

Constitution Act 1900.

Covering Clause 9.

The Constitution of the Commonwealth of Australia,

Section 51, 107, 108 & 109.

Powers for Parliaments to make Laws.

Sections 51, 107, 108 & 109 are similar in so far as they establish the power for Parliaments to make laws and the hierarchy of such laws.

Now we need to understand three very important facts.

Fact 1, all Parliaments require authority from somewhere to create laws.

Fact 2, the laws that every Parliament create, are subject to the Commonwealth Constitution Act.

Fact 3, the Commonwealth Parliament, and the State Parliaments, are restricted by the Commonwealth Constitution. Fact 3 can be somewhat controversial

Commonwealth Constitution.

Section 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: the 39 subsections.

Section 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becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may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.

Section 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.**

Section 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.

Constitution Act. Covering Clause 5.

Clause 5. Operation of the Constitution and laws.

Commonwealth Constitution Act Page 8

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.

The Annotated Constitution make the following comments;

The words "and all Laws".

Page 346.

No difficulty is suggested by the words, "and all laws made by the Parliament of the Commonwealth under the Constitution". **The words "under the Constitution" are words of limitation and qualification. Not all enactments purporting to be laws made by the Parliament are binding; but laws made under, in pursuance of, and within the authority conferred by the Constitution, and those only, are binding on the courts, judges, and people. A law in excess of the authority conferred by the Constitution is no law; it is wholly void and inoperative; it confers no rights, it imposes no duties; it affords no protection.**

The Constitution Act itself is binding without limitation or qualification because it is passed by the sovereign Parliament (UK), but the laws passed by the Parliament of the Commonwealth, a subordinate Parliament, must be within the limits of the delegation of powers or they will be null and void.

Some words from CLRA.

Some argue that since the Australia Act 1986 was created by the UK Parliament, Australia is sovereign. 2 points;

Point 1; The Australia Act 1986 (Imp) is an act of the UK. Parliament and such Parliament can repeal or amend their own acts at any time. Under those conditions Australia cannot possibly be sovereign.

Point 2; The UK. Parliament passed a law for Australia in March 2015 again Australia cannot possibly be sovereign.

The Annotated Constitution make the following comments;

Page 346.

What is not granted to the federal government and what is not possessed by the States is reserved to the people of the Commonwealth, and may at any time be brought into action by the provision for amendment of the Constitution of the Commonwealth. (Referendum, section 128).

To be valid and binding they must be within the domain of jurisdiction mapped out and bounded in express terms, or by necessary implication, in the Constitution itself.

What is not so granted to the Parliament of the Commonwealth is denied to it.

What is not so granted is either reserved to the States, or remains vested but dormant in the people of the Commonwealth, again by the provision for amendment of the Constitution of the Commonwealth. (Referendum, section 128).

Some words from CLRA.

At the time just before Federation our forefathers were creating the Commonwealth Constitution; and they established that there would be three sets of powers that Parliaments have authority to make laws with respect to.

Those powers are enshrined into the Commonwealth Constitution and are called;

1. **Exclusive powers**, as found in section 51 & 107 of the Constitution, that only the Federal Parliament have authority to make laws with respect to, and
2. **Concurrent powers**, as found in section 107 of the Constitution, that both the Federal Parliament and the States have authority to make laws with respect to, and
3. **Reserved powers**, as found in section 107 of the Constitution, that only the States have authority to make laws with respect to.

1. **Exclusive powers**; Section 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 the 39 subsections.

Please “NOTE” This document has not listed any of the subsections described in the exclusive powers, that are mentioned above.

2. **Concurrent powers**; the Commonwealth, and the States shall have powers to make laws with respect to the 21 subsections. The Annotated Constitution. Page 934 & 935.

The Annotated Constitution make the following comments; Page 934 & 935.

CONCURRENT POWERS

- (1) Astronomical and meteorological observations (viii.).
- (2) Banking, other than State banking; also State banking extending beyond the limit of the State concerned, the incorporation of banks, and the issue of paper money (xiii.).
- (3) Bankruptcy and insolvency (xvii.).
- (4) Bills of exchange and promissory notes (xvi.).
- (5) Census and statistics (xi.).
- (6) Copyrights, patents of inventions and designs, and trade-marks(xviii.).
- (7) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (xxii.).
- (8) Foreign corporations, and trading or financial corporations formed within the Commonwealth (xx.).
- (9) Immigration and emigration (xxvii.).
- (10) Influx of criminals (xxviii.).
- (11) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned (xiv.).
- (12) Invalid and old-age pensions (xxiii.).
- (13.) Light-houses, light-ships, beacons and buoys (vii.).
- (14.) Marriage (xxi.).
- (15.) Naturalization and aliens (xix.).
- (16.) People of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special

