

Topic 2: State Legislative Powers

Outline of Topic

1. State Legislative Power
2. Peace, Welfare and Good Government
3. Referral of Powers to the Commonwealth

Legislation

- Constitution ss 51(xxxvii), 106-108
- Constitution Act 1902 (NSW) s 5
- Australia Act 1986 s 2

Cases

- Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (BLF Case) (1986) 7 NSWLR 372
- Union Steamship Co of Australia v King (1988) 166 CLR 1
- Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399
- R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207
- Thomas v Mowbray (2007) CLR 307

Notes

Power of the States is derived from ss.106, 107 of Constitution

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 106

Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 107

Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

There are **3 main limitations on State legislative powers** arising from the *Constitution*:

1. Some powers are vested exclusively in the Commonwealth Parliament (ie; ss 52, 90), which means that States can't make laws on those subject matters.
2. Some provisions expressly limit the powers of the States (ie: s114 a state shall not impose any tax on property belonging to Cth).
3. Limitations implied in the *Constitution* (ie; freedom of political communication, the institutional integrity of the State courts).

Legislative power is 'plenary'

As a general proposition, the legislative power of the States is 'plenary'. They can make and unmake any law they want.

- This is consistent with the idea of parliamentary sovereignty. The key limitation to parliamentary sovereignty is that one Parliament cannot bind a future Parliament. This is to ensure that parliamentary sovereignty exists in the future Parliament. – Eg, if the NSW

Parliament passed a law saying that Parliament must not impose payroll tax, a future NSW Parliament still retains power to impose payroll tax.

State Legislative Power - s.5 Constitution Act 1902

CONSTITUTION ACT 1902 - SECT 5

General legislative powers

5 General legislative powers

The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever:
Provided that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax or impost, shall originate in the Legislative Assembly.

The words 'peace, welfare and good government' are the traditional formula for a grant of plenary power. The grant of plenary legislative power to the States is confirmed by Australia Act 1986 s 2

- The words 'peace, welfare and good government' are not to be construed as limitations on the plenary powers of state legislatures - see below cases.

Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations (BLF Case) (1986) 7 NSWLR 372

Street CJ: said Peace, welfare and good government are words of limitation which restrict the power of Parl • Laws inimical to, or which do not serve, the peace, welfare and good government of our parliamentary democracy... will be struck down by the courts as unconstitutional.

Kirby P: Rejected the idea that 'peace, welfare and good government' are words of limitation: 'By their history, purpose and language these words may not be apt to provide a limitation on what the legislature may enact.'

Rejected Sir Robin Cooke's suggestion from NZ that there are some common law rights that go so deep that Parliament cannot interfere with them: it is contrary to mainstream constitutional theory, it is contrary to constitutional history (the Glorious Revolution of 1688 established the sovereignty of Parl), it is contrary to the democratic will of the people who have never seriously challenged the existence of Parl's plenary power, the doctrine has no obvious limits.

Union Steamship Co of Australia v King (1988) 166 CLR 1

Facts: Francis King was an employee of Union Steamship, who was making a compensation claim for boilermaker's deafness under the Workers Compensation Act 1926 (NSW). They sought to challenge the validity of the law on the basis that its relevant nexus was where the relevant ship was registered, and that this was not enough for it to be a law for the peace, order and good government.

The High Court Unanimously rejected the idea that the words 'peace, welfare and good government' confer limitations on the plenary powers of State Parliament.

Mason CJ, Wilson, Brennan, Dawson, Toohey and Gaudron JJ: at 9: "*The power to make laws "for the peace, welfare, and good government" of a territory is indistinguishable from the power to make laws "for the peace, order and good government" of a territory. Such a power is a plenary power and it was so recognized, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies.*"

- Ie, if they were words of limitation 'welfare' and 'order' would be very different restrictions on power and the two formulas have always been considered equivalent.

At 10: "*Within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the*

legislation does not promote or secure the peace, order and good government of the colony.... Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law ... is another question which we need not explore."

Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399

Facts: The case concerned NSW legislation that vested coal in certain land in the Crown in right of NSW but compensation payable to land owners was less than full compensation. Durham Holdings was a landowner and argued the legislation violated the common law right to receive fair compensation that was firmly rooted in the common law.

The NSW Court of Appeal rejected that argument. Durham Holdings sought special leave to appeal to the High Court, which was ultimately denied.

High Court - Gaudron, McHugh, Gummow and Hayne JJ: at 410 "*Undoubtedly, having regard to the federal system and the text and structure of "[t]he Constitution of each State of the Commonwealth" (the phrase used in s 106 of the Constitution), there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text. However, the limitation for which the applicant contends is not, as a matter of logical or practical necessity, implicit in the federal structure within which State Parliaments legislate. Further, whatever may be the scope of the inhibitions on legislative power involved in the question identified but not explored in Union Steamship, the requirement of compensation which answers the description "just" or "properly adequate" falls outside that field of discourse*"

- Notice the judges are not completely rejecting the deeply rooted fundamental common law rights limitation; they are just saying that compensation isn't such a right

State referrals of power to the Commonwealth - s.51 (xxxvii) Commonwealth Constitution

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 51

Legislative powers of the Parliament [see Notes 10 and 11]

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(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;

Under s.51(xxxvii) of the *Commonwealth Constitution* the States have the ability to confer on the Federal Parliament some of its plenary power to pass law on subjects that the Federal Parliament would not otherwise have power over.

R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex parte Australian National Airways Pty Ltd (1964) 113 CLR 207

Facts: Tasmania passed a statute referring power to the Cth in respect of air transport for a period which might at any time be terminated by the State Governor. There was argument about whether s 51(xxxvii) allows States to put time limits on a referral of power.

High Court: why should there be found in the words "matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States" any implications concerning the period of reference? It is plain enough that the Parliament of the State must express its will and it must express its will by enactment. How long the enactment is to remain in force as a reference may be expressed in the enactment. It none the less refers the matter. Indeed the matter itself may involve some limitation of time or be defined in terms which involve a limitation of time.

The question which was discussed at length before us as to whether when the Parliament of a State has made a reference it may repeal the reference does not directly arise in this case. It forms only a subsidiary matter which if decided might throw light on the whole ambit or operation of the paragraph. We do not therefore discuss it or express any final opinion upon it. We think that the

Tasmanian Act as framed is fairly within the paragraph and does refer a matter. But it must be remembered that the paragraph is concerned with the reference by the Parliament or Parliaments of a State or States. The will of a Parliament is expressed in a statute or Act of Parliament and it is the general conception of English law that what Parliament may enact it may repeal.

Seminar Questions

What relevance does the British concept of parliamentary sovereignty have to the legislative powers of the New South Wales Parliament?

As a general proposition, the legislative power of the States is 'plenary'. They can make and unmake any law they want. In practice it means that the powers of Parliament are paramount and plenary. In practice, this comes close to the British idea of parliamentary sovereignty as Per s 5 of the Colonial Laws Validity Act 1865 (Imp), each government had 'full power to make laws respecting (its own) constitution, powers and procedure'.

What is 'plenary power'? What is the relevance of plenary power to the Australian States?

A plenary power or plenary authority is the complete vesting of a power or powers or authority in a governing body. In this case the State Parliaments.

Are the 'plenary' law-making powers of the Australian States co-extensive with 'sovereign' law-making powers of the British Parliament?

Unlike the Federal Parliament which has a list of powers in s 51, the State Parliaments have plenary power, making them the closest to the British concept of Parliamentary sovereignty.

What sections of the Australian Constitution protect State Parliaments and, briefly, what protection do they provide? Where do the legislative powers of the States come from?

The State parliament constitutions stay as they were before federation unless changed by the plenary powers of state parliaments, s 106

s.106 Commonwealth Constitution

The Constitution of each State of the Commonwealth shall, subject to this Constitution, **continue as at the establishment** of the Commonwealth, or as at the admission or establishment of the State, as the case may be, **until altered in accordance with the Constitution of the State.**

The state parliaments retain the powers they had before federation. s.107

s.107 Commonwealth Constitution

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

The laws of the state parliaments before federation remain in after federation subject to state parliaments exercise of plenary power to change them s.108.

s.107 Commonwealth Constitution

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, **shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth,** the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

What limitations does the Australian Constitution apply to the law-making capacities of the State legislatures?

