Constitutional Law Notes

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1. Constitutional Interpretation and Characterisation

The Constitution of Australia is our premier legal document. It was passed in 1901, by referendum, and was enacted by the Imperial Parliament. Unlike regular statutes interpretation is not conducted following a set method (outlined in the AIA), but is left up to the judges of the High Court. They have developed several different methods of interpretation, according to individual judicial preference.

- Methods of Interpretation

Originalism (Intentionalism and Textual Originalism)

- Originalism has two forms. They both rely on interpreting in light of thoughts/meanings as at the time the constitution was drafted.
  - Intentionalism is the process of interpreting the constitution in light of what the original framers of the constitution intended it to mean.
    - For intentionalists it is acceptable to rely on sources extraneous to the actual text of the document, in order to determine the intent of the framers.
    - For the Australian constitution, it may be possible to refer to the records of the 5 Constitutional Conventions that were held prior to the adoption of the document at which the constitution was essentially drafted, in order to determine the intent of the framers. This would then assist in interpretation.
    - Has been explicitly used in a case (Cole v Whitfield) to interpret s 92, whereas this had been considered an illegitimate method prior.
  - Textual Originalism is still a method of going back to an original meaning, but not the intent of the framers. Instead we look at what the words meant at the time of drafting.
    - Essentially examining whether there were specific words or phrases that had specific meaning at the time, and interpreting it in light of that.

Literalism/Textualism

- Breaking down the sections into the literal meaning of the words.
  - Faces difficulties because a lack of context, whether that be past or present, makes it almost impossible to determine meaning.

Legalism

- Interpret the words according to their ordinary and natural meaning, in light of the common law and statutory history of those words.
  - An extremely important example of this was the Engineers Case
    - Initial intent was likely that the Commonwealth had specific enumerated powers, and that everything else was held in ‘reserve’ for the States. Note the States had plenary power by way of their individual constitutions.
    - Consequently, the legislative power of the Commonwealth was interpreted narrowly.
    - However in Engineers the High Court applied a legalistic interpretive method, which resulted in the stripping of the reserve powers doctrine.
Incremental Accommodation

- Based on the fact that words change meaning over time. The High Court has said that a way words change is that their meaning might be fixed, but their application can change.
  - A prime example is the words ‘foreign power’ as outlined in s 44. In 1901 that would be a nation that is foreign to Australia. The UK would not have fallen within that definition.
  - Obviously by 1999 the UK was a foreign power. So the meaning of the words ‘foreign power’ hadn’t changed but it now applied to UK.
- So this is a ‘connotation/denotation’. Note that the court originally used the words incorrectly and that is why they are the wrong way around.

Purposive/Progressive

- This method relies on the current day context when interpreting what specific words or phrases mean. Prime example is the race power and special laws, saying that they must be ‘good laws’ based on what has changed in the world.

One Method of Interpretation?

- There is no requirement for the Justices of the High Court to use a particular interpretive method. There is not even a requirement for them to personally use the same method in different cases.
- There are pros and cons for implementing such a restriction.
  - The main argument for implementing one set method is that it would increase legal certainty, as people would have a greater idea of how a constitutional issue would be decided.
  - The main argument against is that even if a set method was introduced, it is still possible for justices to come to different conclusions (CASE) and so there is no point to it. There is also the issue of which method would be implemented.
• **State and Commonwealth Legislative Power**

**When is a law valid?**

- Parliament must have power to pass the law. E.g.:
  o Parliament may make laws about A, B, C and D or
  o Parliament may make laws about anything.
- And there must be no constitutional limit on power. E.g.:
  o Parliament may make laws about A, B, C and D as long as they do not do X.

