows that such a suit may only be commenced in the High Court and not, for example, in a state Supreme Court. See *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639; [67 ALR 535](#) [CB](#); commentary at [5180.25].

However, the High Court has power, under both s 44(2) and s 44(2A) of the Judiciary Act, to remit such a matter, commenced in and pending before the High Court, to the Federal Court of Australia or any court of a state or territory: see *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1984) 154 CLR 579; [53 ALR 625](#) [CB](#).

[1695.33] The Commonwealth**L** Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii).

The expression “the Commonwealth” is not to be construed narrowly, and it includes statutory corporations that are agencies or instrumentalities of the Commonwealth: see *Commonwealth v Westwood* (2007) 241 ALR 381; [\[2007\] FCA 1282](#); [BC200706820](#) at [\[52\]](#) [CB](#) (in the context of

s 39B(1A)(a)); *Austral Pacific Group Ltd (in liq) v Airservices Australia* (2000) 203 CLR 136; [173 ALR 619](#); [\[2000\] HCA 39](#); [BC200004309](#) at [\[48\]](#) [CB](#).

For the purposes of [s 75\(iii\)](#), ASIC has the identity of the Commonwealth: *Visnic v ASIC* ([2007](#)) [234 ALR 413](#); [61 ACSR 512](#); [\[2007\] HCA 24](#); [BC200703853](#) at [\[18\]](#) [CB](#); *ASIC v Edensor Nominees Pty Ltd* (2001) 204 CLR 559; [177 ALR 329](#); [\[2001\] HCA 1](#); [BC200100154](#) [CB](#). It is likely that it also includes the Commissioner of the Australian Federal Police: *Commonwealth v Lyon* (2003) 133 FCR 265; [203 ALR 553](#); [\[2003\] FCAFC 284](#); [BC200307682](#) at [\[21\]](#) [CB](#). The Commonwealth includes the Director of Military Prosecutions: see *Commonwealth v Westwood*, above, at [\[53\]](#). It also includes Centrelink (the Commonwealth Service Delivery Agency): *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; [248 ALR 494](#); [\[2008\] FCAFC 104](#); [BC200804402](#) [CB](#).

[1695.40] Trial of indictable offence against a law of the Commonwealth

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 75(iii).

(CTH) [Judiciary Act 1903](#) s 30(c).

[Section 75\(iii\)](#) gives the High Court original jurisdiction in trials on indictment for offences against the laws of the Commonwealth: *R v Kidman* (1915) 20 CLR 425 at 438; *R v Donyaddeh* ([1993](#)) [115 ACTR 1](#) at [7](#).

An alternative source of the same jurisdiction is s 30(c) of the Judiciary Act 1903: see [\[4825.7\]](#).

Section 75(iv)

[1695.50] Exclusive jurisdiction

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(b), Section 44(2).

Section 38(b) of the Judiciary Act 1903 (Cth) makes exclusive to the High Court the jurisdiction in suits between states, or between persons suing or being sued on behalf of different states or between a state and a person suing or being sued on behalf of another state. Section 44(2) of the Judiciary Act authorises the High Court to remit such a matter, or any part of that matter, to the Federal Court or a state or territory court.

[1695.55] Suit between a state and a resident of another state

See, for examples of such suits, *Daly v Victoria* (1920) 28 CLR 395 [CB](#); *New South Wales v Bardolph* (1934) 52 CLR 455 [CB](#); *Crouch v Cmr for Railways (Qld)* (1985) 159 CLR 22; [62 ALR 1](#) [CB](#).

[1695.60] “Between states ...”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 75(iv).

“When the word ‘matter’ is used in [Ch III](#) of the Constitution in its ordinary prima facie sense of the subject matter for determination in a legal proceeding rather than the legal proceeding itself, it focuses attention upon the substance of the dispute. The consequence is that the question whether a

particular ‘matter’ lies within the original jurisdiction of the court under [s 75\(iv\)](#) as a matter ‘[b]etween states’ or as a matter ‘between a state and a resident of another state’ falls to be determined by reference to the substantial subject matter of the controversy and not by reference only to the form in which the legal proceedings involving it happen to be framed ... [I]t can scarcely have been the intention of the framers of the Constitution that the original jurisdiction of the court in relation to a matter of dispute between states or between a state and a resident of another state should be determined according to whether an appropriate state minister, officer or instrumentality or a nominal defendant sued or was sued on its behalf”: *Crouch v Cmr for Railways (Qld)* (1985) 159 CLR 22 at 37–8; [62 ALR 1](#). Where the Commissioner for Railways for Queensland was sued by a resident of another state, the matter fell within [s 75\(iv\)](#).

[1695.65] State Bank of New South Wales

The State of New South Wales “carries on banking through its statutory corporation, the Bank, and ... it necessarily follows that the Bank is for this purpose the State of New South Wales”: *State Bank of New South Wales v Commonwealth Savings Bank of Australia* (1986) 161 CLR 639 at 652; [67 ALR 535](#).

[1695.70] Corporations cannot be residents of states

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iv).

The words “residents” and “resident” in [s 75\(iv\)](#) refer to natural persons only and not to artificial persons or corporations, including a corporation sole: *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 [CB](#). See also *Cox v Journeaux* (1934) 52 CLR 282 [CB](#); *Crouch v Cmr for Railways (Qld)* (1985) 159 CLR 22 at 34–6; [62 ALR 1](#).

[1695.75] Between residents of different states

The presence, on each side of the record, of persons who are residents of the same state, will prevent the matter being treated as a matter between residents of different states: “[T]he plaintiff or plaintiffs must be resident in one state and the defendant or defendants must be resident in another state”: *Watson and Godfrey v Cameron* (1928) 40 CLR 446 at 448–9. See also *R v Anderson; Ex parte Bateman* (1978) [21 ALR 56](#) at [58](#). Similarly, the presence on one side of the record of a corporation will prevent the matter being treated as a matter between residents of different states: *Rochford v Dayes* (1989) [84 ALR 405](#) [CB](#).

Section 75(v)

[1695.90] Original jurisdiction cannot be diminished

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 73(ii), s 75, s 75(iii), s 75(v).

(CTH) [Migration Act 1958](#) s 486A.

The matters dealt with by [s 75\(v\)](#) are part of the original jurisdiction of the High Court, and it is beyond the power of the Parliament to withdraw any matter from this jurisdiction. Any enactment, in so far as it attempts to do so, will be invalid: see *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[5\]](#), [\[53\]](#), [\[98\]](#) [CB](#); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 357; [\[1948\] 2 ALR 89](#); [\(1948\) 22 ALJR 191](#); [BC4800090](#) [CB](#). The “high constitutional purposes” of the remedies provided in [s 75\(v\)](#) has led the High Court in recent years to describe the remedies there provided as “constitutional writs” rather than as “prerogative

writs": *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); [95 ALD 1](#); [\[2007\] HCA 14](#); [BC200702595](#) at [\[37\]](#) [CB](#).

In *Plaintiff S157/2002*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said (at [104]):

[104] The reservation to this court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them. The centrality, and protective purpose, of the jurisdiction of this court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction. In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this court. The court must be obedient to its constitutional function. In the end, pursuant to [s 75](#) of the Constitution, this limits the powers of the parliament or of the executive to avoid, or confine, judicial review.

Thus, [s 75\(v\)](#) introduced into the Constitution an entrenched minimum provision of judicial review: *Bodruddaza v Minister for Immigration and Multicultural Affairs*, above, at [46]; *Plaintiff S157/2002*, above, at [103]; *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[4\]](#); [\[2008\] HCA 28](#); [BC200804501](#) [CB](#).

Aspects of the above reasoning were extended to the state Supreme Courts, via the medium of [s 73\(ii\)](#) of the Constitution, in *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [262 ALR 569](#); [\[2010\] HCA 1](#); [BC201000230](#) [CB](#).

The jurisdiction conferred by [s 75\(v\)](#) cannot be excluded by a law purporting to direct that no court, including the High Court, shall release from custody a person whom the Executive of the Commonwealth has imprisoned: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; [\(1992\) 110 ALR 97](#) at [121](#) [CB](#) per Brennan, Deane and Dawson JJ.

Likewise, there are limitations upon the extent to which parliament can impose time limits within which applications to the High Court pursuant to [s 75\(v\)](#) must be made. In *Bodruddaza v Minister for Immigration and Multicultural Affairs*, above, at [53]:

[53] ... a law with respect to the commencement of proceedings under [s 75\(v\)](#) will be valid if, whether directly or as a matter of practical effect, it does not so curtail or limit the right or ability of applications to seek relief under [s 75\(v\)](#) as to be inconsistent with the place of that provision in the constitutional structure ...

Applying that formulation, the High Court held that s 486A of the Migration Act 1958, which (in the form it took after the enactment of the Migration Litigation Reform Act 2005) purported to require an application to be made to the High Court within a maximum of 84 days of the date of actual notification of the decision to be challenged, and which prohibited the court from extending that time period, was invalid: see *Bodruddaza v Minister for Immigration and Multicultural Affairs*, above, at [60]. It was invalid principally because the time of notification of the decision may be very different from the time that the person becomes aware of the circumstances giving rise to a possible challenge to the decision, and because it did not allow for supervening events which may physically or otherwise incapacitate an applicant from moving within the stipulated time.

However, the Commonwealth Parliament can legislate so as to limit the cases to which the remedies referred to in [s 75\(v\)](#) are applicable. It can do this by indicating, in its legislation, that specified acts of Commonwealth officers are to be treated as valid or are not open to challenge on certain grounds. As Deane and Gaudron JJ put it in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; [127 ALR 21](#) at [46](#) [CB](#) (*Richard Walter*), "while the Parliament cannot withdraw or diminish the jurisdiction of the court to hear and determine the matters which [s 75\(v\)](#) designates

including the critical issue of the validity or lawfulness or an impugned decision or conduct, it can, consistently with [s 75\(v\)](#) and within the limits of the legislative powers conferred upon it by the Constitution, alter the substantive law to ensure that the impugned decision or conduct is in fact valid or lawful.” See also *Richard Walter*, above, ALR at 25 per Mason CJ, 35–6 per Brennan J, 67 per Toohey J, 74 per McHugh J. In *Richard Walter*, ALR at 45, Deane and Gaudron JJ also said that, taken together, [s 75\(iii\)](#) and [\(v\)](#) had the effect of ensuring “that there is available, to a relevantly affected citizen, a [Ch III](#) court with jurisdiction to grant relief against an invalid purported exercise of Commonwealth legislative power or an unlawful exercise of, or refusal to exercise, Commonwealth executive authority”.

Further, [s 75\(v\)](#) of the Constitution does not require the conclusion that there cannot be a valid grant of power in circumstances where a Minister or other person cannot be required to consider the exercise of the power. Maintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise: *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [2010] HCA 41; [BC201008390](#) at [55]–[57] [CB](#).

[1695.95] Officer of the Commonwealth

L Legislation cited in this paragraph

(CTH) [Defence Force Discipline Act 1982](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v),.

The phrase “officer of the Commonwealth” denotes an appointment, or an office of “some conceivable tenure, and usually a salary”: see *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 at 452; 22 ALR 413; [BC1600018](#) [CB](#).

It has been said that an “officer of the Commonwealth” must be a person occupying an identifiable office (*Trimbole v Dugan* (1984) 3 FCR 324; [57 ALR 75](#) [CB](#)) and that the phrase denotes an appointment, or an office of “some conceivable tenure ... and usually a salary”: *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 452; 22 ALR 413; [BC1600018](#) [CB](#) per Isaacs J.

That said, the phrase has been construed expansively. It includes:

- public servants (eg, *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54; [20 ALR 126](#); [BC1400054](#) [CB](#)); *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [2010] HCA 41; [BC201008390](#) at [51] [CB](#) (referring to both departmental officers and the Secretary of a Department);
- Commonwealth police (eg, *Coward v Allen* (1984) 52 ALR 320; [6 ALN N68](#) [CB](#); *Desai v Keelty* (2009) 180 FCR 559; [2009] FCA 1280; [BC200910247](#), [17] [CB](#); *Hinchcliffe v Commissioner of Police of the Australian Federal Police* (2001) 118 FCR 308; [2001] FCA 1747; [BC200107735](#) [CB](#)) and ASIO officers (*Church of Scientology Inc v Woodward* (1982) 154 CLR 25 at 65; [43 ALR 587](#); 57 ALJR 42; [BC8200127](#) [CB](#));
- judges of a federal court (see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co* (1910) 11 CLR 1; 16 ALR 373; [BC1000014](#) [CB](#); *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; [9 ALR 551](#); 50 ALJR 778; [BC7600059](#) [CB](#); *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190; [23 ALR 439](#); 53 ALJR 273; (1979) ATPR ¶40-103 [CB](#); *R v Ross-*

- Jones; Ex parte Green* (1984) 156 CLR 185; [56 ALR 609](#); 59 ALJR 132; [BC8400460](#) ^{CB}; *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations for Queensland* (1995) 184 CLR 620; [132 ALR 198](#) at [207](#), [214–15](#); 70 ALJR 93; [BC9501518](#) ^{CB}; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) ^{CB});
- royal commissioners holding Commonwealth letters patent (eg, *Eatts v Dawson* (1990) 21 FCR 166; [93 ALR 497](#) at [500](#); [20 ALD 498](#) ^{CB} per Morling, Beaumont and Gummow JJ);
 - Commonwealth ministers (eg, *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at 545; [178 ALR 421](#); [\[2001\] HCA 17](#); [BC200101234](#) ^{CB}; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 498; [182 ALR 657](#); [\[2001\] HCA 51](#); [BC200105242](#) ^{CB}); *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#) at [\[51\]](#) ^{CB});
 - the director of the Australian Legal Aid Office (*Thurgood v Director, Australian Legal Aid Office* (1984) [56 ALR 565](#); [9 Fam LR 916](#); (1984) FLC ¶91-570 ^{CB});
 - the President and members of the Administrative Appeals Tribunal (*Geographical Indications Committee v O'Connor* (2000) [64 ALD 325](#); 32 AAR 169; [\[2000\] FCA 1877](#); [BC200007917](#) at [\[20\]](#) ^{CB} per von Doussa, O'Loughlin and Mansfield JJ; *Pancontinental Mining Ltd v Burns* (1994) 52 FCR 454; [124 ALR 471](#) at [484–5](#); [34 ALD 239](#); [BC9406045](#) ^{CB} per von Doussa J);
 - members of the Refugee Review Tribunal (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) at [\[14\]](#) ^{CB});
 - the registrar of the Native Title Tribunal (*Northern Territory v Lane* (1995) 59 FCR 332; [138 ALR 544](#) at [564](#); [39 ALD 527](#) at [545](#); [BC9507752](#) ^{CB} per O'Loughlin J); and
 - members of statutory committees (eg, *Tang v Holmes* (1998) [51 ALD 121](#); [BC9800447](#) ^{CB}).
 - The persons who constitute military service tribunals under the Defence Force Discipline Act 1982 are “officers of the Commonwealth” for the purpose of [s 75\(v\)](#): *White v Director of Military Prosecutions* (2007) [235 ALR 455](#); [\[2007\] HCA 29](#); [BC200704600](#) at [\[39\]](#) ^{CB}.
 - A senior manager of the Australian Prudential Regulation Authority is an officer of the Commonwealth: see *X v APRA* (2007) 226 CLR 630; [232 ALR 421](#); [\[2007\] HCA 4](#); [BC200700720](#) at [\[4\]](#), [\[10\]](#) ^{CB}.

The phrase “officer of the Commonwealth” has been held not to include:

- a body corporate (such as the Australian Telecommunications Commission or the Australian Postal Commission), even though charged with statutory responsibilities under Commonwealth legislation (*Post Office Agents Association Ltd v Australian Postal Commission* (1988) [84 ALR 563](#) at [575](#); [16 ALD 428](#); *Broken Hill Proprietary Co Ltd v National Companies and Securities Commission* (No 6) (1986) [67 ALR 545](#); 61 ALJR 124 at 127; [11 ACLR 101](#); [BC8601375](#) ^{CB}; *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) [82 ALR 499](#) at [500](#); [15 ALD 479](#) per Gummow J; *Vietnam Veterans' Affairs Association of Australia (NSW Branch) Inc v Cohen* (1996) 70 FCR 419 at 432; [46 ALD 290](#); [BC9605418](#) ^{CB});
- the Administrator of the Northern Territory (at least in a case where, on the facts, the litigation concerned the exercise by the Administrator of powers under Northern Territory legislation) (*Arnhem Land Aboriginal Land Trust v Minister for Mines and Energy (NT)* (1997) 78 FCR 556; [158 ALR 427](#) at [438](#); [BC9705043](#) ^{CB} per O'Loughlin J);

- a stipendiary magistrate appointed by a state, even if the magistrate is exercising a power conferred by a Commonwealth Act (*Coward v Allen* (1984) 52 ALR 320 at 325; 6 ALN N68, citing *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437; 22 ALR 413; BC1600018 CB; *Sankey v Whitlam* [1977] 1 NSWLR 333 at 362–3; (1977) 21 ALR 457 at 486; 29 FLR 346 per Hutley JA; *R v Anderson; Ex parte Bateman* (1978) 21 ALR 56; BC7800058 CB; *R v Archdall; Ex parte Taylor* [1919] QWN 35; [1919] St R Qd 207 CB), because the granting of an authorisation to perform a particular act cannot convert an officer of a state into an officer of the Commonwealth (*Trimbole v Dugan* (1984) 3 FCR 324; 57 ALR 75; 6 ALN N289 CB).
- Contractors, and the employees of contractors, engaged to perform merits reviews of decisions made by departmental officers (although the court specifically reserved “the question whether a party identified as ‘an independent contractor’ may fall within s 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been ‘contracted out’”: *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [2010] HCA 41; BC201008390 at [51] CB).

Where persons receive similar powers from both federal and state legislation (as with the Coal Industry Tribunal, constituted by federal and New South Wales legislation), those persons will be officers of the Commonwealth “notwithstanding that they exercise or purport to exercise power conferred by the State Act, even if the power being or purportedly being exercised is identifiable as power conferred by the State Act”: *Re Cram; Ex parte New South Wales Colliery Proprietors Assn Ltd* (1987) 163 CLR 117 at 131; 72 ALR 161 at 166; 61 ALJR 401; BC8701788 CB; see also *R v Hughes* (2000) 202 CLR 535; 171 ALR 155; [2000] HCA 22; BC200002055 CB; *Australian Iron and Steel Ltd v Dobb* (1958) 98 CLR 586; [1958] ALR 513; (1958) 32 ALJR 93 CB.

[1695.97] Jurisdictional error

“Not all errors of law go to jurisdiction and if they do not go to jurisdiction the constitutional writs do not lie. Certiorari is not a constitutional writ but does lie for error of law on the face of the record”: *East Australian Pipeline Pty Ltd v ACCC* (2007) 239 ALR 50; 63 ACSR 404; [2007] HCA 44; BC200708214 at [71] CB. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219; [2000] HCA 57; BC200006927 CB; *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; 234 ALR 114; [2007] HCA 14; BC200702595 CB.

The complexities which ensue in federal jurisdiction based upon s 75(v) are discussed by Hayne J in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; 188 ALR 1; [2002] HCA 16; BC200201733 at [267]–[280] CB.

In *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590; [2021] HCA 17; BC202103997 CB a plurality of Kiefel CJ, Gageler, Keane and Gleeson JJ reiterated the principle enunciated in *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123; 359 ALR 1; [2018] HCA 34; BC201807174 CB that “a statute conferring decision-making authority is not ordinarily to be interpreted as denying legal force to every decision made in breach of a condition which the statute expressly or impliedly requires to be observed in the course of a decision-making process”, but instead is “ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance” (at [31], citing *Hossain* at [29]–[30]).

A jurisdictional error “is material to a decision only if compliance could realistically have resulted in a different decision” (at [35], citing *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421; 363 ALR 599; [2019] HCA 3; BC201900674 at [45] CB). This entails “a question of counter-factual analysis to be determined by the court as a matter of objective possibility as an aspect of determining whether an identified failure to comply with a statutory condition has resulted in a decision that has in fact been made being a decision that is wanting in statutory authorisation” (at

[37], citing *CNY17 v Minister for Immigration and Border Protection* (2019) 268 CLR 76; [375 ALR 47](#); [\[2019\] HCA 50](#); [BC201911661](#) at [\[47\]](#) [CB](#)).

This threshold of materiality is accepted to require the exercise of a “qualitative judgment” about what “real world” limits on the exercise of administrative power are “appropriate” in the context of judicial review (at [32], citing *Hossain*, cited above, at [28]). A determination as to the materiality of a jurisdictional error is “an ordinary question of fact in respect of which the applicant [for judicial review] bears the onus of proof” (at [35], citing *SZMTA*, cited above, at [46]). An applicant for judicial review must prove “all the historical facts necessary to sustain the requisite reasonable conjecture”; the objective is not to prove “that a different decision would have been made had there been compliance with the condition that was breached” but rather to show “the historical facts necessary to enable the court to be satisfied of the realistic possibility that a different decision could have been made had there been compliance with that condition” (at [39]).

In separate judgments, Gordon and Steward JJ (at [83]–[123]) and Edelman J (at [154]–[198]) concurred in the result but took a different approach to the principles of judicial review, which need not be stated here.

[1695.100] Writ of mandamus

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v).

(CTH) [Judiciary Act 1903](#) s 33(1)(e).

(CTH) [Income Tax Assessment Act 1936](#) s 201(1).

(CTH) [High Court Rules 2004](#) r 25.07.

The writ of mandamus is a judicial command addressed to and compelling the respondent to perform a public duty: *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) [CB](#); *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389; [1949] ALR 675; (1949) 23 ALJR 278; [BC4900150](#) [CB](#); *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228; [1933] ALR 533; (1933) 7 ALJR 169; [BC3300002](#) [CB](#).

This remedy has been widely used in Australia, and via [s 75\(v\)](#) of the Constitution is part of the original jurisdiction of the High Court. This jurisdiction cannot be removed by the parliament. In situations not falling within [s 75\(v\)](#) of the Constitution, mandamus can be granted by the High Court pursuant to s 33(1)(e) of the Judiciary Act if the court otherwise has jurisdiction.

However, Parliament can validly provide that there is no duty to consider the exercise of a statutory power, and such a provision will operate to prevent the grant of mandamus: *Plaintiff M61/2010E v Commonwealth* [\(2010\) 272 ALR 14](#); 85 ALJR 133; [\[2010\] HCA 41](#); [BC201008390](#) at [\[55\]–\[57\]](#), [\[99\]](#) [CB](#).

The grant of a writ of mandamus will not be limited to cases where an authority has simply refused to exercise the duty; the courts will also regard a “constructive refusal” as liable to mandamus: see *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott*, above, CLR at 242–3, cited with approval in *Re Refugee Review Tribunal; Ex parte Aala*, above, at [159]. Thus if the time in which an authority or person is required to perform a duty has passed (eg, *R v Hanley Revising Barrister* [\[1912\] 3 KB 518](#) [CB](#)), or the authority or person in question claims to have exercised the duty, but in doing so

has misconstrued it (*Ex parte Hepburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416; 64 WN (NSW) 107 ^{CB}), then mandamus will lie.

Mandamus is a discretionary remedy: see [1695.107] below.

The old law relating to mandamus required an applicant for a writ of mandamus to show that they have requested performance of the duty (see *R v Bristol and Exeter Railway Co* (1843) 4 QB 162 ^{CB}; 114 ER 859 ^{CB}); the performance was refused, or neglected (see *R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504; 23 ALR 179; 53 ALJR 259; 4 Fam LR 598 ^{CB}; *R v Police Magistrate of Cairns; Ex parte Nanook* [1913] QWN 34; [1913] St R Qd 176 ^{CB}); and the authority requested to act was “an officer of the Commonwealth”, as provided by s 75(v). The requirement of proof of a distinct demand is now seen as a matter of evidence that is relevant to whether the respondent actually or constructively refused to perform the relevant duty, rather than as a distinct requirement: *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corp Pty Ltd* (1993) 178 CLR 379 at 394; 115 ALR 321; 67 ALJR 723; BC9303576 ^{CB}.

While mandamus will not lie against the Crown or a servant of the Crown to compel the Crown to disburse moneys (see *R v Cmrs of Inland Revenue; Re Nathan* (1884) 12 QBD 461 ^{CB}), it will lie against a public official who is charged with the performance of a public duty and who acts, not as a servant of the Crown, but as *persona designata*. Accordingly, mandamus was issued by the Federal Court in *R v FCT; Ex parte Just Jeans* (1986) 10 FCR 69; 65 ALR 147; 86 ATC 4165; BC8601582 ^{CB} to compel the Commissioner of Taxation to perform the duty cast on the commissioner by s 201(1) of the Income Tax Assessment Act 1936. This provision obliged the commissioner to refund the amount of any tax overpaid where a person's liability to tax was reduced by reason of an alteration of an assessment on an appeal. When performing the duty imposed by that provision, Northrop J said (ALR at 152) that “the commissioner ... is not acting as a servant or agent of the Crown, but is acting as a *persona designata*. Accordingly, mandamus will lie to compel him to perform that duty”.

See also High Court Rules 2004 r 25.07, and the commentary at [12,535.5]–[12,535.65].

[1695.105] Writ of prohibition

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv), s 61, s 75(v).

(CTH) [High Court Rules 2004](#) r 25.20.

The writ of prohibition developed as a mechanism by which courts and tribunals were prevented from acting in excess of their jurisdiction. For a description of the nature and requirements of this writ, see generally *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; 176 ALR 219; [2000] HCA 57; BC200006927 ^{CB}; M Allars, *Introduction to Australian Administrative Law*, Butterworths, Sydney, 1990, pp 280–5; M Aronson, B Dyer and M Groves, *Judicial Review of Australian Administrative Action*, Law Book Co, Sydney, 2004, pp 690–719.

Prohibition grew from the enforcement of the royal prerogative of justice, whereby a superior court could intervene if there was a usurpation of the prerogative through assumption of jurisdiction unwarranted by law: see *R v Murray; Ex parte Commonwealth* (1916) 22 CLR 437 at 461–5 and 470; 22 ALR 413; BC1600018 ^{CB}; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd* (1914) 18 CLR 54; 20 ALR 126; BC1400054 ^{CB} (*Tramways case*); *London Corporation v Cox* (1867) LR 2 HL 239. It prevents the commencement or continuation of proceedings which are outside the jurisdiction of the authority in question: see *R v Hibble; Ex parte*

Broken Hill Proprietary Co Ltd (1920) 28 CLR 456; 27 ALR 84; [BC2000001](#) ^{CB}; *R v Electricity Cmrs* [\[1924\] 1 KB 171](#) ^{CB}; (1924) 39 TLR 715; [\[1923\] All ER Rep 150](#) ^{CB}. It will also be available to prevent the enforcement of an order or decision where that decision was made in proceedings that were in excess of jurisdiction, provided that the judgment in question has a continuing effect upon the rights and duties of the person affected by the order: see *R v Spicer; Ex parte Waterside Workers Federation of Australia (No 2)* (1958) 100 CLR 324; [1958] ALR 417; (1958) 32 ALJR 71; [BC5800130](#) ^{CB}.

Originally only available against a court, the scope of operation of prohibition has been much extended so that prohibition will lie against persons or bodies who perform quasi-judicial, as well as judicial, functions: see *R v Connell; Ex parte Hetton Bellbird Collieries Ltd (No 2)* (1944) 69 CLR 407 at 429; 18 ALJR 205; *R v Hickman; Ex parte Fox* (1945) 70 CLR 598; 19 ALJR 246 ^{CB}; *R v Australian Stevedoring Industry Board* (1953) 88 CLR 100 at 118; [1953] ALR 461; (1953) 27 ALJR 35; [BC5300260](#) ^{CB}. In *Re Refugee Review Tribunal; Ex parte Aala*, above, at [22], Gaudron and Gummow JJ said:

[22] Prohibition goes against officers of the Commonwealth in circumstances not contemplated by the court of King's Bench and not within the expression "excess of jurisdiction" as understood in England. Thus, an officer of the Commonwealth may be restrained by prohibition in respect of activity under an invalid law of the parliament or of activity beyond the executive power of the Commonwealth identified in [s 61](#) of the Constitution. Further, the common law did not have to take into account the errors of a superior federal court in determining the constitutional limits of its own jurisdiction ...

Prohibition is a discretionary remedy: see [1695.107] below.

In order to obtain issue of a writ of prohibition pursuant to [s 75\(v\)](#), an applicant must prove that the tribunal in question is acting outside its jurisdiction (see *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd*, above; *R v Electricity Cmrs*, above; *R v Murray; Ex parte Commonwealth*, above, CLR at 461–5 and 470; the *Tramways* case, above; *London Corporation v Cox*, above); if the proceedings have been concluded and an order made, that order is capable of enforcement, or is having a continued effect on the rights of the applicant (see *R v Spicer; Ex parte Waterside Workers Federation of Australia (No 2)*, above; *R v Drake Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51; [1943] ALR 394; (1943) 17 ALJR 277; [BC4300008](#) ^{CB}); and the authority requested to act was "an officer of the Commonwealth", as provided by [s 75\(v\)](#).

Prohibition will not issue if the application for it is premature. Thus, where an application for prohibition was brought against the Aboriginal Land Commissioner, who was required to be a judge of the Supreme Court of the Northern Territory, Wilcox J in *Re Mataranka Area Land Claim v Maurice; Ex parte Banibi Pty Ltd* (1986) 15 FCR 520; [70 ALR 53](#) at [59](#) ^{CB} said that:

... prohibition will be granted only when the relevant tribunal has decided to do an act which is in excess of jurisdiction ... In the present case, the commissioner has made no such decision. He has taken note of the point regarding jurisdiction and has indicated that he will deal with it. He has indicated that, in the meantime and to guard against the possible loss of evidence, he will take evidence ... It would be appropriate to interfere, by prohibition, with the commissioner's conduct of the inquiry only if it were already manifest that, absent prohibition, the commissioner would exceed his jurisdiction.

For some time there was a tendency to assume that [s 75\(v\)](#) writs of prohibition would only be issued where the excess of jurisdiction also involved an excess of constitutional power. For example, prohibition is often sought to challenge the power of the Industrial Relations Commission (and its predecessor, the Arbitration Commission), on the grounds that the commission is acting outside the powers of the Commonwealth in relation to industrial matters as set out in [s 51\(xxxv\)](#) of the Constitution: see *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd*, above; *R v Spicer; Ex parte Waterside Workers Federation of Australia (No 2)*, above; *Waterside Workers' Federation of Australia*

v Gilchrist, Watt and Sanderson Ltd (1924) 34 CLR 482 ^{CB}. However, the court has decided that the [s 75\(v\)](#) writ of prohibition ought not be limited to excesses of jurisdiction based on constitutional grounds alone. As Latham CJ noted in *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 606–7, “it extends also to the grant of prohibition on grounds independent of the Constitution and relating only to the statutory powers of a Commonwealth officer”. There the writ will be available on any of the accepted grounds of prohibition, the only caveat being that already noted above, that it be sought against an “officer of the Commonwealth”. (As to the meaning of “officer of the Commonwealth” see [1695.95].) More recently, in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); 81 ALJR 905; [\[2007\] HCA 14](#); [BC200702595](#) at [\[46\]](#) ^{CB}, the High Court confirmed that:

[46] The reference to restraint of officers of the Commonwealth from exceeding federal power should not be read as limited to the observance of the constitutional limitations upon the executive and legislative power of the Commonwealth ...

See also High Court Rules 2004 r 25.20, and the commentary at [12,600.5]–[12,600.35].

[1695.107] Discretionary refusal of relief

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v).

(CTH) [Judiciary Act 1903](#) s 39B.

Prohibition, mandamus and certiorari are discretionary remedies in all cases (whether the vitiating error is manifest): *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); 81 ALJR 905; [\[2007\] HCA 14](#); [BC200702595](#) at [\[44\]](#) ^{CB}; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 at 89, 105–09, 136–7, 144; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) ^{CB} (regarding prohibition); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 394, 410, 415–23, 454, 465; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) ^{CB} (regarding certiorari); *Dranichnikov v Minister for Immigration and Multicultural Affairs* [\(2003\) 197 ALR 389](#); 77 ALJR 1088; [\[2003\] HCA 26](#); [BC200302166](#) at [\[33\]](#) ^{CB}; *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185 at 208; [56 ALR 609](#); [9 Fam LR 888](#); [BC8400460](#) ^{CB} per Wilson and Dawson JJ.

However, as the constitutional writs lie only when a jurisdictional error has occurred, their refusal on discretionary grounds is likely to be rare — particularly if no other avenues for challenge are available: *R v Ross-Jones; Ex parte Green*, above, CLR at 194 per Gibbs CJ; *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511; [137 ALR 47](#) at [66](#); (1996) ATPR ¶41-496; [BC9602007](#) ^{CB} per Black CJ, Cooper and Merkel JJ.