Three main limitations:

1. some powers are vested exclusively in the commonwealth parliament.
2. Some provisions expressly limit the powers of the States.
3. Limitations implied in the constitution. Preserving the integrity of the courts.

There were three main arguments in the BLF Case. What were they?

See facts of the case. s5 'powers to make laws for peace welfare and good government'.

Arguments in the case:

1. NSW Act invalid because it violated a fundamental common law right.
2. the phrase put limitations on laws that may be passed by NSW parliament.
3. whether the separation of powers doctrine was violated by denying a right to appeal.

Do you agree with the minority view of Street CJ in the BLF Case that the grant of power in section 5 of the Constitution Act 1902 (NSW) limits the NSW Parliament's legislative power?

Street CJ: "Laws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy, perceived in the sense I have previously indicated, will be struck down by the courts as unconstitutional..."

Insert Opinion →

In BLF Case Kirby P held that in the Australian legal system protections against manifestly unjust statutes are 'political and democratic' in nature. What did Kirby P mean by this dictum? Are such protections adequate?

Kirby J: "By their history, purpose and language these words may not be apt to provide a limitation on what the legislature may enact... Our protection against such a predicament remains, fundamentally, a political and democratic one."

Here His Honour is essentially saying that the protections against subject legislatures is fundamentally inherent in the democratic process, that is- the process of election and representative parliament. The theory goes that as electors, the public has the right and the ability to choose the people who represent them in parliament and put trust in those people to adequately do so, if the judiciary were to usurp this fundamental link in the chain then the integrity of the democratic process may also be jeopardised. It is better for the people to choose their government, than for judges who are appointed their positions, to choose or limit what laws governments may choose to pass.

In Union Steamship the High Court takes care to leave open the possibility that there may be 'fundamental common law rights.' Are you persuaded by this doctrine? What doubts does Kirby P express in the BLF Case?

'just terms' s51 (xxxii)-

s5 not words of limitations. .. Compensation not a fundamental common law right but may very well be other exceptions. It is essential to see the direct or implicit provisions for protection in the constitution as the source.

In light of Durham Holdings Pty Ltd v New South Wales (2001) 205 CLR 399, what is the current status of the 'fundamental common law rights' doctrine?

Their Honours in the High Court agreed that there are fundamental common law rights available however the 'right' to compensation was not one of them.

at 410: "there are limits to the exercise of the legislative powers conferred upon the Parliament which are not spelled out in the constitutional text..... the requirement of compensation which answers the description "just" or "properly adequate" falls outside that field of discourse."

In The Sovereignty of Parliament: History and Philosophy (Clarendon Press, 1999) Jeffrey Goldsworthy argues that attempting to solve the problem of unjust legislation by empowering judges is a flawed strategy: 'because judges, like legislators, are morally fallible, we would still face the danger of occasional, possibly egregious injustice' (262-263). Do you agree with this argument?

Yes as per the answer in question, it is better for the electors to vote for the people to represent them in parliament and exercise the most law-making power than for judges to be given the scope of power to shut down, limit or choose which laws parliament may or may not pass for the public.

In the article Goldsworthy argues:

1. People cannot rely on courts to use morality in order to defend their rights, because there is nothing which indicates that the Judiciary has a greater moral conscience than the Parliament.
2. If anything, greater faith should be entrusted to the Parliament, since they are, after all, elected and thus represent the will of the people.
3. If the ultimate authority rested with the courts, the same predicament would ensue: court decisions which are considered unjust (and, since judges are also morally fallible, this will obviously happen sometimes) would still have to be accepted.
4. Someone must have an ultimate authority, and it is favourable to the people that the Parliament will have this authority than the Judiciary

Topic 3 Constitutional Amendment

Outline of Topic

1. Amending the *Australian Constitution*
2. Amending the preamble and covering clauses of the *Commonwealth of Australia Constitution Act 1900 (Imp)*
3. Manner and form requirements for amending State constitutions
4. Proposals to 'recognise' Aboriginal and Torres Strait Islander Peoples in the *Australian Constitution*.

