



Teacher Reference Document 104



AUSTRALIAN
CONSTITUTION
CENTRE

Unit 12: Federalism v Westminster Year 9 - C & C Strand: Laws & Citizens

Topic 9.2: Federalism v Westminster

Federalism - What topics can the Commonwealth legislate about?

The framers of the Commonwealth Constitution (ie the people who negotiated and wrote it during constitutional conventions in the 1890s) had to convince the smaller colonies that they would not end up being dominated and overridden by the new Commonwealth Government. One element of this was ensuring that the Commonwealth level of government was only given those powers that needed to be exercised at the national level or where uniformity was required. Everything else was to be left to the States, which were to continue to deal with the main areas of government, such as health and education.

In 1897, a South Australian, Frederick Holder, at the Adelaide Constitutional Convention, said that he wanted a 'true Federation' in which each State has its individuality preserved and its independence assured. He saw this as the relevant principle:

"That in dealing with [the Commonwealth] we should confer on it no powers which it cannot exercise more wisely and well and effectively than the States can exercise those powers. I would even go a step further, and lay down as the principle which should govern our conduct: To the States all that is local and relating to one State, to the Federal authority all that is national and inter-State."

This largely reflects how powers were allocated to the Commonwealth under the Constitution. Today it would be described as the 'principle of subsidiarity' – that powers should be exercised at the level closest to the people at which they can reasonably and practicably be exercised.

The concurrent powers in section 51

Most of the Commonwealth's legislative powers are 'concurrent' (meaning that a State can also legislate about these matters) and listed in [section 51](#) of the Constitution. They tend to fall within the following broad categories that are related to the Commonwealth's international status, its national economic role, matters that cross State borders or matters which need some kind of national or uniform standard to apply.



Parliament House, Canberra
Source: IStock



*Macquarie Lighthouse, Dunbar Head, Watsons Bay, Sydney
Source: Wiki Commons*

Matters relating to the outside world: defence (including the control of railways for defence purposes), external affairs, quarantine, immigration and emigration, naturalization and aliens, the influx of criminals from overseas, the people of any race, relations with the islands of the Pacific, trade and commerce with other countries, and fisheries in waters beyond Australia's territorial limits.

National economic matters: bounties (i.e. subsidies to help producers), borrowing money, banking and insurance (other than State banking and State insurance), bankruptcy and insolvency, and foreign, trading and financial corporations.