The discretion may be exercised against grant of the constitutional writs where the applicant can be seen to have pursued an alternative remedy or where the applicant has available a right of appeal: *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 at 30; [31 ALR 353](#); [6 Fam LR 161](#); [BC8000099](#) ^{CB} per Murphy J; *Re Comalco Aluminium (Bell Bay) Ltd; Ex parte Australian Workers Union* (1995) 70 ALJR 142; [1995] 19 Leg Rep 31a; (1995) 63 IR 445 ^{CB} per Dawson J. In *R v FCT; Ex parte Just Jeans* (1986) 10 FCR 69; [65 ALR 147](#) at [153](#); 86 ATC 4165; [BC8601582](#) ^{CB}, Northrop J said:

In some recent times, less weight is given to the existence of alternative remedies ... Under the existing procedures of this court, mandamus is a simple, convenient, beneficial, effective and speedy remedy which should be granted despite the possible existence of other remedies.

However, in *Re Wilcox; Ex parte Venture Industries Pty Ltd*, above, the Full Federal Court (comprising Black CJ, Cooper and Merkel JJ) observed (obiter) that the availability of a right of appeal from a decision could afford a basis for refusing prohibition. Their Honours also referred to the applicant's election to have a jurisdictional issue determined in and as part of a proceeding in another court as good reason for exercising any discretion against the issue of prohibition.

Delay is a relevant factor: *Re McBain; Ex parte Australian Catholic Bishops Conference*, above, CLR at 421–2.

A sufficient ground for refusing the remedy may be found in the fact that the decision which is challenged was made by consent of the parties affected (*R v Ross-Jones; Ex parte Beaumont* (1979) 141 CLR 504; [23 ALR 179](#); 53 ALJR 259; [4 Fam LR 598](#) ^{CB}, CLR at 513 per Gibbs J; CLR at 513 per Stephen J; CLR at 522 per Aickin J); or that an appeal lay as of right against the challenged decision: *R v Ross-Jones; Ex parte Beaumont*, above, CLR at 513 per Stephen J; CLR at 522 per Jacobs J; CLR at 522 per Aickin J. Acquiescence in the conduct of defective proceedings will also be a relevant factor: *Re McBain; Ex parte Australian Catholic Bishops Conference*, above. See generally M Aronson, B Dyer and M Groves, *Judicial Review of Australian Administrative Action*, Law Book Co, Sydney, 2004, pp 714–19, 736–45.

In *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294; [215 ALR 162](#); [\[2005\] HCA 24](#); [BC200503147](#) at [\[80\]](#), [\[84\]](#) ^{CB} McHugh J said:

[80] The issuing of writs under [s 75\(v\)](#) of the Constitution and s 39B of the Judiciary Act is discretionary. Discretionary relief may be refused under s 39B if the conduct of the party is inconsistent with the application for relief. It may be inconsistent, for example, if there is delay on the part of the applicant or the applicant has waived or acquiesced in the invalidity of the decision or does not come with clean hands. Discretionary relief may also be refused if the applicant has in fact suffered no injustice, for example, because the statutory law compels a particular outcome.

...

[84] If the decision of the tribunal is invalid for want of procedural fairness, there is no reason to withhold discretionary relief. There is nothing to suggest that the conduct of the appellants warrants the refusal to exercise the discretion. There is no suggestion of delay, waiver, acquiescence or unclean hands. Whether the first appellant was in fact deprived of a relevant opportunity to deal with the adverse material received by the tribunal from her eldest daughter should not affect the discretion to grant relief.

In the same case Hayne J (with whom Kirby J relevantly agreed), said (at [211]):

[211] ... There is no basis, in this case, on which the undoubted discretion to refuse the relief sought could be exercised against its grant. There has been no suggestion of delay, waiver, acquiescence or other conduct of the appellants said to stand in their way. As Gaudron J said in *Enfield City Corporation v Development Assessment Commission*:

Those exercising executive and administrative powers are as much subject to the law as those who are or may be affected by the exercise of those powers. It follows that, within the limits of their jurisdiction and consistent with their obligation to act judicially, the courts should provide whatever remedies are available and appropriate to ensure that those possessed of executive and administrative powers exercise them only in accordance with the laws which govern their exercise. The rule of law requires no less. [footnote omitted]

Even if the considerations advanced by the minister were relevant to considering whether relief should go for jurisdictional error constituted by a want of procedural fairness (a question I need not examine) they are not considerations that bear upon whether certiorari should go to quash what is found to be an invalid decision.

[1695.110] Injunction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v).

The principles by which an injunction will be granted to restrain executive action were discussed in *R v Macfarlane; Ex parte O'Flanagan* (1923) 32 CLR 518 [\[CB\]](#), where it was stated that an injunction will not be granted unless there is established a clear case of illegality calculated to result in injury, and that no other means exist whereby the injury could be averted or compensated for. See also *Victoria v Foster* (1944) 68 CLR 485 [\[CB\]](#).

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[82\]](#) [\[CB\]](#), Gaudron, McHugh, Gummow, Kirby and Hayne JJ pointed out that, while prohibition and mandamus are available only for jurisdictional error, injunctive relief may be available pursuant to [s 75\(v\)](#) on grounds that are wider than those that result in relief by way of prohibition and mandamus. They said that “injunctive relief would clearly be available for fraud, bribery, dishonesty or other improper purpose”.

[1695.115] Writs of certiorari

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 75(v).

(CTH) [High Court Rules 2004](#) r 25.06.

[Section 75\(v\)](#) does not mention the writ of certiorari.

In *Re Bowen; Ex parte Federated Clerks Union of Australia* (1984) 154 CLR 207; [53 ALR 187](#) [\[CB\]](#), the High Court described as “untenable” the submission that [s 75\(v\)](#) gave the court jurisdiction to grant certiorari in a case in which the court did not otherwise possess original jurisdiction.

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) at [\[80\]](#) [\[CB\]](#), Gaudron, McHugh, Gummow, Kirby and Hayne JJ said that, while [s 75\(v\)](#) does not refer to certiorari, “it has long been accepted that certiorari may issue as ancillary to the constitutional writs of mandamus and prohibition”. See also *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [176 ALR 219](#); [\[2000\] HCA 57](#); [BC200006927](#) at [\[14\]](#) [\[CB\]](#); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; [234 ALR 114](#); 81 ALJR 905; [\[2007\] HCA 14](#); [BC200702595](#) at [\[62\]](#) [\[CB\]](#); *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) [\[CB\]](#); *Re Coldham; Ex parte Brideson* (1989) 166 CLR 338 at 348; [84 ALR 165](#); *Pittfield v Franki* (1970) 123 CLR 448 [\[CB\]](#); *R v Cook; Ex parte Twigg* (1980) 147 CLR 15; [31 ALR 353](#) [\[CB\]](#); *Re Bowen; Ex parte Federated Clerks Union of Australia* (1984) 154 CLR 207; [53 ALR 187](#) [\[CB\]](#); *R v Ross-Jones; Ex parte Green* (1984) 156 CLR 185; [56 ALR 609](#) [\[CB\]](#).

In *Plaintiff S157/2002 v Commonwealth*, above, it was said that, because jurisdiction with respect to certiorari does not derive directly from the Constitution, a privative clause can validly exclude certiorari for non-jurisdictional error on the face of the record: at [81]. Having directed attention to that comment, six justices in *Bodruddaza v Minister for Immigration and Multicultural Affairs*, above, at [62], said that it was “unnecessary to determine whether it would be open to the parliament to legislate to withdraw from this court any power to grant certiorari as the principal relief in the original jurisdiction of the court”. The court did, however, indicate that parliament cannot validly diminish the authority to afford certiorari as an ancillary remedy so as to determine effectively a matter in respect of which jurisdiction is conferred by [s 75\(v\)](#): *Bodruddaza v Minister for Immigration and*

Multicultural Affairs, above, at [64]. Callinan J agreed with the joint judgment of the other members of the court, save that he reserved his position on this issue (at [80]).

If mandamus is not available, there will frequently be no utility in granting certiorari, because there is no capacity to ensure that a new decision is made in place of that which is quashed: see *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [2010] HCA 41; BC201008390 at [100] ^{CB}; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicant S134/2002* (2003) 211 CLR 441; 195 ALR 1; [2003] HCA 1; BC200300102 at [48] ^{CB}.

Like prohibition and mandamus, certiorari is a discretionary remedy: *Re McBain; Ex parte Australian Catholic Bishops Conference*, above. The principles governing the exercise of the discretion are discussed above at [1695.107].

The lack of an autonomous jurisdiction to issue certiorari has not posed any particular impediment to the functioning of the High Court, for in practice the problem has been overcome by the court's readiness to allow the issue of prohibition in circumstances where certiorari would usually be the appropriate remedy. For example, so long as the order in dispute is shown as having a continued effect on the applicant — or is capable of enforcement — an order of prohibition will issue against the decision-maker (see *R v Spicer; Ex parte Waterside Workers Federation of Australia* (1958) 100 CLR 324 ^{CB}); or against anyone seeking to so enforce it (*R v Drake Brockman; Ex parte National Oil Pty Ltd* (1943) 68 CLR 51 ^{CB}); the outcome being a peculiarly Australian interpretation of prohibition, extending considerably beyond its usually accepted limits in the UK. The result of this liberal interpretation of prohibition has been that certiorari is rarely sought in the High Court. See the opening discussion of R Anderson in "The Application of Privative Clauses to Proceedings of Commonwealth Tribunals" (1956) 3 *U of QLJ* 35.

See also High Court Rules 2004 [r 25.06](#), and the commentary at [\[12,530.5\]–\[12,530.100\]](#).

[1695.118] Declarations

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(v).

In *Combet v Commonwealth* (2005) 221 ALR 621; 80 ALJR 247; [2005] HCA 61; BC200507894 at [165] ^{CB}, Gummow, Hayne, Callinan and Heydon JJ said that "there are evident difficulties in making a declaration in a proceeding brought under [s 75\(v\)](#) of the Constitution without granting relief under s 75(v)."

Nevertheless, in *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14; 85 ALJR 133; [2010] HCA 41; BC201008390 at [101] ^{CB} the High Court granted declaratory relief in two matters in which it had found that the plaintiffs' claims for certiorari and mandamus should be rejected, although it acknowledged that in many cases "the conclusion that certiorari and mandamus do not lie would require the further conclusion that no declaration of right should be made".

In *Commonwealth v Westwood* (2007) 241 ALR 381; [2007] FCA 1282; BC200706820 at [63], [94] ^{CB}, Sackville J declined to grant a declaration in respect of an evidentiary ruling in the course of an incomplete court martial. His Honour applied the observation of Brennan J in *Sankey v Whitlam* (1978) 142 CLR 1 at 25–6; 21 ALR 505 at 515; BC7800068 ^{CB} that:

In any case in which a declaration can be and is sought on a question of evidence or procedure, the circumstances must be most exceptional to warrant the grant of relief.

[1695.120] Exclusivity of s 75(v) jurisdiction

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(e), s 39, s 39B.

Pursuant to s 38(e) of the Judiciary Act 1903, the High Court has exclusive jurisdiction in matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court. The jurisdiction is exclusive in the sense that is excluded from the general investiture of State courts with federal jurisdiction effected by s 39 of the Judiciary Act 1903: see *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League (Inc)* (1979) 143 CLR 190 at 201; [23 ALR 439](#) at [447](#) (per Barwick CJ). However, the jurisdiction with respect to officers of the Commonwealth is not exclusive of the Federal Court of Australia: see s 39B of the Judiciary Act 1903; commentary at [5180.30].

[1695.125] Section 75(v) and privative clauses

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxv), s 73(ii), s 75(v).

(CTH) [Migration Act 1958](#) s 474, s 474(2), (3).

There is a substantial body of High Court authority concerning the effect of privative clauses in the face of [s 75\(v\)](#) of the Constitution. The most significant case is *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2](#); [BC200300103](#) ^{CB} (discussed below).

Some of this authority may now also be relevant to the power of state legislatures to limit the jurisdiction of state Supreme Courts, via the medium of s 73(ii) of the Constitution, having regard to *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; [262 ALR 569](#); [\[2010\] HCA 1](#); [BC201000230](#) ^{CB}; *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 128 ALD 463; [289 ALR 1](#); [\[2012\] HCA 25](#); [BC201204986](#) ^{CB}; cf *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at 634; [143 ALR 55](#); [\[1997\] HCA 11](#); [BC9700985](#) ^{CB}; *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180; [227 ALR 241](#); [\[2006\] HCA 22](#); [BC200603367](#) at [\[33\]](#) ^{CB}.

A privative clause cannot operate to remove a tribunal from the processes of review by prerogative writ where the excess of jurisdiction complained of is an excess of constitutional jurisdiction: see *R v Commonwealth Rent Controller* (1947) 75 CLR 361 ^{CB}; *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 ^{CB}; *R v Murray; Ex parte Proctor* (1949) 75 CLR 387 at 399; *R v Central Reference Board* (1948) 77 CLR 123 at 130.

For example, where there is an alleged excess of jurisdiction by the Conciliation and Arbitration Commission beyond the powers given the Commonwealth by [s 51\(xxxv\)](#) of the Constitution, the High Court's jurisdiction to issue mandamus or prohibition will not be diminished by a privative clause: *R v Hibble; Ex parte Broken Hill Proprietary Co Ltd* (1920) 28 CLR 456 ^{CB}; *R v Spicer; Ex parte Waterside Workers Federation of Australia* (1958) 100 CLR 324 ^{CB}; *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482 ^{CB}. Again, a privative clause "can have no effect, at least in a case where ... there is in effect no decision and the failure to give a decision constitutes a failure to perform a public duty": *Re Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 520; [87 ALR 649](#). See also *Re Coldham; Ex parte*

Australian Building Construction Employees' and Builders Labourers' Federation (1985) 159 CLR 522 at 530–1; [64 ALR 215](#). “The courts are the arbiters of constitutionality and the legislature cannot shackle the jurisdiction of the courts to determine questions of constitutional validity”: *O'Toole v Charles David Pty Ltd (No 2)* (1991) 171 CLR 232; [96 ALR 1](#) per Mason CJ at 251 (CLR); 10 (ALR).

Where there is no constitutional question involved, the precise effect of the privative clause will depend on the construction of the relevant statute, taken as a whole: see *R v Commonwealth Rent Controller* (1947) 75 CLR 361 at 369; *Clancy v Butchers' Shop Employees' Union* (1904) 1 CLR 181 [CB](#); *Baxter v New South Wales Clickers Assn* (1909) 10 CLR 114 [CB](#); *R v Murray; Ex parte Proctor* (1949) 75 CLR 387 at 395. In the absence of constitutional questions, the effect of a privative clause is that “no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body”: *R v Hickman; Ex parte Fox* (1945) 70 CLR 598 at 615.

“The jurisdiction of the court conferred by [s 75\(v\)](#) of the Constitution to grant mandamus and prohibition directed to an officer of the Commonwealth cannot be ousted by a privative clause. However, it has been established by a long course of judicial decisions in this court that a privative clause ... will validate an award or order of the [Arbitration] Commission, so far as it can do so constitutionally, provided that three conditions are fulfilled: ‘... namely that the purported exercise is a bona fide attempt to exercise the power, it relates to the subject matter of the legislation, and it is reasonably capable of being referred to the power (i.e. it does not on its face go beyond the power) ...’, to use the words of Kitto J in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Amalgamated Engineering Union (Australian Section)* (1967) 118 CLR 219 at 252–3 ”: *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415 at 418; [49 ALR 259](#).

The interaction between Federal privative clauses and [s 75\(v\)](#) of the Constitution was considered by the High Court in *Deputy Cmr of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168; [127 ALR 21 CB](#). After referring to *R v Hickman; Ex parte Fox*, (above) at 615, Mason CJ said at 26, that “privative clauses ... are effective to protect an award or order from challenge on the ground of mere defect or irregularity which does not deprive the tribunal of the power to make the award or order”. Brennan J also referred to and adopted at 36–7, the “Hickman principle”.

Deane and Gaudron JJ said at 45–6, that, although the court's jurisdiction under [s 75\(v\)](#) could not be withdrawn or diminished by legislation, the Parliament could alter the substantive law so as to make lawful the conduct of an officer of the Commonwealth, and it could prescribe procedural rules to be observed by the High Court in exercising the [s 75\(v\)](#) jurisdiction.

McHugh J referred at 73 to Dixon J's statement in *R v Hickman; Ex parte Fox*, (above) at 615, as “authoritative”; and said at 74, that, although the Commonwealth Parliament could not oust the jurisdiction conferred by [s 75\(v\)](#), “it can legislate in such a way as to limit the cases that come within its scope. One way this can be done is to make a course of action by a Commonwealth officer non-justiciable.”

In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; [195 ALR 24](#); [\[2003\] HCA 2; BC200300103 CB](#), the High Court rejected an argument by the Commonwealth that s 474 of the Migration Act 1958 (a widely drafted privative clause) was to enlarge “the powers of decision-makers so that their decisions are valid so long as they comply with the three *Hickman* provisos”. That court held that it is wrong to treat “the three *Hickman* provisos” as if they were the only limits upon the power of those who make privative clause decisions. The three *Hickman* provisos qualify the protection a privative clause purports to afford”, not the powers of those who make privative clause decisions. The *Hickman* provisos are no more than rules of statutory construction. It is necessary to

engage in a process of statutory interpretation in order to reconcile the inconsistency between a provision in a statute that confers a limited power or authority, and a provision (the privative clause) which appears to mean that excess of power or authority may not be prohibited. That reconciliation is not appropriately performed simply by applying the *Hickman* principles.

Gleeson CJ, having analysed the terms of the powers and duties conferred by the Migration Act and the terms of s 474 of that Act (the privative clause), concluded at [37] that:

[37] The principles of statutory construction stated above lead to the conclusion that parliament has not evinced an intention that a decision by the tribunal to confirm a refusal of a protection visa, made unfairly, and in contravention of the requirements of natural justice, shall stand so long as it was a bona fide attempt to decide whether or not such a visa should be granted. Decision-makers, judicial or administrative, may be found to have acted unfairly even though their good faith is not in question. People whose fundamental rights are at stake are ordinarily entitled to expect more than good faith. They are ordinarily entitled to expect fairness. If parliament intends to provide that decisions of the tribunal, although reached by an unfair procedure, are valid and binding, and that the law does not require fairness on the part of the tribunal in order for its decisions to be effective under the Act, then s 474 does not suffice to manifest such an intention.

Gaudron, McHugh, Gummow, Kirby and Hayne JJ held that a court confronted with a breach of an Act in circumstances in which a privative clause is contained in that Act is required to examine the true meaning of the Act as a whole, in order to determine whether any departure by a decision-maker from any particular requirement in the Act is a departure of a type that results in a failure to exercise jurisdiction or an excess of jurisdiction. Their Honours accepted, at [69], that “[a]lthough s 474 does not purport to effect a repeal of statutory limitations or restraints, it should be noted that it may be that ... some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of a decision. However, that is a matter that can only be determined by reference to the requirement in issue in a particular case”. See also Gleeson CJ at [26]–[27].

Their Honours read down s 474 of the Act by holding, at [76], that the phrase “decision[s] ... made under this Act” which was used in s 474:

[76] ... must be read so as to refer to decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act. Indeed so much is required as a matter of general principle. This court has clearly held that an administrative decision which involves jurisdictional error is “regarded, in law, as no decision at all”. Thus, if there has been jurisdictional error because, for example, of a failure to discharge “imperative duties” or to observe “inviolable limitations or restraints”, the decision in question cannot properly be described in the terms used in s 474(2) as “a decision ... made under this Act” and is, thus, not a “privative clause decision” as defined in s 474(2) and (3) of the Act.

Their Honours explained the proper approach, which they describe as a “reconciliation process”, at [78] as follows:

[78] The effect of s 474 is to require an examination of limitations and restraints found in the Act. There will follow the necessity ... to determine ... whether, as a result of the reconciliation process, the decision of the tribunal does or does not involve jurisdictional error and, accordingly, whether it is or is not a “privative clause decision” as defined in s 474(2) of the Act.

See also *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441; [195 ALR 1](#); [\[2003\] HCA 1](#); [BC200300102](#) at [\[15\]](#), [\[61\]](#), [\[72\]](#), [\[86\]](#)–[\[88\]](#) [\[CB\]](#); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602; [143 ALR 55](#); 71 ALJR 540; [BC9700985](#) [\[CB\]](#); *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78; 101 LGERA 297; [\[1999\] NSWCA 6](#); [BC9900156](#) [\[CB\]](#).

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(CTH) CONSTITUTION [1700] s 76 Additional original jurisdiction

Practice & Procedure High Court & Federal Court of Australia

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Alexander Flecknoe-Brown

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[1700] 76 Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter —

- (i) Arising under this Constitution, or involving its interpretation:
- (ii) Arising under any laws made by the Parliament:
- (iii) Of Admiralty and maritime jurisdiction:
- (iv) Relating to the same subject-matter claimed under the laws of different States.

Section 76 Generally

[1700.5] Matter

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 74, 75, s 76, 77, 78.

(CTH) [Judiciary Act 1903](#) s 38.

The word “matter” does not mean a legal proceeding, but rather the subject matter for determination in such a proceeding. There is no “matter” within the meaning of [s 76](#), unless there is some “immediate right, duty or liability to be established and determined by the court”: *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265; *Fencott v Muller* (1983) 152 CLR 570; [46 ALR 41](#); 57 ALJR 317; (1983) ATPR 40–350 [CB](#); *Abebe v Commonwealth* (1999) 197 CLR 510; [162 ALR 1](#); [\[1999\] HCA 14](#); [BC9901531](#) [CB](#); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591; [169 ALR 616](#); [\[2000\] HCA 11](#); [BC200000766](#) [CB](#); *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; [229 ALR 58](#); [\[2006\] HCA 41](#); [BC200606677](#) at [\[18\]](#), [\[188\]–\[202\]](#) [CB](#); *Crouch v Cmr for Railways (Qld)* (1985) 159 CLR 22 at 37; [62 ALR 1](#). Note that “matter” is also a key provision in [ss 74](#), [75](#), [77](#) and [78](#) of the Constitution, and s 38 of the Judiciary Act 1903.

In *Houghton v Arms* (2006) 225 CLR 553; [231 ALR 534](#); [\[2006\] HCA 59](#); [BC200610333](#) at [\[27\]](#) [CB](#), the High Court noted that, while it saw no harm in the continued use of the term “accrued jurisdiction”, provided that it is:

(CTH) CONSTITUTION [1700] s 76 Additional original jurisdiction

[27] ... borne in mind that, while there might be several claims made in litigation, there was but one "matter", and that jurisdiction conferred with respect to that matter is not "discretionary" and ordinarily is to be exercised by the court concerned.

Section 76(i)

[1700.10] Arising under the Constitution or involving its interpretation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(i).

(CTH) [Judiciary Act 1903](#) s 30(a), Section 40(1).

The Parliament has exercised the power in [s 76\(i\)](#) and conferred original jurisdiction on the High Court in all matters arising under this Constitution, or involving its interpretation: *Judiciary Act 1903* (Cth) s 30(a). Section 40(1) of the same Act allows a party to such a cause pending in a state or territory court to apply to the High Court for an order removing the matter to the High Court; and directs that such an order shall be made upon application by the Attorney-General of the Commonwealth, a state or the Northern Territory.

[Section 76\(i\)](#) ... empowers the Parliament to confer original jurisdiction on this court in constitutional matters, to use a shorthand term, by removing them into this court for determination from other courts where they are pending. By giving such a power to the Parliament, the Constitution enabled the Parliament to legislate so that important and urgent constitutional matters could conveniently be brought to this court for resolution: *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 323; [65 ALR 74](#).

See also *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372; [188 ALR 1](#); [\[2002\] HCA 16](#); [BC200201733](#) [CB](#).

[1700.15] Arising under the Constitution

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109, s 117, s 76(i), 76(ii), s 90, s 92.

There is a distinction between a matter arising under a federal law, and one involving the interpretation of that law, and that distinction is reflected in the terms of [s 76\(i\)](#): see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; [1945] ALR 245; (1945) 19 ALJR 169; [BC4500028](#) [CB](#); *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 at 540; [1955] ALR 715; (1955) 29 ALJR 359; [BC5500700](#) [CB](#). That distinction was, however, significantly undermined by the decision in *Felton v Mulligan* (1971) 124 CLR 367; [1972] ALR 33; (1971) 45 ALJR 525; [BC7100220](#) [CB](#), where it was held that if a defence or answer is based on a Commonwealth law and is an issue for decision, the matter arises under that Commonwealth law. Nevertheless, Barwick CJ, who was among the majority in that case, referred (CLR at 374) to the difference in language between [s 76\(i\)](#) and [76\(ii\)](#) in arguing that some distinction between matters "arising under" a law, and matters involving the "interpretation" of a law must be maintained.

"Matters arising under the Constitution ... are those in which the right, title, privilege or immunity is claimed under the instrument": *James v South Australia* (1927) 40 CLR 1 at 40; 33 ALR 334. Examples include a matter which raises the invalidity of state legislation under [s 109](#) of the Constitution (*Ex parte McLean* (1930) 43 CLR 472 [CB](#); *Collins v Charles Marshall Pty Ltd* (1955) 92

CLR 529 ^{CB}); a matter which raises the question whether state legislation offends [s 92](#) of the Constitution (*James v South Australia* (1927) 40 CLR 1; 33 ALR 334 ^{CB}); a matter which raises the invalidity of state legislation under [s 90](#) of the Constitution: *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665 ^{CB}; and a matter in which the validity of state rules of court was attacked on the ground that they were inconsistent with [s 117](#) of the Constitution: *Street v Queensland Bar Assn* (1988) 79 ALR 579; 62 ALJR 437; [BC8802589](#) ^{CB}.

A matter can arise under the Constitution even if the constitutional argument ultimately fails, provided that on the facts the claim was raised bona fide: *Hopper v Egg and Egg Pulp Marketing Board (Vic)* (1939) 61 CLR 665 at 673–4, cf 677; [1939] ALR 249; (1939) 13 ALJR 90; [BC3900021](#) ^{CB}.

[1700.20] Involving the interpretation of the Constitution

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 38(d).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 75(iii), 75(iv).

A matter involves the interpretation of the Constitution as soon as it appears that the matter can be resolved by deciding a question of interpretation of the Constitution, even if it might ultimately prove possible, by answering other questions, to dispose of the case without determining the question of interpretation: *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 327; [65 ALR 74](#).

A matter also involves the interpretation of the Constitution if the interpretation of one or more of its provisions is essential or relevant to a question of statutory interpretation involved in the matter; so that, where the terms used in legislation are identical to a constitutional expression (as, for example, with s 38(d) of the Judiciary Act and [s 75\(iii\)](#) and [75\(iv\)](#) of the Constitution), with the result that the interpretation of the constitutional provision is essential to the interpretation of the statute, the section applies: *Attorney-General (NSW) v Commonwealth Savings Bank* (1986) 160 CLR 315 at 327–8; [65 ALR 74](#).

Section 76(ii)

[1700.30] No general investiture of jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(ii), 77(i).

(CTH) [Judiciary Act 1903](#) s 39B(1A)(c).

There has been no general investiture of original jurisdiction in the High Court under [s 76\(ii\)](#) of the Constitution. Any such investiture would overwhelm the High Court. By contrast, s 39B(1A)(c) of the Judiciary Act 1903 does invest jurisdiction in the Federal Court in matters arising under Commonwealth law (other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter), the power to confer jurisdiction in those terms arising from [ss 76\(ii\)](#) and [77\(i\)](#) of the Constitution.

[1700.35] Arising under any law made by the Parliament

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109, s 76(ii).

A matter can only be said to “arise under any law made by the Parliament”, if the right or duty in question in the matter owes its existence to such a federal law, or depends upon federal law for its enforcement: see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett* (1945) 70 CLR 141 at 154; [1945] ALR 245 [CB](#); *LNC Industries Ltd v BMW (Aust) Ltd* (1983) 151 CLR 575 at 581; [49 ALR 599](#); 57 ALJR 701; [BC8300118](#) [CB](#); *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#); [1999] HCA 8; [BC9900714](#) at [90], [133] [CB](#); *Re McJannet; Ex parte Australian Workers’ Union of Employees (Queensland) (No 2)* (1997) 189 CLR 654 at 656; [146 ALR 569](#); 74 IR 361; [BC9703569](#) [CB](#). Therefore a matter will not come within the ambit of [s 76\(ii\)](#) merely because the interpretation of a federal law is involved: see *Felton v Mulligan* (1971) 124 CLR 367 at 374; [1972] ALR 33 at 35. Similarly a matter may arise under [s 76\(ii\)](#) where there is no question of the validity of the federal law: see *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Barrett, above*. There is a point at which interpretation of a federal statute may give rise to a “matter” within [s 76\(ii\)](#), but as a rule a distinction must be maintained between these two situations: per Barwick CJ in *Felton v Mulligan, above*. See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd* (1980) 145 CLR 457; [31 ALR 161](#) [CB](#); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 at 45. A matter does not arise under a Commonwealth law in circumstances where the Commonwealth law is relevant only because it operates, by virtue of [s 109](#) of the Constitution, to render invalid a state law that would otherwise have determined the result of the proceeding: *Tristar Steering and Suspension Australia Ltd v Industrial Relations Commission of New South Wales (No 2)* (2007) 159 FCR 274; 164 IR 318; [2007] FCAFC 95; [BC200704804](#) at [16] [CB](#).

See also the commentary at [5195.115].

[1700.40] Appeals from Nauru

L Legislation cited in this paragraph

(CTH) [Nauru \(High Court Appeals\) Act 1976](#) s 5.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(ii).

In *Ruhani v Director of Police* (2005) 222 CLR 489; [219 ALR 199](#); [2005] HCA 42; [BC200506306](#) [CB](#), the High Court (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ; Callinan and Heydon JJ dissenting) held that [s 5](#) of the Nauru (High Court Appeals) Act 1976 validly conferred jurisdiction upon the High Court to review decisions of the Supreme Court of Nauru. While that Act used terminology consistent with the conferral of appellate jurisdiction, Gleeson CJ, McHugh, Gummow and Hayne JJ (Kirby, Callinan and Heydon JJ dissenting) held that the Act in fact conferred original jurisdiction upon the High Court consistently with [s 76\(ii\)](#) of the Constitution.

The nature of an appeal to the High Court from the Supreme Court of Nauru arose for consideration in *Clodumar v Nauru Lands Committee* (2012) 288 ALR 208; 86 ALJR 697; [2012] HCA 22; [BC201204267](#) [CB](#). In that case, a majority of the court (Heydon J dissenting) held that it was open to the court on hearing an appeal under [s 5](#) of the Nauru (High Court Appeals) Act 1976 to receive evidence that was not before the Supreme Court of Nauru. The majority (French CJ, Gummow, Hayne and Bell JJ) could see no reason, “either historical or constitutional, to burden the original jurisdiction conferred upon the High Court by [s 5](#) of the Nauru Appeals Act with the restriction which limits the nature of the jurisdiction conferred by s 3 of the Commonwealth Constitution to that of an appeal in the strict sense” (at [28]).

Section 76(iii)

[1700.50] Admiralty and maritime jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 76(iii).

(CTH) [Admiralty Act 1988](#) s 10, s 4(3), s 45.

(CTH) [Navigation Act 1912](#) s 425.

(CTH) [Judiciary Act 1903](#) ss 30(b), 30A.

In *CSL Australia Pty Ltd v Formosa* (2009) 261 ALR 441; 235 FLR 273; [2009] NSWCA 363; BC200910120 ^{CB}, the NSW Court of Appeal emphasised that it was necessary in every case to consider the character of the jurisdiction being exercised, because it may affect the law applicable to the controversy. The case involved a claim for damages arising from a personal injury to a stevedore during the unloading of a ship. The Court held that the matter arose in federal jurisdiction, by reason of [s 76\(iii\)](#) of the Constitution, the Admiralty Act 1988 (Cth) s 4(3) and Marine Orders dealing with cargo handling equipment promulgated under the Navigation Act 1912 (Cth) s 425.

“... there seems to me no possible justification for confining the admiralty jurisdiction mentioned in [s 76\(iii\)](#) to that which existed in England in 1900 ...”: *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 204; [27 ALR 1](#) at [25](#) per Gibbs J.

