Delegated Legislation

Section 1 of the Commonwealth Constitution gives Parliament the power to pass legislation. But historically, the British Parliament and the Parliaments of the Australian colonies had passed laws that delegated some of their powers to the Executive Government. This is because Parliament does not have the time to debate and approve all the details that need to be set out in law to make the system of government work in practice. It was understood by the framers of the Constitution that this practice would continue under the Commonwealth Constitution.

So while the Constitution does not say expressly that Parliament may delegate its powers, it has been accepted by the courts that Parliament may do so, and that the Executive may make what is known as 'delegated legislation'. Delegated legislation covers a range of legal rules which are given different names, including 'statutory rules', 'regulations', 'legislative instruments' and 'subordinate legislation'. Here we will call them 'statutory rules', but all those terms are correct and regardless of what they are called, they are all types of law made by the Executive Government under powers given by statute.

Power to make a statutory rule

A statutory rule can only be made if a power to do so is given by a statute (also known as an 'Act' of Parliament). Most Commonwealth Acts will have a section, usually towards their end, which gives a power to the Governor-General, or in more recent times a Minister, to make statutory rules that are necessary or convenient to give effect to the terms of the Act. Those statutory rules are all registered and publicly accessible on the Federal Register of Legislation. Similarly, State or Territory statutes will often contain a section which also allows statutory rules to be made by the Governor, Ministers or sometimes a statutory body, such as an Electoral Commission.

A statutory rule must fall within the scope of the power given in the statute. If the statute only gives a power to make a statutory rule about the terms and conditions of a fishing licence, then that's all the Executive Government can do. It can fill in the detail of a framework established by a statute, but it cannot go beyond the scope of what the statute allows. If a statutory rule goes beyond what is authorised by its parent Act, then its validity can be challenged on the ground that it is '*ultra vires*' – meaning that its making was beyond the power conferred on the Executive and was therefore invalid.

Supervision of statutory rules by Parliament

The Commonwealth Constitution confers the power to legislate on the Commonwealth Parliament. This means that when it delegates this power, it must continue to control it and to supervise its exercise. Parliament can, for example, change a statute to remove or alter the delegated power at any time, or pass a new law to override the delegated legislation.

Parliament usually exercises its supervisory power over statutory rules by making them 'disallowable'. This means that either House can vote to disallow a statutory rule (i.e. withdraw authority for it, so that it is no longer valid) within a certain period after it is made. If one House votes to disallow it while the other House wants to keep it, the statutory rule is disallowed.

At the Commonwealth level, these disallowable statutory rules have to be 'tabled' in Parliament. This means they are literally put on the table in the centre of each House, bringing them officially to the attention of the House. The House then has 15 sitting days (which are the days upon which the House is actually sitting) during which any Member can give notice that they wish to disallow the statutory rule.

Prime Minister Scott Morrison led the Government during the COVID-19 pandemic Source: Wiki Commons

If no one does so in that time, then the chance to disallow it has expired. But if such a notice is given, there is another period of 15 sitting days in which it can be debated. If it is not dealt with in that 15 sitting days, then it is treated as having been disallowed, which means it ceases to be law immediately at the expiry of the 15 sitting days. If the House does deal with it, it can vote to disallow it or allow it to continue in operation. A statutory rule that has been disallowed was nonetheless valid all the time from its making up to the date of its disallowance (i.e. any disallowance does not have a retrospective effect).

Statutory rules are also the subject of scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation on several grounds, including whether they are within power, do not unduly trespass on personal rights and liberties, and do not contain material that should be included in a statute. The Committee publishes a 'Disallowance Alert' which alerts the Senate to problems with a statutory rule that might cause it to disallow it. While disallowance is unusual, it does happen from time to time.

The hierarchy of rules

Statutes override statutory rules. This is because statutes are passed by Parliament in a democratic process and (apart from the Constitution) are the highest form of law. Statutory rules, in contrast, are made by the Executive Government without the public scrutiny and debate involved in the parliamentary approval of a statute. If they conflict, a statute will override a statutory rule.

The exception is where the statute that conferred the power to make a statutory rule contains a 'Henry VIII clause'. It allows the Executive Government to make a statutory rule that can override or alter statutes. This should be very rarely done, because it is a serious matter to allow the Executive Government to make a law that overrides statutes passed by Parliament.

During the 2020 COVID-19 pandemic, the Commonwealth Parliament sat infrequently and many emergency laws were made by statutory rules, rather than the enactment of statutes. This was possible because Parliament anticipated that in an emergency of this kind, urgent rules might need to be made even though Parliament was not sitting, or was not able to sit.

Sections 477 and 478 of the *Biosecurity Act 2015* (Cth) give extensive powers to the Minister for Health to make orders during a human biosecurity emergency. They contain a Henry VIII clause, which says that directions and determinations made under sections 477-478 apply 'despite any provisions of any other Australian law', and that they are not disallowable instruments. While this allows the Government to deal decisively with an emergency, it does remove the ordinary democratic accountability mechanisms, which could be dangerous.

Even though Parliament sat rarely during this period, the Senate Standing Committee for the Scrutiny of Delegated Legislation kept a close watch on the various statutory rules that were made.

People wearing masks to stop the spread of COVID-19
Source: IStock

To help people know what was being done, the Committee also listed the COVID-related statutory rules on a special page of its website, explaining what action the Committee had taken in scrutinising them. The fact that some statutory rules were not disallowable led to accountability concerns.

The Committee then decided to inquire into this kind of exemption from parliamentary oversight. It issued its final report on 16 March 2021, making 11 recommendations to improve parliamentary oversight of delegated legislation. Three of its recommendations were adopted by the Senate in June 2021.

Case Study - Delegated legislation and the 2021 India travel ban

During the COVID-19 pandemic, Australia closed its borders to the world. It imposed restrictions on people leaving and entering Australia. Australian citizens and permanent residents could return to Australia, but there were a limited number of compulsory hotel quarantine places available, making it difficult for many to obtain a ticket to return to Australia.

