

Australian Constitutional Law

1. The place of personal policy preferences on the High Court

- Consti cases have political consequences because it validates/invalidates acts: eg. *Australian Communist Party* case: HC invalidated Commonwealth law which declared Communist Party illegal in Australia:
 - a) the law could not be supported by the defence power (s51(vi))
 - b) the Parliament and Executive were not permitted to *determine* constitutional validity
- SOP protects the doctrine of judicial review- the Judiciary (Ch III) determines the validity of a law
- Cases- politically-charged: judges may sometimes use their position to advance their own preferences (judicial activism).
- *Activism*: Judges must take an *active* role in developing the law versus *Legalism*: Judges should adopt a *passive* role of merely declaring and applying a law (differing approaches to the role of personal values). Prevailing few: legalism not sufficient today

2. Interpretative methods in constitutional decision-making

I) ***Traditional approach: combination of legalism & literalism***

Legalism: “close adherence to legal reasoning”

Literalism: rules of statutory interpretation. Words should be given natural and ordinary meaning- established through a discrete and objective process of analysis: Court is to ascertain the meaning of the words in the Consti/statute under as an instrument complete in itself by examination of its own language

II) **Other interpretative methods:**

- *Originalist approach*: Consti to be interpreted by reference to the intention of the framers- deduced from the words.
 - i) A strict form of originalism has been rejected by the HC, however, since 1988 the Court has accepted that the Convention Debates have probative value by way of context
- *Progressivist approach*
 - i. Judges must do what they can to actively bring about development in the law-promote the interests of justice. Acknowledges ambiguity. Consideration should be given to *contemporary social norms* when interpreting the constitutional text. Acknowledges the significance of international law.
- *Ambulatory approach*

- i. Accommodates historical context and contemporary circumstances. HC recognises that it considers both the connotation and denotation of the words.
- ii. Language of the Consti has an 'original' meaning which is 'fixed' by history (the *connotation*), AND another meaning which not only has regard to the historical context but also looks at the meaning of the words today, taking into account prevailing contemporary circumstances (the *denotation*)

The role of *implications*

- Implication: "a suggestion that the text of the Constitution represents some truth or the existence of some fact that is not expressly stated in its language" eg. nationhood, implied freedom of political and governmental communication
- When assessing national powers lean towards the broad interpretation
- Along with literalism, this approach has had the effect of 'centralising' government power: rationale- the Consti is a document intended to sustain a nation with evolving needs

3. Characterisation

Characterisation: the process of determining whether a law *falls within* one of the enumerated (or exclusive) heads of power

- *Rationale for characterising C laws:*
 - a. Characterisation is necessary because s 51 and s 52 sets out a specific list of powers which the Commonwealth can legislate with respect to. There is no general legislative power afforded to the Commonwealth
 - b. Every federal law must be supported by one (or more) of the Commonwealth's enumerated (or exclusive) powers
- *A liberal approach taken to characterisation*
 - a. Broad approach has been applied to characterisation (like *Jumbunna Coal*)
 - b. The test involves looking at what obligation was imposed, and the DLE of the law

Principles:

Fairfax v Federal Commissioner of Taxation (1965):

- Facts: In a 1961 Amendment Act to the original 1936 Act, superannuation fund incomes were no longer exempt from income tax unless at least 30% of the superannuation fund's assets were invested in government securities (i.e. government bonds)
 - Decision: The law was held to be 'with respect to' taxation under s 51(ii)

- **Test for subject-matter characterisation:**

Is always **one of subject matter**, to be determined by reference solely to the operation which the enactment has if it be valid, it **is a question as to the true nature and character of the legislation**: is it in its real substances a law upon, "with respect to" one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?"