“I accept that the use of the expression ‘Admiralty and maritime jurisdiction’ in [s 76\(iii\)](#) obviates argument that the power of the Parliament is restricted to the jurisdiction of the High Court of Admiralty in England at any particular time. I also accept ...that this provision extends to empower the Parliament to make laws conferring jurisdiction with respect to ‘matters’ arising out of controversies relating to or dealing with the commerce or navigation of the sea, including the means by which or with the assistance of which those activities are or may be conducted”: *Empire Shipping Co Inc v Owners of the Ship Shin Kobe Maru* (1991) 32 FCR 78; [104 ALR 489](#) at [521](#) ^{CB} per Gummow J; affirmed by the Full Court of the Federal Court of Australia (Davies, Lockhart and French JJ): *Owners of the Ship “Shin Kobe Maru” v Empire Shipping Co Inc* (1992) 110 ALR 463 ^{CB}; and by the High Court (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ): *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1994) 181 CLR 404; [125 ALR 1](#) at [12–14](#) ^{CB}.

Sections 30(b) and 30A of the Judiciary Act 1903 (Cth), which conferred original jurisdiction on the High Court in matters of admiralty and maritime jurisdiction, were repealed in 1939. Following their repeal, the admiralty jurisdiction of the High Court derived from the Colonial Courts of Admiralty Act 1890 (UK). That Act was repealed, in so far as it was part of the law of Australia, by s 45 of the Admiralty Act 1988 (Cth), with effect from 1 January 1989. “The effect of the repeal of the 1890 Act is that [s 76\(iii\)](#) of the Constitution no longer is to be read against the background of concurrently applicable Imperial Law. In this sense, the denotation of the terms in which [s 76\(iii\)](#) of the Constitution is expressed has changed and they are to be considered in this new light”: *Empire Shipping Co Inc v Owners of the Ship Shin Kobe Maru* (1991) 32 FCR 78; [104 ALR 489](#) at [498](#) ^{CB} per Gummow J; affirmed by the Full Court of the Federal Court of Australia (Davies, Lockhart and French JJ): *Owners of the Ship Shin Kobe Maru v Empire Shipping Co Inc* (1992) 110 ALR 463 ^{CB}.

Section 10 of the Admiralty Act 1988 confers jurisdiction in respect of proceedings in rem under the Act, on the Federal Court, the Supreme Courts of the territories and, as federal jurisdiction, the Supreme Courts of the states.

Section 76(iv)

[1700.65] Claims under the laws of different states

The Parliament has not exercised the power to confer original jurisdiction on the High Court in matters relating to the same subject matter claimed under the laws of the different states.

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(CTH) CONSTITUTION [1705] s 77 Power to define jurisdiction

Practice & Procedure High Court & Federal Court of Australia

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Alexander Flecknoe-Brown

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[1705] 77 Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws

- (i) Defining the jurisdiction of any federal court other than the High Court:
- (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
- (iii) Investing any court of a State with federal jurisdiction.

Section 77(i)

[1705.5] Appellate jurisdiction

The Parliament may confer jurisdiction on a federal court to hear and determine an appeal from a state court exercising federal jurisdiction: *Cockle v Isaksen* (1957) 99 CLR 155 [CB](#). But a federal court cannot be given appellate jurisdiction over a state court exercising state jurisdiction: *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529 [CB](#).

[1705.7] Defining jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 71, ss 75, 76, s 77.

Parliament can define the jurisdiction of federal courts to exclude jurisdiction in relation to particular matters specified in [ss 75](#) or [76](#) of the Constitution, even if the result of doing so is that the High Court is the only Court that has jurisdiction in relation to such matters. It is the Parliament which may make laws defining the jurisdiction of any other federal court and investing a State court with federal jurisdiction. It would be at variance with the scheme of Chapter III for the High Court in effect to delegate the exercise of its jurisdiction to resolve the controversy to another federal court or to a State court, at either instance selected by the High Court itself: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[12\]–\[13\]](#), [\[41\]](#), [\[53\]](#); [\[2008\] HCA 28](#); [BC200804501](#) [CB](#). It was held, at [198]: “The power to invest original jurisdiction of this Court in another court, whether concurrently, partially, or wholly, is entirely a matter for Parliament as

provided by [s 71](#) and there is no fetter in [s 77](#) as to how Parliament can define the federal jurisdiction of any federal court other than the High Court”.

“Under the Constitution, the jurisdiction of a federal court can be defined only by an Act of the Parliament, and the jurisdiction so defined can be as wide as, or narrower than, (but not of course wider than) the matters mentioned in [ss 75](#) and [76](#)”: *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, at 281; [49 ALR 193](#); 57 ALJR 731; [BC8300103](#) ^{CB}, approved in *Abebe v Commonwealth* (1999) 197 CLR 510, at [48]; [162 ALR 1](#); [\[1999\] HCA 14](#); [BC9901531](#) ^{CB}; *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)*, above, at [202]–[204].

The various powers conferred upon parliament by provisions in Chapter III are necessarily exclusive of those of the State legislatures; and this is true of the conferring, defining and investing of federal jurisdiction: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)*, above at [20], [40].

Section 77(ii)

[1705.10] Exclusive federal jurisdiction

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 44, s 75, s 76, s 77(ii), s 77(iii).

(CTH) [Judiciary Act 1903](#) s 34, ss 38, 39(1), Section 39(2).

The jurisdiction that may be rendered exclusive pursuant to [s 77\(ii\)](#) is the jurisdiction “of any federal court”. That phrase includes the jurisdiction of the High Court: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[22\]](#), [\[178\]](#); [\[2008\] HCA 28](#); [BC200804501](#) ^{CB}; *Pirrie v McFarlane* (1925) 36 CLR 170, at 176; 31 ALR 365; [BC2500021](#) ^{CB}.

The principal exercise of the power to define exclusive federal jurisdiction is to be found in ss 38 and 39(1) of the Judiciary Act 1903 (Cth). Section 38 declares that, subject to s 34, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the state courts in the matters listed in [s 75](#) of the Constitution, with the exception of matters arising other than directly under a treaty. ([Section 44](#) provides that the High Court may remit any pending matter in this class of exclusive matters, with one exception, to a court of a state or territory. The exception is a matter in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.)

Section 39(1) declares that, except as provided in the section, the jurisdiction of the High Court shall, so far as it is not exclusive by virtue of s 38, be exclusive of the jurisdiction of state courts. The phrase “the jurisdiction of the High Court” as used in s 39(1) is apt to include original jurisdiction whether conferred directly by [s 75](#) of the Constitution or by laws made by parliament from time to time under [s 76](#) of the Constitution. These sections of the Judiciary Act are constantly speaking to the present state of the jurisdiction of the High Court: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[22\]](#); [\[2008\] HCA 28](#); [BC200804501](#) ^{CB}; *Le Mesurier v Connor* (1929) 42 CLR 481, at 503; [\[1930\] ALR 41](#); [BC2900008](#) ^{CB}.

Section 39(2), in exercise of the power conferred by [s 77\(iii\)](#) then provides that state courts are invested with federal jurisdiction in all matters covered by [ss 75](#) and [76](#) of the Constitution, except as provided in s 38, and subject to certain conditions as to appeals and the constitution of courts of summary jurisdiction: see *Lorenzo v Carey* (1921) 29 CLR 243 ^{CB}; [\[1705.20\]](#).

[1705.15] Effect on state jurisdiction

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109, ss 75, 76.

The effect of s 39 of the Judiciary Act is that State courts are divested of their inherent state jurisdiction, with respect to all matters referred to in [ss 75](#) and [76](#) of the Constitution, and then invested with federal jurisdiction with respect to some of those matters; so that there cannot be dual jurisdiction in respect of any of those matters: “[I]f federal jurisdiction is attracted at any stage of the proceedings, there is no room for the exercise of a state jurisdiction which apart from any operation of the Judiciary Act the state court would have had. In my opinion, [s 109](#) of the Constitution, working with the Judiciary Act, ensures that there is no state jurisdiction concurrent with the federal jurisdiction invested in a state court”: *Felton v Mulligan* (1971) 124 CLR 367 at 373; [1972] ALR 33 [CB](#). See also *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 243; [27 ALR 1](#); *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[24\]](#), [\[177\]–\[180\]](#); [\[2008\] HCA 28](#); [BC200804501](#) [CB](#).

A state tribunal invested with state judicial power cannot exercise any part of the judicial power of the Commonwealth unless it is a “court” for the purpose of Chapter III, and has been invested with federal jurisdiction by the Commonwealth. Further, the Commonwealth can deprive a State tribunal of “state” jurisdiction in relation to any of the matters identified in [ss 75](#) and [76](#) of the Constitution: see *Trust Company of Australia Ltd (t/as Stockland Property Management) v Skiwing Pty Ltd (t/as Café Tiffany’s)* (2006) 66 NSWLR 77; [234 ALR 398](#); [\[2006\] NSWCA 185](#); [BC200605484](#) [CB](#); *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385; 92 ALD 426; [\[2006\] NSWCA 349](#); [BC200610346](#) [CB](#); *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* (2008) 169 FCR 85; [248 ALR 494](#), at [\[219\]–\[223\]](#); [\[2008\] FCAFC 104](#); [BC200804402](#) [CB](#).
[1705.17] “belongs to”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 77(ii).

That which “belongs to” the State courts within the meaning of [s 77\(ii\)](#) is that authority they possess to adjudicate under the constitutions and laws of the States: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)* (2008) 233 CLR 601; [247 ALR 58](#), at [\[23\]](#); [\[2008\] HCA 28](#); [BC200804501](#) [CB](#).

No jurisdiction “belongs to” State court in any proceeding in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth unless that jurisdiction has been conferred on that State court by the Commonwealth, meaning that even in the absence of a law under [s 77\(ii\)](#) a State court cannot exercise state jurisdiction in such a proceeding: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)*, above, at [\[25\]–\[30\]](#), applying *Ex parte Goldring* (1903) 9 AQLR (CN) 37c; 3 SR (NSW) 260. It may be that State courts similarly lack jurisdiction in matters in which the Commonwealth is a defendant, or in which the State may be compelled under the Constitution to become a defendant, but that has yet to be determined: *MZXOT v Minister for Immigration and Citizenship (the Remitter Case)*, above, at [\[26\]](#), [\[29\]](#).

Section 77(iii)

[1705.20] Judicial and non-judicial powers

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), ss 75, 76, s 77, s 77(iii).

(CTH) [Judiciary Act 1903](#) 44, ss 68.

Investment of jurisdiction in State courts under [s 77\(iii\)](#) is limited to the matters listed in [ss 75](#) and [76](#) of the Constitution.

Therefore, the Federal Parliament cannot confer jurisdiction in respect of non-judicial powers. The investing of a “bare administrative function” in a state court will be an invalid use of [s 77\(iii\)](#): *British Medical Assn v Commonwealth* (1949) 79 CLR 201 at 236; *Steele v Defence Forces Retirements Benefits Board* (1955) 92 CLR 177 at 186–7. See also *R v Murphy* (1985) 158 CLR 596; [61 ALR 139](#) [CB](#). There are many functions which, though in themselves non-judicial, are incidental to the exercise of other strictly judicial powers. In so far as they remain incidental to the exercise of those judicial powers they will be validly invested pursuant to [s 77\(iii\)](#): *Peacock v Newtown Marrickville & General Co-op Building Society (No 4) Ltd* (1943) 67 CLR 25 at 37; *Cominos v Cominos* (1972) 127 CLR 588 at 591, 599, 605; *Russell v Russell* (1976) 134 CLR 495 at 530; [9 ALR 103](#).

There may be doubts, however, as to the validity of such a grant if the non-judicial “accessory” function is vested in a separate court from that exercising the judicial function. See *R v Murphy* (1985) 158 CLR 596 at 616; [61 ALR 139](#), where the High Court could find no “absolute answer” to this problem. The court considered that in most cases a function, which would be incidental to a judicial function when performed in association with it, would be considered a “bare administrative function” when performed on its own. However, the court held that the non-judicial function in question, a committal proceeding in relation to a federal indictable offence, was validly vested in a state court. The High Court came to this conclusion after noting the special nature and history of committal proceedings: CLR at 617–18; see also ss 68 and 44 of the Judiciary Act 1903 and annotations thereunder.

There is also the question of the effect of [s 51\(xxxix\)](#) when read in conjunction with [s 77](#). As to this aspect see annotations to s 51(xxxix) of the Constitution: [\[1505.655\]](#).

[1705.23] Kable principle

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 77(iii).

The fact that [s 77\(iii\)](#) of the Constitution permits the “courts of a State” to be invested with federal jurisdiction has been interpreted as creating certain limitations on the legislative power of the states, both in relation to the nature of the functions that can be conferred upon state courts, and as to the constitution of those courts: see *Kable v DPP(NSW)* (1996) 189 CLR 51; [138 ALR 577](#); [BC9604181](#) [CB](#).

The content of the above limitation, and the meaning of the expression “courts of a State”, have been developed and explained in a series of subsequent cases that are discussed in the commentary above particularly in paragraphs [\[1675.5A\]](#), [\[1675.5C\]](#), [\[1675.52\]](#), [\[1675.55\]](#) and [\[1695.90\]](#).

[1705.25] Committal proceedings

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 77(iii).

Where a magistrate conducts committal proceedings he is not exercising a judicial power: see *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 354–8; *Ammann v Wegener* (1972) 129 CLR 415 at 435–6. Traditionally such proceedings have been considered non-judicial because they do not result in a binding determination of rights: *R v Murphy* (1985) 158 CLR 596; [61 ALR 139](#) ^{CB}. Committal proceedings will therefore only be validly vested pursuant to [s 77\(iii\)](#) of the Constitution if they are incidental to the exercise of a judicial power: *Steele v Defence Forces Retirements Benefits Board* (1955) 92 CLR 177 ^{CB}.

In *R v Murphy* (1985) 158 CLR 596 at 616; [61 ALR 139](#) the High Court stated in a joint judgment that such a connection clearly exists. The court had regard to the fact that committal proceedings have a “distinctive judicial character” in that they are curial proceedings in which the magistrate is bound to act judicially and they affect the interest of the person charged (*Sankey v Whitlam* (1978) 142 CLR 1 at 83–4; [21 ALR 505](#); 53 ALJR 11); the procedures followed in the hearing of committal proceedings are similar to those in judicial proceedings; traditionally such proceedings constitute the first step in the curial process, which may result in a trial; and the frequent consequence of a finding against the accused in committal proceedings is the imprisonment of the accused until trial (subject to bail).

Their Honours concluded that, in light of the above, committal proceedings have “the closest, if not an essential, connection with an actual exercise of judicial power”: *R v Murphy* (1985) 158 CLR 596 at 687; [61 ALR 139](#); see also *Ammann v Wegener* (1972) 129 CLR 415 at 437; *Barton v R* (1980) 147 CLR 75 at 99; [32 ALR 449](#).

[1705.30] Structure of state courts

L Legislation cited in this paragraph

(CTH) [Family Law Act 1975](#) s 97(1), s 97(4).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 77(iii).

(CTH) [Sales Tax Assessment Act \(No.1\) 1930](#) s 50(2).

When investing state courts with federal jurisdiction, the Parliament cannot “affect or alter the constitution of the court itself or the organisation through which its jurisdiction and powers are exercised”: *Le Mesurier v Connor* (1929) 42 CLR 481 at 496. Accordingly, the Parliament cannot provide that the judicial function conferred on the state court be exercised by an officer of the court who is not part of the structure of the court. However, where officers of the court “are an integral part of its organisation and ... under state law, exercise its powers and jurisdiction”, the Parliament may confer similar functions on those officers: *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49 at 58–9; [40 ALR 673](#).

Although the Parliament cannot alter the constitution of a state court, it may modify procedural aspects of the court. In *Russell v Russell* (1976) 134 CLR 495 at 532; [9 ALR 103](#), the High Court decided that s 97(4) of the Family Law Act 1975, requiring that counsel and judges not be robed when a state court exercised jurisdiction under the Act, was valid because it dealt with procedural matters; but s 97(1), which required all proceedings under the Act before state courts to be held “in closed court”, was invalid because it changed the character of the court and involved “the very intrusion into its constitution and organisation which [s 77\(iii\)](#) does not authorise”.

The proposition that the Parliament may specify different procedural arrangements is illustrated by

Adams v Watson (1938) 60 CLR 545 ^{CB}, where the High Court upheld the validity of s 50(2) of the Sales Tax Assessment Act (No 1) 1930. The subsection provided that a prosecution under certain sections of the Act could be commenced in a state court of summary jurisdiction at any time. The court said that the subsection was valid and effective, notwithstanding that s 210 of the Justices Act 1928 (Vic) provided that an information relating to an offence should be laid within 12 months of alleged offence.

[1705.35] Conditions attached to investiture

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) s 39(2).

In *Lorenzo v Carey* (1921) 29 CLR 243 ^{CB}, the High Court held that it was within the power of the Parliament to attach conditions to an investiture of federal jurisdiction in a state court; and that s 39(2), imposing restrictions as to appeals and membership on state courts in the exercise of federal jurisdiction, was valid. See also *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 ^{CB}; *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393 ^{CB}.

[\(CTH\) CONSTITUTION \[1710\] s 78 Proceedings against Commonwealth or State](#)

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[1710] 78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Section 78 Generally

[1710.5] Procedural and substantive rights

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 78.

The power of the Commonwealth Parliament under [s 78](#) “was not confined ... to the making of procedural laws which did not create substantive rights ... [T]he Parliament was authorised by [s 78](#) to make a law giving the subject a substantive right against the Commonwealth in respect of any matter within the judicial competence of the Commonwealth”: *Maguire v Simpson* (1977) 139 CLR 362 at 370; [18 ALR 469](#).

End of Document

(CTH) CONSTITUTION [1715] s 79 Number of judges

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[1715] 79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Section 79 Generally

[1715.5] Court to be composed of judges

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 79.

In *Trust Company of Australia v Skiwing* (2006) 66 NSWLR 77; 234 ALR 398; [2006] NSWCA 185; BC200605484 at [59] ^{CB} the New South Wales Court of Appeal said that: “[a]s suggested by s 79 of the Constitution, it is, in my opinion, an essential feature of a court, as that word is used in [Ch III](#), that it be an institution composed of judges ...”

In *Clark v Federal Cmr of Taxation* (2008) 171 FCR 1; 247 ALR 739; [2008] FCAFC 51; BC200802488, at [35]–[36] ^{CB} a Full Court of the Federal Court held that the applicant magistrate was a judge of a court of a State within the meaning of s 7 of the Superannuation Contributions Tax (Members of Constitutionally Protected Superannuation Funds) Assessment and Collection Act 1997 (Cth), in part by noting that magistrates were regarded as “judges” for the purposes of s 79 of the Constitution: see *Re Bryant; Ex parte Guarino* (2001) 178 ALR 57 at [8]; 75 ALJR 478; [2001] HCA 5; BC200100260 ^{CB}; *Goward v Commonwealth* (1957) 97 CLR 355, at 359–360; [1957] ALR 825; (1957) 31 ALJR 618; BC5700430 ^{CB}; *Bavcevic v Commonwealth* (1957) 98 CLR 296, at 301; [1957] ALR 1065; (1957) 31 ALJR 911 ^{CB}.

(CTH) CONSTITUTION [1720] s 80 Trial by jury

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [CONSTITUTION](#) > [CHAPTER III THE JUDICATURE \[ss 71–80\]](#)

[1720] 80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Section 80 Generally

[1720.5] Not applicable to territories

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 80.

Laws made under [s 122](#), the territories power, are not subject to the [s 80](#) requirement: *R v Bernasconi* (1915) 19 CLR 629 [CB](#).

[1720.10] Trial on indictment

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

“It has been held that [s 80](#) does not mean that the trial of all serious offences shall be by jury; the section applies if there is a trial on indictment, but leaves it to the Parliament to determine whether any particular offence shall be tried on indictment or summarily. This result has been criticised, but the court has consistently refused to reopen the question and the construction of the section should be regarded as settled”: *Kingswell v R* (1985) 159 CLR 264 at 276–7; [62 ALR 161](#). See also *R v Archdall* (1928) 41 CLR 128 [CB](#); *Spratt v Hermes* (1965) 114 CLR 226 at 244; *Zarb v Kennedy* (1968) 121 CLR 283 at 287; *Li Chia Hsing v Rankin* (1978) 141 CLR 182 at 190; [23 ALR 151](#); *Cheng v R* (2000) 203 CLR 248; [175 ALR 338](#); [\[2000\] HCA 53](#); [BC200005825](#) at [\[53\]](#) [CB](#), [141]–[143] and [283]; *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[24\]](#) and [\[88\]](#) [CB](#).

[1720.12] Content

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

The essential features of a trial by jury under [s 80](#) is that it is “the method of trial in which laymen selected by lot ascertain under the guidance of the Judge the truth in questions of fact arising either in a civil litigation or in a criminal process”: *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 375; 15 ALR 241; [1909] HCA 36; [BC0900047](#) ^{CB}; *Cheatle v R* (1993) 177 CLR 541 at 549 and 557–558; [116 ALR 1](#); [1993] HCA 44; [BC9303555](#) ^{CB}; *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[36\]](#) ^{CB}.

[1720.15] Right to jury trial cannot be waived

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

The protection extended by [s 80](#) could not be waived by an accused person: *Brown v R* (1986) 160 CLR 171; [64 ALR 161](#) ^{CB}.

[1720.17] Sleeping judge

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

In *Cesan v R* (2008) 236 CLR 358; [250 ALR 192](#); [\[2008\] HCA 52](#); [BC200809727](#) ^{CB}, the High Court held that a miscarriage of justice had occurred in a case where the judge presiding in a trial involving federal jurisdiction had been asleep for multiple periods of time, in some cases possibly for as long as 20 minutes, during the trial. One ground of appeal was that the fact that the judge was asleep contravened [s 80](#) of the Constitution, but it was not necessary for the Court to determine that issue.

[1720.20] “The trial ...” includes committal

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

Committal proceedings “have the closest, if not an essential, connexion with an actual exercise of judicial power... It is inconceivable that, when [s 80](#) of the Constitution provided for the trial on indictment of any offence against any law of the Commonwealth [to] be ‘by jury’, the ordinary curial process for bringing an alleged offender to trial was not intended to be followed in the case of federal indictable offences”: *R v Murphy* (1985) 158 CLR 596 at 616–17; [61 ALR 139](#); See also *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[23\]](#) and [\[86\]](#) ^{CB}.

[1720.25] Jury verdict must be unanimous

L Legislation cited in this paragraph

(SA) [Juries Act 1927](#) s 57, s 68.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80's.

In *Cheatle v R* (1993) 177 CLR 541; [116 ALR 1](#) ^{CB}, the High Court held that s 57 of the Juries Act 1927 (SA), which authorised the taking of majority verdicts in criminal trials, could not apply to the trial in that state of Commonwealth indictable offences. In their joint judgment, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ said 116 ALR at 14: "... history, principle and authority combine to compel the conclusion that [s 80's](#) guarantee of trial by jury precludes a verdict of guilty being returned in a trial upon indictment of an offence against a law of the Commonwealth otherwise than by the agreement or consensus of all the jurors. That being so, s 57 of the Juries Act 1927 (SA) cannot, consistently with [s 80](#), operate to authorise the conviction of either of the appellants by majority verdict. Their convictions were unconstitutional and must be set aside."

In *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[258\]](#) ^{CB} fn 59, French CJ said, in a part of his judgment with which Gummow, Hayne, Crennan, Kiefel and Bell JJ agreed (at [86]): "Although the correctness of the result in *Cheatle* ... is not in question, its analysis was erroneous in so far as the Court considered the effect of [s 80](#) of the Constitution upon s 57 of the Juries Act 1927 (SA) in providing for majority verdicts and read the provision down pursuant to s 22a(1) of the Acts Interpretation Act 1915 (SA). French CJ pointed out that [s 80](#) of the Constitution cannot have implications for the validity of a State provision, and that "[t]he constitutional question relates to the operation of s 68 of the Judiciary Act".

[1720.27] Directed verdict of acquittal

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 80.

The guarantee of trial by jury given by [s 80](#) of the Constitution would not be infringed by a law of the Commonwealth conferring a right of appeal from a directed acquittal of an indictable offence against a law of the Commonwealth: *R v LK* (2010) 241 CLR 177; [266 ALR 399](#); [\[2010\] HCA 17](#); [BC201003366](#) at [\[25\]](#) ^{CB} and [40].

[1720.30] Defence force disciplinary offences

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 80.

The power of the Parliament to make laws with respect to the naval and military defence of the Commonwealth authorises the Parliament to enact a disciplinary code to be administered judicially, but free from the constraints expressed in [Ch III](#) of the Constitution, including the guarantee of trial by jury contained in [s 80](#): *Re Tyler; Ex parte Foley* (1994) 181 CLR 18; [121 ALR 153](#) ^{CB}.

User Name: REECE STORME FERRARA

Date and Time: Saturday, 10 September 2022 7:36:00 PM AEST

Job Number: 179160130

Documents (73)

1. [\[1755\] s 81 Consolidated Revenue Fund](#)
Client/Matter: -None-
2. [\[1760\] s 82 Expenditure charged thereon](#)
Client/Matter: -None-
3. [\[1765\] s 83 Money to be appropriated by law](#)
Client/Matter: -None-
4. [\[1770\] s 84 Transfer of officers](#)
Client/Matter: -None-
5. [\[1775\] s 85 Transfer of property of State](#)
Client/Matter: -None-
6. [\[1780\] s 86 Customs, excise, and bounties](#)
Client/Matter: -None-
7. [\[1785\] s 87 Revenue from customs and excise duties](#)
Client/Matter: -None-
8. [\[1790\] s 88 Uniform duties of customs](#)
Client/Matter: -None-
9. [\[1795\] s 89 Payment to States before uniform duties](#)
Client/Matter: -None-
10. [\[1800\] s 90 Exclusive power over customs, excise, and bounties](#)
Client/Matter: -None-
11. [\[1805\] s 91 Exceptions as to bounties](#)
Client/Matter: -None-
12. [\[1810\] s 92 Trade within the Commonwealth to be free](#)
Client/Matter: -None-
13. [\[1815\] s 93 Payment to States for five years after uniform tariffs](#)
Client/Matter: -None-
14. [\[1820\] s 94 Distribution of surplus](#)
Client/Matter: -None-
15. [\[1825\] s 95 Customs duties of Western Australia](#)
Client/Matter: -None-
16. [\[1830\] s 96 Financial assistance to States](#)
Client/Matter: -None-
17. [\[1835\] s 97 Audit](#)
Client/Matter: -None-
18. [\[1840\] s 98 Trade and commerce includes navigation and State railways](#)

- Client/Matter:** -None-
19. [\[1845\] s 99 Commonwealth not to give preference](#)
- Client/Matter:** -None-
20. [\[1850\] s 100 Not abridge right to use water](#)
- Client/Matter:** -None-
21. [\[1855\] s 101 Inter-State Commission](#)
- Client/Matter:** -None-
22. [\[1860\] s 102 Parliament may forbid preferences by State](#)
- Client/Matter:** -None-
23. [\[1865\] s 103 Commissioners' appointment, tenure and remuneration](#)
- Client/Matter:** -None-
24. [\[1870\] s 104 Saving of certain rates](#)
- Client/Matter:** -None-
25. [\[1875\] s 105 Taking over public debts of States](#)
- Client/Matter:** -None-
26. [\[1880\] s 105A Agreements with respect to State debts](#)
- Client/Matter:** -None-
27. [\[2505\] s 106 Saving of Constitutions](#)
- Client/Matter:** -None-
28. [\[2510\] s 107 Saving of power of State Parliaments](#)
- Client/Matter:** -None-
29. [\[2515\] s 108 Saving of State laws](#)
- Client/Matter:** -None-
30. [\[2520\] s 109 Inconsistency of laws](#)
- Client/Matter:** -None-
31. [\[2525\] s 110 Provisions referring to Governor](#)
- Client/Matter:** -None-
32. [\[2530\] s 111 States may surrender territory](#)
- Client/Matter:** -None-
33. [\[2535\] s 112 States may levy charges for inspection laws](#)
- Client/Matter:** -None-
34. [\[2540\] s 113 Intoxicating liquids](#)
- Client/Matter:** -None-
35. [\[2545\] s 114 States may not raise forces. Taxation of property of Commonwealth or State](#)
- Client/Matter:** -None-
36. [\[2550\] s 115 States not to coin money](#)
- Client/Matter:** -None-
37. [\[2555\] s 116 Commonwealth not to legislate in respect of religion](#)
- Client/Matter:** -None-
38. [\[2560\] s 117 Rights of residents in States](#)
- Client/Matter:** -None-
39. [\[2565\] s 118 Recognition of laws, etc. of States](#)
- Client/Matter:** -None-
40. [\[2570\] s 119 Protection of States from invasion and violence](#)

- Client/Matter:** -None-
41. [\[2575\] s 120 Custody of offenders against laws of the Commonwealth](#)
- Client/Matter:** -None-
42. [\[2605\] s 121 New States may be admitted or established](#)
- Client/Matter:** -None-
43. [\[2610\] s 122 Government of territories](#)
- Client/Matter:** -None-
44. [\[2615\] s 123 Alteration of limits of States](#)
- Client/Matter:** -None-
45. [\[2620\] s 124 Formation of new States](#)
- Client/Matter:** -None-
46. [\[2705\] s 125 Seat of Government](#)
- Client/Matter:** -None-
47. [\[2710\] s 126 Power to Her Majesty to authorise Governor-General to appoint deputies](#)
- Client/Matter:** -None-
48. [\[2715\] s 127 \(Repealed\)](#)
- Client/Matter:** -None-
49. [\[2805\] s 128 Mode of altering the Constitution](#)
- Client/Matter:** -None-
50. [\[2905\] SCHEDULE](#)
- Client/Matter:** -None-
51. [Statute of Westminster Adoption Act 1942: Table of Provisions](#)
- Client/Matter:** -None-
52. [\[3055\] s 1 Short title](#)
- Client/Matter:** -None-
53. [\[3060\] s 2 Commencement](#)
- Client/Matter:** -None-
54. [\[3065\] s 3 Adoption of Statute of Westminster, 1931](#)
- Client/Matter:** -None-
55. [\[3570\] THE SCHEDULE](#)
- Client/Matter:** -None-
56. [Australia Act 1986: Table of Provisions](#)
- Client/Matter:** -None-
57. [\[3575\] s 1 Termination of power of Parliament of United Kingdom to legislate for Australia](#)
- Client/Matter:** -None-
58. [\[3580\] s 2 Legislative powers of Parliaments of States](#)
- Client/Matter:** -None-
59. [\[3585\] s 3 Termination of restrictions on legislative powers of Parliaments of States](#)
- Client/Matter:** -None-
60. [\[3590\] s 4 Powers of State Parliaments in relation to merchant shipping](#)
- Client/Matter:** -None-
61. [\[3595\] s 5 Commonwealth Constitution, Constitution Act and Statute of Westminster not affected](#)
- Client/Matter:** -None-
62. [\[3600\] s 6 Manner and form of making certain State laws](#)

Client/Matter: -None-

63. [\[3605\] s 7 Powers and functions of Her Majesty and Governors in respect of States](#)

Client/Matter: -None-

64. [\[3610\] s 8 State laws not subject to disallowance or suspension of operation](#)

Client/Matter: -None-

65. [\[3615\] s 9 State laws not subject to withholding of assent or reservation](#)

Client/Matter: -None-

66. [\[3620\] s 10 Termination of responsibility of United Kingdom Government in relation to State matters](#)

Client/Matter: -None-

67. [\[3625\] s 11 Termination of appeals to Her Majesty in Council](#)

Client/Matter: -None-

68. [\[3630\] s 12 Amendment of Statute of Westminster](#)

Client/Matter: -None-

69. [\[3635\] s 13 Amendment of Constitution Act of Queensland](#)

Client/Matter: -None-

70. [\[3640\] s 14 Amendment of Constitution Act of Western Australia](#)

Client/Matter: -None-

71. [\[3645\] s 15 Method of repeal or amendment of this Act or Statute of Westminster](#)

Client/Matter: -None-

72. [\[3650\] s 16 Interpretation](#)

Client/Matter: -None-

73. [\[3655\] s 17 Short title and commencement](#)

Client/Matter: -None-

(CTH) CONSTITUTION [1755] s 81 Consolidated Revenue Fund

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CHAPTER IV FINANCE AND TRADE [ss 81–105A]

[1755] 81 Consolidated Revenue Fund

All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Section 81 Generally

[1755.1] Historical background

For a discussion of the historical background to the establishment of a Consolidated Revenue Fund, see *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555; [112 ALR 87](#) at [98–9](#) [CB](#) per Mason CJ, Deane, Toohey and Gaudron JJ.

[1755.3] Not a source of spending power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxix), s 61, ss 81, 83.

In *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) [CB](#), the High Court rejected a challenge to the Tax Bonus for Working Australians Act (No 2) 2009 (Cth), which was enacted to provide a stimulus to the national economy in response to the “global financial crisis”. In the course of upholding that law, the entire Court held that [ss 81](#) and [83](#) of the Constitution do not confer a substantive spending power. Those sections are concerned with ensuring Parliamentary control of public revenues. The power to spend appropriated monies must be found elsewhere in the Constitution or in statutes made under it, including in the executive power of the Commonwealth derived from [s 61](#) of the Constitution, subject to the appropriation requirement and supportable by legislation made under the incidental power in [s 51\(xxxix\)](#).