<table>
<thead>
<tr>
<th>Determining the validity of Commonwealth and State legislation: overview of topics</th>
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<tbody>
<tr>
<td><strong>1st Inquiry: Is there POWER to pass the law?</strong></td>
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<tr>
<td><strong>Commonwealth</strong></td>
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<td>Enumerated heads of power – characterization of laws</td>
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<tr>
<td>o Corporations power (s 51(xxii))</td>
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<td>o External affairs power (s 51(vccc))</td>
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<tr>
<td>o Taxation (s 51(ii))**</td>
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<tr>
<td>&quot;NB - tax power has internal limitations&quot;</td>
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<tr>
<td><strong>Commonwealth Legislative Power</strong></td>
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<tr>
<td>o S 51 of the constitution outlines the multiple (36) heads of power under which the Commonwealth parliament can legislate.</td>
</tr>
<tr>
<td>o In addition, the States are able to refer to the Commonwealth parliament any matter that they wish the Commonwealth to legislate.</td>
</tr>
<tr>
<td>o S 51(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law;</td>
</tr>
</tbody>
</table>
• Characterisation
There are several steps to follow when characterising the validity of a law.
• Interpret the head of power
• Look at the legislation
• Compare the two
  o This method has developed over time from various High Court decisions. See Mason J in Tasmanian Dam Case (1983) 158 CLR 1, 150; Re Dingjan; Ex parte Wagner (1995) 183 CLR 323, 369 (McHugh J); Grain Pool of WA v Commonwealth (2000) 202 CLR 479, 492

Interpret the Head of Power
• The old approach (no longer good law):
  • Griffith Court
    o Reserved powers
    o Implied immunities
    o E.g. R v Barger (1908) 6 CLR 41
      ▪ Commonwealth law imposed a tax on agricultural implements, unless the manufacturer paid their employees at a rate determined by the Commonwealth.
      ▪ Held: this is a law about regulation of labour, therefore one that only the States can make.
  • This approach was invalidated by the Engineers Case (1920) 28 CLR 129
    o Constitution as a statute
    o Legalism as the guiding interpretative principle
      ▪ Ordinary meaning
      ▪ Informed by common law and statutory context
  • O’Connor J in Jumbunna Coal Mine NL v Victorian Coal Miners’ Association (1908) 6 CLR 309
    o ‘it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.’

• Thus, the method of interpreting the head of power changes depending on the power. The

Look at the Legislation
The next step is to examine the legislation.
• Determine ‘the character of the law’ by reference to the ‘rights, powers, liabilities, duties and privileges that it creates’.
• Consider ‘the practical as well as the legal operation of the law’.
  o Re Dingjan; Ex parte Wagner (1995) 183 CLR 323, 369 (McHugh J); Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479, 492 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)
**Compare the Law to the Head of Power**

The test of validity is different if it the power in question is a ‘subject matter power’ or a ‘purposive’ power.

- **Subject matter powers: test of sufficient connection**
  - i.e. s 52 (xx) ‘foreign corporations, and trading or financial corporations, formed within the limits of the Commonwealth;
  - A sufficient connection is one that is not
    - ‘so insubstantial, tenuous or distant’ that it cannot sensibly be described as a law ‘with respect to’ the head of power.
  - As per the majority in *Grain Pool*, the principles to be applied are:
    - First, the constitutional text is to be construed ‘with all the generality which the words used admit’ (*R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd*)
    - Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates.
    - Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.
    - Fourthly, (as per Mason and Deane JJ in *Re F; Ex parte F*) in a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two subject matters.’
    - Finally, if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matter of legislative choice.
  - This can be called ‘squaring’ the law with the head of power (*US v Butler* (Roberts J)).

- **Note the purpose and proportionality irrelevant** (see Kitto J in *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418) and the wisdom of the law irrelevant (*Grain Pool*).

- **The incidental power**
  - Express incidental power: s 51(xxxix): power to make laws with respect to ‘[m]atters incidental to the execution of any power vested by this Constitution in the Parliament ... or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth’.
  - Implied incidental power also attaches to every head of power: *D’Emden v Pedder* (1904) 1 CLR 91.
    - Note both of these categories have the same test.
• All this means is that we have to determine whether a law is squarely with respect to a head of power OR is it incidentally with respect to a head of power, both will be valid.
  o Note that in practice the ‘sufficient connection’ question will allow determination, both of squarely and incidental relation.

• **Purposive powers: test of proportionality**
  o I.e. s 52 (vi) ‘the naval and military defence of the Commonwealth and of the several States, and the control of the forces to executive and maintain the laws of the Commonwealth;’
  o Test is whether the law is proportionate, or appropriate and adapted, to the relevant purpose.
  o Proportionality can also be relevant to characterising laws under the incidental powers: *Leask v Commonwealth* (1996) 187 CLR 579.

**Final Steps**

• Characterise the law section-by section.
  o One section may be within power and another may not.
  o Different sections may be supported by different heads of power.

• Only one ‘character’ of the law needs to be within power: *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; Stephen J in *Actors and Announcers Equity Assn v Fontana Films* (1982) 150 CLR 169
  o If Parliament has power to make laws with respect to A, B and C… and a law is with respect to A and D…
    ▪ E.g. Law requiring lighthouses to run whale education classes
  o The law is still valid.