In April and May 2021, there was a sharp increase in the spread of COVID-19 in India, and the number of people returning to Australia from India who were infected. On 27 April 2021, the Prime Minister announced a ban on direct flights from India to Australia. But many travellers from India avoided this by travelling via other countries. The spike in numbers of infected persons in hotel quarantine put a significant strain on the system in Australia. The Commonwealth Government decided that a 14 day pause was necessary in order to clear currently infected people from the Howard Springs quarantine station and increase its capacity, so it could safely receive new infected cases.

The Minister for Health issued a Determination (which is a form of statutory rule) under section 477 of the *Biosecurity Act* ***2015*** (Cth). It said it would apply only from 3 May 2021 to 15 May 2021 (i.e. for less than two weeks). It prohibited persons from entering Australia if they had been in India in the previous 14 days. Any breach of a section 477 Determination is a criminal offence, which may result in a fine or imprisonment. This offence and its penalty were already set out in section 479 of the Act – they were not created by the Minister or made up to deal with these circumstances.

The statute and delegated legislation

Section 475 of the *Biosecurity Act* allows the Governor-General to declare that a 'human biosecurity emergency' exists. The Governor-General did so in relation to COVID-19 in March 2020. Section 477 gives the Health Minister, during a 'human biosecurity emergency', power to make 'Determinations' that set out requirements, if the Minister is satisfied that they are necessary to prevent or control the entry or spread of the relevant disease in Australia. The validity of any Determinations made under this section and the Governor-General's declaration of a human biosecurity emergency can by challenged in a court.

Mr Gary Newman was a 73 year old dual Australian and British citizen. He flew to India on 6 March 2020, early in the COVID-19 pandemic, to visit friends. He booked a return flight to Australia in November 2020, but his booking was later cancelled by the airline. He challenged the validity of the Minister's Determination in the Federal Court of Australia.

The arguments

Mr Newman made a number of arguments, the main ones of which were:

1. that the Minister did not satisfy all the conditions in section 477 before making the Determination;
2. that section 477 wasn't clear enough to permit action that would restrict his fundamental common law right, as a citizen, to return to Australia.
3. that the Commonwealth does not have a constitutional power to support section 477 of the *Biosecurity Act*; and
4. that there is an implied constitutional right of citizens to return to their country, which cannot be limited by statute or delegated legislation.

People wearing masks to stop the spread of COVID-19
Source: IStock

As the Determination would only last for 12 days, the case had to be argued quickly for it to have any effect. So Mr Newman decided only to proceed with arguments 1 and 2, and leave the constitutional ones (3 and 4) for another time, if the travel ban were extended. The case was heard on 10 May before the Federal Court, and decided by the judge, Justice Thawley, that same afternoon.

The first argument relied on the fact that section 477 is full of conditions. The Minister could only make a Determination, such as the travel ban, if he was satisfied that the requirements were likely to be effective in achieving the purpose of preventing or controlling the spread of disease, were appropriate for that purpose, were no more restrictive and intrusive than necessary and the period during which they applied was only as long as is necessary. Mr Newman argued that the Minister had failed to consider less restrictive or intrusive measures and had not properly considered all the matters required for him to be satisfied of these things.

The Minister had received advice from the Chief Medical Officer, who told him that there had been a sharp increase in the number and proportion of COVID-19 cases in hotel quarantine that had been acquired in India since mid-April and that they showed variants in the disease that were of concern. The increase in cases risked leakage into the Australian community, with recent events of that kind occurring in Western Australia and New South Wales. He argued that a pause on arrivals from India until 15 May 2021 would be an effective and proportionate measure to maintain the integrity of Australia's quarantine system, as it would 'likely allow the system to recover capacity'.

He advised that the limited period of the pause, until 15 May, meant that it would be in place for only as long as necessary. He also recommended various exemptions to ensure that the Determination was appropriate and no more restrictive or intrusive than necessary. The Minister acted as advised by the Chief Medical Officer, and confirmed in writing that he was satisfied of all the things required by section 477.

Justice Thawley accepted that the Minister was satisfied of those matters and that he had taken into account how to make his Determination no more restrictive or intrusive than necessary. This included exemptions for emergency evacuation flights and certain categories of people. He therefore rejected Mr Newman's first argument.

The second argument was that there is a fundamental common law right held by citizens to enter Australia. All parties to the case agreed, for the purposes of the case, that such a right existed. There was therefore no dispute about it.

Common law rights can be overridden by statutes and delegated legislation. But the courts apply the 'principle of legality', which says that if Parliament intends to permit the limitation of a fundamental common law right, it must be very clear about it. Mr Newman argued that the Act was not sufficiently clear that it would permit the exclusion of citizens from Australia.

Justice Thawley disagreed. He looked to a range of different provisions in the *Biosecurity Act* which showed an intention to exclude entry into Australia, even of citizens. Section 477 allows the Minister to take measures to 'prevent' the entry into Australia of a disease. The 'most obvious' way of doing so is to prevent entry of persons carrying the disease into the country. He thought that the Act was clear enough to permit a citizen's right of return to Australia to be limited.

Mr Newman lost his case. But the travel ban was still lifted on 15 May 2021, as the Determination had always stated. Repatriation flights from India commenced again, as Howard Springs was cleared of existing COVID-19 cases and increased its capacity to take new ones. Mr Newman dropped his constitutional claims. They may be raised in future, however, if a similar ban is introduced for a longer period.

Emergency Powers and Common Law Freedoms

The common law recognises freedoms, such as freedom of speech, freedom of movement, freedom of assembly, freedom of association and freedom of religion. But all these freedoms are subject to the law. Statutes and delegated legislation can restrict, suspend or remove those freedoms. However, the courts, when interpreting statutes and delegated legislation, will prefer interpretations that do not restrict common law freedoms, unless it is made very clear in the relevant statute (including the authorising statute for delegated legislation) that this is intended.