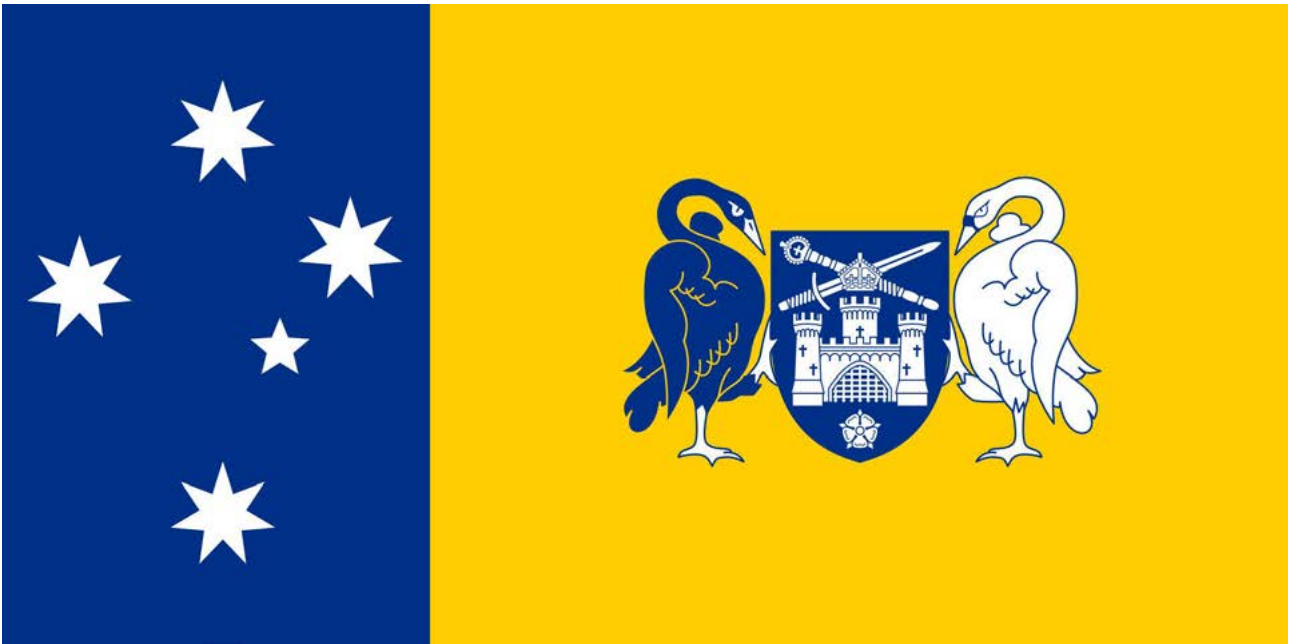
Cross-border matters within Australia: trade and commerce among the states, the recognition throughout Australia of laws and judicial proceedings, the service and execution of civil and criminal processes and judgments throughout Australia, the acquisition, construction and extension of railways across Australia, and the conciliation and arbitration of inter-state industrial disputes.

Matters needing a uniform standard or approach across the country: postal, telegraphic and telephonic services, lighthouses, lightships, beacons and buoys, astronomical and

meteorological observations, census and statistics, currency, coinage and legal tender, bills of exchange and promissory notes, weights and measures, copyrights, patents and trade marks, marriage and divorce.

Matters relating to the operation of the national level of government: taxation by the Commonwealth, compulsory acquisition of property by the Commonwealth, matters referred to the Commonwealth by the States, the exercise of cooperative Commonwealth/State powers, and matters incidental to the Commonwealth's executive and judicial powers (which has been used as the basis for a 'nationhood' power).

The hardest subjects to put in the above loose categories are the social welfare ones. Originally the Constitution provided for the Commonwealth to legislate with respect to invalid (i.e. sick people) and old-age pensions, but this was expanded in 1946 to a range of medical and other social security benefits. It could be argued that these fall within the 'uniform standard' category because it is important for all Australians to have access to uniform social security standards, or it could be argued that it is a matter that falls within the Commonwealth's national economic role.



Other Commonwealth legislative powers in the Constitution

In addition, there are a small number of exclusive Commonwealth powers listed in [section 52](#) of the Constitution, such as the power to make laws with respect to the seat of government (now the ACT, Canberra) and Commonwealth places.

Various other Commonwealth legislative powers are scattered throughout the Constitution. Chapter III contains powers with respect to courts, including creating courts, conferring and defining the jurisdiction of courts, limiting appeals, prescribing the number of judges and conferring rights to take legal actions against the Commonwealth or a State.

The Commonwealth Parliament may make laws about certain financial matters, including making laws about how the Commonwealth's surplus is to be paid to the states under [section 94](#), granting financial assistance to States under [section 96](#), taking over State debts under [section 105](#) and making laws about financial agreements under [section 105A](#).

The flag of the Australian Capital Territory
Source: Wiki Commons

The Commonwealth Parliament also has power under section 122 to legislate for the government of its territories. It can admit new States to the Commonwealth under section 121, alter State borders under [section 123](#) and determine the seat of government under [section 125](#). It may pass a constitutional amendment, under [section 128](#), but it only comes into effect if it is approved by voters in a referendum.