[1755.5] Associated provision

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 81, s 83.

[Section 81](#) should be read with [s 83](#) of the Constitution, which prohibits the withdrawal of moneys from the Treasury except in accordance with an appropriation by law: see [\[1765\]](#).

[1755.10] Appropriation not subject to judicial review

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 81.

“[T]he validity of an Appropriation Act is not ordinarily susceptible to effective legal challenge”: *Davis v Commonwealth* (1988) 166 CLR 79 at 96; [82 ALR 633](#). This is either because “the purposes of the Commonwealth”, for which Parliament may appropriate revenues or money, are those purposes selected by the Parliament (*Victoria v Commonwealth* (1975) 134 CLR 338 at 394 — the *AAP* case); because neither a state government nor its Attorney-General has standing to challenge an appropriation Act, which neither confers rights or privileges nor imposes duties or obligations (*AAP* case, above, CLR at 387, 390); or because an appropriation Act is internal to the Commonwealth's government and “cannot by itself be the subject of legal challenge”: *AAP* case, above, CLR at 394; *Pape v Cmr of Taxation* (2009) 238 CLR 1; [257 ALR 1](#); [\[2009\] HCA 23](#); [BC200905831](#) ^{CB}, at [49] (French CJ).

In *Combet v Commonwealth* [\(2005\) 221 ALR 621](#); 80 ALJR 247; [\[2005\] HCA 61](#); [BC200507894](#) ^{CB}, a challenge to the appropriation of money to fund an advertising campaign to promote the Commonwealth's workplace relations reforms was dismissed. The challenge involved the interpretation of the Appropriation Act (No 1) 2005–2006, as opposed to its validity. That Act was structured around Sch 1, which identified 16 portfolios including, relevantly, Employment and Workplace Relations, and allocated sums to various agencies within those portfolios, dividing the sums between “Departmental Outputs” and “Administered Expenses”. Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ (McHugh and Kirby JJ dissenting) held that s 7 of the Appropriation Act (No 1) 2005–2006 validly authorised the appropriation to fund the advertising campaign. Gummow, Hayne, Callinan and Heydon JJ held that the “outcome statements” in Sch 1 did not control expenditure, and that the Act authorised the appropriation of funds for expenditure for the departments of the Commonwealth. That was a purpose of the Commonwealth within [s 81](#) of the Constitution. Their Honours said, at [160], that:

It is for the parliament to identify the degree of specificity with which the purpose of an appropriation is identified. It may readily be accepted that the constitutional provisions examined earlier in these reasons are to be understood as providing for what, in 1903, was said in relation to the House of Commons to be “a comprehensive and continuous guardianship over the whole finance” of the Commonwealth. But the manner of exercising that guardianship, within the relevant constitutional limits, is to be determined by the parliament ...

See also *New South Wales v Commonwealth (Surplus Revenue Case)* (1908) 7 CLR 179 at 200; 14 ALR 625; [1908] HCA 68; [BC0800026](#) ^{CB} per Isaacs J; *Attorney-General (Vic) v Commonwealth* (1945) 71 CLR 237 at 253, 256; [1945] ALR 435; (1945) 19 ALJR 279; [BC4500010](#) ^{CB} per Latham CJ; *Victoria v Commonwealth* (1975) 134 CLR 338 at 404; [7 ALR 277](#) at [332–3](#); 50 ALJR 157; [BC7500055](#) ^{CB} per Jacobs J; compare *Cincinnati Soap Co v United States* (1937) 301 US 308 at 321–2.

[1755.15] Laws imposing taxation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 53–55, s 81, s 83.

“It is essential to the validity of a law or proposed law ‘imposing taxation’ for the purposes of [ss 53–55](#) of the Constitution that the moneys raised by such a law shall form part of the Consolidated Revenue Fund whence they shall be appropriated by law ‘for the purposes of the Commonwealth’. The principle adopted by the Constitution is that revenues or moneys raised shall form part of that fund from which they can be appropriated only for Commonwealth purposes and only by law. That principle finds expression in [s 81](#). It is supplemented by [s 83](#) which forbids the drawing of money from the Treasury except under appropriation by law”: *Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 176 CLR 480; [112 ALR 53](#) at [63](#) ^{CB} per Mason CJ, Brennan, Deane and Gaudron JJ.

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(CTH) CONSTITUTION [1760] s 82 Expenditure charged thereon

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[1760] 82 Expenditure charged thereon

The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

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(CTH) CONSTITUTION [1765] s 83 Money to be appropriated by law

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[1765] 83 Money to be appropriated by law

No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

Section 83 Generally

[1765.5] Appropriation legislation

An appropriation Act has the effect of “legally segregating [revenue moneys] from the general mass of the Consolidated Fund and dedicating it to the execution of some purpose”: *New South Wales v Commonwealth* (1908) 7 CLR 179 at 200 (the *Surplus Revenue* case). To achieve this result the Appropriation Act must, first, authorise the executive government to withdraw money from the government fund and spend that money; second, the Act must specify the purpose on which the money is to be spent, thereby “restricting the expenditure to the particular purpose”: *Commonwealth v Colonial Ammunition Co Ltd* (1924) 34 CLR 198 at 224.

[1765.10] Appropriation legislation does not authorise new activities

L Legislation cited in this paragraph

(CTH) [Remuneration Tribunal Act 1973](#).

“The Appropriation Act must be read in the context of existing legislation which, unless repealed by the Appropriation Act, requires that the purposes to be found in the broad terms of the Appropriation Act be limited to accord with the existing legislation”: *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 211–12; [90 ALR 371](#). Consequently, the appropriation of funds for “Parliamentary and Ministerial Staff and Services” and “Advance to the Minister for Finance” in the Supply Act (No 1) 1989–90 (Cth) did not authorise the expenditure of funds to pay parliamentary postal allowances above those authorised pursuant to the Remuneration Tribunal Act 1973 (Cth).

[1765.15] Expenditure of unappropriated funds

“Any payment out of the consolidated fund made without parliamentary authority is simply illegal and ultra vires, and may be recovered by the government if it can ... be traced”: *Auckland Harbour Board v R* [\[1924\] AC 318](#) at [326](#). The reference to tracing should be read as a reference “to tracing the identity of the recipient of the money”: *Commonwealth v Burns* [\[1971\] VR 825](#) at [828](#).

The recovery of an unauthorised payment will not be impeded by any representations as to the legality of the payment on which the payee may have relied, that is, by the doctrine of estoppel (*Commonwealth v Burns*, above); nor will the unappropriated payment be irrecoverable because it was given in return for valuable consideration: *Attorney-General (NSW) v Gray* (1977) 1 NSWLR 406.

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(CTH) CONSTITUTION [1770] s 84 Transfer of officers

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[1770] 84 Transfer of officers

When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

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(CTH) CONSTITUTION [1775] s 85 Transfer of property of State

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[1775] 85 Transfer of property of State

When any department of the public service of a State is transferred to the Commonwealth —

- (i) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:
- (ii) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:
- (iii) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:
- (iv) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

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(CTH) CONSTITUTION [1780] s 86 Customs, excise, and bounties

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[1780] 86 Customs, excise, and bounties

On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

End of Document

(CTH) CONSTITUTION [1785] s 87 Revenue from customs and excise duties

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[1785] 87 Revenue from customs and excise duties

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

End of Document

(CTH) CONSTITUTION [1790] s 88 Uniform duties of customs

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[1790] 88 Uniform duties of customs

Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

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(CTH) CONSTITUTION [1795] s 89 Payment to States before uniform duties

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[1795] 89 Payment to States before uniform duties

Until the imposition of uniform duties of customs —

- (i) The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.
- (ii) The Commonwealth shall debit to each State —
 - (a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;
 - (b) The proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.
- (iii) The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State.

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(CTH) CONSTITUTION [1800] s 90 Exclusive power over customs, excise, and bounties

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[1800] 90 Exclusive power over customs, excise, and bounties

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

Section 90 Generally

[1800.5] The objective of s 90

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 88, s 90, 92, 99.

The wide view of the purpose of [s 90](#) has been expressed by Mason J: “[T]he grant of exclusive power to impose duties of excise in conjunction with a like power to impose customs duties... ‘was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by state action’...”: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 631; 47 ALR 461. See also *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 260; [1950] ALR 55 [CB](#); *Western Australia v Chamberlain Industries Pty Ltd* (1970) 121 CLR 1 at 17; [1970] ALR 483 [CB](#).

The narrower view of that purpose was expressed as follows by Gibbs CJ: “The conjunction of customs, excise and bounties suggests that it was intended by [s 90](#) to give the Commonwealth a real control of its tariff policy, but it is by no means evident that it was intended to go further, and ‘to give the Parliament a real control of the taxation of commodities’ ... and still less clear that it was intended to give the Parliament ‘the control of the national economy as a unity which knows no boundaries’ ...”: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 616–17; 47 ALR 461. See also

(CTH) CONSTITUTION [1800] s 90 Exclusive power over customs, excise, and bounties

Parton v Milk Board (Vic) (1949) 80 CLR 229 at 264–67; 23 ALJR 554; *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 555–6; [1960] ALR 129 [\[CB\]](#); *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 480; [87 ALR 193](#); *Ha v New South Wales* (1997) 189 CLR 465 at 506–7; [146 ALR 355](#); [BC9703377](#) [\[CB\]](#).

A third view of the purpose behind [s 90](#) has been expressed by Brennan, Deane and Toohey JJ: [ss 88, 90, 92](#) and [99](#) “can be seen to effect the objective of creating a free trade area embracing the whole of the territory [of the Commonwealth]”; it plays a part “in achieving the ‘essential objective’ of abolishing internal customs barriers and in guaranteeing equality as regards the customs and excise duties which the people of the Commonwealth are to bear”: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 276, 278; [109 ALR 1](#) at [17, 19](#). This view of the purpose of [s 90](#) was adopted by Brennan CJ, McHugh, Gummow and Kirby JJ in *Ha v New South Wales* (1997) 189 CLR 465 at 494–6; [146 ALR 355](#); [BC9703377](#) [\[CB\]](#).

[1800.10] Territories cannot impose excise duties

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 51(iii), Section 90.

[Section 90](#) qualifies [s 122](#) of the Constitution, so that the legislature of a self-governing territory cannot impose excise duties: “The exclusivity of power secured by [s 90](#) ensures that the parliament, to the exclusion of the legislatures of both states and internal territories, may exercise the powers to which that section refers”: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 at 279; [109 ALR 1](#) at [19](#) per Brennan, Deane and Toohey JJ. See also per Gaudron J, CLR at 290; ALR at 28 (the requirement expressed in s 51(iii), that bounties be uniform throughout the Commonwealth, leads to the result that the matters referred to in [s 90](#) are excluded from the legislative power of a territory legislature).

[1800.15] Excise duties — taxes on goods

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 90.

“It is now established that for constitutional purposes duties of excise are taxes directly related to goods imposed at some step in their production or distribution before they reach the hands of consumers”: *Bolton v Madsen* (1963) 110 CLR 264; [1963] ALR 518 [\[CB\]](#). See also *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 185; [2 ALR 460](#); *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 615; 47 ALR 461; *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 430–1; [87 ALR 193](#). For the purpose of this definition, the place of origin of the goods, and the fact that the tax does not discriminate between local and imported goods, are irrelevant: “I think an inland tax upon goods of a class manufactured in Australia and abroad imposed without regard to their place of origin, is an excise”: *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 540; [1960] ALR 129 [\[CB\]](#).

In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 589–90; [118 ALR 1](#) at [12](#), Mason CJ, Brennan, Deane and McHugh JJ agreed that a tax imposed indifferently on all goods, whether imported or locally manufactured, fell within [s 90](#); and that “the term ‘duties of customs and of excise’ in [s 90](#) must be considered as exhausting the categories of taxes on goods.”

Similarly, in *Ha v New South Wales* (1997) 189 CLR 465 at 499; [146 ALR 355](#); [BC9703377](#) [\[CB\]](#), Brennan CJ, McHugh, Gummow and Kirby JJ held that, for the purposes of [s 90](#) of the Constitution,

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excise duties are taxes on the production, manufacture, sale or distribution of goods, whether of foreign or domestic origin.

[1800.20] The minority view of excise duties — discriminatory taxes on goods

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 90.

There is a minority (and strongly articulated) view that an excise duty is a tax imposed on goods manufactured in Australia, so that a non-discriminatory tax imposed on goods generally, “in their character as articles of commerce rather than in their character as goods manufactured in Australia”, would not be an excise duty: *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 485; [87 ALR 193](#). See also *Parton v Milk Board (Vic)* (1949) 80 CLR 229 at 264; [1950] ALR 55 [CB](#); *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 555; [1960] ALR 129 [CB](#).

In *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 631; [118 ALR 1](#) at [45](#), Toohey and Gaudron JJ, having reviewed the history, purpose and judicial interpretation of [s 90](#), concluded that its reference to “excise duties” was limited to “[s]tate taxation measures which discriminate against goods manufactured or produced in Australia.”

Similarly, in *Ha v New South Wales* (1997) 189 CLR 465 at 507–10; [146 ALR 355](#); [BC9703377](#) [CB](#), Dawson, Toohey and Gaudron JJ criticised the expanded concept of excise duties, first adopted in *Parton v Milk Board (Vic)*, *above*, and concluded (at 514–15) “that an excise duty is a tax which falls selectively upon the local production or manufacture of goods”; and held that the decision in *Parton v Milk Board (Vic)*, *above*, should be overruled.

[1800.25] Characterising excise duties

In deciding whether a state law imposes a tax on goods (and is therefore invalid as an excise duty), “[i]t is necessary to examine the practical operation of a law as well as its terms in order to ascertain whether it imposes an excise ... Otherwise the constitutional prohibition is reduced to a formula which lends itself to evasion”: *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 633; 47 ALR 461 at 661–2. The former view, that this question was to be determined by a legal analysis of the law’s criterion of liability (*Bolton v Madsen* (1963) 110 CLR 264 at 271; [1963] ALR 518 [CB](#)), is now out of favour: “The weight of opinion has come down, though by no means conclusively, in favour of substance and against criterion of liability alone”: *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 450; [87 ALR 193](#).

[1800.30] Consumption taxes

The proposition, that a tax imposed on the consumer of a commodity lies outside the definition of an excise duty, has been directly tested only once, in *Dickenson’s Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; [2 ALR 460](#) [CB](#). Barwick CJ observed that this exclusion was compelled by “no logical reason”: CLR at 185. But all members of the court, except McTiernan J, accepted the exclusion. In the words of Gibbs J: “Since *Parton v Milk Board (Vic)* (1949) 80 CLR 229; [1950] ALR 55 [CB](#) no member of the court has dissented from, and almost every member who has had occasion to discuss the matter has expressly affirmed, the proposition that a tax imposed on consumption is not a duty of excise”: CLR at 221.

In fact, the exclusion of consumption taxes appears to have been adopted in Australia through an unconscious deference to a series of Privy Council decisions, which had centred on the distinction drawn in s 92(II) of the British North America Act 1867 (UK) between “direct” and “indirect” taxes. These decisions included *Bank of Toronto v Lambe* [1886–90] All ER 770; [\(1887\) 12 App Cas 575](#) [CB](#) and *Atlantic Smoke Shops Ltd v Conlon* [\[1943\] AC 550](#) [CB](#). For a critique of this adoption,

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see *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529 at 554; [1960] ALR 129 [CB](#); *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 219 and 239; [2 ALR 460](#).

In *Ha v New South Wales* (1997) 189 CLR 465 at 499–500; [146 ALR 355](#); [BC9703377](#) [CB](#), the majority (Brennan CJ, McHugh, Gummow and Kirby JJ) declined to consider whether a tax on the consumption of goods would be classified as a duty of excise.

[1800.35] Business franchise fees

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 90.

Despite the wide definition of excise duties and the High Court's focus on the practical operation of state laws when deciding whether those laws should be characterised as imposing an excise duty, the court has developed an anomalous exception to [s 90](#). Under this exception, the states may use the device of fees for a licence to sell certain commodities, based on the licensee's past turnover in those commodities, to collect a tax on the sale of those commodities. This device has been endorsed for licence fees imposed on retailers of alcoholic beverages (*Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; [1960] ALR 129 [CB](#)); and then extended to licence fees imposed on retailers of tobacco products (*Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; [2 ALR 460](#) [CB](#)); and retailers of petroleum: *H C Sleight Ltd v South Australia* (1977) 136 CLR 475; [12 ALR 449](#) [CB](#).

In *Ha v New South Wales* (1997) 189 CLR 465 at 504; [146 ALR 355](#); [BC9703377](#) [CB](#), the majority (Brennan, McHugh, Gummow and Kirby JJ) of the court rejected the proposition that alcohol and tobacco were in a special category for [s 90](#) purposes and overruled two decisions which had upheld heavy state licence fees on sales of tobacco: *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 440; [87 ALR 193](#); *Coastace Pty Ltd v New South Wales* (1989) 167 CLR 503; [87 ALR 258](#) [CB](#).

[1800.40] The current law on business franchise fees

Following the majority decision in *Ha v New South Wales* (1997) 189 CLR 465; [146 ALR 355](#); [BC9703377](#) [CB](#), the position in relation to business franchise fees (licence fees impose on the sellers of commodities) appears to be as follows:

- (1) Licence fees payable as a condition for the issue of a licence to sell particular goods may avoid characterisation as duties of excise if those fees are closely modelled on the licence fees upheld in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; [1960] ALR 129 [CB](#) and *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177; [2 ALR 460](#) [CB](#). If it can be said of a licence fee that it has “no closer connection” with the production or distribution of goods than that as a fee for the privilege of engaging in the process of production or distribution, then the licence fee will not be characterised as an excise duty: *Ha v New South Wales* (1997) 189 CLR 465 at 501; [146 ALR 355](#); [BC9703377](#) [CB](#); see also *Philip Morris Ltd v Cmr of Business Franchises* (1989) 167 CLR 399 at 445–6; [87 ALR 193](#).
- (2) In determining whether a licence fee has “no closer connection” with production or distribution (so that it can escape characterisation as an excise duty), regard will be had to a number of features of the legislation imposing the licence fee. These features include the proximity to the licence period of the period used to calculate the licence fee; the length of the licence period; the size of the tax imposed compared to the value of the commodity; whether the tax is to be borne only once in the course of distribution of particular goods; and whether the legislation is revenue-raising rather than regulatory: *Ha v New South Wales* (1997) 189 CLR 465 at 501; [146 ALR 355](#); [BC9703377](#) [CB](#).

The features of the New South Wales legislation which led the majority in *Ha v New South Wales*, above, to characterise the licence fee imposed on wholesalers and retailers of tobacco as a duty of excise were (see CLR at 502):

- (1) the size of the tax — an amount equal to 75 or 100 per cent of the value of tobacco sold during the relevant period, which “could not conceivably be regarded as a mere fee for a licence required as an element in a scheme for regulatory control of businesses selling tobacco”; and
- (2) the minimal provisions in the legislation controlling businesses selling tobacco.

[1800.45] Taxes outside the business franchise fee “exception”

In the past, the court has refused to extend the device of licence fees, based on past turnover, and has declined to uphold taxes imposed on processors of fish products: *M G Kailis (1962) Pty Ltd v Western Australia* (1974) 130 CLR 245; [2 ALR 513](#) ^{CB}; and on the operators of premises used for slaughtering animals: *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368; [57 ALR 417](#) ^{CB}. Similarly, a majority of the High Court has held that a licence fee imposed on vendors of video films, based on past sales of those films, is a tax on goods and, therefore, an excise duty; because the structure of the licence fee could be distinguished from the licence fees upheld in *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529; [1960] ALR 129 ^{CB}: *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561; [118 ALR 1](#) ^{CB}.

The extension of the business franchise fee device to sales of petroleum products remains uncertain, following the majority decision in *Ha v New South Wales* (1997) 189 CLR 465; [146 ALR 355](#); [BC9703377](#) ^{CB}. Although the majority justices refrained from reconsidering the decision in *H C Sleight Ltd v South Australia* (1977) 136 CLR 475; [12 ALR 449](#) ^{CB} (which had upheld the device in that context), they noted (CLR at 504) the reservation expressed as to that case in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561; [118 ALR 1](#); [BC9303553](#) ^{CB}.

In *Australian Capital Territory v Queanbeyan City Council* (2010) 188 FCR 541; [273 ALR 553](#); [\[2010\] FCAFC 124](#); [BC201007065](#) ^{CB}, the Full Federal Court overturned a finding that the Utilities (Network Facilities) Tax (UNFT) imposed on ACTEW Corporation Ltd by the ACT in respect of sections of the water distribution network that were located on land that was not owned by ACTEW was not a duty of excise because, even if it was a tax, there was no relationship at all between the value of the UNFT and the quantity or value of water which passed through the network, and that meant that the UNFT could not be characterised as a duty of excise.

(CTH) CONSTITUTION [1805] s 91 Exceptions as to bounties

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

Alexander Flecknoe-Brown

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[CONSTITUTION](#) > [CHAPTER IV FINANCE AND TRADE \[ss 81–105A\]](#)

[1805] 91 Exceptions as to bounties

Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

End of Document

(CTH) CONSTITUTION [1810] s 92 Trade within the Commonwealth to be free

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Constitution current to: Act 84 of 1977 • Commentary Last updated: March 2022
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[1810] 92 Trade within the Commonwealth to be free

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

Section 92 Generally

[1810.5] Purpose of s 92

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

The purpose of [s 92](#) is “to create a free trade area throughout the Commonwealth and to deny to Commonwealth and states alike a power to prevent or obstruct the free movement of people, goods and communications across state boundaries”; and “the elimination of protection”: *Cole v Whitfield* (1988) 165 CLR 360 at 391 and 394; [78 ALR 42](#).

Nevertheless, the High Court has accepted that “[s 92](#) was not designed to create ‘a *laissez-faire* economy in Australia’; rather it had a more limited operation, to prevent the use of State boundaries as trade borders or barriers for the protection of intrastate players in a market from competition from interstate players in that market”: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [244 ALR 32](#), at [\[36\]](#); [\[2008\] HCA 11](#); [BC200801843](#) ^{CB}.

In *Betfair Pty Ltd v Western Australia*, *above*, the High Court drew attention to developments in Australia since *Cole v Whitfield*, including the Court’s recognition of the place of Chapter IV of the Constitution in the “creation and fostering of national markets [that] would further the plan of the

Constitution in the creation of a new federal nation and would be expressive of national unity” (at [12]) and the emergence of the new economy in which internet dependent businesses deal with customers without regard to geographic boundaries, which has the result that the proposition that [s 92](#) mandates that each State retain its own economic centre is “overbroad” (at [14]–[15]). In *Betfair Pty Ltd v Racing New South Wales* (2012) 286 ALR 221; 86 ALJR 418; [2012] HCA 12; [BC201201677](#) ^{CB}, the application of [s 92](#) to markets conducted without reference to State boundaries was described by the majority as “a large question” which could “await another day”: at [57] per French CJ, Gummow, Hayne, Crennan and Bell JJ, at [127] per Kiefel J.

[1810.10] Discrimination against interstate trade prohibited

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

The purpose of [s 92](#) requires “the prohibition of measures which burden interstate trade and commerce and which also have the effect of conferring protection on intrastate trade and commerce of the same kind. The general hallmark of measures which contravene [s 92](#) in this way is their effect as discriminatory against interstate trade and commerce in that protectionist sense”: *Cole v Whitfield* (1988) 165 CLR 360 at 394; [78 ALR 42](#).

The term “protection” is concerned with the preclusion of competition, an activity which occurs in a market for goods and services. This makes it important to determine the ambit of any market on the supply and demand side, and to consider notions of substitution of various goods and services available in that market: *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [244 ALR 32](#), at [15], [115]–[116]; [2008] HCA 11; [BC200801843](#) ^{CB}. Those considerations are reflected in the references in earlier cases to whether interstate and intrastate trade are of “the same kind”: see *Cole v Whitfield* (1988) 165 CLR 360, at 407–408; [78 ALR 42](#); [1988] HCA 18; [BC8802596](#) ^{CB}; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182, at 204–205; [96 ALR 524](#); [1990] HCA 50; [BC9002904](#) ^{CB}.

[1810.15] Discrimination assessed by practical operation

L Legislation cited in this paragraph

(VIC) [Business Franchise \(Tobacco\) Act 1974](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

“The concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation”: *Cole v Whitfield* (1988) 165 CLR 360 at 399; [78 ALR 42](#).

In *Bath v Alston* (1988) 165 CLR 411; [78 ALR 669](#) ^{CB}, the majority of the High Court held that the Business Franchise (Tobacco) Act 1974 (Vic) offended against [s 92](#). The Act imposed a tax on the Victorian wholesalers of tobacco products and the Victorian retailers of those tobacco products in respect of which no tax had been paid by a Victorian wholesaler. The Act, according to the majority, discriminated between interstate tobacco wholesalers and local tobacco wholesalers so as to protect the latter. Its protectionist character could be seen, the majority said, in the form in which the legislation was expressed, exempting from the calculation of the tax tobacco purchased from a Victorian wholesaler; and in its practical effect, protecting local wholesalers from the competition of interstate wholesalers. The practical effect of the tax on Victorian retailers was to reduce the capacity of interstate wholesalers of tobacco to compete in the Victorian market — those wholesalers

subject to a similar tax in their own state would have the cost of their product raised to a point where their products “would be effectively excluded from the Victorian market”, and those wholesalers who operated in a state where there was no such product would lose their competitive advantage (which came from a lower cost structure) as against Victorian wholesalers: CLR at 426.

A superficially non-discriminatory law may offend against [s 92](#), if it can be shown that the law operates so as to protect intrastate traders against competition from interstate traders. In *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; [90 ALR 371](#) ^{CB}, the High Court held that the Beverage Container Act 1975 (SA) offended against [s 92](#). The Act, which required retailers of beer to collect a deposit from each purchaser of bottled beer, was held to discriminate in its effect against an interstate supplier of bottled beer. The Act required a higher deposit for non-refillable containers than it did for refillable containers and obliged the retailer of non-refillable bottles to accept returns of those bottles, an obligation which was waived in the case of refillable bottles. The Act was held to discriminate against the interstate supplier of bottled beer, whose plant was set up to use non-refillable bottles, and to protect local suppliers of bottled beer, who used refillable bottles.

However, in *Betfair Pty Ltd v Racing New South Wales* [\(2012\) 286 ALR 221](#); 86 ALJR 418; [\[2012\] HCA 12](#); [BC201201677](#) ^{CB}, the separate judgments of the court each emphasised that the subject of [s 92](#) is interstate trade, not traders: at [50] per French CJ, Gummow, Hayne, Crennan and Bell JJ; at [68]–[69], [73] per Heydon J; at [113]–[115] per Kiefel J. *Betfair* contended that, as an interstate trader, the effect of the facially neutral fee condition that the racing authorities imposed, as a condition of the race fields information use approval, was to take a higher proportion of its gross revenue than that of the TAB, an intrastate trader. Although it contended that it was in this respect in a similar position to the Bond Brewing Company in *Castlemaine Tooheys*, the plurality noted that the court’s conclusion in that case was facilitated by the inclusion of certain facts in the case stated which were not present in *Betfair’s* case. Those facts included the adverse effect that the change in the legislative regime had on the Bond Brewing Company’s ability to obtain market share in South Australia, and that the object and effect of the regime was to make the selling of beer in non-refillable bottles commercially disadvantageous: at [54].

By contrast, the fact that *Betfair* adopted a different fee structure to that adopted by other wagering operators “did not constitute a relevant difference which, consistently with [s 92](#), could not be disregarded by treating alike interstate and intrastate wagering transactions utilising NSW race field information”. Nor had *Betfair* demonstrated that “the likely practical effect of the imposition of the fees will be loss to it of market share or profit or an impediment to increasing that share or profit”: at [55]–[56]. The evidence given by its Chief Executive Officer was to the contrary: see the plurality’s reasons at [30] and the reasons of Heydon J at [74]. See also the reasons of Heydon J at [71]–[75]; and the reasons of Kiefel J at [131]–[133]. A law that requires a licence to be held before it is permissible to trade in a particular State does not necessarily contravene [s 92](#); the operation of [s 92](#) in relation to a licensing regime will depend upon whether that regime, in its legal or practical operation, creates discriminatory burdens on interstate operators of a protectionist kind: see *Cross v Barnes Towing and Salvage (Qld) Pty Ltd* [\(2005\) 65 NSWLR 331](#); [232 ALR 209](#); [\[2005\] NSWCA 273](#); [BC200506077](#), at [\[54\]–\[57\]](#) ^{CB}; *Betfair Pty Ltd v Racing New South Wales* [\(2012\) 286 ALR 221](#); 86 ALJR 418; [\[2012\] HCA 12](#); [BC201201677](#) ^{CB}; *Sportsbet Pty Ltd v New South Wales* [\(2012\) 286 ALR 404](#); 86 ALJR 446; [\[2012\] HCA 13](#) ^{CB}.

In *Betfair v Western Australia* (2008) 234 CLR 418; [244 ALR 32](#); [\[2008\] HCA 11](#); [BC200801843](#) ^{CB}, the High Court held that certain provisions of the Betting Control Act 1954 (WA) were invalid. One of those provisions, s 24(1aa), provided that any person who bet through a betting exchange committed an offence. The provision was facially neutral. Nevertheless, it was held to contravene [s 92](#), because its practical effect was to protect established wagering operators in Western Australia from the competition that *Betfair* (an interstate betting exchange) would otherwise have presented, the Court having found that the services offered by *Betfair* through its betting exchange were relevantly of the

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“same kind” as (or were substitutable for) those offered by the established Western Australian operators.

The other provision held invalid, s 27D, prohibited the publication of Western Australia “race fields” unless the person was authorised to publish those race fields. Again, the provision did not on its face discriminate against interstate traders. Section 27D was invalid in its operation with respect to Betfair because, in light of the policy in the Act against betting exchanges, the prospect that Betfair could obtain approval was illusory.

[1810.15A] Purpose

L Legislation cited in this paragraph

(CTH) [Northern Territory \(Self-Government\) Act 1978](#) s 49.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

In *Sportsbet Pty Ltd v New South Wales* (2012) 286 ALR 404; 86 ALJR 446; [2012] HCA 13^{CB}, the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) endorsed a statement of the Full Court of the Federal Court that the subjective purpose of the racing authorities was not relevant to proving that the imposition of the fee as a condition of Sportsbet’s approval contravened s 49 of the Northern Territory (Self-Government) Act: at [24]. The Full Court had observed that the operation of s 49 (which is in equivalent terms to [s 92](#) but in relation to trade between the Territory and the States) “depends on the effect of the measure, not on whether those responsible for its adoption and implementation were correct in their understanding of the operation of [s 92](#) of the Constitution”: *Racing New South Wales v Sportsbet Pty Ltd* (2010) 189 FCR 448; [274 ALR 12](#); [2010] FCAFC 132; [BC201008574](#)^{CB} at [112].

In *Betfair v Racing New South Wales* (2012) 286 ALR 221; 86 ALJR 418; [2012] HCA 12; [BC201201677](#)^{CB}, Kiefel J observed that the intention of the racing authorities might be relevant in proceedings for judicial review, to show that they had some improper purpose. But the proceedings before the court were “not proceedings of that kind” (at [141]): “Any intention on the part of RNSW and HRNSW to protect TAB is not relevant to proving that the measure had a protectionist effect. That is a question of fact to be determined by reference to factors relating to *Betfair*’s ability to compete as an interstate trader.”

[1810.20] Discrimination to achieve social goals

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

The protection extended by [s 92](#) may not be available to strike down a governmental control, which disadvantages interstate trade, where that control is pursuing a legitimate interest of the government. See *Cole v Whitfield* (1988) 165 CLR 360 at 408–9; [78 ALR 42](#). The High Court has said that it will balance the pursuit of that objective against the protectionist effect of the legislation and conclude that [s 92](#) is not infringed where the “legislative measures ... are appropriate and adapted to the resolution of those problems [and] any burden imposed on interstate trade was incidental and not disproportionate to their achievement”: *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 at 473; [90 ALR 371](#).