Emergency powers – impact on rights

During an emergency, it may be necessary to limit freedoms so as to support other, more pressing and important purposes, such as protecting human life, safety and health. A pandemic provides a good example. It may be necessary to restrict freedom of movement so as to prevent the spread of an infectious disease and save lives. It may even be necessary to restrict political communication, to some degree, such as preventing people from joining large crowds to protest about a political matter (eg the Black Lives Matter protests in 2020 during the pandemic).

Restrictions to the constitutionally protected implied freedom of political communication must be limited to what is reasonably necessary and proportionate. For example, other means of political protest should be permitted, and the least intrusive and restrictive legal limits should apply to protests, consistent with the need to protect public health and public safety.

Emergency powers – need for urgent Executive action

Another feature of emergencies is that action usually has to be taken urgently. There is often no time to draft legislation, debate it, and pass it through both Houses of Parliament with three readings in each House. Parliament might not be sitting when the emergency arises and might not be able to sit because of the emergency (particularly if transport is disrupted, the Parliament building is inaccessible or the movement of MPs across the country is inappropriate or not possible due to the emergency). For these reasons, the Commonwealth and the States and Territories all have emergency legislation already in place which usually grants extensive power for the Executive Government to make delegated legislation to deal with the emergency.

Accountability of the exercise of emergency powers

As emergency powers can be quite extreme in nature, there needs to be careful accountability measures in place. It is important to prevent an 'emergency' extending for years so that the Executive can govern without the bother of Parliament. This is not an uncommon scenario in some countries where emergency powers are abused.

In Australia, it is usual for emergency powers to be limited in time, although they can be renewed. For example, at the Commonwealth level the Governor-General declared a 'human biosecurity emergency' in March 2020, which can only last for 3 months. He then extended it every 3 months while the pandemic continued. This was able to be done without extra parliamentary involvement.

Emergency workers were the backbone of the fight against COVID-19
Source: IStock

In contrast, in Victoria, renewal of the state of emergency had to occur every 4 weeks and could not extend beyond 6 months without legislative change. While this provides a good check upon the behaviour of the Executive Government, it did result in significant controversy in 2020. The Victorian Government initially sought to extend the maximum time period for a state of emergency to 18 months, but after an outcry it was reduced to 12 months. This 12 month maximum period only applied in relation to the COVID-19 pandemic – any other emergency would still have a maximum cap of 6 months. The new law also required that for any extension beyond 6 months during the COVID-19 pandemic, the Minister had to report to Parliament the reasons for the extension and provide a copy of the advice of the Chief Health Officer with respect to the extension.

Other kinds of accountability may include sunset provisions (i.e. the emergency direction or other delegated legislation ceases to operate after a certain time), disallowance of an emergency measure by a House of Parliament, and scrutiny by parliamentary committees, which may meet online, even when Parliament cannot meet as a whole.

Example of emergency laws – Victoria

Different types of emergencies may be dealt with by powers under different laws. In Victoria, for example, health emergencies are dealt with under the *Public Health and Wellbeing Act 2008* (Vic), after a state of emergency is declared.

Where there are circumstances causing a serious risk to public health, a state of emergency can be declared by the Health Minister, on the advice of the Chief Health Officer, after consultation with the Emergency Management Commissioner. It must apply to an emergency area, which could be the whole State or a particular part of the State where the emergency is occurring.

The Chief Health Officer may, for the purpose of eliminating or reducing the serious risk to public health, allow 'authorised officers' to exercise certain emergency powers. These include the power in section 200 to detain people within the declared emergency area for a period reasonably necessary to eliminate or reduce a serious risk to public health, the power to prevent people from entering the emergency area, the power to restrict the movement of people within the emergency area, and the power to give such other directions as the authorised officer considers are reasonably necessary to protect public health. It is an offence under section 203 of the Act to fail to comply with a direction validly given by an authorised person.

Both the initial declaration by the Minister of a state of emergency, and the exercise of emergency powers by making public health directions, amount to exercises of delegated legislative power. Their validity can be challenged in the courts on administrative grounds (eg that there was no power to make them, or the decision-maker acted for an improper purpose or did not take into account relevant considerations) or constitutional grounds.

Stopping the spread of COVID-19
Source: IStock

Examples are the *Loielo case* and the *Gerner case* (discussed in the separate 'freedom of movement' document).

The types of directions made under these powers included 'Stay at Home Directions (Restricted Areas)' which imposed curfews, restricted the circumstances in which people could leave their home, confined travel to within 5km of their home, and placed restrictions on gatherings. There were also 'Care Facilities Directions' and 'Workplace Directions', which applied restrictions, such as the wearing of face masks in workplaces and limiting access to workplaces. These Directions had significant impacts on common law freedoms, but were made by authorised health officers on the basis that they were reasonably necessary to protect public health.

Other emergency powers were exercised under the *Emergency Management Act 1986* (Vic), once a 'state of disaster' was declared. They allowed the Police Minister to coordinate government actions and allocate resources. They also permitted the control of movement within the disaster area, and entry or departure from it, affecting freedom of movement.

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AUSTRALIAN CONSTITUTION CENTRE

Unit 9: The Constitution and the Making of Law in Australia – Year 8 - C & C
Strand: Laws & Citizens

Topic 8.1: The making of law in Australia

Statutes – How Are They Made?

Terminology

Statutes are laws made by Parliament. They are also known as 'Acts' or 'legislation'. When they are introduced into Parliament and while they are in the process of being passed by the Houses of Parliament they are known as 'bills'. Once a bill has been passed by majority votes in both Houses, it is sent to the Governor-General (or the Governor in the case of States) to receive royal assent. When a bill receives royal assent, this turns it into a law and from then on it is known as an Act of Parliament. (There is the odd exception – such as a 'Bill of Rights' or a 'Bill of Attainder', which keeps the word 'bill' in its title, but oddities are inevitable when your system of law has developed, via the United Kingdom, over centuries.)

Australian statutes each have a 'long title' and a 'short title', which is usually specified in section 1.

For example, the long title of the *National Emergency Declaration Act 2020* (Cth), is 'An Act to provide for the declaration of national emergencies, and for related purposes'. The long title is used to describe the scope of the bill. Amendments cannot be made to the bill when it is passing through Parliament unless they fall within the description in the long title. This prevents Members from hijacking an existing bill to change the law to something completely different.