**Summary**

• Interpret the head of power.
  o We study four heads of power in this course. Each one has been interpreted extensively by the High Court.

• Look at the legislation.
  o Consider the rights, powers, liabilities, duties and privileges it creates as well as its practical operation.

• Compare the legislation to the head of power.
  o Subject matter powers: sufficient connection.
  o Purposive powers: proportionality.
• **Reading Down and Severance**
  • What happens if a law is beyond power?
    o Whole Act may be invalid.
    o Particular sections – or even particular words – may be severed.
    o The law may be read down so as to preserve the valid applications of the law.

**What is Severance?**
Example: *No natural person or constitutional corporation shall sell cigarettes.*
  • Not supported by a head of power.
  • However, the invalid part can be severed.
    o *No natural person or constitutional corporation shall sell cigarettes.*

**What is Reading Down?**
Example: *No corporation shall sell cigarettes.*
  • Not supported by a head of power, as too broad regarding corporation.
  • However, the law can be read down so as only to apply to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

**When Can You Do It?**
Acts Interpretation Act 1901 (Cth)
  • 15A—Construction of Acts to be subject to Constitution
    o Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.
  • So this means we can preserve the valid parts of the Act if the Act also contains elements which are invalid (in excess of legislative power). It is similar in SA:

Acts Interpretation Act 1915 (SA)
  • 22A—Construction of Act so as not to exceed power of State
    o (1) Every Act and every provision of an Act will be construed so as not to exceed the legislative power of the State.
    o (2) Any Act or provision of an Act which, but for this section, would exceed the power of the State, is nevertheless a valid enactment to the extent to which it does not exceed that power.

**Restrictions**
  • Reading down and severance are used to give effect to Parliament’s intention.
  • Can only be done if ‘the operation of the remaining parts of the law remains unchanged’: *Pidoto v Victoria* (1943) 166 CLR 87.
    o If severing one part of the law changes the whole meaning or purpose of the Act then it will not be possible to sever.
  • Laws expressed in general terms are particularly problematic.
    o Would Parliament have intended the law to have only a partial operation?
Example:

- Can you read down this law?
  - **No person shall sell cigarettes.**
  - Problem: no head of power.
- Possible ‘reading down’ solutions:
  - No corporation shall sell cigarettes (s 51(xx))
  - No person shall sell cigarettes interstate or overseas (s 51(i))
  - No person shall use postal, telegraphic, telephonic or other like services to sell cigarettes (s 51(v))
  - No person shall sell cigarettes from a lighthouse (s 51(vii))
- There is no way to determine which solution parliament intended and thus it is likely the law could not be read down. The entire law would likely be invalid.

- Real Example: *Concrete Pipes Case*
  - Section 7 provided that s 42 applied to contracts made:
    - In the course of interstate or overseas trade or commerce;
    - To which the Commonwealth is a party;
    - Made in a Territory;
    - Made by a foreign, trading or financial corporation.
  - Section 7(4) provided that the section shall not be construed as limiting the operation of the Act.
- The general law (s 42) is invalid because it is too broad. The purpose of s 7 is to bring it within a range of heads of power, each of which would make the specific application valid, in order to make the general invalid law apply as broadly as possible.
- Menzies J:
  - Courts cannot ‘reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application.’
- Courts cannot ‘separate the woof from the warp and manufacture a new web’.
- Courts can undertake amputation and excision, but not plastic surgery.
2. Corporations Power (xx)

- **Background**
A corporation is a distinct legal person, separate from its shareholders, directors and employees (separate legal personality). It is capable of having legal rights and obligations, and is usually created by a process called ‘incorporation’ or by statute. S 51(xx) gives the federal parliament the power to legislate with respect to ‘Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.’

**Historical View**
The corporations power has dramatically evolved over time. For over 50 years it was basically ignored as a basis for Commonwealth legislation because of the *Huddart Parker* decision.

- *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 was the first HCA decision that dealt with the power of s 51(xx).
  - The court favoured a very narrow interpretation of the power, ruling that sections of legislation that prevented constitutional corporations from engaging in certain restrictive trade practices, such as unfair competition, were invalid.
  - Their approach reflected the perceived need to protect ‘the reserved powers of the States’, and that a broader interpretation might give rise to an uncontrollable power.
  - Isaacs J wrote a strong dissent that influenced subsequent decisions, particularly after the doctrine of reserved powers was overturned by the *Engineers Case*.