However, in *Betfair v Western Australia* (2008) 234 CLR 418; [244 ALR 32](#); [2008] HCA 11; [BC200801843](#)^{CB}, the High Court has cast doubt upon central aspects of the reasoning in

Castlemaine Tooheys, and has re-interpreted the proportionality test identified in that case so that it will be harder to justify laws that impose burdens on interstate trade and commerce. In particular, in *Betfair* the Court held that the “appropriate and adapted” criterion articulated in *Castlemaine Tooheys* should now be understood as involving a criterion of “reasonable necessity”: at [102]. That is, a law with a non-protectionist object may be held to be contrary to [s 92](#) if the means adopted in pursuing that object are not “reasonably necessary” to the achievement of that object. While in *Castlemaine Tooheys* the Court expressly held that a “necessity” test should not be adopted, because to do so would place the Court in an invidious position in second guessing legislative judgments about the means by which legitimate objects should be obtained (see *Castlemaine Tooheys Ltd v South Australia*, *above*, CLR at 472–473, at least this aspect of the judgment in *Castlemaine Tooheys* has been implicitly overruled in *Betfair* (at [99])).

The Court will no longer display the same deference to the political judgments of Parliament in deciding whether a law is appropriate and adapted to a legitimate purpose. The two provisions held to contravene [s 92](#) in *Betfair* were invalid because the Court was not satisfied that, to the extent that Western Australia had legitimate concerns about the effect of betting exchanges on the integrity of its wagering industry, it could not have addressed those concerns through regulation rather than prohibition. For that reason, the prohibition on betting exchanges was not “necessary”: *Betfair* at [99], [110].

In *Cole v Whitfield*, *above*, the High Court accepted that any advantage given by a Tasmanian prohibition on undersized crayfish to the local trade in mature Tasmanian crayfish could be justified as “a necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters”. This was because the only practicable form of checking the size of crayfish was random inspection and because local and interstate crayfish were indistinguishable: CLR at 409–10.

On the other hand, in *Castlemaine Tooheys Ltd v South Australia*, *above*, the High Court rejected arguments that legislation discriminating against interstate beer sold in South Australia in non-refillable bottles could be justified as a means of reducing litter and conserving the energy required to manufacture bottles. Although the court was obliged to “take account of the fundamental consideration that, subject to the Constitution, the legislature of a state has power to enact legislation for the well-being of the people of that state” (CLR at 472), the law was not “appropriate and adapted to the protection of the environment in South Australia from the litter problem and to the conservation of the state’s finite energy resources”, and its impact on interstate trade was “incidental and not disproportionate to the achievement of those objects”: CLR at 473–4. The discrepancy between the legislation’s treatment of non-refillable and refillable bottles was, the court concluded, greater than necessary to achieve the first objective; and the effect of bottle production on the state’s energy resources was so small that it was outweighed by the serious competitive disadvantage which the legislation imposed on the interstate supplier of beer.

[1810.25] Marketing schemes



Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

A compulsory marketing scheme, under which a state agency acquires all of a particular commodity produced in a state and then trades in that commodity, does not contravene [s 92](#) where the agency is prepared to sell that commodity to all consumers within and outside the state. Although such a scheme protects smaller producers of the commodity by guaranteeing them a minimum price, there is no discrimination against interstate trade in the commodity: “In-state and out-of-state [consumers] must buy from the [agency] if they wish to make purchases of barley produced in New South Wales. Accordingly, there is no discrimination against the out-of-state [consumer]”: *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; [96 ALR 524](#) at [535](#); 65 ALJR 49 at 56 [CB](#).

Earlier decisions, such as *Peanut Board v Rockhampton Harbour Board* (1933) 48 CLR 266; *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559; [7 ALR 433](#); 50 ALJR 121 [CB](#) and *Australian Coarse Grains Pool Pty Ltd v Barley Marketing Board* (1985) 157 CLR 605; [59 ALR 641](#) [CB](#), which indicated that such a scheme offended [s 92](#) because it burdened the right of traders to engage in interstate trade, are “open to question to the extent to which those decisions were decided by reference to an interpretation of the section that could no longer be supported”: *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; [96 ALR 524](#) at [534](#); 65 ALJR 49 at 55 [CB](#).

[1810.30] The “intercourse” limb and freedom of movement

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 92.

[Section 92](#) creates a personal right in “an Australian... to pass over this continent irrespective of any state border as a reason in itself for interference”: *R v Smithers* (1912) 16 CLR 99 at 113. Consequently, the Influx of Criminals Prevention Act 1903 (NSW) which purported to prevent persons resident in another state entering the first state within three years after completing a sentence of imprisonment was invalid.

Similarly, the Restriction of Interstate Passenger Transport Order (Cth), which prohibited unauthorised rail travel from one state to another, was held to infringe the absolute freedom of interstate intercourse guaranteed by [s 92](#), notwithstanding that the Order's purpose was “the public safety or defence of the Commonwealth or any other legislative purpose”: *Gratwick v Johnson* (1945) 70 CLR 1 at 17.

In *Palmer v Western Australia* ([2021](#)) [388 ALR 180](#); [\[2021\] HCA 5](#); [BC202101051](#) [CB](#) the High Court considered the test for infringement of the ‘intercourse’ limb of s 92. This issue arose in a challenge by Mr Palmer, as a resident of Queensland, to a Western Australian law (hence in the court's original jurisdiction under s 75(iv), as well as under s 76(i)) to certain directions made under the Emergency Management Act 2005 (WA) in the context of the COVID-19 pandemic. The impugned law empowered a minister to:

[88] ... make and periodically renew a declaration that a state of emergency exists in an “emergency area”, comprising the whole or any area or areas of Western Australia, in respect of the occurrence of a plague or epidemic of a nature that requires a significant and coordinated response ...

While such a declaration is in force, the law empowered “an authorised officer to give a general direction prohibiting movement of persons into or out of the declared emergency area for the purpose of combating the effects of the declared emergency” (per Gageler J at [88]). Such a declaration was duly made, and a direction thereafter prohibited entry of certain persons into Western Australia. The High Court unanimously rejected Mr Palmer's challenge to the validity of the impugned provisions of the Emergency Management Act in their application to the declared emergency.

The joint judgment of Kiefel CJ and Keane J held that:

[50] ... a law which is directed to discriminating against, or in fact discriminates against, interstate movement is invalid as contrary to s 92 unless it is justified by reference to a non-discriminatory purpose. It may be justified if it goes no further than is reasonably necessary to achieve a legitimate object ...

However, their Honours reinterpreted this standard so as to introduce the test of structured proportionality. Their Honours observed that the “test of reasonable necessity is not a conclusion to be stated after an impression is gained about a law’s purpose and how that purpose is sought to be achieved”, but rather “requires more than a view that there exists a need to which it is the statute’s purpose to respond and the measures taken are reasonable. The test is to be applied in a concrete way to determine whether the measures which the law permits are themselves reasonably necessary. It is obviously logically relevant to, if not demanded by, that enquiry whether there may be alternative, effective measures available to achieve the same object but which have less restrictive effects on the freedom” (at [51]). Once it is accepted that a “discriminatory law must be justified as reasonably necessary, in the sense that it is understood in proportionality analysis, there seems no reason why it should not be justified as adequate in its balance” (at [59]).

Edelman J took a substantially similar approach, holding that the intercourse limb of s 92 imposes:

[261] ... a requirement that laws concerning movement across a border — whether it be goods, persons, or communications or other intangibles — cannot discriminate by imposing an unjustified burden on trade, commerce, or intercourse in one State compared with another.

See further at [269]–[276] for a detailed explication of the three stages of the structured proportionality analysis. The application of structured proportionality in this context therefore commanded a majority of three Justices out of a reduced bench of only five hearing the case.

Gageler J held that the intercourse limb requires absolute freedom:

[92] ... from discriminatory burdens of any kind. The guarantee of the intercourse limb is of absolute freedom from laws imposing differential burdens on interstate intercourse (in comparison to intrastate intercourse) which cannot be justified as a constitutionally permissible means of pursuing constitutionally permissible non-discriminatory legislative ends ...

Further, “the guarantees of absolute freedom of trade and commerce and absolute freedom of intercourse each apply to intercourse that occurs in trade or commerce” (at [92] and [97]–[99]). His Honour rejected the application of a test of structured proportionality to the intercourse limb, favouring instead a standard of reasonable necessity as determined in *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418; [244 ALR 32](#); [\[2008\] HCA 11](#); [BC200801843](#) ^{CB} (see *Palmer* at [138]–[151]).

Gordon J similarly rejected structured proportionality. Her Honour observed that the first step in determining compliance with the intercourse limb is “to ask whether the impugned law, in its legal or practical operation, imposes a differential burden on interstate trade, commerce or intercourse in favour of intrastate trade, commerce or intercourse”; absent a differential burden there is no infringement (at [190]). Where there is a differential burden, the next step is to identify the law’s object or objects; if the law’s sole object is “to erect State borders as barriers against freedom of trade, commerce or intercourse” then without more there is an infringement of s 92 (at [191]). But where there is another legitimate object, “the question then is whether the differential burden imposed by that law is justified”; the test “is whether the differential burden imposed by the impugned law is reasonably necessary to achieve a legitimate object of that law” (at [192]). Gordon J found that a structured proportionality approach would be inappropriately rigid and would introduce, in the “balancing” stage of proportionality, a “new element that would be contrary to the foundations and current operation of s 92”, being a “value judgment” which must be avoided in the context of the “complex, multi-faceted and evolving” nature of trade, commerce and intercourse (at [198]–[199]).

In *Gerner v Victoria* [\(2020\) 385 ALR 394](#); [\[2020\] HCA 48](#); [BC202012269](#) ^{CB} the High Court unanimously rejected a contention that intrastate movement is a necessary incident of the absolute

freedom of interstate intercourse guaranteed by s 92, so as to extend the protection of s 92 to intrastate movement. The court pointed out that an implied freedom of movement of that breadth “would swallow the freedom expressly guaranteed by s 92”, rendering “otiose the delineation clearly drawn by the text of s 92 between protected interstate intercourse ... and intrastate intercourse, which it does not purport to protect” (at [28]). The court also rejected, more briefly, the arguments that the Constitution contained a freestanding implied freedom of movement (at [10]–[22]), and that movement is necessarily political communication, and hence is protected by the implied freedom of political communication (at [23]–[25]).

[1810.35] Freedom of communication

L Legislation cited in this paragraph

(CTH) [Migration Act 1958](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 92.

In *Cunliffe v Commonwealth* (1994) 182 CLR 272; [124 ALR 120](#) ^{CB}, the High Court held that a prohibition on unregistered persons providing (for reward) advice and assistance to a person seeking to enter Australia as an immigrant or a refugee (contained in the Migration Act 1958) did not offend the guarantee of absolute freedom of intercourse between the States. Although communication across State borders constitutes “intercourse between the States” with [s 92](#), the Migration Act’s prohibition did no more than impose a burden or restriction on that communication to the extent reasonably necessary for the regulation of a distinct subject matter: see ALR at 139 per Mason CJ; ALR at 159 per Brennan J; ALR at 169 per Deane J; ALR at 185 per Dawson J; ALR at 199 per Toohey J; ALR at 205 per Gaudron J; ALR at 208–9 per McHugh J.

**(CTH) CONSTITUTION [1815] s 93 Payment to States for five years after
uniform tariffs**

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Constitution current to: Act 84 of 1977

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[1815] 93 Payment to States for five years after uniform tariffs

During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides —

- (i) The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:
- (ii) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

End of Document

(CTH) CONSTITUTION [1820] s 94 Distribution of surplus

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[1820] 94 Distribution of surplus

After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth.

Section 94 Generally

[1820.5]

Moneys appropriated by the Commonwealth Parliament to a trust fund for expenditure in later years amount to expenditure within the Constitution and prevents those moneys being regarded as “surplus revenue” to be distributed to the states: *New South Wales v Commonwealth* (1908) 7 CLR 179 .

End of Document

(CTH) CONSTITUTION [1825] s 95 Customs duties of Western Australia

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[1825] 95 Customs duties of Western Australia

Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

End of Document

(CTH) CONSTITUTION [1830] s 96 Financial assistance to States

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[1830] 96 Financial assistance to States

During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Section 96 Generally

[1830.5] Not transitional

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 96.

Despite the introductory words of [s 96](#), “it seems to have been taken for granted that the scope and purpose of the power conferred by [s 96](#) was to be ascertained on the footing that it was not transitional but stood with the permanent provisions of the Constitution”: *Victoria v Commonwealth* (1957) 99 CLR 575 at 605 (the *Second Uniform Tax case*).

[1830.10] Not coercive

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 96.

“[I]n [s 96](#), there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition”: *Victoria v Commonwealth* (1957) 99 CLR 575 at 605 (the *Second Uniform Tax case*).

[1830.15] An unrestricted power

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 96.

“[T]he course of judicial decision has put any ... limited interpretation of [s 96](#) out of consideration”: *Victoria v Commonwealth* (1957) 99 CLR 575 at 609 (the *Second Uniform Tax* case).

“[T]he power conferred by [\[s 96\]](#) is well exercised although (1) the state is bound to apply the money specifically to an object that has been defined, (2) the object is outside the powers of the Commonwealth, (3) the payments are left to the discretion of the Commonwealth minister, (4) the money is provided as the Commonwealth's contribution to an object for which the state is also to contribute to funds”: *Second Uniform Tax* case, above at 606. Moreover, “[s 96](#) is satisfied if the money is placed in the hands of the state notwithstanding that in the exercise of the power to impose terms and conditions the state is required to pay over the money to a class of persons in or connected with the state in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly”: at 607.

[1830.20] Uniform income taxation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 96.

A grant of financial assistance to the states on condition that each recipient state refrain from levying its own form of income taxation is supported by [s 96](#). “The Commonwealth may properly induce a state to exercise its powers (for example, the power to make roads) by offering a money grant. So also the Commonwealth may properly induce a state by the same means to abstain from exercising its powers”: *South Australia v Commonwealth* (1942) 65 CLR 373 at 417 (the *First Uniform Tax* case). Such a grant “does not compel the states to abandon their legislative power to impose a tax upon incomes”: *First Uniform Tax* case, above at 418. Nor could the validity of such a grant be impeached on the ground that “it does in fact weaken or destroy, and even is intended to weaken or destroy, some state activity”: at 424.

[1830.25] Specific purpose grants

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi), s 96.

By using [s 96](#), the Commonwealth can undertake public expenditure programs in areas which the Commonwealth Constitution appears to regard as State responsibilities. It can, for example, fund the construction of roads nominated by the Commonwealth (*Victoria v Commonwealth* (1926) 38 CLR 399 [CB](#)) (the *Federal Roads* case)) and it can fund the operation of private schools selected by the Commonwealth: *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559; [33 ALR 321](#) [CB](#). In the latter case, Wilson J explained (CLR at 659–60) why a Commonwealth grant to the states, on condition that the states pass on the money to designated private schools, satisfied the requirements of [s 96](#) for a valid law: “It is a non-coercive law which in terms grants money to each of the states ‘by way of financial assistance to the state’. The freedom of each state to decide whether to accept or reject the grant, however restricted it may be in a political sense, is legally fundamental to the validity of the scheme, and its existence as a matter of law cannot be denied. The conditions attaching to the grant are those to be determined by the Commonwealth, but this has always been so. It is not necessary that the grant should benefit the state treasury directly, or that the purpose of the grant should be within the express legislative power of the Commonwealth, or that the state should be the instigator or even a party to the initiation of the scheme”.

In *Spencer v Commonwealth* [\[2008\] FCA 1256](#); [BC200808384](#), at [\[120\]–\[122\]](#) [CB](#), Emmett J (in an

analysis with which Spigelman CJ, for the NSW Court of Appeal, agreed in *Arnold v Minister Administering the Water Management Act 2000* (2008) 163 LGERA 429; [253 ALR 173](#); [\[2008\] NSWCA 338](#); [BC200810818](#) ^{CB}) said:

Accordingly, it may be arguable that an agreement between the Commonwealth and a State will be invalid if, as a condition of accepting a grant of financial assistance, the State agrees to acquire property otherwise than on just terms. Thus, an agreement between the Commonwealth and a State whereby the Commonwealth agrees to offer a money grant by way of financial assistance under [s 96](#) in order to induce a State to exercise its powers to resume land on terms that are not just is arguably invalid.

If a Commonwealth law authorises the making of grants under [s 96](#) on the condition that there is an agreement with a State as to the terms of that financial assistance, the Commonwealth law would ordinarily be interpreted to require a valid agreement. If a Commonwealth law is silent as to whether the agreement may provide for the acquisition of property otherwise than on just terms, the Commonwealth law should be interpreted to authorise only the making of agreements that impose conditions on the granting of financial assistance that would not be constitutionally invalid under [s 51\(xxxi\)](#) if they were imposed directly as a condition of a grant by a Commonwealth law made under [s 96](#) (see *Evans v State of New South Wales* [\[2008\] FCAFC 130](#) ^{CB}).

Thus, a purported agreement imposing a requirement on a State that it acquire property on unjust terms as a condition of the Commonwealth's providing financial assistance would be *ultra vires* the power to enter into agreements under such a Commonwealth law. For that reason, the issue of the Constitutional validity of such an agreement need not arise *directly* in such a case. Such a Commonwealth law would not be invalid by reason of [s 51\(xxxi\)](#), because it would not authorise the making of unconstitutional agreements. If a Commonwealth law did expressly, or by necessary implication, authorise the making of unconstitutional agreements, that law would be invalid. However, none of that will lead to the law of a State being invalid, unless the operation of that State law is dependant upon the existence of a valid agreement with the Commonwealth (see *Magennis's case*).

[1830.30] Intergovernmental agreements concerning acquisition of property

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxxi), s 61, s 96.

[Section 51\(xxxi\)](#) of the Constitution constrains grants made pursuant to [s 96](#) of the Constitution, such that the Commonwealth cannot validly impose a term or condition on a grant of funds that requires a state to acquire property on other than just terms. The constraints imposed by constitutional prohibitions or guarantees on grants under [s 96](#) are directed to the range of permissible terms and conditions rather than their underlying purpose: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[46\]](#) and [\[174\]](#) ^{CB}.

A grant under [s 96](#) of the Constitution is not vitiated merely because it is shown to be made for the purpose of inducing the state to exercise its powers of acquisition on less than just terms: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#) at [\[36\]](#) ^{CB}; *Pye v Renshaw* (1951) 84 CLR 58; [1951] ALR 880; (1951) 25 ALJR 519; [BC5100230](#) ^{CB}.

Nor is the validity of a state law affected by the existence of any subjective intention by the state or Commonwealth parliaments to evade [s 51\(xxxi\)](#): *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [\[2009\] HCA 51](#); [BC200911041](#), [\[36\]](#) ^{CB}. See also *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382 at 399; [1950] ALR 33; [BC4900620](#) ^{CB}; *Deputy Commissioner of Taxation v WR Moran Pty Ltd* (1939) 61 CLR 735 at 774; [1939] ALR 357; (1939) 13 ALJR 205; [BC3900014](#) ^{CB}.

A Commonwealth law that imposes a term or condition *requiring* a state to acquire property on other than just terms is impermissible because, if such a condition is imposed by, or can be imposed pursuant to, the Commonwealth law, then that Commonwealth law is properly characterised as a law with respect to the acquisition of property, and will therefore be invalid because of the absence of the provision of just terms: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; [BC200911041](#), [33]–[46] ^{CB} (French CJ, Gummow and Crennan JJ). See also *Attorney-General (Vic); Ex rel Black v Commonwealth of Australia (DOGS case)* (1981) 146 CLR 559; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#) ^{CB}.

The Commonwealth Executive cannot validly make an intergovernmental agreement that can be characterised as an agreement with respect to the acquisition of property on other than just terms, because “[as] [s 96](#) was relevantly qualified by [s 51\(xxxi\)](#), an agreement to facilitate such a grant which could not be authorised by [s 96](#) would not be supported by [s 61](#). In this way, limitations upon legislative power may indicate whether the ends of an agreement are consistent with the Constitution”: *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; [BC200911041](#), [29] ^{CB}, (French CJ, Gummow and Crennan JJ); see also [174] (Heydon J).

A term or condition on a grant of funds to a state pursuant to [s 96](#) of the Constitution may be imposed in a variety of different forms, not all of which may constitute “requirements” for the purpose of the above principle. A term or condition may be imposed by:

- an express legislative provision (in which case, if the legislation so provides, the condition may be directly enforceable, in that the legislation may provide that the grant is repayable by the state if it fails to comply with the term or condition) — see *Victoria v The Commonwealth (Second Uniform Tax case)* (1957) 99 CLR 575, 605; [1957] ALR 761; [BC5700970](#) ^{CB}. See also *South Australia v The Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373; [1942] ALR 186; [BC4200026](#) ^{CB}; *Deputy Commissioner of Taxation v WR Moran Pty Ltd* (1939) 61 CLR 735, 738; [1939] ALR 357; [BC3900014](#) ^{CB}; *Attorney-General (Vic); Ex rel Black v Commonwealth of Australia (DOGS case)* (1981) 146 CLR 559, 640; [33 ALR 321](#); [BC8100050](#) ^{CB};
- an intergovernmental agreement that is attached to, or otherwise approved or given effect to, by legislation (as was the case in *Magennis*);
- a Commonwealth Minister or official acting pursuant to a statutory power to impose terms or conditions on a grant, or to enter into agreements concerning the imposition of terms and conditions on a grant — See *Victoria v Commonwealth (Roads Case)* (1926) 38 CLR 399 ^{CB}; and
- a formal intergovernmental agreement not supported by legislation.

The extent to which a term or condition may be imposed by an informal intergovernmental agreement (as may have occurred in *Pye v Renshaw* (1951) 84 CLR 58; [1951] ALR 880; [BC5100230](#) ^{CB}) remains open (see *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; 261 ALR 6; [2009] HCA 51; [BC200911041](#) at [38] ^{CB}), that possibility being the basis for the conclusion in *Spencer* that the Federal Court erred in summarily dismissing the application, with the result that the matter should be remitted the matter for trial: see *Spencer v Commonwealth* (2010) 241 CLR 118; [269 ALR 233](#); [2010] HCA 28; [BC201006309](#) at [4] ^{CB}, [29]–[30], [32] and [40].

[1830.35] Discrimination and preference

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 96.

[Section 96](#) may be used to adjust the burden of taxation laws between the various states, or to give a financial advantage to one state over the other states: “[Section 96](#) is a means provided by the Constitution which enables the Commonwealth Parliament, when it thinks proper, to adjust inequalities between states which may arise from the application of uniform non-discriminating federal laws to states which vary in development and wealth”: *Deputy Commissioner of Taxation v W R Moran Pty Ltd* (1939) 61 CLR 735 at 763–4; “There never has been and there cannot be uniformity in payments made by the Commonwealth in or to states or persons in states”: the *First Uniform Tax* case 65 CLR at 429.

[1830.40] Other constitutional constraints

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 116, s 96.

Laws made under [s 96](#) are subject to the restrictions imposed by [s 116](#) of the Constitution: “[A]n Act which granted money to a state on condition that the state would prohibit entirely the exercise of a particular religion would, in my opinion, be a law for prohibiting the free exercise of that religion, and would be invalid”: *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559 at 592–3; [33 ALR 321](#).

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(CTH) CONSTITUTION [1835] s 97 Audit

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[1835] 97 Audit

Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Section 97 Generally

[1835.5]

L Legislation cited in this paragraph

(CTH) [Audit Act 1901](#).

The Parliament has otherwise provided: see the Audit Act 1901 (Cth).

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(CTH) CONSTITUTION [1840] s 98 Trade and commerce includes navigation and State railways

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[1840] 98 Trade and commerce includes navigation and State railways

The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

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(CTH) CONSTITUTION [1845] s 99 Commonwealth not to give preference

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[1845] 99 Commonwealth not to give preference

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Section 99 Generally

[1845.5] Related provision

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii).

See [s 51\(ii\)](#), which prohibits discrimination between states or parts of states in any Commonwealth law with respect to taxation.

[1845.10] Laws “... of trade, commerce, or revenue”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(i), s 51(vi), s 98, s 99.

Commonwealth Government orders, made under the authority of the Commonwealth's defence power, [s 51\(vi\)](#), are not controlled by [s 99](#): *Morgan v Commonwealth* (1947) 74 CLR 421 [CB](#). “The terms of [s 99](#) show a connection with the legislative power with respect to trade and commerce”; and “should be read as applying only to laws which can be made under the power conferred upon the Commonwealth Parliament by [s 51\(i\)](#)”: 74 CLR at 454 and 455.

[Section 99](#) does not require Commonwealth laws made under the corporations power and the external affairs power to be limited, in their operation, to one state. The section is confined “to laws made, or capable of being made, under [ss 51\(i\)](#) and [s 98](#)”: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 154–5; [46 ALR 625](#).

[1845.15] Preference

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 99.

A law will give preference contrary to [s 99](#) when the law provides a different rule for different parts of Australia: “Where the rule laid down is general, applicable to all states alike, but is found to operate unequally in the several states not from anything done by the Commonwealth Parliament but from the inequality of the conditions existing in, or the law imposed by, the states themselves, the Commonwealth has not been guilty of ... preference between states”: *James v Commonwealth* (1928) 41 CLR 442 at 462. Preference involves the giving of a “tangible commercial advantage ... a trading or commercial preference which is definitely given to one state or part thereof over another state or part thereof”: *Elliott v Commonwealth* (1936) 54 CLR 657 at 669.

[1845.20] “to one state ... over another state”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 99.

“[T]he *discrimen* which [s 99](#) forbids the Commonwealth to select is not merely locality as such, but localities which for the purpose of applying the *discrimen* are taken as states or parts of states”: *Elliott v Commonwealth* (1936) 54 CLR 657 at 675. But see *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246 at 265–6.

(CTH) CONSTITUTION [1850] s 100 Not abridge right to use water

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[1850] 100 Not abridge right to use water

The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Section 100 Generally

[1850.10] By any law or regulation of trade or commerce

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) ss 51(i), ss 98 to 102.

In *Morgan v Commonwealth* (1947) 74 CLR 421 at 455; [1947] ALR 161; (1947) 21 ALJR 25; [BC4700210](#) ^{CB}, the Court decided that, by reason of the words “any law or regulation of trade or commerce” (contained in each of [ss 98 to 102](#) of the Constitution) the restraint on Commonwealth legislative power should be understood as applying only to laws which can be made under the power conferred by [ss 51\(i\)](#) (such as the trade and commerce power).

Mason, Murphy and Brennan JJ accepted the authority of *Morgan* in *Commonwealth v Tasmania* (1983) 158 CLR 1 at 153–154, 182, 248–249; [46 ALR 625](#); 57 ALJR 450; [BC8300075](#) ^{CB}. Deane J (at 251) suggested that there may be occasion for the High Court to reconsider the clear statement in *Morgan*, but he found that issue unnecessary to decide, because the legislation under consideration did not answer the description of a “law or regulation of trade or commerce”. See also *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, at 426; [211 ALR 18](#); [\[2004\] HCA 53](#); [BC200407491](#), at [\[96\]](#) ^{CB}.

Morgan was followed by the NSW Court of Appeal in *Arnold v Minister Administering the Water Management Act* (2008) 163 LGERA 429; [253 ALR 173](#); [\[2008\] NSWCA 338](#); [BC200810818](#), at [\[89\]–\[93\]](#) ^{CB}. In the High Court, it was not necessary for the Court to rule on an application to re-open that decision as the case was decided on other grounds: *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; [263 ALR 193](#); [\[2010\] HCA 3](#); [BC201000370](#) at [\[23\]](#), [\[53\]](#), [\[76\]](#) ^{CB}. See also *Campisi v Commonwealth* [\[2010\] FCA 379](#); [BC201002459](#) ^{CB}.

In *Arnold*, the High Court did observe that “it is difficult to see how an agreement made between the executive governments of the Commonwealth and the States could, of itself, constitute a “law or regulation of trade or commerce”: *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; [263 ALR 193](#); [\[2010\] HCA 3](#); [BC201000370](#) at [\[24\]](#) ^{CB}.

[1850.15] Waters of rivers

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 100.

The drafting history and purpose of [s 100](#) reveal that the phrase “waters of rivers” in [s 100](#) of the Constitution does not extend to groundwater that percolates through the soil, or to underground water in aquifers. A river is a stream flowing in a defined channel: *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; [263 ALR 193](#); [\[2010\] HCA 3](#); [BC201000370](#) at [\[26\]](#) ^{CB}, [\[56\]](#)–[\[58\]](#), [\[75\]](#).

[1850.20] Right of the residents

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 100.

“There is ... an interesting question whether the term “right of ... the residents” in [s 100](#) is used in a collective sense rather than as a reference to individual rights”: *Arnold v Minister Administering the Water Management Act 2000* (2010) 240 CLR 242; [263 ALR 193](#); [\[2010\] HCA 3](#); [BC201000370](#) at [\[24\]](#) ^{CB} (French CJ) and [\[53\]](#) (Gummow and Crennan JJ), referring to the discussion in *Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290 at 334–335 as raising a question whether [s 100](#) can be invoked by a corporation. In the same paragraph, Gummow and Crennan JJ also noted a question whether “as between riparian States and their residents [s 100](#) guarantees access to the use of the waters for the purposes mentioned, or does no more than impose a restriction upon the exercise of the power of the Commonwealth”, being a point left open by Mason J in *Commonwealth v Tasmania* (1983) 158 CLR 1; [46 ALR 625](#); [BC8300075](#) ^{CB}.

(CTH) CONSTITUTION [1855] s 101 Inter-State Commission

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[1855] 101 Inter-State Commission

There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

SECTION 101 GENERALLY

[1855.5] Powers of adjudication

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 101.

Notwithstanding the terms of [s 101](#), the Interstate Commission cannot be empowered to exercise functions which are part of the judicial power of the Commonwealth: *New South Wales v Commonwealth* (1915) 20 CLR 54 [CB](#) (the *Wheat* case). Accordingly, Pt V of the Interstate Commission Act 1912 (Cth), giving the Interstate Commission power to enforce its orders through injunctions, violated “the fundamental principle of the separation of powers as marked out in the Australian Constitution”: *Wheat*, above at 88. Any powers of adjudication given by the Parliament to the Interstate Commission must be confined to adjudication incidental to the Commission's executive and administrative functions: *Wheat*, above at 64.

End of Document

(CTH) CONSTITUTION [1860] s 102 Parliament may forbid preferences by State

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[1860] 102 Parliament may forbid preferences by State

The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

End of Document

(CTH) CONSTITUTION [1865] s 103 Commissioners' appointment, tenure and remuneration

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[1865] 103 Commissioners' appointment, tenure and remuneration

The members of the Inter-State Commission —

- (i) Shall be appointed by the Governor-General in Council:
- (ii) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:
- (iii) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

End of Document

(CTH) CONSTITUTION [1870] s 104 Saving of certain rates

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[1870] 104 Saving of certain rates

Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

End of Document

(CTH) CONSTITUTION [1875] s 105 Taking over public debts of States

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[1875] 105 Taking over public debts of States

The Parliament may take over from the States their public debts or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

[s 105 altered, Act No 3, 1910 s 2]

End of Document

(CTH) CONSTITUTION [1880] s 105A Agreements with respect to State debts

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[1880] 105A Agreements with respect to State debts

- (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including —
- (a) the taking over of such debts by the Commonwealth;
 - (b) the management of such debts;
 - (c) the payment of interest and the provision and management of sinking funds in respect of such debts;
 - (d) the consolidation, renewal, conversion, and redemption of such debts;
 - (e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and
 - (f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.
- (2) The Parliament may make laws for validating any such agreement made before the commencement of this section.
- (3) The Parliament may make laws for the carrying out by the parties thereto of any such agreement.
- (4) Any such agreement may be varied or rescinded by the parties thereto.
- (5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.
- (6) The powers conferred by this section shall not be construed as being limited in any way by the provisions of section one hundred and five of this Constitution.
-

SECTION 105A GENERALLY

[1880.5] Financial agreement

L Legislation cited in this paragraph

(CTH) [Financial Agreement Act 1928](#).

(CTH) [Financial Agreement Validation Act 1929](#).

(CTH) [Financial Agreement Act 1944](#).

The Commonwealth and the states entered into a financial agreement in 1927, which was given legislative approval by the Commonwealth Parliament in the Financial Agreement Act 1928 (Cth) and the Financial Agreement Validation Act 1929 (Cth). It was amended in 1931, 1934 and 1944. A consolidated version of the agreement appears in the Financial Agreement Act 1944 (Cth).

[1880.10] Expiry of financial agreement

For the argument that the financial agreement expired on 30 June 1985 or (in the case of New South Wales) 1 July 1986, see C Saunders, "The Expiry of the Financial Agreement", *Papers on Federalism*, Intergovernmental Relations in Victoria Program, Law School, University of Melbourne.

[1880.15] Content of the financial agreement

L Legislation cited in this paragraph

(CTH) [Financial Agreement Act 1944](#) Pt III.