Section 1 of the Act sets out its short title: 'This Act is the *National Emergency Declaration Act 2020*.' This is how we ordinarily refer to an Act - by its short title. If a very old Act does not have a short title, you can either use its long title or its number during the reign of the relevant monarch - eg 18 & 19 Vic, c 54 (which means Act 54 during the 18th and 19th years of the Reign of Queen Victoria).

Bushfires in Australia
Source: IStock

The House of Representatives where Members debate Bills
Source: Wiki Commons

When citing an Act, we give it its short title including the year it was made, usually in italics, and then after it we usually add its jurisdiction in brackets (eg – (Cth) or (NSW) or (Tas)) so it is clear which Parliament passed the Act - eg *Mining Act 1906* (NSW).

Initiating a statute

Where does the idea for a statute come from? There are many potential sources. For example, there may be public pressure to fix a problem by enacting a new law or altering an existing one. Perhaps a court case showed flaws in the existing law, or an inquiry was held to deal with a problem (such as deaths in custody or drug addiction) which recommended new laws be made. The law might be needed to give effect to a treaty obligation or an inter-governmental agreement. It might have been an election promise by the party now in government, or part of its political platform. It might be the idea of the Minister or a proposal of public servants.

The idea for the *National Emergency Declaration Act 2020* first sprang from public criticism of the Prime Minister for being away on holiday during catastrophic bushfires in January 2020. The Prime Minister responded that the fires were a matter for the States, which was correct. But the public also expected national leadership and the use of the Australian Defence Force ('ADF'), where necessary, to aid bushfire efforts (eg in using ships to rescue people stranded on beaches from advancing fires). The Prime Minister agreed to the use of the ADF, but said that the Commonwealth was acting at the edge of its constitutional powers. He initiated a Royal Commission into National Natural Disaster Arrangements to look further into the role of the Commonwealth in dealing with disasters which are 'national' in their scope or severity.

The Royal Commission recommended the enactment of legislation to allow the Commonwealth to make national emergency declarations in particular circumstances. The Act was passed by Parliament in response.

Cabinet approval

While there are slightly different rules and procedures for each jurisdiction in Australia, following is a general overview of how the system works, from Cabinet to Parliament. To get an accurate description of the process in a particular jurisdiction, check the 'Legislation Handbook' or equivalent documents created by the relevant Government, including bodies such as the Office of Parliamentary Counsel.

To get a bill on the Government's program for legislation, Ministers in some jurisdictions must make a 'bid' at a certain time before the parliamentary session starts. A Committee of Cabinet then nominates which proposals should proceed and their priority. If an urgent proposal comes up later, the Minister must then convince the Prime Minister (or Premier, as the case may be) of the need to vary the Government's legislative program.

If successful, the Minister authorises public servants in his or her Department to prepare a submission for Cabinet (known as a 'Cabinet Submission' or 'Cabinet Minute').

Commonwealth Ministry
Source: Albanese Twitter

The relevant public servant prepares the Cabinet Submission. It sets out the background, explaining the policy intent of what is proposed, why a law is needed, what other options were considered and why they were rejected in favour of this proposal. The submission needs to explain what the 'mischief' (eg the problem) being addressed is, what the law would do, and how the law would fix the problem. It may need to set out the constitutional authority to make the law and any legal risks involved (particularly at the Commonwealth level). It should set out any consultation that has been undertaken on the issue, including with stakeholders who will be most affected by the law. It should also provide any evidence from reports or court cases about why the law is needed.

The submission needs to address timing and financial matters – how much it will cost and whether there is existing money in the budget to cover it. Examples of Cabinet Minutes can be seen on the National Archives website – such as this one about extending the power to bug phones and this one about emergency preparations to deal with the Y2K bug that was believed likely to crash computers at the beginning of the year 2000.

There will usually be a requirement to address what impact the proposed law would have in particular fields. For example, in those States with a *Human Rights Act*, the submission may need to address the impact of the proposed law on human rights. The Commonwealth also requires a 'statement of compatibility with human rights' to accompany every Bill introduced into Parliament.

A Cabinet Submission may also have to address its regulatory impact (eg would it add more government 'red-tape' by burdening ordinary people or businesses with greater costs, administration or delay?)

The critical part of the Cabinet Submission is its recommendation, as this usually becomes the basis for the decision of the Cabinet. Either Cabinet adopts the recommendation as its decision, or it imposes some alteration or variation to it.

The Cabinet Submission must be signed and approved by the relevant Minister, before it is submitted, electronically, into the Cabinet system. There is then a period of consultation amongst relevant Ministers and Departments on the Submission before it is addressed at the Cabinet meeting. This is because a law dealing with, say, transport, may have flow-on effects in areas of energy, the environment, health and housing. The point of the Cabinet process is to give 'whole of government' consideration to proposals, rather than have them developed in silos without anyone thinking about how the laws and policies fit together across the entire jurisdiction. Ideally, all criticisms and disagreements about the proposal are resolved before it is put to the Cabinet in a Cabinet meeting, but if not, it is up to Cabinet to decide. At the Commonwealth level, the Prime Minister can approve proposals for bills with 'minor policy significance' without the need for Cabinet approval.

Once Cabinet gives 'in principle' approval to proceed with legislation, the relevant public servant gives drafting instructions to the person in the Office of Parliamentary Counsel (the office that does the drafting of bills) about what should be included in the bill and what it is intended to achieve. Professional drafters then decide on the words that are used in the bill – although there is a process of discussing and negotiating drafts to ensure that the bill does what Cabinet intended. In some jurisdictions, the bill then goes back to a Legislation Committee of Cabinet, or a specially nominated Minister, for final approval before it is introduced into Parliament. If the bill in its final form has departed significantly from what Cabinet originally approved, it might need to go back to the full Cabinet for approval.

Parliamentary approval

Once the bill is ready, it may also need the approval of Government members in the party room before it can be introduced. In some jurisdictions there is also a special briefing of cross-benchers (being Independents and members of minor parties, who often hold the balance of power in the upper House) before the bill is introduced in Parliament.