**Changing Times**
The *Concrete Pipes Case* led to an evolution in the thinking regarding the corporations power as a source of Commonwealth legislation.

*Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468

- The case involved a challenge to the *Trade Practices Act 1965* (Cth) of which s 35 made agreements between competitors restricting competition ‘examinable’, and were defined to include those in agreements made by constitutional corporations.
- Although actually ruling the law invalid, based on its intricate use of heads of power, the court explicitly stated that the s 51(xx) corporations power could be used to support a law like this, and explicitly declared *Huddart Parker* incorrect and overturned.
  - Barwick CJ: ‘...should this Court now accept its decision in *Huddart, Parker & Co Pty Ltd v Moorehead* as a correct construction of s 51(xx) of the Constitutions? I am clearly of opinion that is should not...’
  - ‘The case was decided in the year 1909 at a time when the current doctrine of the Court was that the construction of the words of the Constitution by which legislative power is granted to the Parliament should be approached on the footing that there were certain legislative areas reserved by the Constitution to the States and that the Constitution should not be read as authorizing the
Parliament to invade those areas... This was the so-called reserved powers doctrine which was exploded and unambiguously rejected by this Court in the year 1920...”

- ... from a reading of the reasons given by the majority in Huddart Parker that the influence of the then current reserved powers doctrine was so strong that the Court was driven to emasculate the legislative power given by s 51(xx) and to confine it in substance...’

As a result of the Concrete Pipes Case the corporations power was given new life as a potential source of legislative power for the Commonwealth. Subsequently the power has developed on a case-by-case basis with two main questions at its premise:

- Which corporations come within Commonwealth power under s 51(xx)? That is, when is a corporation a s 51(xx) corporation; and
- What aspects or activities of a corporation can be regulated under s 51(xx)? That is, what is the scope of the power?

- **What qualifies as a Constitutional Corporation?**

S 51(xx) states that the Commonwealth has power to make laws for the peace, order and good government of the Commonwealth with respect to:

- foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;

Foreign corporations are easy to understand, in that they must have been incorporated outside of the bounds of the Commonwealth (*Incorporation Case*).

Regarding trading and financial corporations, over time two different tests have developed over several different cases to determine whether a specific corporation falls under one of the categories.

- The ‘activities’ test, i.e. what activities did the incorporation undertake?
  - If it undertook substantial trading and financial activities, it would qualify.
- The ‘purpose’ test, i.e. for what purpose was the incorporation formed?
  - If it was for a trading or financial purpose, it would qualify.

**The ‘Activities’ Test**

- The activities test for trading corporations depends on the trading activities in which the corporation engages: *R v Federal Court of Australia; Ex parte WA National Football League (Adamson’s Case)* (1979) 143 CLR 190.
  - Trading activities need not be the primary or dominant activities of the corporation, but they must be substantial or significant: *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282; *Tasmanian Dam Case*; Mason J in Adamson’s Case.
  - This is a question of fact and degree. Note does not need to turn a profit (Adamson’s Case)
- The activities test for financial corporations suggests that a financial corporation is one which engages in substantial financial activities: *State Superannuation Board of Victoria v Trade Practices Commission* (1982) 150 CLR 282.
- A question of fact and degree.
  
  - Example: *Tasmanian Dams Case* (1983) 158 CLR 1
    - Trading activities:
      - Selling electricity in bulk and by retail on a very large scale.
    - Non-trading activities
      - Generating electricity for distribution to the public
      - Constructing dams and plants
      - Policy-making

**The ‘Purpose’ Test**

- Initially the purpose test was held to determine whether a corporation was constitutional.
  - *St George County Council* (1974) 130 CLR 533: majority held a corporation was not a trading corporation because it had a non-trading purpose
  - Adamson’s: overruled St George; majority considered activities instead of purpose; minority still looked to purpose.
    - Purpose test may be relevant as a supplement to the activities test.
    - *Work Choices and Williams (No 2)* expressly left the question open.
  - If a corporation has no activities, it will be a trading or financial corporation if it has a trading or financial purpose: *Fencott v Muller* (1983) 152 CLR 570

**Recent Developments**

- In a recent case, *Queensland Rail* (2015) 89 ALJR 434, the High Court looked to both activities and purpose of a corporation.
  - Queensland Rail’s purposes included ‘managing railways’, ‘providing rail transport services’ etc. Queensland Rail was to ‘carry out its functions as a commercial enterprise’.
    - Activities: labour hire only
    - High Court looked at both activities and purpose:
      - In combination, these considerations require the conclusion that the Authority is a trading corporation. It is not necessary to consider which of them is or are necessary or sufficient to support the conclusion.