There are many provisions in the Constitution which set a rule 'until the Parliament otherwise provides'. Section 51(xxxvi) then gives the Parliament the power to make laws with respect to these matters. It is through this power that Parliament can make laws with respect to federal elections, the voting system used, the distribution of seats, the number of Senators for each State, the qualifications of voters, the qualifications of Members of Parliament (but not their disqualification, which is fixed by the Constitution), disputed elections, the number of Ministers, the payment of Members of Parliament and Ministers, the powers and privileges of the Houses, the quorum for sittings of the Houses, the salary of the Governor-General, the appointment of public servants and the audit laws for the Commonwealth.



Unit 12: Federalism v Westminster Year 9 - C & C Strand: Laws & Citizens

Topic 9.2: Federalism v Westminster

Federalism - What if State and Commonwealth laws conflict?

Most of the powers conferred upon the Commonwealth Parliament are 'concurrent' powers. This means that both the Commonwealth and the States can exercise those powers at the same time. This is fine, as long as those laws can operate in parallel, or build on each other, without coming into conflict. But what if there is an inconsistency between them?

Section 109 of the Commonwealth Constitution says: '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.'

The key message that comes from this provision is that where Commonwealth and State laws conflict, the Commonwealth law wins, and it is the one that citizens must obey.

The rule only applies if both of the laws are otherwise valid. If, for example, the Commonwealth law does not fall within a subject that the Commonwealth Parliament can legislate about, it will be invalid and section 109 will not apply.

While the word used in section 109 is 'invalid', it actually means 'inoperative'. The States still have the power to make inconsistent laws – it's just that these laws will be inoperative, to the extent of the inconsistency, while that inconsistency exists. For example, a State may enact a law of which 10% of its provisions are inconsistent with a Commonwealth law, but 90% are perfectly capable of applying without any inconsistency. In such a case the 10% will be treated as inoperative, but the other 90% will continue to operate. The State had the power to make the law, but a part of it is inoperative while the inconsistency exists. But if the Commonwealth then amends its law, so that the inconsistency no longer exists, the inoperative 10% of the State law automatically becomes operative again (assuming it hasn't been repealed in the meantime), so the State law applies in full, without the State needing to take any action.



*Parliament House, Canberra
Source: IStock*



The High Court adjudicates upon conflicts between State and Commonwealth laws
Source: HCA

What does section 109 cover?

Section 109 covers conflicts between Commonwealth and State 'laws'. What is meant by 'law' here includes Commonwealth or State statutes, delegated legislation (such as regulations) and instruments given the effect of a Commonwealth law, such as an industrial award. The consequence is that if a Commonwealth industrial award conflicts with a State statute, the industrial award prevails. Section 109 does not, however, cover the common law (i.e. traditional judge-made laws that are applied as precedents by the courts), because the common law can always be overridden by statutes, including State statutes.

The rule in section 109 also does not apply to inconsistencies between the laws of two different States (which are usually worked out by statutory interpretation), or between a territory law and a Commonwealth law (where the Commonwealth law prevails because all Territory legislative power has been delegated to it, and is controlled, by the Commonwealth Parliament).

Most importantly, the rule in section 109 does not apply to an inconsistency between a State law and the Commonwealth Constitution. The Commonwealth Constitution binds the States and it is outside the power of a State to make any law that breaches the Commonwealth Constitution. A State law that breaches the Commonwealth Constitution is therefore invalid at the time it is made. In contrast, a State has the *power* to make a law that is inconsistent with a Commonwealth law, but under section 109 the inconsistent part of it will be inoperative while the inconsistency exists.

What tests does a court use to decide if laws are inconsistent?

Some inconsistencies are obvious. If it is impossible to obey two laws (eg one says you must do X and the other says you must not do X) then there is a direct inconsistency.

Some inconsistencies are a little less obvious. For example, one law might permit you to do something (eg give you a right or power), while another law might prohibit or limit it. In this case it is possible to obey both laws (eg by choosing not to exercise the right or power), but one law detracts from the other, by taking away something that the other law gives you. This is also regarded as a form of direct inconsistency. A test often used by the High Court is whether a State law 'would alter, impair or detract from the operation of a law of the Commonwealth'. If so, it is to that extent inoperative.