A decision also has to be made about the House into which the bill should first be introduced. This may depend upon timetabling, to prevent a House from running out of business. But there are also constitutional limits on introducing certain types of bills dealing with money (eg bills imposing taxation or appropriating money) in the Senate. These bills have to start in the House of Representatives.

Each bill has three 'readings' in a House before it is passed. The 'first reading' simply involves its introduction. It is formally presented by the Minister to the House and handed to the Clerk of the House (who is a parliamentary official). Historically, the bill used to be read out loud in its entirety, so that Members knew what was in it (in the days before printed copies were available). These days a 'reading' occurs by the Clerk reading out the long title of the bill. Once it is formally introduced, all Members can get a copy of the bill to help decide how to vote on it and what to say about it in the later debate. Each bill is accompanied by an Explanatory Memorandum which is supposed to explain in more detail what is intended by the bill.

The key reading is the 'second reading'. Here the Minister (or the Minister representing him or her in the other House) gives the 'second reading speech'. This is a carefully prepared speech which explains what is intended by the bill. It is usually written by the public servant responsible for the bill. The Minister's second reading speech can be used by courts when interpreting the meaning of statutes. This is why this particular speech is an important record which needs to be clear and accurate. Once the Minister's second reading speech is given, debate on the bill is commonly adjourned (i.e. delayed till a later time) to allow other Members to consider the bill and prepare their own speeches about it for when the debate later resumes.

When the second reading debate resumes, the Opposition spokesperson will give a speech setting out the Opposition's position on the bill. Then each side usually takes turns in giving speeches, debating the main principles of the bill, rather than the detail. The House then votes to agree to the bill in principle (or reject it or defer its consideration to a later time).

If the second reading is passed, there is usually then a consideration of the bill in detail (sometimes described as consideration by the 'Committee of the whole') during which the Opposition or cross-benchers, and sometimes even the Government, move amendments (i.e. propose changes) to the bill. This can be a long process, as the House goes through the bill line by line, discussing many separate amendments. But if there is general agreement to the bill it may be a much quicker process, or by-passed altogether. After any amendments are agreed to or rejected, a third reading is held. This is usually no more than a formality. If it is passed, the bill is then sent to the other House and the process starts again.

In some cases, a bill is also scrutinised by a parliamentary committee, such as the Senate Foreign Affairs, Defence and Trade Legislation Committee or the Senate Legal and Constitutional Affairs Legislation Committee. This allows the Committee to receive written and oral evidence on the bill from outside experts and people affected by it. A Committee can then identify flaws in the bill and sometimes persuade the Government to make amendments, or accept Opposition or cross-bench amendments .

If the other House passes amendments to the bill (or 'requests' amendments to money bills, in the case of the Senate), then it goes back to the first House to see whether or not it will agree. If it does, the bill is passed. If it does not, it can reject the amendments and send the bill back in its earlier form. In the United Kingdom, this process is known as 'ping-pong' because a bill can bounce between the two Houses for a while. But politicians are pretty good at knowing who has the power and giving up when they cannot win.

Royal assent

Once a bill, with or without amendments, has been passed in identical form by majorities in both Houses, it is then sent to the Governor-General (or Governor, in the case of the States) for royal assent. This is done by the Governor-General (or Governor) signing two copies of the bill. Once this happens, it becomes a law.

Operation

The commencement of an Act, however, may happen later, depending on what is said in its commencement provision. It will apply as a law until such time as it is repealed by Parliament or found to be constitutionally invalid by a court (in which case it was never validly a law at all). Some Acts contain 'sunset' provisions, which mean that they automatically cease to apply after a certain period, unless they are re-enacted.

What is in a statute? – Case study – the *National Emergency Declaration Act 2020*

If you look at the *National Emergency Declaration Act 2020* (Cth), you will see the provisions most commonly included in a statute. It starts by setting out its short title. Next, it tells you when the statute commences its operation. In this case it starts on the day after it receives royal assent. Alternatives could include setting a fixed commencement date, or allowing it to start on a future date to be proclaimed by the Governor-General. Sometimes different parts of an Act commence at different times, so it is important to check.

Next, this Act sets out its objects. Acts do not always do this, but it helps courts when they are interpreting provisions in the Act to know what Parliament was intending to achieve. Such a provision is more commonly included when there are doubts about the constitutional validity of the Act and Parliament wishes to make clear its view about how the Act connects to the Constitution. In this case, section 3 explains that the object of the Act is to recognise and enhance the role of the Commonwealth in preparing for, responding to and recovering from emergencies that cause, or are likely to cause, nationally significant harm. It then describes how this object is achieved by the Act. As the Constitution does not give any express power to the Commonwealth to deal with emergencies, the Commonwealth is seeking to tie this Act to an implied 'nationhood' power, by reference to 'nationally significant harm'.

The Act then deals with its operation. Section 5 says that it 'binds the Crown in each of its capacities'. This means that it is intended to be binding on all branches of government at the Commonwealth, State and Territory levels across Australia. Sections 6 and 7 explain that it is also intended to deal with Australia's external territories and offshore areas such as the sea and airspace around Australia.

Section 8 is a 'just in case' provision dealing with interpretation. It says: 'This Act does not, by implication, limit the executive powers of the Commonwealth'. The concern here is that a court might otherwise say – 'Well, you have defined the Commonwealth's power to deal with emergencies in this Act, which shows you intended the executive power to be limited to what you have set out, and not go any further'. This section tries to defeat such an argument by effectively saying – 'OK, we have set out specific rules for dealing with emergencies, but if we didn't think of something, and it would otherwise have been covered by the executive power, we still want to leave open the ability to use executive power to deal with it'.

Section 9 is about the interaction of this law with State laws. Emergencies are primarily dealt with by the States and there are extensive State laws and powers to address emergencies. Section 109 of the Constitution says that where there is an inconsistency between a Commonwealth law and a State law, the Commonwealth law applies and the State law is inoperative to the extent of the inconsistency. The courts have previously accepted that if the Commonwealth Parliament 'covers the field' by comprehensively legislating about a topic, then this excludes State laws from operating within that field altogether, even if they are not directly inconsistent with the Commonwealth law, because the Commonwealth law is intended to apply exclusively.

