

**CONSTITUTIONAL LAW  
SUMMARY  
2010**



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SAMPLE ONLY

## INTRODUCTION

Constitutional Law concerns what the Commonwealth, and in some respects States, has the power to legislate for. The Commonwealth Constitution<sup>1</sup> outlines areas of power for which the Commonwealth can legislate. These are mostly listed within Section 51 of the Constitution. In all, this section contains 39 specific heads of power for which the Federal (or Commonwealth) parliament has the power to make legislation. In addition the Commonwealth government has exclusive powers in Section 52 and implied powers that will be examined.

A central concern for Constitutional lawyers is whether a piece of Commonwealth legislation is lawful. In deciding whether a law is enacted in line with the Constitution the law must:

- be supported by a relevant head of power;
- be characterised as falling within the subject matter of the power; or
- be a law which the meaning and scope of the act can be characterised as a law with respect to the subject matter of the Cth power.

## ***PRINCIPLES OF CHARACTERISATION***

In characterising a law the central starting point to remember is that a Commonwealth head of power should be read broadly. This is known as the *Jumbunna Principle* and forms the first stage in characterising a law.

### ***The Central Question***

As outlined above the central question to ask yourself is: *is the law supported by a head of power or can the law be seen to fall within the subject matter of a power?*

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<sup>1</sup> Here after referred to as the Constitution.

## ***The Test***

To do this, consider:

1. what the meaning or scope of the subject matter of the relevant Cth power; and
2. is this law one that can be described as falling within the subject matter of the Cth power (is the law within the head of power).

## ***Tools of Interpretation***

In order to assist characterisation a number of important interpretation tools are utilised:

- Severability:
  - If part of an enactment exceeds the Commonwealth's constitutional power then the act is valid to the extent it is not in excess of the relevant power.<sup>2</sup>
- Reading Down:
  - a court will generally favour a reading of an act that brings the law within Cth power.
- Purpose of the Act:
  - If there is an ambiguity within an act the Court will prefer a meaning of the law that promotes the law's purpose determined from the text of the act as a whole.<sup>3</sup>

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<sup>2</sup> Section 15A, *Acts Interpretation Act* 1901. Hereafter referred to as *AIA*.

## ***Characterisation***

The ultimate overarching principle for testing the validity of law is to determine if there is a *sufficient connection between the law and head of power*.

### **1. The Law can have multiple characters**

A law can have *multiple characters*. The law will be considered valid if:

Murphy v Commonwealth:

- at least one character is within a Cth power, regardless if the other characters are not.

### **2. There must be a sufficient connection between the law and a head of power**

To test if there is a *sufficient connection* to characterise a law as falling within a head of power:

Leask v Commonwealth:

For a law to be valid there needs to be a *sufficient connection* between:

1. how the law operates and what effects it creates; and
2. the subject matter of the head of power.

Laws can be considered to be wrt a head of power when they are characterised as falling within:

- the core area of the power; or

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<sup>3</sup> Section 15AA(1), *AIA*.

- the incidental area of the power.

i. *Core Area of Power*

A law can be considered as falling within the heart of the head of power if:

Commonwealth v Bank of NSW (Bank Nationalisation Case):

- the law directly operates upon the subject matter at the core of the power;
- the law deals with the subject at the heart of the power.

The extent to which the law operates as a law falling within the core area of a power:

- if the law imposes any limit or condition they are supported by the law regardless of relevance to subject matter of the power.

ii. *Incidental Area of the Power*

***The Definition***

Section 51(xxxix) provides that the Commonwealth in addition to the express heads of power has an incidental power to legislate wrt matters 'incidental to the execution of any power vested by this constitution...'<sup>4</sup>

***Sources of Incidental Power***

D'Emden v Pedder:

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<sup>4</sup> Constitution 1901, section 51(xxxix). Contained in Blackshield and Williams, *Australian Constitutional Law and Theory* 3<sup>rd</sup> edition. Sydney: The Federation Press, 2002, p.1346.

- Incidental Power for Cth action comes from s. 39 (xxxix) Constitution as discussed above.
- An express grant of power to the Cth in heads of power and in enacted legislation can include further implied powers such that:
  - *these powers include every power and every control of power the denial of which would render the grant of power ineffective.*

### ***Sufficient Connection Test***

In order to argue that a law is supported under an incidental power there must be a reasonable connection, or sufficient connection, between the law and the head of power the law is to be enacted under. (Nationwide News)

#### **1. The Test for a Sufficient Connection:**

##### Bank Nationalisation Case:

- The factors set out by the majority for testing whether there was a sufficient connection are still relevant and were set out in Leask; the factors include:
  - Actual Operation of the Law*
    - examine how the law operates or impinges upon *rights, duties, powers and privileges*;
    - determine how the law in operation creates, changes, regulates or abolishes *rights, duties, powers and privileges*;
    - is there a factual link to a relevant head of power?
  - The provisions of the Law*
    - an asserted connection to a head of power is not enough the operation of the law must be consistent with the subject matter of the power.
  - The Purpose of the Law*

- the purpose clause of an Act or law is relevant to determining a sufficient connection but secondary in importance;
- a purpose clause cannot bring an Act within a power if the Act's provisions have no real connection with the power.



**If you have any queries regarding the constitutional law summary  
please email - [info@lawskool.com.au](mailto:info@lawskool.com.au)**

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