The agreement established an Australian Loan Council, with one representative of the Commonwealth and each state. The Commonwealth chairs the Council and, on every question for decision, has two votes and a casting vote, while each state has only one vote. The Commonwealth and each state are obliged, while Pt III of the agreement remains in force, to submit their borrowing programs to the Loan Council which may reduce the total amount of borrowings and allocate that amount between the Commonwealth and states. While Pt III of the agreement remains in force, neither the Commonwealth nor the states may borrow money except under the agreement, and the Commonwealth undertakes all borrowing under the agreement. However, each state is authorised, while Pt III remains in force, to borrow moneys within that state; and the Commonwealth is authorised, during the same period, to borrow moneys within the Commonwealth. Borrowings by the Commonwealth and the states "for temporary purposes" are exempted from the agreement, as are Commonwealth borrowings "for defence purposes approved by the Parliament of the Commonwealth".

[1880.20] Legal constraints of financial agreement

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 105A(5).

The financial agreement is "part of the organic law of the Commonwealth. It can only be varied or rescinded by the parties thereto. Nothing in the Constitution or the constitutions of the states can affect it or prevent its operation. It creates rights and duties as between the Commonwealth and the states upon and in respect of which the judicial power of the Commonwealth can be exerted": *New South Wales v Commonwealth (No 1)* (1932) 46 CLR 155 at 186.

“[T]he whole of the rights of the Commonwealth and of the states to borrow are included in the agreement and that no such rights exist outside the agreement”: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 279–80.

More recently, Stephen J (with whom Aickin J agreed) said that [s 105A\(5\)](#) did not render a breach of the agreement unlawful. Its purpose and effect were “to place beyond the reach both of statutes and of constitutional principles and provisions the obligatory force of such agreements”, so that it was the law of contract which gave the financial agreement its binding force, which was then protected by [s 105A\(5\)](#) “from the effects both of statute and of constitution. The failure to perform an obligation under [the agreement] results in breach of contract but not in ‘unlawfulness under’ [s 105A\(5\)](#) ”: *Sankey v Whitlam* (1978) 142 CLR 1 at 74 and 75; [21 ALR 505](#); 53 ALJR 11.

End of Document

(CTH) CONSTITUTION [2505] s 106 Saving of Constitutions

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CHAPTER V THE STATES [ss 106–120]

[2505] 106 Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

SECTION 106 GENERALLY

[2505.5] State Constitutions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 106.

(VIC) [Imperial Acts Application Act 1980](#) s 8.

According to Isaacs and Rich JJ, the composition and function of the Supreme Court of Queensland, “though not contained in the document labelled ‘Constitution’, are in a legal sense as much part of the Constitution of the state as the Acts relating to the state parliament”: *McCawley v R* (1918) 26 CLR 9 at 52. For a narrower view, see Barton J at 31. This question is discussed by C D Gilbert, “Federal Constitutional Guarantees of the states: [Section 106](#) and Appeals to the Privy Council from state supreme courts” (1978) 9 *Federal Law Review* 348 at 350–7; and J A Thomson, “State Constitutional Law: gathering the fragments” (1985) 15 *University of Western Australia Law Review* 90 at 93.

The Bill of Rights 1688 is one of the “transcribed elements” set out in s 8 of the Imperial Acts Application Act 1980 (Vic), but the preferable view is that that provision at best serves to re-inforce settled constitutional principles. The absence of an executive power of dispensation from statute law is an aspect of the rule of law, and is absent from the Constitutions of the States identified in [s 106](#) of the Constitution: *Port of Portland Pty Ltd v Victoria* (2010) 177 LGERA 415; [272 ALR 449](#); [\[2010\] HCA 44](#); [BC201009266](#) at [\[13\]](#) [CB](#).

[2505.10] Procedural constraints

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) [Section] 106.

“[\[Section\] 106](#) of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed”: *Western Australia v Wilsmore* [1981] WAR 179; [\(1981\) 33 ALR 13](#) at [18](#) [CB](#).

[2505.15] Commonwealth legislation and the states

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ii), s 51(xxxv).

“The Commonwealth Constitution as it exists for the time being, dealing expressly with sovereign functions of the Crown in its relation to Commonwealth and to states, necessarily so far binds the Crown, and laws validly made by authority of the Constitution, bind, so far as they purport to do so, the people of every state considered as individuals or as political organisms called states — in other words, bind both Crown and subjects”: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 153.

“[T]he power of the Parliament with respect to taxation is not in any wise excepted from the basic principle that a valid law made by the Parliament may bind the Crown in right of a state according to its terms”: *Victoria v Commonwealth* (1971) 122 CLR 353 at 383 (the *Payroll Tax* case).

The Commonwealth Parliament may, pursuant to its power with respect to taxation under [s 51\(iii\)](#), tax state governments in respect of the “fringe benefits” which those governments pay to state ministers, members of Parliament and judges: *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329; [73 ALR 161](#) [CB](#).

The Commonwealth Parliament may, pursuant to its power with respect to industrial conciliation and arbitration under [s 51\(xxxv\)](#), authorise a federal arbitrator to settle an industrial dispute between a state and its employees, if that dispute extends beyond the limits of one state: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 [CB](#); *Re Lee; Ex parte Harper* (1986) 160 CLR 430; [65 ALR 577](#) [CB](#). The arbitrator can be given authority to determine minimum conditions of employment (wages and hours of employment, for example) for the bulk of State government employees. However, the Parliament cannot authorise a federal arbitrator to determine the number and qualifications of State government employees, nor the terms and processes for making those employees redundant. And the employment by a State of employees at “higher levels” of government (department heads, parliamentary officers and ministerial staff, for example) is immune from the legislative power of the Commonwealth: *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 [CB](#).

[2505.20] Commonwealth legislation and state prerogatives

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xvii).

The Commonwealth's legislative power over bankruptcy and insolvency, [s 51\(xvii\)](#), is adequate to support Commonwealth legislation affecting state governments' rights as creditors which, in large

part, depend on the royal prerogative: *Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd* (1943) 63 CLR 278 at 312–14; *South Australia v Commonwealth* (1942) 65 CLR 373 ^{CB} (the *First Uniform Tax* case); *Victoria v Commonwealth* (1957) 99 CLR 575 ^{CB} (the *Second Uniform Tax* case).

Similarly, no constitutional immunity attaches to the state prerogative function of issuing Letters Patent to a Royal Commissioner (*Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25 at 79–80, 93, 105, 119; [41 ALR 71](#)); nor to the state prerogative function of managing Crown lands: *Commonwealth v Tasmania* (1983) 158 CLR 1 at 140–1; [46 ALR 625](#) and 214–15.

[2505.25] Discrimination against state governments

L Legislation cited in this paragraph

(CTH) [Native Title Act 1993](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(xxix), Section 51(xxvi).

There is an implication that protects the states from certain Commonwealth laws. For some time it was thought that this implication had two elements, being (1) a prohibition against discrimination which involves the placing on the states of special burdens or disabilities; and (2) a prohibition against laws of general application which operate to destroy or curtail the continued existence of the states or their capacity to function as governments: see *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 206–7, 217, 222, 247–8, 260–2; [61 ALR 1](#) at [11–12](#), [19](#), [23](#), [30–1](#), [52–4](#); 59 ALJR 699; [BC8501108](#) ^{CB}; *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 500, 541–2; [138 ALR 129](#) at [157–8](#), [189–90](#); 70 ALJR 680; [BC9603985](#) ^{CB} per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ; *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 240; 128 ALR 609 at 636; 69 ALJR 451.

In *Austin v Commonwealth* (2003) 215 CLR 185; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) ^{CB}, Gaudron, Gummow and Hayne JJ (with whom Kirby J agreed at [281]) emphasised that discriminatory treatment, without more, would not attract the *Melbourne Corporation* doctrine. It was not enough that “the like was treated as the unlike and thereby the states were burdened in a ‘special way’”. Instead, their Honours said (at [124]):

There is, in our view, but one limitation, though the apparent expression of it varies with the form of the legislation under consideration. The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as “special burden” and “curtailment” of “capacity” of the states “to function as governments”. These criteria are to be applied by consideration not only of the form but also “the substance and actual operation” of the federal law.

While there is only one limitation, discrimination remains relevant to the operation of that limitation. Thus, the Commonwealth Parliament may not single out the states for special burdens or disabilities not imposed on the rest of the community. For this reason, s 48 of the Banking Act 1945 (Cth), which prohibited the private banks from conducting banking business for a state government or instrumentality, was held to be invalid in *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ^{CB}. “[T]o my mind, the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a state in the exercise of its executive authority”: at 83.

Applying the approach in *Austin*, above, in *Clarke v Cmr of Taxation* (2009) 240 CLR 272; [258 ALR](#)

[623](#); [\[2009\] HCA 33](#); [BC200908000](#) at [\[33\]–\[36\]](#), [\[69\]](#), [\[101\]](#) ^{CB}, the High Court unanimously held that Commonwealth legislation that purported to authorise the imposition of a superannuation contribution surcharge with respect to the superannuation entitlements of State parliamentarians was invalid because it involved a significant burden on or impairment of the capacity of the States to fix the amount and terms of remuneration of parliamentarians, which is a critical aspect of the capacity of the State to conduct the parliamentary form of government.

Similarly, the Conciliation and Arbitration (Electricity Industry) Act 1985 (Cth), which prescribed a special procedure before the Commonwealth Conciliation and Arbitration Commission for the settlement of an identified industrial dispute between the Electrical Trades Union of Australia and several Queensland government authorities, was held to be invalid in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; [61 ALR 1](#) ^{CB}.

The Native Title Act 1993 (Cth) does not offend against the States' immunity from discriminatory legislation: *Western Australia v Commonwealth* (1995) 183 CLR 373; [128 ALR 1](#) ^{CB}. [Section 51\(xxvi\)](#) of the Constitution will support a law protecting native title from impairment. To exercise that power it is necessary to control the exercise by other repositories of the power to extinguish or impair native title. As extinguishment or impairment can be effected at common law only by or pursuant to a law enacted by a competent legislature, the power conferred by [Section 51\(xxvi\)](#) must extend to the support of a law which excludes, wholly or in part, State or Territory laws from operating to affect native title. The power cannot be limited by an implication which exempts the States from the application of such a law without denying what is at the heart of [Section 51\(xxvi\)](#) so far as it may be exercised for the benefit of the indigenous races of Australia. The Native Title Act, being supported by that provision, cannot be held to discriminate impermissibly in its application to the State of Western Australia or in its application to the States and Territories as a whole.

On the other hand, some of the Commonwealth's legislative powers authorise discrimination against a state or states. In *Richardson v Forestry Commission* (1988) 164 CLR 261; [77 ALR 237](#) ^{CB} the High Court concluded that legislation passed under [s 51\(xxix\)](#), to implement Australia's international obligation to protect properties of world heritage status, could single out the property of the State of Tasmania. The obligation, Mason CJ and Brennan J said, "necessarily falls to be discharged with respect to particular properties"; and to protect those properties did "not invalidly discriminate against the state in whose territory the property is situated": 164 CLR at 294.

[2505.30] Preserving the states' independence

L Legislation cited in this paragraph

(CTH) [Native Title Act 1993](#).

The Commonwealth cannot apply its legislation to the states where that legislation threatens the continued existence or independence of the states or a state: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 66, 75; *Victoria v Commonwealth* (1971) 122 CLR 353 at 424; *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 206, 217, 226, 231, 247; [61 ALR 1](#) and 260. In *Austin v Commonwealth* (2003) 215 CLR 185; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) ^{CB}, the High Court (Kirby J dissenting) held two Commonwealth superannuation Acts that constructed a scheme by which state judges were taxed as if they had made contributions to superannuation schemes. As a matter of law, the Acts treated state judges differently from other high income earners and federal judges, although that was done in an attempt to achieve economic equivalence. The legal discrimination against state judges was held to be impermissible, because it interfered with arrangements made by states for the remuneration of their judges, thereby affecting recruitment and retention of judges to perform an essential function of the state.

The Commonwealth Parliament cannot legislate so as to prohibit political advertising in the context of state elections, because such legislation burdens the functioning of the states, or seeks to control the states and their people in the exercise of their constitutional functions: *Australian Capital Television Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106; [108 ALR 577](#) at [613–14](#) ^{CB} per Brennan J and 675–7 per McHugh J.

The Commonwealth Parliament cannot authorise a federal arbitrator to determine the number and qualifications of State government employees, the terms and processes for making those employees redundant, nor the conditions on which the State employs employees at “higher levels” of government (department heads, parliamentary officers and ministerial staff, for example) because those are “aspects of a State's functions which are critical to [the State's] capacity to function as a government”: *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; 128 ALR 609; 69 ALJR 451; 58 IR 431 ^{CB} at 26 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

However, the Native Title Act 1993 (Cth), which prevented the operation of several State laws that would otherwise have extinguished native title and compelled the States to pay fair compensation for other extinguishments of native title, is not an invalid encroachment on the existence and nature of the States. While the Act may diminish the breadth of discretions available to a State government, it did not affect the machinery of State government nor did it deprive the States of the resources which the States required to exercise their powers: *Western Australia v Commonwealth* (1995) 183 CLR 373; [128 ALR 1](#) at [59–60](#) ^{CB} per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

In *Austin v Commonwealth* (2003) 215 CLR 185 at 269; [195 ALR 321](#); [\[2003\] HCA 3](#); [BC200300114](#) ^{CB}, the Court left open whether it was critical to the constitutional integrity of the States that they alone have the capacity to give directions to their officials and to determine what duties they perform.

In *O'Donoghue v Ireland* (2008) 234 CLR 599; [244 ALR 404](#), at [\[56\]–\[57\]](#); [\[2008\] HCA 14](#); [BC200802740](#) ^{CB}, the High Court left open whether the *Melbourne Corporation* doctrine should be developed to produce the result that the Commonwealth Parliament lacks power, without State legislative approval, to impose upon the holder of a State statutory office a duty, rather than merely a power of an administrative nature. The argument in favour of a such a development was based, in part, on United States authorities including *Printz v United States* (1997) 521 US 898, at 932; 138 L Ed 2d 914. Kirby J, dissenting, held that the Commonwealth cannot unilaterally impose administrative functions on State magistrates.

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(CTH) CONSTITUTION [2510] s 107 Saving of power of State Parliaments

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[2510] 107 Saving of power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

[2510.5] State legislation and the Commonwealth

The Commonwealth enjoys a degree of immunity from state legislation. The immunity derives from implications based on the system of government established by the Constitution: *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 at 22 per Dixon J; *Re Foreman & Sons Pty Ltd; Uther v FCT* (1947) 74 CLR 508 at 528 per Dixon J; *Commonwealth v Bogle* (1953) 89 CLR 229 at 259 per Fullagar J; *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378; [1963] ALR 304 [CB](#) per Dixon CJ.

Consequently, state legislation, deferring the rights of the Commonwealth as a creditor, is invalid: *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372; [1963] ALR 304 [CB](#); similarly, it would appear that state rent control legislation cannot apply to the Commonwealth as lessor: *Commonwealth v Bogle* (1953) 89 CLR 229 [CB](#); and state legislation cannot restrict the power of the Commonwealth Trade Practices Commission to initiate proceedings against an insolvent company: *Trade Practices Commission v Manfal Pty Ltd* (1990) 97 ALR 231 at 240 per Wilcox J and 258 per French J.

The Commonwealth Parliament can legislate so as to authorise a person to undertake some activity despite a state law prohibiting, restricting, qualifying or regulating that activity: *Botany Municipal Council v Federal Airports Corp* (1992) 175 CLR 453; [109 ALR 321](#) at [327](#) [CB](#) per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

[2510.10] Exceptions

L Legislation cited in this paragraph

(CTH) [Judiciary Act 1903](#) [5725].

However, the Commonwealth may be bound by state laws which attach legal consequences to a transaction entered into by the Commonwealth: *Federal Cmr of Taxation v Official Liquidator of E O Farley Ltd* (1943) 63 CLR 278 at 308 per Dixon J; *Uther v FCT* (1947) 74 CLR 509 at 528 per Dixon J; *Commonwealth v Bogle* (1953) 89 CLR 229 at 260 per Fullagar J; *Commonwealth v Cigamic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378; [1963] ALR 304 ^{CB} per Dixon CJ.

Section 64 of the Judiciary Act 1903 (Cth) declares that, whenever the Commonwealth is a party to a suit, its rights and liabilities are to be as nearly as possible the same as in a suit between subject and subject: see [5725]. This requirement ensures that, whenever the Commonwealth is a litigant, its rights and liabilities will be determined by reference to relevant state legislation: *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397 at 427 per Kitto J; *Maguire v Simpson* (1977) 139 CLR 362; [18 ALR 469](#) ^{CB}; *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254; [66 ALR 412](#) ^{CB}. However s 64 will not render the Commonwealth amenable to state laws creating offences or imposing penalties: *Commonwealth v Evans Deakin Industries Ltd*, *above* at 265 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; *Strods v Commonwealth* [\[1982\] 2 NSWLR 182](#) ^{CB}. And the operation of s 64 may be displaced by other Commonwealth legislation which leaves no room for the operation of state law: *Deputy Commissioner of Taxation v Moorebank Pty Ltd* (1988) 165 CLR 55 at 64; [78 ALR 641](#) per Mason CJ, Brennan, Deane, Dawson and Gaudron JJ.

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(CTH) CONSTITUTION [2515] s 108 Saving of State laws

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[2515] 108 Saving of State laws

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

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(CTH) CONSTITUTION [2520] s 109 Inconsistency of laws

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[2520] 109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

SECTION 109 GENERALLY

[2520.5] “law”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

“[T]he phrase ‘the laws of the Commonwealth’ [wherever used in the Constitution] probably means Acts of the Parliament of the Commonwealth”: *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421 at 431. See also *Re Foreman & Sons Pty Ltd; Uther v FCT* (1947) 74 CLR 508 at 520 and 532; *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372 at 378; [1963] ALR 304 [CB](#). The term “law” will include subordinate legislation, but not industrial awards. Where there is potential conflict between federal awards and state legislation, the question of inconsistency will depend on an analysis of the Commonwealth legislation under which the award was made. “The theory upon which the operation of state law gives way in favour of an award providing an inconsistent industrial regulation imputes to the Conciliation and Arbitration Act an intention to confer power upon the arbitrator to make on a subject of dispute an exhaustive determination containing an industrial regulation that, on the subject with which it deals, will cover the ground to the exclusion of any different or further provision”: *T A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 182.

Administrative orders or directions will not be treated as laws of the Commonwealth for the purposes of [s 109](#): *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1 at 31 and 46.

[2520.10] “invalid”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

A state law rendered invalid under [s 109](#) does not disappear into oblivion; but its operation is suspended for so long as the inconsistency continues. “The relevant law of the Commonwealth will not necessarily be applicable to all persons or all things or even uniformly at all times to the same persons or the same things; and it will not necessarily endure for all time ... Thus, considered as an expression of legislative will, the ‘law of a state’ comes into existence and remains in existence even though, for the time being, or from time to time, its operative force may be suspended, wholly or in part, by reason of concurrent existence of the ‘law of the Commonwealth’ with which it is inconsistent”: *Lamb v Cockatoo Docks & Engineering Co Pty Ltd* (1960) 61 SR (NSW) 459 at 468. Accordingly, an invalid state law will revive if the Commonwealth law, with which it was inconsistent, is repealed or otherwise disappears. “[T]he words ‘to the extent of the inconsistency’ must be taken to have a temporal as well as a substantive connotation. The federal Act can ‘prevail’ only whilst it remains in force and invalidity of the state Act is produced only as the counterpart of the ‘supremacy’ of the federal Act”: *Butler v A-G (Vic)* (1961) 106 CLR 268 at 283.

[2520.15] Direct inconsistency

L Legislation cited in this paragraph

(NSW) [Guardianship Act 1987](#) s 35(1).

(CTH) [Family Law Act 1975](#) Pt VII.

(CTH) [Criminal Code](#) s 11.5, s 131.1.

(VIC) [Crimes Act 1958](#) 321, ss 72.

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109, s 80.

It is a sufficient, but not a necessary, indication of inconsistency between two laws that the subject could only obey one law by disobeying the other law: see, for example, *R v Licensing Court of Brisbane: Ex parte Daniell* (1920) 28 CLR 23 [\[CB\]](#). Alternatively, inconsistency may be found where one law takes away a right or privilege which the other law confers: see, for example, *Clyde Engineering v Cowburn* (1926) 37 CLR 466 at 477–9, 490 and 522; *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 at 160, 161 and 163; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258.

Another frequently used formulation is that, when a state law would “alter, impair or detract” from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid: *Victoria v Commonwealth* (1937) 58 CLR 618 at 630; [1938] ALR 97; [BC3800001](#) [\[CB\]](#) (Dixon J), embraced by the whole Court in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; [161 ALR 489](#); [\[1999\] HCA 12](#); [BC9901017](#) at [\[28\]](#) [\[CB\]](#); *Dickson v R* (2010) 270 ALR 1; 84 ALJR 635; [\[2010\] HCA 30](#); [BC201006930](#) at [\[13\]](#), [\[30\]](#) [\[CB\]](#). See also *Loo v DPP (Vic)* (2005) 12 VR 665; 192 FLR 271; [\[2005\] VSCA 161](#); [BC200504428](#) at [\[40\]](#) [\[CB\]](#); *Jemena Asset Management Pty Ltd v Coinvest Ltd* (2009) 180 FCR 576; [263 ALR 374](#); [\[2009\] FCAFC 176](#); [BC200911529](#) at [\[29\]–\[39\]](#) [\[CB\]](#).

In *P v P* (1994) 181 CLR 583; [120 ALR 545](#) [\[CB\]](#), a majority of the High Court (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ; Brennan and Dawson JJ dissenting) held that s 35(1) of the Guardianship Act 1987 (NSW) was inconsistent with Pt VII of the Family Law Act 1975 (Cth) and therefore invalid to the extent of the inconsistency. The state law prohibited the administration of medical treatment to an incapable person over the age of 16 years unless the State Guardianship

Board had consented to the carrying out of the treatment. The Commonwealth law gave the Family Court jurisdiction to authorise the sterilisation of an incapable child of a marriage. In their joint judgment, Mason CJ, Deane, Toohey and Gaudron JJ said at 558 that the practical effect of the state law would be to remove from the Family Court the medical welfare component of its jurisdiction in relation to incapable children of a marriage resident in New South Wales and aged over 16. That removal was not contemplated by the Family Law Act, the justices said at 559:

“... one would not anticipate a legislative intent either to subject the general welfare jurisdiction with respect to children of a marriage conferred by the Parliament upon a federal court to every prohibition and constraint which might subsequently be imposed by a state or territory medical welfare scheme or to permit state or territory laws to make the effective exercise of an important part of that jurisdiction of the Family Court dependent upon the exercise by a state or territory court or board of powers or jurisdiction conferred or confirmed by such a state scheme.”

However, the High Court has held that there is no inconsistency between a state law declaring that no one is presumed to have consented to sexual intercourse with a person by reason of being married to that person, and a Commonwealth law authorising the Family Court to make an order relieving a person from any obligation to render conjugal rights: *R v L* (1991) 103 ALR 577 ^{CB}. Even if the act of marriage had carried with it an irrevocable consent to sexual intercourse, the Commonwealth law did not give statutory endorsement to that “conjugal right”: at 579 per Mason CJ, Deane and Toohey JJ; 593 per Dawson J.

In *Dickson v R* (2010) 270 ALR 1; 84 ALJR 635; [2010] HCA 30; BC201006930 at [9], [30] ^{CB} the High Court held that there was direct inconsistency between s 131.1 of the Criminal Code (Cth), and the conspiracy provision in s 11.5 of that Code, and ss 72 and 321 of the Crimes Act 1958 (Vic). The appellant had been convicted of conspiracy to steal contrary to the state provision, in circumstances where on the facts his conduct also contravened the Code because the property the subject of the conspiracy “belonged to” the Commonwealth, by reason of it being in the possession of Customs. The maximum penalty for the Commonwealth and state offences was the same (10 years imprisonment). The Court emphasised the importance of s 109 “not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies”: at [19]. It stated that the case for inconsistency was “strengthened by the differing methods of trial” for the State and Commonwealth offences, the difference being that a trial of the Commonwealth offence would have been required to be a trial by jury in accordance with s 80 of the Constitution, whereas Victorian law permitted majority verdicts in some cases: at [2], [12] and [20]. The Court held: (at [22])

The direct inconsistency in the present case is presented by the circumstance that s 321 of the Victorian Crimes Act renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the Commonwealth Criminal Code. In the absence of the operation of s 109 of the Constitution, the Victorian Crimes Act will alter, impair or detract from the operation of the federal law by proscribing conduct of the appellant which is left untouched by federal law ... No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of ‘direct collision’ because the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law.

The reasoning of the Court in *Dickson* in finding that direct inconsistency existed drew on principles developed by the Court in the context of indirect inconsistency (eg the references to legislative intention). It treated the limits of the conduct criminalised by Commonwealth law as identifying the boundaries of “areas of liberty designedly left [and which] should not be closed up”: *Dickson v R* (2010) 270 ALR 1; 84 ALJR 635; [2010] HCA 30; BC201006930 at [25] ^{CB}. However, it denies the relevance of express statements of legislative intention to the determination of whether direct inconsistency exists: at [37].

[2520.20] Indirect inconsistency

A law of a state will be inconsistent with a law of the Commonwealth where the state law purports to regulate some activity which the Commonwealth law was intended to regulate exhaustively and exclusively — where the state law enters a field covered by the Commonwealth law. “The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a federal statute discloses such an intention, it is inconsistent with it for the law of a state to govern the same conduct or matter”: *Ex parte McLean* (1930) 43 CLR 472 at 483.

Thus, “if it appears from the terms, the nature of the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent”: *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61; [161 ALR 489](#); [\[1999\] HCA 12](#); [BC9901017](#) at [\[28\]](#) ^{CB}; *Dickson v R* (2010) 270 ALR 1; 84 ALJR 635; [\[2010\] HCA 30](#); [BC201006930](#) at [\[13\]–\[14\]](#) ^{CB}.

[2520.25] Same subject matter

L Legislation cited in this paragraph

(NSW) [Listening Devices Act 1984](#) s 16.

(CTH) [Customs Act 1901](#) s 219B(1).

(VIC) [Road Safety Act 1986](#) s 74.

(CTH) Radiocommunications Act 1983.

Inconsistency of this type will be found only where the two laws deal with the same field: see, for example, *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 593; *O'Sullivan v Noarlunga Meat Ltd* (1956) 95 CLR 177 at 187; *Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 121–2; *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47 at 56–7; [66 ALR 217](#); *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 250, 253; [28 ALR 449](#); *New South Wales v Commonwealth* (1983) 151 CLR 302 at 316, 319, 334; [45 ALR 579](#) (the *Hospital Benefits* case).

In *Love v A-G (NSW)* (1990) 169 CLR 307; [90 ALR 322](#) ^{CB}, the High Court held that s 16 of the Listening Devices Act 1984 (NSW) was not inconsistent with s 219B(1) of the Customs Act 1901 (Cth). The state law authorised the use of listening devices by state and federal police in the investigation of criminal offences; and the Commonwealth law prohibited federal police from using a listening device for the purpose of narcotics inquiries by the Australian Federal Police except in accordance with a warrant issued under that Act. The court concluded that, on its proper interpretation, the state law did not purport to deal with the investigation of federal narcotics offences; and this “indicates that the field covered by ... the Customs Act is one into which the state Act does not purport to intrude”: CLR at 318.

In *Scutchings v George* [\[1991\] 1 VR 732](#) ^{CB}, the Victorian Supreme Court concluded that s 74 of the Road Safety Act 1986 (Vic) was not inconsistent with the Radiocommunications Act 1983 (Cth). The Commonwealth law, the court said, was primarily directed to technical matters intended to achieve efficient and fair use of the radio frequency spectrum; but the state law dealt with an “entirely different” subject matter: at 743–4.

[2520.30] Overlapping criminal laws**L** Legislation cited in this paragraph(QLD) [Traffic Act 1949](#) s 16(1)(a).(CTH) [Defence Force Discipline Act 1982](#) s 40(2).(CTH) [Customs Act 1901](#) s 233B.

The leading case on this topic is now *Dickson v R* ([2010](#)) [270 ALR 1](#); 84 ALJR 635; [\[2010\] HCA 30](#); [BC201006930](#) ^{CB}, which is discussed at [2520.15] above. That case, which was decided on the basis of direct rather than indirect inconsistency, appears to have reduced the scope for concurrent operation of Commonwealth and state criminal laws.

Overlapping Commonwealth and state criminal laws should be treated as inconsistent, at least where “[t]he same acts or omissions were ... made subject to the penal sanctions of the federal enactment and the somewhat different penal sanctions of the state enactment”: *Ex parte McLean* (1930) 43 CLR 472 at 484. It appears that this proposition embraces overlapping legislation which imposes any sanctions, criminal or civil, on prohibited conduct: *Viskauskas v Niland* (1983) 153 CLR 280 at 292–3; [47 ALR 32](#).

However, it may be that laws laying down different penalties for the same conduct could only be described as overlapping and therefore inconsistent when they deal with the same subject matter. Where two laws dealt with different subject matters, “each may validly apply in relation to the same set of facts”, because “[t]here is no inconsistency between Acts which prescribe different penalties for offences which, albeit constituted by the same conduct, are in substance different from one another”: *R v Winneke*; *Ex parte Gallagher* (1982) 152 CLR 211 at 218–219; [44 ALR 577](#).

In *McWaters v Day* (1989) 168 CLR 289; [89 ALR 83](#) ^{CB}, the High Court upheld the conviction of a member of the Australian Regular Army for driving a motor vehicle on a road within Army barracks under the influence of liquor, contrary to s 16(1)(a) of the Traffic Act 1949 (Qld), and rejected an argument that the Queensland law was inconsistent with s 40(2) of the Defence Force Discipline Act 1982 (Cth), which penalised a defence force member who drove a motor vehicle on defence force property under the influence of liquor. The Discipline Act was limited in its scope, being concerned with efficiency, good order and discipline in the armed forces. It “contemplate[d] parallel systems of military and ordinary criminal law and [did] not evince an intention that defence force members enjoy an absolute immunity from liability under the ordinary criminal law”: CLR at 298.

In *R v Stevens* ([1991](#)) [102 ALR 42](#) ^{CB}, the New South Wales Court of Criminal Appeal held that s 233B of the Customs Act 1901 (Cth), which prohibits the importation of narcotics into Australia, did not cover the field of offences relating to the possession of narcotic drugs imported into Australia; so that state law creating the offence of conspiring to supply heroin was not inconsistent with the Commonwealth law.

[2520.35] Inferred intention to cover the field**L** Legislation cited in this paragraph(CTH) [Commonwealth of the Australia Constitution Act](#) s 51(ix), s 51(xii), s 51(xv).(VIC) [BLF \(De-recognition\) Act 1985](#).

(CTH) [Builders Labourers' Federation \(Cancellation of Registration\) Act 1986](#).

The intention of the Commonwealth law-maker to “cover the field”, to provide the exclusive code on the subject, may be inferred from the detail contained in the law: see, for example, *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 [\[CB\]](#); *T A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 184; contrast *Australian Broadcasting Commission v Industrial Court (SA)* (1977) 138 CLR 399 at 417; [15 ALR 609](#); *Metal Trades Industry Assn v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 644; [48 ALR 385](#); *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 339; [70 ALR 449](#).

Alternatively, the intention of the Commonwealth law-maker to “cover the field” might be inferred from the subject matter of the legislation. Some subjects over which the Commonwealth Parliament has power are such that uniform control is the only practicable system of regulation: for example, weights and measures ([s 51\(xv\)](#)), currency ([s 51\(xii\)](#)) and quarantine ([s 51\(ix\)](#)); see, for example, *Hume v Palmer* (1926) 38 CLR 441 at 462; *Wenn v A-G (Vic)* (1948) 77 CLR 84 [\[CB\]](#); *R v Loewenthal*; *Ex parte Blacklock* (1974) 131 CLR 338; [4 ALR 293](#) [\[CB\]](#); *Viskauskas v Niland* (1983) 153 CLR 280; [47 ALR 32](#) [\[CB\]](#); compare *Victoria v Commonwealth* (1937) 58 CLR 618 at 630–1 and 628 (the *Shipwrecks* case); *Flaherty v Girgis* (1987) 162 CLR 574 at 595; [71 ALR 1](#).

The mere coexistence or overlap of state and Commonwealth laws will not establish inconsistency: the Commonwealth law may be interpreted as intended to complement state laws or as contemplating the concurrent operation of state laws. For example, in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 246; [28 ALR 449](#), Stephen J described the power of an employer, under a Commonwealth industrial agreement, to terminate a contract of employment as “a right the nature of which is to be understood against the background to its operation which general laws of the land, whether state or federal in origin, provide”, including the Equal Opportunity Act 1977 (Vic).