Section 9 of the *National Emergency Declaration Act* says that: 'This Act does not exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act'. This means that the Commonwealth has no intention of 'covering the field', and wants State laws to continue to deal with emergencies, as long as the State laws are not directly inconsistent with the Commonwealth one.

Section 10 sets out the definitions used in the Act. This is a really important provision, because it gives very specific meanings to words or phrases which might otherwise be interpreted in different ways. For example it defines 'Australian offshore area', so we know precisely what is covered.

It also defines the term 'nationally significant harm', which we saw in the objects clause. It determines whether particular types of harm (eg harm to life, health, property or the environment) are 'nationally significant' by reference to their scale and consequences.

Part 2 of the Act then deals with the substance of what the Act does. In this case it allows the Governor-General to make a national emergency declaration. It then provides for the declaration period to be extended, or for the declaration to be varied or revoked.

The power of the Governor-General to make a declaration is subject to conditions. The first is that the Prime Minister, who advises the Governor-General to make the declaration, is satisfied of various things. They include that the emergency is likely to cause nationally significant harm in Australia or an Australian offshore area and that either the governments of relevant States or Territories have requested the making of the declaration, or it was not practicable for them to do so (eg the government was wiped out by a tsunami), or the emergency is affecting Commonwealth interests in the State or Territory (eg Commonwealth places such as airports or defence facilities are at risk) or that it is appropriate to make the declaration having regard to the nature of the emergency and the nature and severity of the nationally significant harm.

If the Prime Minister is going to recommend the making of the national emergency declaration without a request from relevant State or Territory Governments, then the Prime Minister must at least consult those governments, unless the Prime Minister is satisfied that it is not practicable to do so. (The use of such terminology about what is 'practicable' in an emergency has led to significant litigation in other countries. It can become a very controversial issue.)

Other conditions require the declaration to be in writing and to specify the emergency to which it relates, its nature, the circumstances that gave rise to it and the period for which the declaration is to apply. A declaration can be made for a maximum period of 3 months, but it can be extended. There is no parliamentary involvement in, or scrutiny of, any extension.

One of the most important bits of section 11 is sub-section (6), which says that the national emergency declaration is not subject to section 42 of the *Legislation Act 2003* (Cth). This means that even though the Governor-General is exercising a delegated legislative power, it is not disallowable by either House of Parliament. This strips away an important form of parliamentary accountability for an executive act. It also used to remove this instrument from scrutiny by the Senate Standing Committee on the Scrutiny of Delegated Legislation, but that was corrected in 2021.

Due to accountability concerns, section 14A was inserted as an amendment to the Bill. It requires the Senate Standing Committee on Legal and Constitutional Affairs or another Senate Committee to conduct a review of each national emergency declaration by the first anniversary of it being made. Section 17 also requires a report to be given to Parliament about any powers exercised under national emergency laws for the purposes of any national emergency declaration.

There are other provisions which give the Commonwealth extra powers in an emergency. For example, there is a power for the Prime Minister to extract information from 'Commonwealth entities' (which are Commonwealth bodies that are outside the public service and often act on a commercial basis) on matters such as medical stockpiles. This suggests that the Prime Minister did not find these bodies as helpful as they might have been during the 2020 pandemic.

Section 18 requires a Senate Committee to undertake a review of the operation of the Act by 30 June 2021 and every five years after that. Such a provision is sometimes included in controversial legislation to calm concerns about it by ensuring that there are future opportunities to see if it is operating appropriately.

Finally, section 19 sets out the standard provision, found in most Acts, which allows the Governor-General to make regulations about matters required or permitted by the Act to be dealt with by regulation, or matters that are 'necessary or convenient to be prescribed for carrying out or giving effect to this Act'. This is a very wide power. However, the courts have previously held that it can only be used for filling in the details of the plan or framework set out by the Act – not to extend or supplement the substance of the Act.

Powers of the Australian Defence Force (ADF) in Natural Disasters and Pandemics

The Commonwealth Parliament can only legislate on a subject if the Constitution gives it power to do so. It has no direct constitutional power to deal with emergencies. So how can it permit the Australian Defence Force ('ADF') to be used in an emergency?

The power to 'call out' the troops

Section 51(vi) of the Commonwealth Constitution gives the Commonwealth Parliament power to make laws with respect to the defence of Australia. It permits laws for the establishment of the ADF, the enlistment of its members, its equipment and training. Section 68 makes the Governor-General the commander in chief of the naval and military forces of Australia.

Section 114 prevents States from having their own army. The flip side is that section 119 says that the 'Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'. This means that the Commonwealth is required to protect the States against invasion. But if there is internal violence, such as terrorism or riots (which the Constitution describes as 'domestic violence'), then the State must ask for assistance first before the Commonwealth steps in.

The High Court has accepted, however, that if there is domestic violence within a State which interferes with the operations of the Commonwealth Government (eg the postal services or the ability of electors to vote in federal elections) then the Commonwealth can intervene to restore order, even without a request from the State concerned.

Defence Headquarters - Russell Offices - Canberra.
Source: defencejobs.gov.au

Soldiers from the Royal Australian Artillery assist in preventing the reignition of bushfires on Kangaroo Island in January, as part of Operation Bushfire Assist 2019-2020 (Photo: Australian Defence Force)

In such a case the Commonwealth would be acting in 'self-protection' under an implied nationhood power. For example, where the Commonwealth has international obligations to protect foreign dignitaries, and a terrorism incident puts them at risk, the Commonwealth is entitled to use the ADF to provide protection to them within a State, even without a State request. This occurred in 1978 after a bomb exploded outside the Hilton Hotel in Sydney during a regional meeting of Commonwealth Heads of Government.

The Commonwealth therefore can use the ADF to defend Australia from external threats and to protect it from internal violence, at the request of a State, or where that violence threatens Commonwealth property or functions. It can also rely on the defence power to protect Australia from terrorism, including by imposing control orders on terrorists, which restrict their freedom of movement.