Legislation

- *Constitution s.128*
- *Colonial Laws Validity Act 1865 s.5*
- *Australia Act 1986 s.6*

Cases

- Taylor v Attorney-General of Queensland (1917) 23 CLR 457
- McCawley v The King [1920] AC 691
- Attorney-General (NSW) v Trethowan (1931) 44 CLR 394
- South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603
- West Lakes Ltd v South Australia (1980) 25 SASR 389
- Attorney-General (WA) v Marquet (2003) 217 CLR 545

Notes

What is being Amended?: *Commonwealth Constitution Clause 9*

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - CLAUSE 9

Constitution [see Note 1]

The Constitution of the Commonwealth shall be as follows:

The Constitution

This Constitution is divided as follows:

- Chapter I--The Parliament
 - Part I--General
 - Part II--The Senate
 - Part III--The House of Representatives
 - Part IV--Both Houses of the Parliament
 - Part V--Powers of the Parliament
- Chapter II--The Executive Government
- Chapter III--The Judicature
- Chapter IV--Finance and Trade
- Chapter V--The States
- Chapter VI--New States
- Chapter VII--Miscellaneous
- Chapter VIII--Alteration of the Constitution
- The Schedule

Mode of altering the Constitution s.128

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 128

Mode of altering the Constitution [see Note 1]

This Constitution shall not be altered except in the following manner:

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State **and Territory** to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State **and Territory** qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, *Territory* means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

Steps for Constitutional Amendment: s.128

1. Initiating amendments:
 - If there is an absolute majority of both Houses
 - The amendment shall (must) be put to the electors in a referendum.
 - If only the lower House passes amendment bill by absolute majority and the Senate rejects:
 - Then 3months pass and the bill passes by absolute majority and the Senate rejects it again (or the Houses will not agree on amending recommendations):

- The Governor-General may (contingent on advice of Ministers) submit proposed law to the electors with or without amendments recommended by the Houses.
 - However, the conventions of responsible government require that the Governor-General act only on the advice of Ministers, so if a proposal fails to pass the House of Representatives where the government has a majority it is unlikely government Ministers will advise the Governor-General to have a referendum.
- 2. Double majority required: i) majority of electors overall, plus ii) majority of electors in a majority of states.
- 3. Triple majority required in the four defined circumstances.

Amending State Constitutions

- Colonies to States
- Constitution s.106

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 106

Saving of Constitutions

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

- Constitution s.107

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 107

Saving of Power of State Parliaments

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Ordinary legislation can amend state constitutions

McCawley v The King (1920, Privy Council) • Section 15 of the Constitution Act 1867 (Qld) provided that Supreme Court judges had life tenure subject to good behaviour

- The Industrial Arbitration Act 1916 (Qld) created a Court of Industrial Arbitration. Its President and other judges held office for renewable 7 year terms. Section 6(6) allowed the President to be appointed to the Supreme Court, and that provision had been interpreted to mean that the President could hold office as a Supreme Court judge for a period of 7 years
- Argument that s 6(6) was invalid as contradicting s 15 of the Constitution Act
- Held: State Constitutions can be amended by ordinary legislation, including by legislation that is merely inconsistent with the Constitution Act through the ordinary doctrine of implied repeal
-unless a higher law says otherwise

The Two such higher laws

1. Colonial Laws Validity Act 1865 s.5 (pre 3 March 1986)

s.5 Colonial Laws Validity Act 1865 s.5

“Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be

required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.”

2. Australia Acts 1986 (from March 1986)

The CLVA is no longer applicable to the states, repugnancy doctrine is abolished, however under s.6 of the Australia Acts:

AUSTRALIA ACT 1986 No. 142 of 1985 - SECT 6

Manner and form of making certain State laws

6. Notwithstanding sections 2 and 3 (2) above, a law made after the commencement of this Act by the Parliament of a [State](#) respecting the constitution, powers or procedure of the Parliament of the [State](#) shall be of no force or effect unless it is made in such manner and form as may from time to time be required by [a law made by that Parliament](#), whether made before or after the commencement of this Act.