The more difficult form of inconsistency is 'indirect inconsistency', which is also known as 'covering the field'. Here the inconsistency arises because the Commonwealth Parliament has chosen to legislate in a way that completely covers a particular subject, to the exclusion of all other laws. Marriage is an example. While section 51(xxi) of the Constitution gives the Commonwealth Parliament power to make laws with respect to marriage, the Commonwealth didn't use the power for a long time. Each State therefore continued with its own laws recognising marriage, which were slightly different from the laws in other States.



Eventually, the Commonwealth enacted a *Marriage Act 1961* (Cth) which was intended to deal with the recognition of marriage in its entirety across Australia. This meant that all the State marriage laws became inoperative, because the Commonwealth was now exhaustively covering the field.

Before the Commonwealth amended its *Marriage Act* to recognise same-sex marriage, various States proposed to recognise it in their laws, and the *ACT* passed a *same-sex marriage law*. But the High Court decided that the Commonwealth had covered the field in relation to marriage, so that no other kind of marriage could be recognised in a State or Territory law, even though there was no direct inconsistency (see *Commonwealth v ACT*). Only the Commonwealth could change the law with respect to what constituted a 'marriage' in Australia.

Often the difficulty is working out whether the Commonwealth Parliament intended to cover the field or wanted to leave space for State laws that were not directly inconsistent. This may require a court to work out what the particular field is. For example, *Debbie Wardley* wanted to be a commercial pilot. She had all the necessary experience and she trained men who went on to become commercial pilots. But the Ansett airline refused to employ her because she was a woman. There was a 'Pilot's Agreement', which had the status of a Commonwealth industrial award and therefore a 'law' for the purposes of section 109 of the Constitution.

The rainbow flag: used by those promoting the successful yes case in the 2017 plebiscite vote on same-sex marriage
Source: *IStock*

It allowed pilots to be hired or dismissed for any reason. Ansett argued that it covered the field to the exclusion of State anti-discrimination laws.

The *High Court* decided in 1980 that they operated in two different fields. The Pilot's Agreement dealt with industrial matters and was not intended to exclude State laws in the different field of anti-discrimination. The right to hire and fire was intended to operate in the context of the general law, including anti-discrimination laws. Debbie got to be a commercial pilot and had a long career flying commercial jets around the world.



Pilot Debbie Wardley (now known as Deborah Lawrie)
Source: *Catholic Weekly*





Unit 12: Federalism v Westminster Year 9 - C & C Strand: Laws & Citizens

Topic 9.2: Federalism v Westminster

Federalism - Exclusive powers of the Commonwealth

How the Constitution allocates powers

The Commonwealth Constitution gives listed powers to the Commonwealth Parliament, while the State Parliaments can exercise any legislative power, as long as it has not been expressly taken away from them by the Constitution. Most of the legislative powers (known as 'heads of power') given to the Commonwealth Parliament are set out in section 51 of the Constitution. They are 'concurrent' powers, which can also be exercised by the States.

If both the Commonwealth and State Parliaments make valid laws on a subject, and they are inconsistent, then section 109 of the Constitution says that the Commonwealth law is the one that applies and the State law becomes inoperative to the extent of the inconsistency.

But in a small number of cases, the Commonwealth Parliament is given 'exclusive' powers. This means that the States do not have power to make laws with respect to these subjects or that their laws do not apply in these particular places.

The federal seat of government

Section 52 of the Constitution gives the Commonwealth Parliament the exclusive power to make laws about the federal seat of government, and all places acquired by the Commonwealth for public purposes.