This defence power supports the enactment of Part IIIAAA of the *Defence Act* ***1903*** (Cth), which is titled 'Calling out the Defence Force to protect Commonwealth interests, States and self-governing Territories'. It permits the Governor-General to issue a call-out order, on the advice of authorising Ministers, to protect Commonwealth interests or to protect a State or self-governing territory from domestic violence.

In all cases, however, there must be violence, or the threat or risk of it, to justify the call-out. If called-out under these provisions, the ADF may be authorised to exercise 'coercive powers' (eg detaining people, controlling their movement and using weapons).

Powers during emergencies, disasters and pandemics

Neither Part IIIAAA of the *Defence Act*, nor the constitutional provisions discussed above, support the Commonwealth using the ADF for the purpose of helping the community deal with non-violent emergencies, such as a bushfire, cyclone, flood or earthquake, or during a pandemic. Yet, the ADF may be the one body with the capability, in terms of personnel, resources (eg ships and aircraft) and skills (eg the ability to build temporary bridges), that can best deal with aspects of these kinds of non-violent emergencies. This leaves the ADF in an uncertain legal position, forcing it to fall back on non-statutory executive power to support its role in providing aid to the community.

ADF soldiers were deployed to help police with compliance checks in Sydney. Source: NSW Police

Prerogative powers

One type of executive power is known as a 'prerogative' power. It is an ancient power that was exercised by English Kings in medieval times and has been handed down over centuries. It is recognised by the common law and was inherited in Australia along with the common law (although the British kept some prerogatives, such as the power to enter into treaties and to declare war, out of the hands of their colonies for some time).

Prerogative powers have the same status as the common law – which means that they can be overridden and displaced by statutes. Most prerogative powers have been replaced by statutes, so there are not many left. Prerogative powers may be exercised by the Executive Government of the Commonwealth or a State, depending on their subject. For example, the Commonwealth Government can exercise the prerogative to enter into a treaty, as foreign affairs powers fall within its jurisdiction, whereas the 'prerogative of mercy' can be exercised by whichever Government is responsible for the law under which the person was convicted.

One prerogative power is the power to 'control and dispose of the defence forces'. This prerogative appropriately attaches to the Commonwealth Government, and means that it can move the defence forces around Australia and deploy them (i.e. put them to use) without needing anyone's permission (although according to section 119 of the Constitution, a State request is needed for them to 'protect' the State against internal violence).

So what can the ADF do while it is deployed in a State? The prerogative does not appear to give authority to exercise any 'coercive' powers. The ADF could, of course, do what any other person is entitled to do. That would include removing debris from a road during a bushfire, transporting people out of danger and repairing infrastructure. But the ADF does not have power to detain people, or restrain their movement, or order them to do things, when it is not acting under statutory powers.

Deployment during the 2020 bushfires and pandemic

When 6500 members of the ADF were deployed during the bushfires in January 2020, they had no greater powers to act than ordinary people. They could not, for example, take action against people who refused orders to leave areas that were under threat.

Concerns were also expressed that they did not have sufficient legal powers or protection, as they might be sued if they did anything that negligently caused injury to anyone. The Commonwealth later enacted legislation to give ADF members immunity from legal action when they were acting in good faith in the performance of their duties when providing assistance in relation to a natural disaster or emergency.

In March 2020, members of the ADF were deployed during the pandemic to aid contact tracing, logistics, preventing movement across State borders, checking on compliance with self-isolation orders and guarding hotel quarantine facilities. Again, Part IIIAAA of the *Defence Act* was not used, because there was no internal violence. Accordingly, there was reliance on prerogative powers. The Minister for Defence announced that the ADF was aiding state and territory police and that the ADF would have 'no coercive enforcement powers'.

The ADF deployment during the pandemic was done under an existing policy framework, known as the Defence Assistance to the Civil Community Manual ('DACC'). DACC only applies to situations that do not involve the use or potential use of force, including intrusive or coercive acts by ADF members. 'Force' is defined in the DACC Manual as including restricting the freedom of movement of the civil community, whether there is physical contact or not. It is therefore difficult to see how ADF members deployed under DACC could have been used to guard quarantine hotels or stop people from crossing State borders.

The DACC Manual also said that it is a condition of deployment under DACC that 'local, state or territory resources, including commercially available resources, are or imminently will be exhausted, are inadequate, not available or cannot be mobilised in time'. Yet Victoria was heavily criticised for using those commercially available resources to guard hotel quarantine, instead of the ADF. Confusion arose from the differences between the ADF's written policies and how it was being used to deal with a real emergency. There was also doubt about the ability of the ADF to exercise these coercive roles, such as guarding hotel quarantine or State borders, if its members were not backed with a statutory power to do so.

A legal and constitutional mess

The constitutional and legal position remains unclear for a number of reasons. First, there is also a prerogative power to deal with emergencies, but it is unclear whether it would permit coercive action.

Second, the High Court has recognised that there is a 'nationhood power' derived from sections 61 and 51(xxxix) of the Constitution, which allows the Commonwealth to deal, in limited circumstances, with national emergencies. But it remains unclear whether this power would permit coercive action either. The *National Emergency Declaration Act 2020* (Cth), seeks to rely on the nationhood power, but it only authorises the making of a declaration – not the use of troops to guard and restrain the movement of people.

Finally, in some cases, members of the ADF may be exercising powers conferred by other statutes under other constitutional powers, such as the quarantine power in section 51(ix) of the Constitution. For example, the *Biosecurity Act 2015* (Cth) contains some provisions which would permit ADF members, if appropriately qualified, to be 'human biosecurity officers', allowing them to exercise powers that may be coercive. Under section 452 of that Act, the ADF may be declared a 'national response Agency' in relation to a biosecurity emergency.

If this all sounds like a big mess – it's because it is. The risk of trying to sort it out by legislation is that the legislation might be found to be unconstitutional and a referendum would be required to fix it. So far, the tactic of relying on uncertain prerogative powers has worked, because no one has taken any legal action to challenge it.