And in *Dobinson v Crabb* [\(1990\) 94 ALR 321](#) [\[CB\]](#), the High Court held that the BLF (De-recognition) Act 1985 (Vic) was not inconsistent with the Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth), because the Commonwealth law was to be read as leaving substantial aspects of the affairs of a de-registered union to be covered by state law.

[2520.40] Express intention to cover the field or not to cover the field

L Legislation cited in this paragraph

(CTH) [Native Title Act 1993](#).

(CTH) [Commonwealth of the Australia Constitution Act](#) s 109.

(CTH) [Competition and Consumer Act 2010](#) s 75.

(CTH) [Crimes Act 1914](#) s 4C(2).

(CTH) [Criminal Code](#) s 131.1, s 261.1.

To settle doubts, the Commonwealth law-maker may express a clear intention to cover the field by providing that the Commonwealth law is to apply to the exclusion of state laws. “If such a parliamentary intention is effective when it is ascertained by inference only, there can be no reason why it should not be equally effective when the intention is expressly stated”: *Wenn v A-G (Vic)* (1948) 77 CLR 84 at 120. See also *New South Wales v Commonwealth (Work Choices*

case) (2006) 229 CLR 1; [231 ALR 1](#); 81 ALJR 34; [2006] HCA 52; [BC200609129](#) at [364]–[372] ^{CB}; *Bayside City Council v Telstra Corp Ltd* (2004) 216 CLR 595; [206 ALR 1](#); [2004] HCA 19; [BC200402132](#) at [35]–[39] ^{CB}.

However, in *John Holland Pty Ltd v Victorian WorkCover Authority* (2009) 239 CLR 518; [260 ALR 95](#); [2009] HCA 45; [BC200909277](#) ^{CB} the High Court required a statement of parliamentary intention to cover the field to be tested against the content of the substantive provisions of the Commonwealth Act (an approach which may detract from the capacity of the Commonwealth to leave part of a field vacant, as had been permitted in the *Work Choices* case, above). John Holland concerned the operation of s 4(1) of the Occupational Health and Safety Act 1991 (Cth), which provided that “this Act is intended to apply to the exclusion of any law of a State or Territory ... to the extent that the law of the State or Territory relates to occupational health or safety and would otherwise apply in relation to employers [or] employees”. In finding that that subsection did not exclude the operation of state laws in relation to events that occurred prior to employer having become subject to the Commonwealth Act, the High Court said (at [20]):

The legislative power of the Parliament extends to the expression in a law of its intention to cover a particular field of activity or to refrain from doing so. Such a law assists in the resolution, as a matter of statutory construction, of the question of the existence of such an intention. In the light of a provision such as s 4 it is not necessary to undertake a detailed analysis of the remaining provisions of the Act in order to determine with precision the field which it is intended the law should cover. That is set out in the express statement of legislative intent. But such a statement is only a statement of intention which informs the construction of the Act as a whole. It must be an intention which the substantive provisions of the Act are capable of supporting. Absent that necessary qualification, the character of a bare statement of intention could approach that of a bare exclusion of state law.

Several provisions in the Native Title Act 1993 (Cth) expressly precluded the operation of certain state laws on native titles. In *Western Australia v Commonwealth* (1995) 183 CLR 373; [128 ALR 1](#) at 48 ^{CB}, the majority of the High Court (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; Dawson JJ dissenting) held that those provisions were effective to displace the operation of state laws under [s 109](#) and were not an invalid attempt to prevent the exercise of legislative power by the states. “Such a State law is rendered inoperative not because the Commonwealth law directly invalidates the state law but by force of [s 109](#) of the Constitution ... Provided the [relevant legislative power] supports a Commonwealth law making its regime exclusive and exhaustive, the law may validly exclude in terms the application of State law to the subject matter”.

Alternatively, the Commonwealth law-maker may express an intention *not* to cover the field by providing that the Commonwealth law is “not intended to exclude or limit the concurrent operation of any law of a state” (as in s 75 of the Trade Practices Act 1974 (Cth)). Such a declaration is valid and effective to prevent indirect inconsistency, but will not prevent direct inconsistency: *General Motors Acceptance Corp v Credit Tribunal* (1977) 137 CLR 545 at 563; [14 ALR 257](#); ATPR 40–022; *John Holland Pty Ltd v Victorian Workcover Authority* (2009) 239 CLR 518; [260 ALR 95](#); [2009] HCA 45; [BC200909277](#) at [21] ^{CB}. See also *Palmdale-AGCI Ltd v Workers Compensation Commission (NSW)* (1978) 140 CLR 236 at 243; [17 ALR 1](#).

In *Dickson v R* (2010) 270 ALR 1; 84 ALJR 635; [2010] HCA 30; [BC201006930](#) at [21] ^{CB}, the High Court held that s 4C(2) of the Crimes Act 1914 (Cth), which provides that where an act or omission constitutes an offence under both a law of the Commonwealth and that of a state, and the offender has been punished for that offence under the state law, the offender shall not be liable to be punished for the Commonwealth offence, operated only in a situation where the state law is not inoperative under [s 109](#) as, for example “when there is an absence of conflict between the provisions of the two laws and the Commonwealth law is not intended to be exclusive and exhaustive”. See also *R v Loewenthal*; *Ex parte Blacklock* (1974) 131 CLR 338 at 347; [4 ALR 293](#); 48 ALJR 368; [BC7400049](#) ^{CB}. The Court in *Dickson* also held that s 261.1 of the Criminal Code (Cth), which denied for any

provision of Pt 7 (including s 131.1) an “intention to exclude or limit” any state law, “could not displace or avoid the direct collision between the conspiracy provisions with which the appeal is concerned”.

However, once a state law has been held to be inconsistent with a Commonwealth law and therefore invalid, the invalidity of the state law effected by [s 109](#) “cannot later be excluded by retrospectively declaring that the truth was other than it was”, because “Commonwealth statutes cannot prevail over the Constitution”: *University of Wollongong v Metwally* (1984) 158 CLR 447 at 457; [56 ALR 1](#). On the other hand, it appears that such a retrospective declaration by the Commonwealth Parliament would be effective to vacate the relevant field retrospectively, thus providing the opportunity for a state legislature to enter, through the enactment of fresh retrospective legislation, that field: at 460, 469, 475, 480 and 485.

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(CTH) CONSTITUTION [2525] s 110 Provisions referring to Governor

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Constitution current to: Act 84 of 1977

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[2525] 110 Provisions referring to Governor

The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

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[\(CTH\) CONSTITUTION \[2530\] s 111 States may surrender territory](#)

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[2530] 111 States may surrender territory

The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.

SECTION 111 GENERALLY

[2530.5] Areas surrendered

L Legislation cited in this paragraph

(NSW) [Seat of Government Surrender Act 1909](#).

(CTH) [Seat of Government Acceptance Act 1909](#).

(NSW) [Seat of Government Surrender Act 1915](#).

(CTH) [Jervis Bay Territory Acceptance Act 1915](#).

(CTH) [Northern Territory Acceptance Act 1910](#) Northern Territory Acceptance Act 1907 (Cth).

By the Seat of Government Surrender Act 1909 (NSW), the New South Wales Parliament surrendered to the Commonwealth a part of that state, which was formally accepted by the Commonwealth Parliament in the Seat of Government Acceptance Act 1909 (Cth). That area became the Australian Capital Territory, to which was added a second part of New South Wales, surrendered under the Seat of Government Surrender Act 1915 (NSW) and accepted under the Jervis Bay Territory Acceptance Act 1915 (Cth).

By the Northern Territory Surrender Act 1907 (SA), the South Australian Parliament surrendered to the Commonwealth a part of that state, which was formally accepted by the Commonwealth Parliament in the Northern Territory Acceptance Act 1907 (Cth).

[2530.10] No necessity for a referendum

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 111, s 123.

Notwithstanding the requirement expressed in [s 123](#) of the Constitution, that an alteration in the limits of a state be approved by the voters in that state, a surrender of part of a state under [s 111](#) does not require that approval: “[Section 111](#) and [s 123](#) are quite disparate, dealing with quite different matters and powers; they make no impact one on the other”: *Paterson v O'Brien* (1978) 138 CLR 276 at 280; [18 ALR 31](#).

[2530.15] No necessity for Commonwealth legislation

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 111.

“[T]he ability of the Commonwealth to accept a surrender of state territory is unconditioned ... [T]he acceptance can be effected by an executive act of the Commonwealth. Acceptance within [s 111](#) does not have to be by an Act of the Parliament”: *Paterson v O'Brien* (1978) 138 CLR 276 at 280–1; [18 ALR 31](#).

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(CTH) CONSTITUTION [2535] s 112 States may levy charges for inspection laws

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[2535] 112 States may levy charges for inspection laws

After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.

SECTION 112 GENERALLY

[2535.5] Freedom of interstate trade

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 112, s 92.

Charges imposed under [s 112](#) are a qualification on the absolute freedom of interstate trade guaranteed by [s 92](#). However, such charges must be necessary for the administration of the state's inspection laws, that is they must be “compensation for services rendered” and not “taxes” (*Duncan v Queensland* (1916) 22 CLR 556 at 588); and the inspection laws may not be used as a device for absolutely excluding goods from entering the state: *Ex parte Nelson (No 1)* (1928) 42 CLR 209 at 240; *Tasmania v Victoria* (1935) 52 CLR 157 at 186.

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(CTH) CONSTITUTION [2540] s 113 Intoxicating liquids

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[2540] 113 Intoxicating liquids

All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.

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(CTH) CONSTITUTION [2545] s 114 States may not raise forces. Taxation of property of Commonwealth or State

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[2545] 114 States may not raise forces. Taxation of property of Commonwealth or State

A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.

SECTION 114 GENERALLY

[2545.5] Tax on property

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 114.

The section has been considered in a number of cases:

- *D'Emden v Pedder* (1904) 1 CLR 91 [CB](#), where it was held that a receipt given by a federal officer for his salary was not the property of the Commonwealth, and that [s 114](#) of the Constitution would not exempt such receipt from stamp duty;
- *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208 [CB](#), where it was held that to levy a municipal rate upon Commonwealth property was to impose a tax within [s 114](#);
- *Attorney-General (NSW) v Collector of Customs for NSW* (1908) 5 CLR 818 [CB](#), where it was held that the levying of duties of customs on goods imported into Australia by a state was not the imposition of a tax on property belonging to a state within [s 114](#);
- *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1 [CB](#), where Latham CJ held (at 14) that a state tax on the occupier of any land could not, consistently with [s 114](#), apply to the Commonwealth when it occupied land;
- *Attorney-General (Qld); Ex rel Goldsbrough Mort & Co Ltd v A-G (Cth)* (1915) 20 CLR 148 [CB](#), where it was held that a Commonwealth Act which imposed a land tax on leasehold estates in Crown lands was not invalid by reason of [s 114](#);

(CTH) CONSTITUTION [2545] s 114 States may not raise forces. Taxation of property of Commonwealth or State

- *Victoria v Commonwealth* (1971) 122 CLR 353 [\[CB\]](#), where the court held that a payroll tax (a tax on wages paid or payable by the Crown in the right of a state to its employees) was not a tax on the property of a state within [s 114](#);
- *Superannuation Fund Investment Trust v Cmr of Stamps (SA)* (1979) 145 CLR 330; [26 ALR 99](#) [\[CB\]](#), where it was decided that [s 114](#) did not prevent a state from imposing stamp duty on the conveyance or transfer of real property to a body corporate set up under Commonwealth law to manage a superannuation fund for Commonwealth employees;
- *Queensland v Commonwealth* (1987) 162 CLR 74; [69 ALR 207](#) [\[CB\]](#), where the High Court held that a Commonwealth tax on the states, imposed and calculated by reference to the “fringe benefits” provided by each state to its employees, including the use of state-owned housing and motor vehicles, was not a tax on property belonging to the state: “The section protects the property of a state from a tax on the ownership or holding of property but it does not protect the state from a tax on transactions which affect its property, unless the tax can be truly characterised as a tax on the ownership or holding of property ... [A] tax on the possession or use of property would constitute a tax on the ownership of that property ... And a tax on the proceeds of sale of property is likewise a tax on the ownership of property or on property because it is an indirect means of taxing the ownership of property”: 162 CLR at 98.
- *Deputy Cmr of Taxation v State Bank of New South Wales* (1992) 174 CLR 219; [105 ALR 161](#); 66 ALJR 250 [\[CB\]](#), where the High Court held that a Commonwealth tax imposed on the sale value of goods manufactured by a state and applied to the state's own use is a tax on ownership of the goods, use being the exercise of a right central to concept of ownership.
- *South Australia v Commonwealth* (1992) 174 CLR 235; [105 ALR 171](#); 66 ALJR 240 [\[CB\]](#), where the High Court held that an income tax imposed on income produced by property, including interest received on loans, cannot be characterised generally as a tax on the ownership or holding of that property; but a capital gains tax imposed on part of the proceeds of disposition of property is a tax on the ownership of that property because the right of disposition is central to the concept of ownership of property. Because the property in question was owned by a state instrumentality, the capital gains tax was invalid under [s 114](#) of the Constitution.
- *Registrar of Accident Compensation Tribunal v FCT* (1993) 178 CLR 145; [117 ALR 27](#) [\[CB\]](#), where the High Court held that income tax levied on interest earned on moneys held by the Victorian Accident Compensation Tribunal and credited to an account for the benefit of dependants of a deceased worker was neither in substance nor in form a tax on property belonging to the State of Victoria. Mason CJ, Deane, Toohey and Gaudron JJ said at 44 that, in substance, the tax fell on income which, in equity, was income of the private citizens who were the beneficiaries of the trust constituted by the payment to the registrar of compensation to which the private citizens were entitled; and, in form, the tax fell on the income of the registrar in his capacity as trustee.

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(CTH) CONSTITUTION [2550] s 115 States not to coin money

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

Alexander Flecknoe-Brown

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[2550] 115 States not to coin money

A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

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(CTH) CONSTITUTION [2555] s 116 Commonwealth not to legislate in respect of religion

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

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[2555] 116 Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

SECTION 116 GENERALLY

[2555.5] “religion”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 116.

“[Section 116](#) is concerned with both the toleration of all religions and the toleration of the absence of religion”: *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 [CB](#). Religion may be approached from several perspectives: by seeing a religion as “a system of beliefs or statement of doctrine”; as “prescribing a code of conduct”; or as a “prescribed form of ritual or religious observance”. Belief in a deity is not an essential part of a religion: 67 CLR at 124.

According to Mason J, there are two criteria of religion: “first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief”: *Church of the New Faith v Cmr of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 136; [49 ALR 65](#). Wilson and Deane JJ identified four “indicia” of religion: a collection of ideas involving “belief in the supernatural”; the ideas relating to the individual's “nature and place in the universe and ... relation to things supernatural”; the ideas prescribing a code of conduct or practices “having supernatural significance”; and the adherents of those ideas constituting an identifiable group or groups: 154 CLR at 174.

[2555.10] “establishing any religion”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 116.

“By the establishment of religion is meant the erection and recognition of a state church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognising religion or religious worship”: J Quick and R F Garran, *Annotated Constitution of the Australian Commonwealth*, (1901), p 951.

A law will infringe this aspect of [s 116](#) only if “its express and ... single purpose” is the establishment of religion; “a law establishing a religion could scarcely do so as an incident of some other purpose”: *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS Case)* (1981) 146 CLR 559 at 579; [33 ALR 321](#). And a law will infringe this aspect of [s 116](#) where the law endorses “a particular religion or religious body as a state religion or state church” but not where the law supports religion generally: at 582, 597, 608–9, 616 and 653. Consequently, [s 116](#) does not prohibit the Commonwealth from providing financial assistance to schools operated by religious organisations on the same basis as that assistance is provided to other private schools.

[2555.15] “prohibiting the free exercise of any religion”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 116.

The freedom guaranteed by [s 116](#) is not absolute but must be qualified by controls necessary to ensure the “maintenance of civil government [and] the continued existence of the community. The Constitution protects religion within a community organised under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organised”: *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 at 131–2. Consequently, [s 116](#) did not protect a religious association from government war-time measures designed to inhibit the association's activities, where the association was actively and publicly discouraging its members from participating in the Government's defence efforts. “The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe ... Conduct in which a person engages in giving effect to his faith in the supernatural is religious, but it is excluded from the area of legal immunity marked out by the concept of religion if it offends against the ordinary laws, ie if it offends against laws which do not discriminate against religion generally or against particular religions or against conduct of a kind which is characteristic only of a religion”: *Church of the New Faith v Cmr of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at 135–6; [49 ALR 65](#).

See also *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Assn* (1987) 17 FCR 373; [71 ALR 578](#) at [584](#) [CB](#).

[2555.20] “office ... under the Commonwealth”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 116.

In *Williams v Commonwealth* [\(2012\) 288 ALR 410](#); 86 ALJR 713; [\[2012\] HCA 23](#); [BC201204253](#) [CB](#), the plaintiff contended that the contract between the Commonwealth and private service provider for the provision of chaplaincy services was invalid because it imported a qualification requirement for school chaplains that amounted to a religious test for that office, contrary to the second limb of [s 116](#). In rejecting that argument, Gummow and Bell JJ, with whom the other members of the majority agreed (at [4], [168], [476], [597]), stated that the chaplains engaged by the provider held no office under the Commonwealth, and that the provision of funding was insufficient to render a chaplain so engaged as the holder of such office: at [109]. Although their Honours considered that, in light of the significance of [s 116](#) in the Constitution, the word “office” should not be given a restricted

(CTH) CONSTITUTION [2555] s 116 Commonwealth not to legislate in respect of religion

meaning, the phrase “office ... under the Commonwealth” must be read as a whole; when so read, “the force of the term ‘under’ indicates a requirement for a closer connection to the Commonwealth than that presented by the facts of this case”: at [110]. See also the reasons of Heydon J at [444]–[446].

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(CTH) CONSTITUTION [2560] s 117 Rights of residents in States

Practice & Procedure High Court & Federal Court of Australia

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[2560] 117 Rights of residents in States

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

SECTION 117 GENERALLY

[2560.5] Purpose of s 117

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 117.

The purpose of [s 117](#) is the enhancement of “national unity and a real sense of national identity” and it expresses “a fundamental feature of federation” — “equality of treatment within each state” of state residents: *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 485 and 512; [88 ALR 321](#).

[2560.10] Extent of s 117's protection

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 117.

[Section 117](#) protects an interstate resident who is an Australian citizen (*Street v Queensland Bar Assn* (1989) 168 CLR 461 at 525 and 548; [88 ALR 321](#)) from the operation of a law “wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident”: 168 CLR at 559. The presence of discrimination or disability is not to be discovered through comparing the situation of an out-of-state resident with the situation of residents in the legislating state and asking whether the legislating state treats both classes equally, but by comparing the situation of the out-of-state resident with that person's hypothetical situation if he or she were resident in the legislating state and asking: “would any disadvantage now suffered by the person be removed if he or she were resident in the legislating state?”: 168 CLR at 489.

In *Street v Queensland Bar Assn* (1989) 168 CLR 461; [88 ALR 321](#) ^{CB}, the High Court held that rules of the Queensland Supreme Court, which required applicants for admission to the Queensland bar to be resident in Queensland or to undertake to practise principally in Queensland, contravened [s 117](#) in their application to a New South Wales resident and barrister who sought admission in Queensland. The contravention lay in the disadvantage which the New South Wales resident and barrister would experience — abandoning the person's current residence or abandoning the principal part of the person's practice, a disadvantage to which that person would not be exposed if already resident in Queensland.

In *Goryl v Greyhound Australia Pty Ltd* (1994) 120 ALR 605 ^{CB}, a majority of the High Court (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ; Deane and Gaudron JJ holding the section invalid for different reasons) held that s 20 of the Motor Vehicles Insurance Act 1936 (Qld) imposed a discriminatory disability on residents of other States from which [s 117](#) of the Constitution relieved those residents. Section 20 limited the amount of damages that a person resident in another State could recover in Queensland for personal injuries arising out of a motor accident to the maximum amount that the person could recover in his or her place of residence for a similar cause of action. In their joint judgment, Dawson and Toohey JJ (with whose reasons Mason CJ agreed) said at 620:

“In applying [s 117](#), the comparison to be made is between a non-resident in the position of the plaintiff and the position she would be in if she were resident in Queensland. Quite clearly the plaintiff [a resident of New South Wales] is, upon such a comparison, subject both to a disability and to discrimination. She can only recover damages at a lesser rate than if she were resident in Queensland. And there is no difference in the plaintiff's position which would justify the distinction which is drawn. It is not because she claims the benefit of any welfare or insurance scheme established for and financed by Queensland residents. The disability imposed upon the plaintiff is imposed regardless of any indemnity available to the respondent under the statutory insurance scheme. It is simply the case of a non-resident being afforded under Queensland law different and less advantageous treatment than she would if she were a resident of Queensland. In our view, [s 117](#) applies to relieve the plaintiff from that disability or discrimination so that she is entitled to recover the full amount of damages recoverable in Queensland at common law.”

[2560.15] Practical operation of law determinative

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 117.

The presence of a disability or discrimination is to be determined by considering the practical operation and individual effect of a challenged law. [Section 117](#) “is concerned not only with legal rights and liabilities but also with the actual effect on the individual of legal rights and liabilities produced by a law or other governmental action”: *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 507–8; [88 ALR 321](#).

[2560.20] Indirect discrimination

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 117's.

[Section 117's](#) protection extends “to indirect discrimination or different treatment which is revealed by the disparate impact of the matter in complaint”: *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 569; [88 ALR 321](#). “Discrimination can arise just as readily from a law which treats as equals

those who are different as it can from a law which treats differently those whose circumstances are not materially different”: 168 CLR at 581.

[2560.25] “resident”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 117.

The word “resident” in [s 117](#) “must be construed distributively, as applying to any kind of residence which a state may attempt to make a basis of discrimination”: *Davies v Western Australia* (1904) 2 CLR 29 at 39; see also *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 516–17, 543–4 and 586–7; [88 ALR 321](#).

The fact that [s 117](#) “was designed to enhance national unity and a real sense of national identity” points “to a liberal, rather than a narrow, interpretation of ‘resident’ in [s 117](#)”, one which would protect the individual against discrimination “in relation to all aspects of residence”: 168 CLR at 485.

[2560.30] Limits to protection of s 117

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 117.

To invoke [s 117](#) so as to prevent a state from confining state-provided welfare benefits to residents of that state “would offend accepted notions of state autonomy and financial independence and a due sense of a state’s responsibility to the people of the state”: *Street v Queensland Bar Assn* (1989) 168 CLR 461 at 492; [88 ALR 321](#).

“[T]he existence of a federal system of government ... necessarily requires the conclusion that some subject matters are the concern only of the people of each state [so that] laws dealing with these particular subject matters may exclude interstate residents from participation”: at 583–4.

A narrower view has been expressed by Brennan J: “Nothing less than the need to preserve the institutions of government and their ability to function can justify the erection by a government of a barrier to the legal need and social unity of the Australian people”: at 513.

In *Goryl v Greyhound Australia Pty Ltd* ([1994](#)) [120 ALR 605](#) [CB](#), a majority of the High Court Dawson and Toohey JJ appeared to acknowledge at 620 that a Queensland law limiting the amount of damages that a non-resident could recover in Queensland would not offend [s 117](#) of the Constitution if the non-resident was seeking to claim the benefit of a “welfare or insurance scheme established for and financed by Queensland residents”; or if the person whom the non-resident sued was protected by an indemnity under a statutory insurance scheme.

(CTH) CONSTITUTION [2565] s 118 Recognition of laws, etc, of States

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Last updated: March 2022

Alexander Flecknoe-Brown

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[2565] 118 Recognition of laws, etc, of States

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

SECTION 118 GENERALLY

[2565.5] Associated provisions

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Section 51(xxv).

[Section 51\(xxv\)](#) authorises the Parliament to legislate with respect to “the recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the states”.

In the exercise of that power, the Parliament has enacted the State and Territorial Laws and Records Recognition Act 1901 (Cth), s 18 of which provides: “All public acts, records and judicial proceedings of any state or territory, if proved or authenticated as required by the Act, shall have such full faith and credit given to them in every court and public office as they have by law or usage in the courts and public offices of the state or territory from whence they are taken.”

[2565.10] Conflict of laws

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, ss 106, 107, 108, s 109, s 117, s 118, s 77(iii), s 92.

In *Breavington v Godleman* (1988) 169 CLR 41; [80 ALR 362](#) ^{CB} a variety of judicial views was expressed as to the effect of [s 118](#) on conflicts of laws within the Australian federation. That issue was subsequently resolved in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#); [\[2000\] HCA 36](#); [BC200003351](#) ^{CB} (in which the court reformulated the approach that had been adopted in *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 110–11; [104 ALR 257](#) at [396](#);

66 ALJR 186; [BC9102614](#) ^{CB} and *Stevens v Head* (1993) 176 CLR 433 at 453; [112 ALR 7](#) at [20](#); 67 ALJR 343; [BC9303608](#) ^{CB}).

In *Breavington v Godleman* (1988) 169 CLR 41 at 98; [80 ALR 362](#) at [386–7](#), Wilson and Gaudron JJ said:

The problem of one set of facts giving rise to one legal consequence by operation of one state law and another legal consequence by operation of another state law was resolved by the requirement in [s 118](#), to which the Constitutions, the powers and laws of the states are by [ss 106, 107](#) and [108](#) made subject ... By the constitutional subjection of the Constitutions, the powers and the laws of the states to [s 118](#), the consequence was effected that the one set of facts occurring in a state would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication.

Unlike [s 109](#) of the Constitution, [s 118](#) provides no formula for the ascertainment of the one applicable body of law ... [E]ffect is given to the requirement flowing from [s 118](#) ... only by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in a court exercising the judicial power of the state in which the events occurred."

Deane J said (at CLR 129–30; ALR 410):

To give full faith and credit to something does not, as a matter of ordinary language, mean merely to acknowledge the fact that it exists ... [T]he directive of [s 118](#) to give full faith and credit 'throughout the Commonwealth' to the laws and Acts of a state whose laws and territorial legislative powers are continued under the Constitution does not, as a matter of ordinary language, mean merely to accept that such laws or Acts exist or have been made. It decrees that those laws must be accepted *throughout the Commonwealth* as the national law applicable to regulate, and define the consequences or attributes of, conduct, property or status within that particular part of the national territory ... [T]o give the words of [s 118](#) their full effect seems to me to involve no more than allowing the section to perform its intended function of confirming the integration of state legislative powers and state laws within the national legal system which the Constitution established ...

Compare the narrower role given to [s 118](#) at CLR 83 per Mason CJ, CLR 116–17 per Brennan J, CLR 150 per Dawson J.

See also *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565 ^{CB}; *Re Commonwealth Agricultural Service Engineers Ltd* [1928] SASR 342 ^{CB}; *Re E & B Chemicals & Wool Treatment Pty Ltd* [1939] SASR 441 ^{CB}; *Harris v Harris* [1947] VLR 44 ^{CB}; *Koop v Bebb* (1951) 84 CLR 629 ^{CB}; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 ^{CB}; *G v G* ([1986](#)) [64 ALR 273](#) ^{CB}; *Byrnes v Groote Eylandt Mining Co Pty Ltd* ([1990](#)) [19 NSWLR 13](#); [93 ALR 131](#) ^{CB}.

In *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; [104 ALR 257](#) at [274–5](#); 66 ALJR 186; [BC9102614](#) ^{CB}, Brennan, Dawson, Toohey and McHugh JJ said that [s 118](#) "does not prescribe the selection of the *lex loci delicti* or other extraterritorial body of law as the exclusive body of law governing liability for extraterritorial torts ... The selection of the applicable rules governing liability is the function of the common law; s 118 provides for recognition by the courts of the forum of the rules so selected".

In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; [172 ALR 625](#); [\[2000\] HCA 36](#); [BC200003351](#) ^{CB}, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ held that the common law of Australia should be developed so that the *lex loci delicti* is the governing law with respect to torts committed in Australia but which have an interstate element. That is the single choice of law rule in courts exercising federal jurisdiction and in courts exercising non-federal jurisdiction. Their Honours explained the significance of [s 118](#) in the reasoning that led to that conclusion as follows (at [63]–[65]):

[63] In its terms, s 118 does not state any rule which dictates what choice is to be made if there is some relevant

(CTH) CONSTITUTION [2565] s 118 Recognition of laws, etc, of States

intersection between legislation enacted by different States. Nor does it, in terms, state a rule which would dictate what common law choice of law rule should be adopted. It may well be, however, that s 118 (and in some cases [s 117](#), or even [s 92](#) in its protection of individual intercourse) deals with questions of competition between public policy choices reflected in the legislation of different States — at least by denying resort to the contention that one State's courts may deny the application of the rules embodied in the statute law of another State on public policy grounds.

[64] ... in *Breavington*, six members of the court appear to have accepted that [s 118](#) may preclude the refusal of one State to apply the law of another on the grounds of public policy where the law of that other State is otherwise applicable. However, it may also be that s 118 suggests that the constitutional balance which should be struck in cases of intranational tort claims is one which is focused more on the need for each State to acknowledge the predominantly territorial interest of each in what occurs within its territory than it is on a plaintiff's desire to achieve maximum compensation for an alleged wrong.

[65] It has been said that the giving of full faith and credit to the law of another State only when the choice of law rules of the forum point to that law “is to give full faith and credit to one's own law rather than to that of the sister-state, a fact which the unity of the common law in Australia has so far concealed”. And there was a deal of debate in the oral argument in the present case about the effect of [s 118](#). Some of those questions were considered in *Breavington* but not resolved by the formulation of a choice of law rule deriving its force from s 118. However, the terms of s 118 indicate that, as between themselves, the States are not foreign powers as are nation states for the purposes of international law. That apart, it is not necessary in the present matter to resolve other questions respecting s 118. The matter is to be resolved, in our view, by developing the common law to take account of federal jurisdiction as delineated in [Ch III](#) of the Constitution and, also, to take account of the federal system in which sovereignty is shared between the Commonwealth and the member States of the federation.

Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ went on to hold, at [67]–[70] that the common law with respect to the choice of law rule for tort should be developed to take into account various matters arising from the Australian constitutional text and structure including:

- the existence and scope of federal jurisdiction, including the investment of state courts with federal jurisdiction pursuant to [s 77\(iii\)](#) of the Constitution;
- the position of this court as the ultimate court of appeal, not only in respect of decisions made in the exercise of federal jurisdiction;
- the impact of [ss 117](#) and [118](#) of the Constitution upon any so-called “public policy exception” to a choice of law rule for tort;
- the predominant territorial concern of the statutes of state and territory legislatures; and
- more generally, the nature of the federal compact.

Their Honours held that the above matters “arising from the constitutional text and structure may amount collectively to a particular constitutional imperative which dictates the common law choice of law rule which we favour. It may be that those matters operate constitutionally to entrench that rule, or aspects of it concerning such matters as a ‘public policy exception’. If so, the result would be to restrict legislative power to abrogate or vary that common law rule. However, we leave these questions open, not the least because there were no developed submissions upon them.”

In *Mineralogy Pty Ltd v Western Australia* ([\(2021\) 393 ALR 551](#); [\[2021\] HCA 30](#); [BC202109693](#) ^{CB}) the plaintiff contended (among other things) that provisions of a Western Australian law were incompatible with s 118. Laws of other states recognised as binding on the parties arbitral awards made in any Australian state or territory, but the impugned Western Australian law directly and indirectly deprived those particular awards of legal effect. The law under which the awards had been made was that of Western Australia. The contention was that the two laws were in conflict, and that s 118 resolved this conflict by invalidating the Western Australian law. However, the court found that the laws of the other states accommodated changes in the law under which the awards were made, and accordingly there was no conflict. As had occurred in *Sweedman v Transport Accident Commission* (2006) 226 CLR 362; [224 ALR 625](#); [\[2006\] HCA 8](#); [BC200601021](#) at [\[52\]](#) ^{CB}, the contention that s 118 contained an “adequate constitutional criterion ... which would resolve inconsistency between the laws of two or more States ... awaits formulation on another occasion

(CTH) CONSTITUTION [2565] s 118 Recognition of laws, etc, of States

where the circumstances of the propounded incompatibility of the State laws suggest a criterion by which that incompatibility is to be recognised and resolved" (*Mineralogy* at [92]).

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(CTH) CONSTITUTION [2570] s 119 Protection of States from invasion and violence

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[2570] 119 Protection of States from invasion and violence

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

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(CTH) CONSTITUTION [2575] s 120 Custody of offenders against laws of the Commonwealth

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[2575] 120 Custody of offenders against laws of the Commonwealth

Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

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(CTH) CONSTITUTION [2605] s 121 New States may be admitted or established

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CHAPTER VI NEW STATES [ss 121–124]

[2605] 121 New States may be admitted or established

The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit.