So in summary:

<table>
<thead>
<tr>
<th></th>
<th>Substantial trading activities?</th>
<th>Trading purpose?</th>
<th>Is this a ‘trading corporation’?</th>
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<tbody>
<tr>
<td>Corporation A</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (Qld Rail)</td>
</tr>
<tr>
<td>Corporation B</td>
<td>Yes</td>
<td>No</td>
<td>Yes (Adamson’s)</td>
</tr>
<tr>
<td>Corporation C</td>
<td>No</td>
<td>Yes</td>
<td>Probably</td>
</tr>
<tr>
<td>Corporation D</td>
<td>No</td>
<td>No</td>
<td>No</td>
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</tbody>
</table>
• **What is the Scope of the Power?**

The scope of the corporation power has drastically increased over time. The current authoritative statement comes from the *Work Choices Case (New South Wales v Commonwealth)* (2006) 229 CLR 1. This has overruled previous tests including the ‘Distinctive Character’ test, in which the nature of the foreign, trading or financial corporation must be significant in the way in which the law relates to them (*Concrete Pipes Case, Tasmanian Dams Case*); and the ‘External v Internal’ test, which suggested that the power could only be applied to regulate external matters of a corporation, not internal matters (as proposed by Isaacs J in *Huddart Parker*). The rejection of the doctrine of reserved powers and/or the need for federal balance (as found in the *Engineers Case*) allowed the court to give what they deemed the ‘ordinary scope to the legislative power’, as there was no basis in the text of the constitution to limit s 51(xx).

**Work Choices**

- A series of laws was passed, relying on the corporation power, that regulated all aspects of the relationship between corporations and their employees.
- Majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) held the laws valid.
  - Gaudron J’s statement in *Re Dingjan* (paraphrased):
    - ‘First, the business activities of corporations formed within Australia signify whether they are trading or financial corporations, and the main purpose of the power to legislate with respect to foreign corporations must be directed to their business activities in Australia. Second, it follows that the power conferred by s 51(xx) extends “at the very least” to the business functions and activities of constitutional corporations and to their business relationships. Third, once the second step is accepted, it follows that the power “also extends to the persons by and through whom they carry out those functions and activities and with whom they enter into those relationships”’.
  - Gaudron J’s statement in *Re Pacific Coal*:
    - ‘I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that subsection, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.’
- The use of these statements was controversial, as they were made in dissenting judgements and according to Kirby J, were taken out of context.
- However they have provided an authoritative method for examining the scope of the corporation power.
Examples of Laws ‘with respect to’ Corporations

- A law regulating restrictive trade practices between corporations: *Strickland v Rocla Concrete Pipes Ltd* (‘Concrete Pipes Case’) (1971) 124 CLR 468.
- A law prohibiting a ‘secondary boycott’ (conduct hindering or preventing the supply of goods or services to a corporation, or the acquisition of goods or services by a third person from a corporation, where the conduct would cause damage to the business of the corporation): *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.
- A law prohibiting corporations, for the purposes of their trading activities, from carrying out excavation works, building, damaging buildings, damaging trees, making roads, or using explosives on certain land: *Commonwealth v Tasmania* (‘Tasmanian Dam Case’) (1983) 158 CLR 1.

Examples of Laws Outside the Scope of the Power

- A law giving the Industrial Relations Commission power to vary or set aside unfair contracts ‘relating to the business of a constitutional corporation’: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.
- A law authorising the Commonwealth to give money to corporations: *Williams v Commonwealth* (No 2) [2014] HCA 23.
- A law providing for the incorporation of trading and financial corporations: *New South Wales v Commonwealth* (Incorporation Case) (1990) 169 CLR 482.
  - This was a surprising decision; however it was held that laws can only apply to existing corporations, not provide a structure for incorporation itself.