Grain Pool of Western Australia v Commonwealth (2000)

- Facts: Two federal laws granted plant variety rights on new varieties of plants. This had the effect of extending the plant breeders' rights so that it fell within the ambit s 51(xviii) of the Constitution (constituting an 'invention')
- Decision: HC recognised that these rights constituted a new type of 'invention', thus attracting the support of s 51(xviii)
- Court set out the rules:
 1. **Consti powers are to be interpreted generously** unless the text states otherwise
 2. The **character of the law** in question **must be determined by reference to** the rights, powers, liabilities, duties and privileges which it creates- **DLE**
 3. 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- what does the law do?** Matter of the law with respect to a legislative power is a matter of degree: **Re Dingjan; Ex parte Wagner (1995)**
 4. 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 matters of legislative choice*- the **laws purpose does not affect its validity**

4. Implied Incidental Power

- Each s 51 HOP has an 'implied incidental power' to regulate matters which are related to the express subject matter in the 'core' of the HOP
- Effect: expanding the scope of Commonwealth legislative power because even if the law is not 'with respect to' the head of power, it may still be constitutionally valid as an exercise of the implied incidental power.

5. Precedent

- HC not bound by the rules of precedent and by its own decisions in previous constitutional cases but will ordinarily follow its own decisions unless there are cogent reasons to suggest otherwise

- Characteristics of a questionable constitutional precedent:

Although the HC will reconsider a previous decision only with “great caution and for strong reasons”, it will do so if it “involves a question of vital constitutional importance and is manifestly wrong”: *Lange v ABC* (1997)

- Circumstances when HC might reopen or overrule a previous decision:

4 matters that *might* justify: *John v Federal Commissioner of Taxation* (1989)

- (1) The earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases;
- (2) There exists a difference between the reasons of the justices constituting the majority in one of the earlier decisions
- (3) The earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience; or
- (4) The earlier decisions had not been independently acted on in a manner which militated against reconsideration.

6. Invalidity

- An invalid law is held to be *void ab initio*: the law is to be treated to be “invalid from the outset”, meaning that “it was never valid, and therefore never operative”: *First Uniform Tax case* (1942)
- Potential for severance and ‘reading down’ of statutes:

Severance- “where distinct parts of the statute are invalid and are ‘cut out’, leaving valid parts in force.

‘Reading down’- where it is possible to confine the meaning of an offensive provision in such a way that it may continue to have a valid operation

Federalism

The division of legislative powers in Australia

2 basic types of: Concurrent and exclusive powers-

#*Exclusive* powers gives the C special immunity from the operation of State laws

#*Concurrent* powers: listed in s 51, C and States (recognised by s 109)

- States can legislate in any field left vacant by the Commonwealth (residual power is guaranteed by s 107) but the C can always pass inconsistent legislation which invalidates the State law to the extent of its inconsistency (*Pirrie v McFarlane* (1925):
- Facts: McFarlane- member of RAAF, required to drive a motor car on public roads. Under the *Motor Car Act 1915* (Vic), motorists required to hold valid Victorian licence. McFarlane didn’t. Stopped by Pirrie (Victorian PO), charged under the Act. The magistrate hearing the matter held that the

Act did not apply to members of the defence forces. Pirrie appealed successfully.

- Held: The Act (as applied) was valid and McFarlane was not immune from the operation of the state law. The law applied equally to all road users and the Commonwealth had not passed a law which made the Victorian Act invalid.
- Rationale: In the absence of a Commonwealth law immunising McFarlane, the State law applied. **Section 107 of the Constitution gives states the power to pass laws in an area left vacant by the Commonwealth.**

Co-sovereign federalism ('balanced federalism')

- The Court developed and applied two doctrines that had a restrictive effect on the scope of federal constitutional powers

1. Doctrine of implied intergovernmental immunity ('implied immunity')

- Presumption: both the States and the C were seen to be immune from each other's laws

- The C was immune from the operation of the legislation of the States=

***D'Emden v Pedder* (1904)**: Tasmania could not oblige a Commonwealth public servant (Henry D'Emden) to pay a State tax (stamp duty) on his salary. Held: **C officers and procedures were 'immune' from state laws**

- The States were immune from the operation of the legislation of the Commonwealth.

= ***Railway Servants case* (1906)**: The doctrine was reciprocal and not just subject to taxation. A **NSW government instrumentality was not subject to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration.**

2. Doctrine of state 'reserved' powers

- Any legislative powers not specifically granted to the C were reserved to the States

- Grants of law-making power to the C must be narrowly construed so as not to intrude on the powers of the States (***Huddart, Parker v Moorehead* (1909)**)

Engineers Case

- **Facts:**