The colonies had agreed that the federal 'seat of government' – where Parliament and the main federal institutions would be based – would not be in either of the two largest cities, Sydney or Melbourne. Parliament would sit at Melbourne until a place was chosen for Australia's capital city, which would include the seat of government. Section 125 of the Constitution says that the seat of government needs to be somewhere within New South Wales, and at least 100 miles (161km) from Sydney.



*Parliament House, Canberra
Source: IStock*



It was only in 1908 that Parliament decided that land in what today is known as Canberra would be Australia's seat of government. In 1911, New South Wales gave part of its territory, including Canberra, to the Commonwealth, creating the Australian Capital Territory. Construction of Canberra began in 1913, and in 1927, the Commonwealth Parliament finally moved from Melbourne to Canberra. It was still quite remote. Sheep would graze around the Parliament building, now known as 'Old Parliament House'.

Places acquired by the Commonwealth for public purposes

There are lots of places around Australia that the Commonwealth has acquired for public purposes, like airports and post offices. The Commonwealth has exclusive power to make laws for them, but if State laws didn't apply there, this would lead to a big problem. For example, the law against murder is a State law. Does that mean that constitutionally-savvy murderers could stake out Post Offices and kill their victims there because the State law of murder doesn't apply?

Fortunately, this problem has been fixed. To prevent post offices and other Commonwealth places becoming crime dens, the Commonwealth Parliament enacted a special law, the *Commonwealth Places (Application of Laws) Act 1970* (Cth), which picks up the laws of whichever State the Commonwealth place is situated in, and applies them as Commonwealth law to that place. So if our murderer killed someone in the Post Office at Parramatta, and claimed the State law of murder didn't apply to her, she would not escape conviction.

*The Australian Defence Force Ensign (ADF). Section 114 of the Constitution says the States cannot, without Commonwealth consent, raise their own armies or navies.
Source: Wiki Commons*

Instead, she could still be convicted under the State law of murder, as picked up and applied by a Commonwealth law. This would mean, for example, that she could only be convicted by a unanimous jury verdict, because her trial would run under federal jurisdiction. If it were a State offence, she could be convicted by a majority jury verdict.

Raising military forces

Section 114 of the Constitution says the States cannot, without the consent of the Commonwealth Parliament, raise their own armies or navies. This is probably a good thing because we wouldn't want a war between Queensland and New South Wales. State of Origin football is a better way of dealing with rivalry.

States, of course, still have strong police forces and laws to keep us safe. But the Commonwealth has overall responsibility for the defence of Australia, and section 119 of the Constitution says it must protect the States from invasion. If the States ask, the Commonwealth must also protect them from internal violence, such as terrorism. But the Constitution is not clear about the extent to which the Commonwealth can use its army to deal with bushfires or other natural disasters in a State, as this falls outside of 'defence'.



Minting coins

Section 115 of the Constitution prevents the States from coining money. Only the Commonwealth can do this. Since 1965, all of Australia's circulating coins have been produced by the Royal Australian Mint in Canberra. Could a State make its own crypto-currency? Is that 'coining money'?

*The Royal Australian Mint. Only the Commonwealth can coin money.
Source: Royal Australian Mint*

Customs and excise

Section 90 of the Constitution prohibits the States from raising certain kinds of taxes called customs and excise duties. Customs duties are taxes on goods brought into the country from abroad for sale (imports). An excise is a tax on the production, manufacture, distribution or sale of goods. In the past, these taxes were an important source of income for the Australian colonies. But under the Constitution, only the Commonwealth is able to impose these kinds of taxes.

Excise duties include taxes on goods such as alcohol, tobacco and petrol. Customs duties also apply to the import of these goods, as well as many others, like luxury cars.

Other areas outside State power

Apart from the areas in which the Constitution grants exclusive law-making power to the Commonwealth, there are other matters the States cannot make laws about because they simply have nothing to do with the States.

For example, a State could not legislate to decide what the national anthem or the national flag was. Nor could it legislate to require the Governor-General to hold a federal election or decide upon how votes are to be counted in a federal election. None of these things would be a law concerning the State.