Solving Problem Questions

- Is the law supported by s 51(xx)?
  - A question of whether the law is valid.
  - Starting point: *Work Choices*.
  - Determine whether the character of the law can be squared with the issues outlined in Gaudron’s statement.
- Assuming the law is valid, does the law apply to a particular corporation?
  - Is it a foreign corporation?
  - Is it a trading corporation? Does it engage in substantial trading activities or have a trading purpose?
  - Is it a financial corporation? Does it engage in substantial financial activities or have a financial purpose?
3. External Affairs Power (xxix)

- **Influence of International Law**
  
  International law can impact domestic law in different ways for different nations.
  
  - In some nations the ratification of a treaty immediately results in the obligations forming part of domestic law (transformation).
  - In other nations (including Australia) a ratified treaty does not implement any domestic obligations until a domestic law which seeks to implement the obligations is passed (incorporation).
    - Treaty ratification has “no legal effect on the rights and duties of the subjects of the Crown” *Chow Hung Ching v The King* (1948) 77 CLR 449 at 478.
  - However international law can have an interpretive influence on domestic law
    - That courts ‘should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.’ Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 38.
  - In addition Kirby J has strongly argued that international law should have an influence on Constitutional interpretation - *Kartinyeri v Commonwealth (Hindmarsh Bridge Case)* (1998) 195 CLR 337 at 417.
    - This has not found favour with any other justices however, and indeed been strongly disagreed by some – ‘There is no power in the judges to amend the Constitution by reference to the rules of international law post 1900’ *Al-Kateb v Godwin* (2004) 219 CLR 562, 589-591 per McHugh J.
  - International law is invoked in the development of the common law, *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42 per Brennan J.
  - International norms can be the basis of scrutiny of federal administrative decisions.

So if the Commonwealth wants to implement international law it must implement domestic legislation. There is a power in the constitution for the parliament to do this.

- **Background to the Power**
  
  S 51 (xxix) of the Constitution gives the Commonwealth the power to legislate with respect to ‘External Affairs’ without any additional detail. In a historical context the phrase ‘external affairs’ was likely used instead of foreign affairs because Australia was considered a dominion of the British Empire, who would conduct all foreign policy on behalf of Australia.

Subsequently it has been held that the ‘External Affairs’ head of power enlivens legislative power on three bases:

  - Laws the affect Australia’s relationship with other countries.
  - Laws that concern matters geographically external to Australia.
  - Laws that implement international obligations that Australia has voluntarily assumed.
    - This base is the most interesting and controversial.
• Relationships with Other Countries
  
  There have been relatively few cases that have tested legislation implemented under this use of the head of power.
  
  • *R v Sharkey* (1949) 79 CLR 101 (Latham CJ).
    o “The prevention and punishment of the excitement of disaffection within the Commonwealth or Constitution of any other dominion may reasonably be thought by parliament to constitute an element in the preservation of friendly relations with other Dominions,” at 137.
      ▪ Latham’s CJ’s comment in *R v Sharkey* extended to relations with “all countries outside Australia,” page 136.
  
  • *Thomas v Mowbray* (2007) 233 CLR 307 (Gummow and Crennan JJ)
    o “… the external affairs power at least includes power to make laws in respect to matters affecting Australia’s relations with other countries. The commission of Terrorist Acts …[is] one of these matters,” at 364.
  
  • Relations with other “international persons” – (e.g. the United Nations and its agencies) *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 258 (Brennan J).

• Matters Geographically External to Australia
  
  There has been some debate over the extent of this power, and whether there is a requirement of a nexus between the matter external to Australia and the country itself. This debate was highlighted in *Polyukhovich* in the contrasting judgments of Brennan J and Deane J.

  • Sovereignty over the continental shelf (extending to the territorial seas)
    o *New South Wales v The Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337
      ▪ “anything which in its nature is external to Australia” at 360 per Barwick CJ
  
  • Regulating matters, persons or things outside Australia
    o “any matter, person or thing occurring or situate outside Australia”
      *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 at 602 per Deane J
  
  • *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501, per Brennan J 550-552:
    o “I do not understand the phrase ‘external affairs’ to sweep into Commonwealth power every person who exists or every relationship, set of circumstances or field of activity which exists ... outside Australian Territory. The ‘affairs’ which are the subject matter of the power are ... the external affairs of Australia.”
    o “would a law be properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person who, being a citizen of France, dropped litter in a Parisian Street 40 years ago?” (Brennan J, 552)
  
  • *XYZ v Commonwealth* (2006) 227 CLR 532
    o *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth), s50BA and 50BC
  
  • *Pape v Commissioner of Taxation* (2009) 238 CLR 1