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(CTH) CONSTITUTION [2610] s 122 Government of territories

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[2610] 122 Government of territories

The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

SECTION 122 GENERALLY

[2610.5]

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 111.

Two territories have been surrendered by a state and accepted by the Commonwealth under [s 111](#) — the Northern Territory and the Australian Capital Territory: see [\[2530.5\]](#).

Two territories have been placed under the authority of the Commonwealth by the Queen and accepted by the Commonwealth — Papua (see *Strachan v Commonwealth* (1906) 4 CLR 455 [\[CB\]](#); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439; [218 ALR 483](#); [\[2005\] HCA 36](#); [BC200505501](#) [\[CB\]](#)) and Norfolk Island (see *Berwick Ltd v Gray* (1976) 133 CLR 603; [8 ALR 580](#) [\[CB\]](#); *Bennett v Commonwealth* (2007) 235 ALR 1; [\[2007\] HCA 18](#); [BC200702905](#) at [\[2\]](#) [\[CB\]](#)). Territories which have been “otherwise acquired by the Commonwealth” include the Cocos (Keeling) Islands, Christmas Island, Heard and McDonald Islands, the Coral Sea Islands, Ashmore and Cartier Islands, the Australian Antarctic Territory and the Trust Territory of New Guinea. Of these territories, Papua New Guinea was granted independence from Australia in 1975.

[2610.10] Sections 122 and 7

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 7.

[Section 122](#) of the Constitution is wide enough in its terms to authorise legislation allowing representation of the territories in the Senate and hence prevails over [s 7](#): *Western Australia v Commonwealth* (1975) 134 CLR 201; [7 ALR 159](#); 50 ALJR 68 [CB](#); *Queensland v Commonwealth* (1977) 139 CLR 585; [16 ALR 487](#); 52 ALJR 100 [CB](#).

[2610.15] Sections 122 and 24

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 24.

For the reason explained in [2610.10], and in view of the fact that the power to allow representation of the territories in the Senate is coextensive with the power to allow representation of the territories in the House of Representatives, [s 122](#) prevails over [s 24](#) of the Constitution (which deals with the composition of the House of Representatives) and by its terms authorises legislation allowing representation of the territories in that house.

[2610.17] Sections 122 and 52(i)

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122.

The Commonwealth Parliament may legislate under [s 122](#) to confer power on a Territory legislature to make laws with respect to places acquired by the Commonwealth in the Territory. The exclusive power of the Commonwealth Parliament with respect to places acquired by the Commonwealth for public purposes is exclusive of the states' legislative power: *Svikart v Stewart* (1994) 181 CLR 548; [125 ALR 554](#); 69 ALJR 35 [CB](#).

[2610.20] Scope of s 122

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, Section 51.

“[Section 51](#) is concerned with what may be called federal legislative powers as part of the distribution of legislative power between the Commonwealth and the constituent states. [Section 122](#) is concerned with the legislative power for the government of the Commonwealth Territories in respect of which there is no such division of legislative power. The grant of legislative power by [s 122](#) is plenary in quality and unlimited and unqualified in point of subject matter. The power may be used to legislate so as to affect persons or things outside the territories, so long as the law is relevant to the government of a territory: “[O]nce the law is shown to be relevant to that subject matter it operates as a binding law of the Commonwealth wherever territorially the authority of the Commonwealth runs”: *Lamshed v Lake* (1958) 99 CLR 132 at 141; *Spratt v Hermes* (1965) 114 CLR 226 at 241–2; [1966] ALR 597; [BC6500590](#) [CB](#). The scope of [s 122](#) may be qualified by other provisions in the Constitution. “[I]t is necessary to adopt ‘an interpretation which will treat the Constitution as one coherent instrument for the government of the federation, and not as two constitutions, one for the federation and the other for its territories’ (per Kitto J in *Lamshed v Lake* (1958) 99 CLR 132 at 320). It would therefore be erroneous to construe [s 122](#) as though it stood isolated from other provisions of the Constitution which might qualify its scope”: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [109 ALR 1](#) at [14](#) [CB](#) per Brennan, Deane and Toohey JJ. See also

New South Wales v Commonwealth (2006) 231 ALR 1; 81 ALJR 34; [2006] HCA 52; BC200609129 at [364]–[383] ^{CB}.

The variety of the circumstances to which [s 122](#) must apply explains the generality of its language and, in particular, of the power to “make laws for the government of any territory”: *Bennett v Commonwealth* (2007) 235 ALR 1; [2007] HCA 18; BC200702905 at [10], [37] ^{CB}.

[2610.21] Territory self-government

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 122, s 52(i).

(CTH) [Australian Capital Territory \(Self-Government\) Act 1988](#) s 22.

In *Lamshed v Lake* (1958) 99 CLR 132 at 153–4; [1958] ALR 388; BC5800530 ^{CB}, Kitto J said that “[Section 122](#) is a grant of power, not for the government of a community by a legislature established for it, but for the exercise of superior authority over a community by the legislature of another community”. See *Bennett v Commonwealth* (2007) 235 ALR 1; [2007] HCA 18; BC200702905 at [30] ^{CB}.

“No system of government, elected or otherwise, is prescribed for the territories. Sovereign legislative power is conferred by s 122 upon the Commonwealth Parliament to make laws for the government of the territories but there need be no representation of a Territory in either House of Parliament, nor is there any requirement that institutions of representative government exist within the territories”: *Kruger v Commonwealth* (1997) 190 CLR 1 at 69–70; 146 ALR 126 at 160; BC9703253 ^{CB}. Accordingly, “[b]earing in mind the diversity of territories, the Parliament, if it decides to establish institutions of representative government within a territory, is not bound to confirm to any particular model of representative government”: *Bennett v Commonwealth*, above, at [42].

[Section 122](#) “is wide enough to enable Parliament to endow a territory with separate political, representative and administrative institutions, having control of its own fiscus”: *Berwick Ltd v Gray* (1976) 133 CLR 603 at 607; 8 ALR 580 at 583 per Mason J.

The power conferred by [s 122](#) is to make laws for the “government of any territory”. The terminology of [s 122](#) emphasises that the Parliament may prescribe the constitutional arrangements for the government of a territory. There is no reason to construe [s 122](#) as precluding the creation of a representative legislature for a territory as a step in its political development with a view to its ultimate admission as a new state. However, [s 52\(i\)](#), conferring exclusive power on the Parliament to make laws with respect to the seat of government, and “considerations of history and principle” affect the scope of [s 122](#) in its application to a territory containing the seat of government; “the Australian Capital Territory, unlike the Northern Territory, cannot become a new state”: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; 109 ALR 1 at 14, 15 ^{CB} per Brennan, Deane and Toohey JJ. But see Mason CJ, Dawson and McHugh JJ, ALR at 9–10.

The Legislative Assembly of the Australian Capital Territory, established by the Australian Capital Territory (Self-Government) Act 1988 (Cth), s 22, has a plenary and independent legislative power; the Assembly is not a delegate of the Commonwealth Parliament: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 109 ALR 1 at 21–3 per Brennan, Deane and Toohey JJ. See also per Mason CJ, Dawson and McHugh JJ at 9.

[Section 122](#) authorised a law that made Australian citizenship a necessary qualification for voting for, and standing for, election to the Legislative Assembly of Norfolk Island:

[32] It is important to observe the difference between a political and a legal argument about [s 122](#). No doubt, if the Parliament decides that the most appropriate form of government of a territory is democratic self-government, then the method by which it provides for representation of the people of the territory in the process of self-government will affect the acceptability, and ultimately the success, of the form of government established. While concepts such as self-government, representative government, and democratic process have a minimum content, standards as to their most appropriate forms of expression vary with time and place. ...

If Parliament gives effect to a politically contestable view of what is appropriate, that of itself has no bearing on the validity of its legislation: *Bennett v Commonwealth*, above, at [32], [36].

[2610.25] Relationship to constitutional constraints

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) Ch III, s 116, s 122, s 51(xxix), s 51(xxxi), s 55, s 72, s 73, s 80, Section 90.

The limitations imposed by [s 55](#) on Commonwealth laws imposing taxation do not apply to taxation laws enacted for a territory: *Buchanan v Commonwealth* (1913) 16 CLR 315 [CB](#).

It has been held that [s 122](#) is not limited or qualified by [s 51\(xxxi\)](#) or, for that matter, by any other paragraph of that section: *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 570; [1971] ALR 190; (1969) 44 ALJR 25; [BC6900250](#) [CB](#) (*Teori Tau*); see also *Northern Land Council v Commonwealth* (1986) 161 CLR 1 at 6; [64 ALR 493](#); 60 ALJR 331; [BC8601419](#) [CB](#).

However, in *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513; [147 ALR 42](#); 71 ALJR 1346; [BC9703570](#) [CB](#), Gaudron, Gummow and Kirby JJ would have overruled *Teori Tau*. Those justices, together with Toohey J, held that legislation pursuant to which the Commonwealth had effectively prohibited mining in the Kakadu National Park, while it could be characterised as being for the government of the Northern Territory under [s 122](#), could also be characterised as legislation with respect to external affairs under [s 51\(xxix\)](#) since its purpose was to implement Australia's obligations under a convention for the protection of world heritage. On that basis, the law could be regarded as affecting an acquisition of property for a purpose for which the parliament had power to make laws, and was subject to [s 51\(xxxi\)](#). Indeed, Gaudron, Gummow and Kirby JJ indicated that s 122 was a purposive power, and thus the Act in question, even when characterised as a law under s 122, was for the purposes of s 51(xxxi) to be regarded as a law "for a purpose in respect of which the Parliament has the power to make laws". The other member of the majority, Toohey J, declined to overrule *Teori Tau*, but did so because he considered that for the future it was "almost inevitably that any acquisition of property by the Commonwealth will not attract the operation of s 51(xxxi)" (at CLR 561). Brennan, Dawson and McHugh JJ dissented. The decision of the majority suggests that s 122 is more likely to be held to be subject to constraints that apply to other Commonwealth powers.

It appears that laws passed under [s 122](#) will be subject to [s 116](#), with its guarantees of the free exercise of religion and against the establishment of any religion. In *Kruger v Commonwealth* (1997) 190 CLR 1 at 123; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) [CB](#), Gaudron J held that s 116 did apply as a limit on laws passed pursuant to s 122. Toohey and Gummow JJ were strongly included to agree. However, Dawson and McHugh JJ expressed the contrary view. Earlier dicta on the point was unclear: *Lamshed v Lake* (1958) 99 CLR 132 at 143; [1958] ALR 388; (1958) 32 ALJR 75; [BC5800530](#) [CB](#); *Teori Tau* at CLR 570; compare *Attorney-General (Vic); Ex rel Black v Commonwealth* (1981) 146 CLR 559 at 593–4; [33 ALR 321](#); 55 ALJR 155; [BC8100050](#) [CB](#).

[Section 90](#) of the Constitution, which makes exclusive the power of the parliament to impose duties of customs and excise and to grant bounties on the production of goods, operates to preclude a territory

legislature from imposing duties of excise: *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248; [109 ALR 1](#); 66 ALJR 794; [BC9202659](#) ^{CB}.

The applicability of [Ch III](#) to the territories has long been a contentious issue. In *R v Bernasconi* (1915) 19 CLR 629; 21 ALR 86; [1915] HCA 13; [BC1500008](#) ^{CB} the court held that [s 80](#) of the Constitution, requiring trial by jury for indictable Commonwealth offences, is not applicable to the territories. There are also several cases holding that appeals from the territories stand outside [s 73](#) of the Constitution: see *Porter v R; Ex parte Yee* (1926) 37 CLR 432 at 441, 448, 449, compare 446–7, 438; [1926] ALR 144; [BC2600031](#) ^{CB}; *Spratt v Hermes* (1965) 114 CLR 226 at 240; [1966] ALR 597; (1965) 39 ALJR 369; [BC6500590](#) ^{CB}; *Capital TV & Appliances Pty Ltd v Falconer* (1971) 125 CLR 591 at 599; [1971] ALR 385; (1971) 45 ALJR 186; [BC7100510](#) ^{CB}.

Some members of the High Court have suggested a need for reconsideration of these cases: *Gould v Brown* (1998) 193 CLR 346; [151 ALR 395](#); 72 ALJR 375; [BC9800072](#) at [\[63\]](#) ^{CB} per Gaudron J, at [131]–[132] per McHugh J; *Northern Territory v GPAO* (1999) 196 CLR 553; [161 ALR 318](#); [\[1999\] HCA 8](#); [BC9900714](#) at [\[92\]](#) ^{CB} per Gleeson CJ and Gummow J, at [125] per Gaudron J, at [256]–[257] per Hayne J, contra McHugh and Callinan JJ; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; [165 ALR 171](#); [\[1999\] HCA 44](#); [BC9905445](#) at [\[25\]–\[26\]](#) ^{CB} per Gaudron J, at [66] per Gummow and Hayne JJ; *Kruger v Commonwealth* (1997) 190 CLR 1; [146 ALR 126](#); 71 ALJR 991; [BC9703253](#) ^{CB} at CLR 83–4 per Toohey J, at CLR 108–9 per Gaudron J, at CLR 167–76 per Gummow J.

It now seems clear that not all of the provisions of [Ch III](#) can be put aside as not applicable to the territories, although some clearly can be. For example, judges of territory courts are not entitled to the security of tenure guaranteed to judges of federal courts by [s 72](#) of the Constitution: *Spratt v Hermes* (1965) 114 CLR 226; [1966] ALR 597; (1965) 39 ALJR 369; [BC6500590](#) ^{CB}; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322; [165 ALR 171](#); [\[1999\] HCA 44](#); [BC9905445](#) ^{CB}; *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; [206 ALR 315](#); [\[2004\] HCA 31](#); [BC200403588](#) at [\[29\]](#) ^{CB}.

[\(CTH\) CONSTITUTION \[2615\] s 123 Alteration of limits of States](#)

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[2615] 123 Alteration of limits of States

The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected.

SECTION 123 GENERALLY

[2615.5] Surrender of part of a state

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 111, s 123.

A surrender of part of a state under [s 111](#) of the Constitution does not require approval by the voters in that state: “[Section 111](#) and [s 123](#) are quite disparate, dealing with quite different matters and powers; they make no impact one on the other”: *Paterson v O'Brien* (1978) 138 CLR 276 at 280; [18 ALR 31](#).

End of Document

(CTH) CONSTITUTION [2620] s 124 Formation of new States

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[2620] 124 Formation of new States

A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

End of Document

(CTH) CONSTITUTION [2705] s 125 Seat of Government

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CHAPTER VII MISCELLANEOUS [ss 125–127]

[2705] 125 Seat of Government

The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

SECTION 125

[2705.5] Seat of government

L Legislation cited in this paragraph

(CTH) [Seat of Government Acceptance Act 1909](#).

(CTH) [Seat of Government \(Administration\) Act 1910](#).

The seat of government is located at Canberra, in the Australian Capital Territory: Seat of Government Acceptance Act 1909 (Cth); Seat of Government (Administration) Act 1910 (Cth).

(CTH) CONSTITUTION [2710] s 126 Power to Her Majesty to authorise Governor-General to appoint deputies

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Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

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[2710] 126 Power to Her Majesty to authorise Governor-General to appoint deputies

The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

SECTION 126

[2710.5] Letters Patent

Clause IV of the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia, dated 21 August 1984, authorises the Governor-General to appoint a deputy or deputies to exercise in that capacity the functions assigned to the deputy by the Governor-General during the pleasure of the Governor-General.

End of Document

(CTH) CONSTITUTION [2715] s 127 (Repealed)

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[2715] 127

[s 127 rep Act 55 of 1967 s 3]

SECTION 127

[2715.5] “Aboriginal natives”

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 127.

Before its repeal [s 127](#) read as follows: “In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.”

End of Document

(CTH) CONSTITUTION [2805] s 128 Mode of altering the Constitution

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977 • Commentary Published: April 2011

Alexander Flecknoe-Brown

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CHAPTER VIII ALTERATION OF THE CONSTITUTION [s 128]

[2805] 128 Mode of altering the Constitution

This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, of increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section,

Territory means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives

SECTION 128 GENERALLY

[2805.5] Manner of voting

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 128.

(CTH) [Referendum \(Machinery Provisions\) Act 1984](#).

Parliament has exercised the power conferred by the first sentence of the fourth paragraph of [s 128](#): Referendum (Machinery Provisions) Act 1984 (Cth). The second sentence of the fourth paragraph has been redundant since the introduction of national adult suffrage by the Commonwealth Electoral Act 1902 (Cth).

[2805.10] Form of proposed law

“[I]n the absence of some clear indication to the contrary, the court should not conjure up by a process of implication a restraint on the capacity of Parliament to determine the content of the proposed law to be submitted to the electors ... The absence of any such reference suggests, in conformity with the doctrine of parliamentary supremacy, that there is no relevant limitation or restraint on Parliament's capacity to formulate an amendment or amendments to the Constitution in the form of one Bill, if the houses so decide. What the section then requires is electoral approval of the measure, whatever it be, that has passed both houses. That measure has the character of a proposed law until such time as it obtains the requisite electoral approval and assent. It then achieves the status of a law amending the Constitution”: *Boland v Hughes* [\(1988\) 83 ALR 673](#) at [675](#).

[2905.15] General references

L Legislation cited in this paragraph

(CTH) [Commonwealth of the Australia Constitution Act](#) s 128.

See J G Latham, “Changing the Constitution” (1952–55) *Sydney Law Review* 14; H V Evatt, “Amending the Constitution” 1 *Res Judicatae* 264; A P Canaway, “The safety valve of the Constitution” (1938) 12 *Australian Law Journal* 108; A P Canaway, “The evolution of [s 128](#) ” 13 *Australian Law Journal* 274; G Sawyer, “Some legal assumptions of constitutional change” (1957) 4 *West Australian Annual Law Review* 1; R D Lumb, “Fundamental law and the processes of constitutional change in Australia” (1978) 9 *Federal Law Review* 148; J Thomson, (1983) 13 *Federal Law Review* 323.

In relation to the impermissibility of using failed referenda as an aid in constitutional interpretation see *New South Wales v Commonwealth* [\(2006\) 231 ALR 1](#); 81 ALJR 34; [\[2006\] HCA 52](#); [BC200609129](#) at [\[153\]–\[163\]](#) [CB](#).

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(CTH) CONSTITUTION [2905] SCHEDULE

Practice & Procedure High Court & Federal Court of Australia

Constitution current to: Act 84 of 1977

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[2905] SCHEDULE

OATH

I, *A B*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. SO HELP ME GOD!

AFFIRMATION

I, *A B*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE — *The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

End of Document

Statute of Westminster Adoption Act 1942: Table of Provisions

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Statute of Westminster Adoption Act 1942: Table of Provisions

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(CTH) Statute of Westminster

Adoption Act 1942 [3055] s 1 Short title

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Statute of Westminster

Adoption Act 1942

An Act to remove Doubts as to the Validity of certain Commonwealth Legislation, to obviate Delays occurring in its Passage, and to effect certain related purposes, by adopting certain Sections of the Statute of Westminster, 1931, as from the Commencement of the War between His Majesty the King and Germany.

Preamble

WHEREAS certain legal difficulties exist which have created doubts and caused delays in relation to certain Commonwealth legislation, and to certain regulations made thereunder, particularly in relation to the legislation enacted, and regulations made, for securing the public safety and defence of the Commonwealth of Australia, and for the more effectual prosecution of the war in which His Majesty the King is engaged:

AND WHEREAS those legal difficulties will be removed by the adoption by the Parliament of the Commonwealth of Australia of sections two, three, four, five and six of the Statute of Westminster, 1931, and by making such adoption have effect as from the commencement of the war between His Majesty the King and Germany:

BE it therefore enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:

[3055] 1 Short title

This Act may be cited as the [Statute of Westminster Adoption Act 1942](#).

(CTH) Statute of Westminster Adoption Act 1942 [3060] s 2 Commencement

Practice & Procedure High Court & Federal Court of Australia

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[3060] 2 Commencement

This Act shall come into operation on the day on which it receives the Royal Assent.

End of Document

(CTH) Statute of Westminster Adoption Act 1942 [3065] s 3 Adoption of Statute of Westminster, 1931

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 56 of 1942

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[3065] 3 Adoption of Statute of Westminster, 1931

Sections two, three, four, five and six of the Imperial Act entitled the Statute of Westminster, 1931 (which Act is set out in the Schedule to this Act) are adopted and the adoption shall have effect from the third day of September, One thousand nine hundred and thirty-nine.

End of Document

(CTH) Statute of Westminster Adoption Act 1942 [3570] THE SCHEDULE

Practice & Procedure High Court & Federal Court of Australia

Current to: Act 56 of 1942

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [Statute of Westminster Adoption Act 1942](#) > [Statute of Westminster Adoption Act 1942](#)

[3570] THE SCHEDULE

Section 3

STATUTE OF WESTMINSTER, 1931

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December 1931]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

AND WHEREAS it is meet and proper to set out by way of preamble to this Act that, in as much as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it could be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

AND WHEREAS it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

AND WHEREAS it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

AND WHEREAS the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

NOW, THEREFORE, be it enacted by the King's Most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1 In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

(CTH) Statute of Westminster Adoption Act 1942 [3570] THE SCHEDULE

2 (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3 It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4 No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5 Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6 Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7 (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada, or of any of the legislatures of the Provinces respectively.

8 Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9 (1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10 (1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

(CTH) Statute of Westminster Adoption Act 1942 [3570] THE SCHEDULE

11 Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12 This Act may be cited as the Statute of Westminster 1931.

End of Document

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(CTH) Australia Act 1986 [3575] s 1 Termination of power of Parliament of United Kingdom to legislate for Australia

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Australia Act 1986

No 142 of 1985

An Act to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation

WHEREAS the Prime Minister of the Commonwealth and the Premiers of the States at conferences held in Canberra on 24 and 25 June 1982 and 21 June 1984 agreed on the taking of certain measures to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation:

AND WHEREAS in pursuance of paragraph [51\(xxxviii\)](#) of the Constitution the Parliaments of all the States have requested the Parliament of the Commonwealth to enact an Act in the terms of this Act:

BE IT THEREFORE ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

[3575] 1 Termination of power of Parliament of United Kingdom to legislate for Australia

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.

End of Document

(CTH) Australia Act 1986 [3580] s 2 Legislative powers of Parliaments of States

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[3580] 2 Legislative powers of Parliaments of States

(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

(2) 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 but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

End of Document

(CTH) Australia Act 1986 [3585] s 3 Termination of restrictions on legislative powers of Parliaments of States

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[3585] 3 Termination of restrictions on legislative powers of Parliaments of States

(1) The Act of the Parliament of the United Kingdom known as the Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a State shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a State shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the State.

End of Document

(CTH) Australia Act 1986 [3590] s 4 Powers of State Parliaments in relation to merchant shipping

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[3590] 4 Powers of State Parliaments in relation to merchant shipping

Sections 735 and 736 of the Act of the Parliament of the United Kingdom known as the Merchant Shipping Act 1894, in so far as they are part of the law of a State, are hereby repealed.

End of Document

**(CTH) Australia Act 1986 [3595] s 5 Commonwealth Constitution,
Constitution Act and Statute of Westminster not affected**

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[3595] 5 Commonwealth Constitution, Constitution Act and Statute of Westminster not affected

[Sections 2](#) and [3\(2\)](#) above —

- (a) are subject to the Commonwealth of Australia Constitution Act and to the Constitution of the Commonwealth; and
- (b) do not operate so as to give any force or effect to a provision of an Act of the Parliament of a State that would repeal, amend or be repugnant to this Act, the Commonwealth of Australia Constitution Act, the Constitution of the Commonwealth or the Statute of Westminster 1931 as amended and in force from time to time.

End of Document

(CTH) Australia Act 1986 [3600] s 6 Manner and form of making certain State laws

Practice & Procedure High Court & Federal Court of Australia

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[3600] 6 Manner and form of making certain State laws

Notwithstanding [sections 2](#) and [3\(2\)](#) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

End of Document

(CTH) Australia Act 1986 [3605] s 7 Powers and functions of Her Majesty and Governors in respect of States

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3605] 7 Powers and functions of Her Majesty and Governors in respect of States

- (1) Her Majesty's representative in each State shall be the Governor.
- (2) Subject to [subsections \(3\)](#) and [\(4\)](#) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.
- (3) [Subsection \(2\)](#) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.
- (4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of [subsection \(2\)](#) above.
- (5) The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.

End of Document

(CTH) Australia Act 1986 [3610] s 8 State laws not subject to disallowance or suspension of operation

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Current to Act: 142 of 1985

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[3610] 8 State laws not subject to disallowance or suspension of operation

An Act of the Parliament of a State that has been assented to by the Governor of the State shall not, after the commencement of this Act, be subject to disallowance by Her Majesty, nor shall its operation be suspended pending the signification of Her Majesty's pleasure thereon.

End of Document

**(CTH) Australia Act 1986 [3615] s 9 State laws not subject to withholding of
assent or reservation**

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3615] 9 State laws not subject to withholding of assent or reservation

(1) No law or instrument shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State.

(2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon.

End of Document

(CTH) Australia Act 1986 [3620] s 10 Termination of responsibility of United Kingdom Government in relation to State matters

Practice & Procedure High Court & Federal Court of Australia

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[3620] 10 Termination of responsibility of United Kingdom Government in relation to State matters

After the commencement of this Act Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State.

End of Document

(CTH) Australia Act 1986 [3625] s 11 Termination of appeals to Her Majesty in Council

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3625] 11 Termination of appeals to Her Majesty in Council

(1) Subject to [subsection \(4\)](#) below, no appeal to Her Majesty in Council lies or shall be brought, whether by leave or special leave of any court or of Her Majesty in Council or otherwise, and whether by virtue of any Act of the Parliament of the United Kingdom, the Royal Prerogative or otherwise, from or in respect of any decision of an Australian court.

(2) Subject to [subsection \(4\)](#) below —

- (a) the enactments specified in [subsection \(3\)](#) below and any orders, rules, regulations or other instruments made under, or for the purposes of, those enactments; and
- (b) any other provisions of Acts of the Parliament of the United Kingdom in force immediately before the commencement of this Act that make provision for or in relation to appeals to Her Majesty in Council from or in respect of decisions of courts, and any orders, rules, regulations or other instruments made under, or for the purposes of, any such provisions,

in so far as they are part of the law of the Commonwealth, of a State or of a Territory, are hereby repealed.

(3) The enactments referred to in [subsection \(2\)\(a\)](#) above are the following Acts of the Parliament of the United Kingdom or provisions of such Acts:

The Australian Courts Act 1828, section 15
The Judicial Committee Act 1833
The Judicial Committee Act 1844
The Australian Constitutions Act 1850, section 28
The Colonial Courts of Admiralty Act 1890, section 6.

(4) Nothing in the foregoing provisions of this section —

- (a) affects an appeal instituted before the commencement of this Act to Her Majesty in Council from or in respect of a decision of an Australian court; or
- (b) precludes the institution after that commencement of an appeal to Her Majesty in Council from or in respect of such a decision where the appeal is instituted —

(CTH) Australia Act 1986 [3625] s 11 Termination of appeals to Her Majesty in Council

- (i) pursuant to leave granted by an Australian court on an application made before that commencement; or
- (ii) pursuant to special leave granted by Her Majesty in Council on a petition presented before that commencement,

but this subsection shall not be construed as permitting or enabling an appeal to Her Majesty in Council to be instituted or continued that could not have been instituted or continued if this section had not been enacted.

End of Document

(CTH) Australia Act 1986 [3630] s 12 Amendment of Statute of Westminster

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3630] 12 Amendment of Statute of Westminster

Sections 4, 9(2) and (3) and 10(2) of the Statute of Westminster 1931, in so far as they are part of the law of the Commonwealth, of a State or of a Territory, are hereby repealed.

End of Document

(CTH) Australia Act 1986 [3635] s 13 Amendment of Constitution Act of Queensland

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3635] 13 Amendment of Constitution Act of Queensland

(1) The Constitution Act 1867–1978 of the State of Queensland is in this section referred to as the Principal Act.

(2) Section 11A of the Principal Act is amended in subsection (3) —

(a) by omitting from paragraph (a) —

(i) “and Signet”; and

(ii) “constituted under Letters Patent under the Great Seal of the United Kingdom”; and

(b) by omitting from paragraph (b) —

(i) “and Signet”; and

(ii) “whenever and so long as the office of Governor is vacant or the Governor is incapable of discharging the duties of administration or has departed from Queensland”.

(3) Section 11B of the Principal Act is amended —

(a) by omitting “Governor to conform to instructions” and substituting “Definition of Royal Sign Manual”;

(b) by omitting subsection (1); and

(c) by omitting from subsection (2) —

(i) “(2)”;

(ii) “this section and in”; and

(iii) “and the expression

Signet means the seal commonly used for the sign manual of the Sovereign or the seal with which documents are sealed by the Secretary of State in the United Kingdom on behalf of the Sovereign”.

(4) Section 14 of the Principal Act is amended in subsection (2) by omitting “, subject to his performing his duty prescribed by section 11B,”.

(CTH) Australia Act 1986 [3640] s 14 Amendment of Constitution Act of Western Australia

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3640] 14 Amendment of Constitution Act of Western Australia

(1) The Constitution Act 1889 of the State of Western Australia is in this section referred to as the Principal Act.

(2) Section 50 of the Principal Act is amended in subsection (3) —

(a) by omitting from paragraph (a) —

(i) “and Signet”; and

(ii) “constituted under Letters Patent under the Great Seal of the United Kingdom”;

(b) by omitting from paragraph (b) —

(i) “and Signet”; and

(ii) “whenever and so long as the office of Governor is vacant or the Governor is incapable of discharging the duties of administration or has departed from Western Australia”; and

(c) by omitting from paragraph (c) —

(i) “under the Great Seal of the United Kingdom”; and

(ii) “during a temporary absence of the Governor for a short period from the seat of Government or from the State”.

(3) Section 51 of the Principal Act is amended —

(a) by omitting subsection (1); and

(b) by omitting from subsection (1) —

(i) “(2)”;

(ii) “this section and in”; and

(iii) “and the expression

Signet means the seal commonly used for the sign manual of the Sovereign or the seal with which documents are sealed by the Secretary of State in the United Kingdom on behalf of the Sovereign”.

(CTH) Australia Act 1986 [3645] s 15 Method of repeal or amendment of this Act or Statute of Westminster

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [Australia Act 1986](#)

[3645] 15 Method of repeal or amendment of this Act or Statute of Westminster

(1) This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

(2) For the purposes of subsection (1) above, an Act of the Parliament of the Commonwealth that is repugnant to this Act or the Statute of Westminster 1931, as amended and in force from time to time, or to any provision of this Act or of that Statute as so amended and in force, shall, to the extent of the repugnancy, be deemed an Act to repeal or amend the Act, Statute or provision to which it is repugnant.

(3) Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with [section 128](#) of the Constitution of the Commonwealth after the commencement of this Act.

End of Document

(CTH) Australia Act 1986 [3650] s 16 Interpretation

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

[Practice & Procedure High Court & Federal Court](#) > [Commonwealth Constitution](#) > [Australia Act 1986](#)

[3650] 16 Interpretation

(1) In this Act, unless the contrary intention appears —

appeal includes a petition of appeal, and a complaint in the nature of an appeal;

appeal to Her Majesty in Council includes any appeal to Her Majesty;

Australian court means a court of a State or any other court of Australia or of a Territory other than the High Court;

court includes a judge, judicial officer or other person acting judicially;

decision includes determination, judgment, decree, order or sentence;

Governor, in relation to a State, includes any person for the time being administering the government of the State;

State means a State of the Commonwealth and includes a new State;

the Commonwealth of Australia Constitution Act means the Act of the Parliament of the United Kingdom known as the Commonwealth of Australia Constitution Act;

the Constitution of the Commonwealth means the Constitution of the Commonwealth set forth in section 9 of the Commonwealth of Australia Constitution Act, being that Constitution as altered and in force from time to time;

the Statute of Westminster 1931 means the Act of the Parliament of the United Kingdom known as the Statute of Westminster 1931.

(2) The expression “a law made by that Parliament” in section 6 above and the expression “a law made by the Parliament” in section 9 above include, in relation to the State of Western Australia, the of that State.

(3) A reference in this Act to the Parliament of a State includes, in relation to the State of New South Wales, a reference to the legislature of that State as constituted from time to time in accordance with the Constitution Act, 1902, or any other Act of that State, whether or not, in relation to any particular legislative act, the consent of the Legislative Council of that State is necessary.

End of Document

(CTH) Australia Act 1986 [3655] s 17 Short title and commencement

Practice & Procedure High Court & Federal Court of Australia

Current to Act: 142 of 1985

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[3655] 17 Short title and commencement

(1) This Act may be cited as the [Australia Act 1986](#).

(2) This Act shall come into operation on a day and at a time to be fixed by Proclamation.

End of Document