This may be because people instinctively obey orders from ADF personnel in uniform, as they assume that they have the authority to give the orders. A consequence may be that the ADF personnel have not had to take any significantly coercive actions, so there is no reason for anyone to undertake a legal challenge. It might also be the case that as ADF personnel have been paired with police officers, it is the police who have taken any significant coercive action.

Finally, it may be the case that as the ADF is there to help in an emergency, no one is going to object to that. The public recognises that the ADF's help is needed and rightly values that help. But it would be helpful to sort these issues out before the next major emergency strikes.

Topic 8.1: Lesson/ Activities Two

COVID-19 Case Study

AUSTRALIAN CONSTITUTION CENTRE

Time/Lesson	Learning Goal
• 1 hour	To understand that, during the 2020 COVID-19 pandemic, the Commonwealth Parliament sat infrequently and many emergency laws were made by statutory rules, rather than the enactment of statutes. Students will learn how to write a report (case study) for the Executive Government on one aspect of how the Commonwealth Executive Government or Parliament used its powers to manage the pandemic.
Rationale	**Success Criteria**
Students should understand how the Executive Government can make statutory rules as a form of delegated legislation, how Parliament supervises and can often disallow statutory rule and how statutes are made. Students should also understand that the ExecutiveGovernment can use non-statutory executive powers, such as prerogative powers, to deploy the ADF during an emergency, but that these are quite limited powers.	Students will demonstrate they understand about statutes and delegated legislation by writing a summary report of between 500 to 1000 words.

Teacher Reference Documents

- TRD 75: Delegated legislation
- TRD 76: Case Study – Delegated legislation and the 2021 India travel ban
- TRD 77: Emergency powers and common law freedoms
- TRD 78: Statutes – How are they made? (including case study on the *National Emergency Declaration Act 2020* (Cth))
- TRD 79: Powers of the ADF in natural disasters and pandemics

Resources

- Selected BTN COVID-19 videos https://www.abc.net.au/btn/all-covidstories/13257160
- Teacher selects COVID-19 news stories relevant to class from https://www.abc.net.au/news/story-streams/coronavirus/

Tuning In

- REVISE the TRD and lesson: The common law, statute and the hierarchy of laws. Students demonstrate they understand the different ways to make laws in Australia, and which laws prevail over others.
- DISCUSSION: Students remember how their lives were affected by COVID-19 lockdowns. Students identify some of the new laws and rules put in place through these periods (eg rules restricting movement, closing schools, requiring the wearing of masks, vaccinations and the closure of certain businesses) and their effect upon their daily home routines. If schools in your local area were not closed, were there any other restrictions that affected students? Did students encounter ADF members helping the police?

Teacher Instruction

Teacher chooses from amongst the following activities:

- WATCH selected BTN and ABC COVID-19 video clips to discuss the impact of government legislation on communities.
- EXPLAIN: During the COVID-19 pandemic, Australia closed its borders to the world, with some exceptions. The States and the Territories used emergency legislation to close their borders and to restrict the movement of people within local regions. The Commonwealth legislated for programs such as Jobkeeper to subsidise wages for people unable to go to work. Students had to adjust to online learning at home.
- DISCUSS stories of the impact these changes had on families and ask students to write 300 words about their experiences or give a speech to the class.
- WRITE: Written and artistic contributions on student life experiences through the pandemic, can be made into a class booklet. This may be of great interest to future generations. If students didn't keep a diary through the pandemic, they may like to recreate one from what experiences they can recall in their own lives and communities.
- DISCUSSION: View videos of the National Cabinet set up by the Prime Minister and Premiers during the pandemic. What was the purpose of their online meetings?
- EXPLAIN that National Cabinet had no power to make laws or implement decisions. It was just a means of discussing problems and agreeing on plans and aims. Each Premier and Chief Minister had to go back to their own Parliament and work within their own laws to implement any agreement made at National Cabinet.
- DISCUSSION: Delegated Legislation: Why is it important that emergency laws permit the Government to make statutory rules during an emergency? What measures can be taken to ensure Parliament supervises Government action in an emergency? How can accountability be balanced against the need for quick and decisive action?
- DISCUSSION: READ the TRD Case Study – Delegated legislation and the 2021 India travel ban. Do you agree with the 2021 India travel ban? What were the reasons for and against it?
- DISCUSS the TRD – Statutes – How are they made? Why is there such a detailed process for making laws that involves so many opportunities for review?
- UNDERSTAND the powers of the Australian Defence Force (ADF) when dealing with non-violent emergencies. Should there be limits on ADF powers to impose force when dealing with natural disasters and pandemics?
- DISCUSS the deployment of ADF soldiers during the 2020 bushfires and pandemic as outlined in the TRD. Why does the legal and constitutional position remain unclear in emergencies?

Wrapping It Up

EXIT SLIP: What are three significantly memorable Australian laws during the pandemic you are likely to remember for the rest of your life? Who made those laws and why? Could they have been improved? Was more scrutiny needed?

Assessment Strategies

WRITE a report: Students select a particular law or rule that applied during the pandemic and write their own report or case study as a review to a Cabinet Minister (e.g. the Health Minister, the Prime Minister, the Treasurer or the Minister for Defence). Were the measures brought in necessary? Could different legislation or statutory rules have been more effective? How could things be done better next time?

Extension Activities

COMPARE: Almost 100 years earlier, Australia suffered another pandemic described as the Spanish flu. Compare the laws, rules and restrictions imposed then and now. Were there requirements to wear masks and be vaccinated? Were schools and certain businesses closed? Were borders shut? Students use Trove to access newspaper articles from 1919 and 1920 about how their State or Territory dealt with the Spanish flu. Students draw up a comparison table of the measures taken and restrictions imposed by laws in the two different pandemics. Students could write comparative diary entries as themselves on one day in 2020 and as a child their age on the same day in 1920. What would be different and what would be similar?

Teachers should be aware that some students may have faced stressed circumstances through the pandemic and adapt lessons appropriately.