- laws (xxvi.).
- (17.) Postal, telegraphic, telephonic, and other like services (v.).
- (18.) Quarantine (ix.).
- (19.) Railways, control with respect to transport for naval and military purposes of the Commonwealth (xxxii.).
- (20.) Railway construction and extension in any State with the consent of that State (xxxiv.).
- (21.) Taxation; but so as not to discriminate between States or parts of States (ii.).
- (22.) Trade and commerce with other countries, and among the States (i.); except that on the imposition of uniform duties of customs the power to impose duties of customs and excise
- (23.) Weights and measures (xv becomes exclusively vested in the Federal Parliament (sec. 90)

3. Reserved powers; The States shall have powers to make laws with respect to. **RESIDUARY LEGISLATIVE POWERS.**—The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal, and social powers, including control over 9 subsections and the regulation of 25 departments, of the State Governments.

The Annotated Constitution make the following comments; Page 935 & 936.

RESIDUARY LEGISLATIVE POWERS (Reserved powers) —The residuary authority left to the Parliament of each State, after the exclusive and concurrent grants to the Federal Parliament, embraces a large mass of constitutional, territorial, municipal, and social powers, including control over:

- Agriculture and the cultivation of the soil:
- Banking — State banking within the limits of the State:
- Borrowing money on the sole credit of the State:
- Bounties and aids on mining for gold, silver, or metals:
- Bounties and aids on mining for gold, silver, or metals:
- Charities—establishment and management of asylums:
- Constitution of State: amendment, maintenance and execution of
- Corporations—other than foreign corporations and trading or financial corporations:
- Courts—civil and criminal, maintenance and organization for the execution of the laws of a State:

Departments of State Governments — regulation of

- Education
- Factories
- Fisheries within the State:
- Forests
- Friendly Societies
- Game
- Health
- Inspection of goods imported or proposed to be exported in order to detect fraud or prevent the spread of disease:
- Insurance — State Insurance within the limits of the State:
- Intoxicants—the regulation and prohibition of the manufacture within the State of fermented, distilled, or intoxicating liquids:
- Justice—Courts:
- Land—management and sale of public lands within the State:
- Licenses—the regulation of the issue of licenses to conduct trade and industrial operations, within the State, such as liquor licenses and auctioneers' licenses. Subject however to sec. 92:
- Manufactures:
- Mines and Mining:
- Municipal institutions and local government:
- Officers—appointment and payment of public officers of the State:
- Police — regulations, social and sanitary:
- Prisons—State prisons and reformatories:
- Railways—control and construction of railways within the State, subject to constitutional limitations:
- Rivers—subject to constitutional limitations (see Restricted Powers): Shops—subject to constitutional limitations:
- Taxation on order to the raising of revenue for State purposes:
- Trade and Commerce within the State:
- Works—construction and promotion of public works and internal improvements, subject to the constitutional limitations:

Some words from CLRA.

The Parliament of the Commonwealth can only create laws from the list of subsections contained in section 51 (exclusive powers), section 52, section 55 and any section that has contained within it the words "until the Parliament otherwise provides" of the Commonwealth Constitution and from the list of subsections confined in the concurrent powers which are contained in section 107 of the Commonwealth Constitution.

The Parliament of a State can only create laws from the list of subsections confined in the powers reserved to the States and from the list of subsections contained in the concurrent powers both of which are contained in section 107 of the Commonwealth Constitution.

It's the overlap of powers (concurrent powers) that should be the only time that section 109 (Inconsistency of laws) comes into play. There have been many cases that both the Parliament of the Commonwealth, and the Parliaments of the States have created laws that are ultra vires (outside of their power or outside their authority to make such laws). Which means **it's not a law**.

If the Parliament of the Commonwealth creates a law that is listed in the powers that are reserved to the States, it is not a law and section 109 of the Commonwealth Constitution will not apply because section 109 of the Commonwealth Constitution only deals with laws.

If the Parliament of a State that creates a law that is listed in the powers that are exclusively vested to the Parliament of Commonwealth, it is not a law and section 109 of the Commonwealth Constitution will not apply because section 109 of the Commonwealth Constitution only deals with laws.

As described early in this document, that, just because a parliament creates a law, that does not mean that such law is a law. Only if that law is created consistent with the power that is given to such parliament it can become a law. If any Parliament creates any law that is outside the power of such Parliament, is not invalid, it is Ultra Vires, or, no law.

As said early it's only when the Parliament of Commonwealth and the Parliament of a State create a law that is listed in concurrent powers then section 109 of the Commonwealth Constitution may apply. It's the law created by the Parliament of Commonwealth which will prevail, and the law that Parliament of a State created shall, as far as it is inconsistent, will be invalid.