A State Parliament also cannot legislate to do anything that breaches the Constitution.



Topic 9.2: Lesson/ Activities Two

Commonwealth Power versus State Power



AUSTRALIAN
CONSTITUTION
CENTRE

Time/Lesson	Learning Goal
<ul style="list-style-type: none">1 hour/ 1 Lesson	<ul style="list-style-type: none">To understand that the Commonwealth and State parliaments have different powers in law-making.To understand when the Commonwealth power prevails.To apply this understanding to actual High Court cases.
Rationale	Success Criteria
Students need to identify issues where Commonwealth and State Parliaments both have the power to make laws, and recognise that a valid federal law will override the state law if they conflict (AC9HS5K08_E2).	Students can explain the powers of Commonwealth and State parliaments to make laws. Students can accurately apply section 109 of the Constitution to real High Court.
Teaching Reference Document	
<ul style="list-style-type: none">TRD 104: Federalism - What topics can the Commonwealth legislate about?TRD 105: Federalism - What if State and Commonwealth laws conflict?TRD 106: Federalism - Exclusive powers of the Commonwealth	
Resources	
<ul style="list-style-type: none">VIDEO: Google - Levels of Government - PEO (Parliament Education Office)	
Tuning In	
<ul style="list-style-type: none">WATCH: BTN's level of governmentEXPLAIN: The Constitution gives the Commonwealth Parliament the power to make laws on subjects that are listed in the Constitution. Some of these powers are exclusive to the Commonwealth Parliament but most are concurrent, meaning that State Parliaments can also make laws about the same subject. Where a Commonwealth law and a state law conflict, section 109 of the Constitution says that the Commonwealth law prevails, meaning that it is the law that applies, while the inconsistent part of the State law ceases to operate.	

Teacher Instruction

- **READ:** TRD FEDERALISM – WHAT IF STATE AND COMMONWEALTH LAWS CONFLICT?
- **ANSWER** Questions when reading:
 1. What laws does section 109 deal with?
 2. Why is the question of whether a law is 'covering the field' important? Provide an example.
- **READ:** TRD FEDERALISM – WHAT TOPICS CAN THE COMMONWEALTH LEGISLATE ABOUT?
- **ANSWER** Questions when reading:
 1. What are 'concurrent powers'?
 2. List the five broad topics of matters that the Commonwealth Parliament can make laws about. Do these make sense or would it be better if State Parliaments made these laws? Why/why not?
 3. If you were writing the Constitution today, are there any modern subjects (eg artificial intelligence or cryptocurrencies) that you would give to the Commonwealth Parliament?

Group Independent Learning

- **CASE STUDY:** In pairs, students go through facts of Tasmanian Dam case (starting with reference to the Australian Constitution Centre (<http://www.australianconstitutioncentre.org.au/nationhood---the-constitution-saves-the-franklin-river.html>) and form arguments about whether the Commonwealth or State law should have prevailed and how they were inconsistent. What were the consequences for the environment (eg a river saved but the loss of green hydro energy and the use of fossil fuels instead, adding to climate change)? Should courts take into account the consequences of their decisions or just apply the law and the Constitution? Why was the case so controversial? Consider some news articles from the time, using Trove.

Wrapping It Up

EXPLAIN: Where there is an inconsistency between Commonwealth and State laws, the Commonwealth law wins - but only if it is a valid law.

Differentiation/Enrichment

EXTENSION: Students identify one of the exclusive powers of the Commonwealth - eg to coin money or to maintain an army. What would life be like in Australia if this was not an exclusive Commonwealth power and the States could have their own armies or mint their own currency? Students engage in creative writing, writing a story about a scenario involving State armies in conflict or how they would manage different State currencies in their daily lives.

Assessment Strategies

Check understanding of Group/Independent Learning.