‘Manner and Form’ requirements:

1. The entrenched provision/s (ie the law/s that can't be changed in the ordinary way)
2. The manner and form provision which sets out the manner and form in which the entrenched provision/s may be amended
3. The amending law, which seeks to amend the entrenched provision/s.

Attorney-General (NSW) v Trethowan (1931) 44 CLR 394

Facts: NSW Parl enacted s 7A saying the Legislative Council could not be abolished without a referendum (sub-s(1)) and that s 7A itself could not be amended or repealed without a referendum (sub-s(6)). Bills were later passed without a referendum (i) to repeal s 7A and (ii) to abolish the Legislative Council, on the theory that Parl can make and unmake any law it wants.

An injunction was sought to stop the Bill being presented to the Governor for Royal Assent on the ground that the requirements of s 7A had not been met.

High Court: confirmed that the double entrenchment in s 7A was effective as a manner and form requirement imposed by law per s 5 of the CLVA.

- The law proposed by the repeal Bill is a law respecting the powers of the legislature
 - S 7A is a preexisting NSW law
 - A requirement for a Bill to be approved by the electors is a manner and form requirement.
 - McTiernan J (dissenting): such a requirement is not a manner and form requirement, it is an abdication or deprivation of power
 - S 7A imposes such a requirement
 - We fall within the proviso in CLVA s 5
- NB: sub-s(6) was key. Without it, sub-s(1) could have been repealed in the ordinary way which would have then allowed the LC to be abolished without referendum

South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603

Facts: S 6 of the Real Property Act 1886 (SA) said that land covered by the Act will not be subject to any future laws unless those future laws use the words “notwithstanding the provisions of ‘The Real Property Act 1886’”. The South-Eastern Drainage Amendment Act 1900 (SA) was a law affecting land subject to the RPA but it did not use the words.

High Court: Held: SEDA Act valid. Reasoning:

- S 6 is not a manner and form provision. It prescribes the content of future laws and not the manner and form in which they need to be passed.
 - There is no higher law giving power to bind a future parliament in that way. Such a law will be impliedly repealed by any future law inconsistent with it.
- High Court majority made a huge mistake in their reasoning! They asked whether RPA s 6 was a law respecting the constitution, powers and procedure of the legislature and said no

- But the question under CLVA s 5 (and also AusAct s 6) needs to be asked of the later law not the earlier law.
 - Only if the answer to that question is yes do you then go on to ask whether the earlier law imposes a manner and form requirement for passing the later law

West Lakes Ltd v South Australia (1980) 25 SASR 389

Facts: Company and Govt entered into an agreement for a suburb development. Legislation was enacted to give legal effect to the agreement. The agreement/legislation said the company's agreement was necessary before any change could be made to the building code set out in the agreement/legislation. A Bill was later passed making changes to the code. The Company said the Bill hadn't complied with a manner and form requirement.

High Court: Held: Act valid. Reasoning:

- The later Bill did not concern the constitution, powers or procedures of the Parliament
- The requirement for the agreement of the company was not a manner and form requirement but rather an abdication of legislative power. It related to the substance of the lawmaking power and not the manner and form of its exercise.
- Anyway, there was no double entrenchment

Interesting points made:

- There might be a point at which a true manner and form requirement is so onerous to amount in substance to an attempt to deprive Parl of its powers rather than to prescribe the manner and form of its exercise.
- Trethowan involved an extra-parliamentary requirement (approval by electors at referendum) but is seen as a manner and form requirement because it was limited to obtaining the approval of the people whom the legislature represents
- A provision requiring the consent to legislation of an entity not forming part of the legislative structure (including the people represented by the legislature) is not a manner and form requirement but an abdication of power.

Attorney-General (WA) v Marquet (2003) 217 CLR 545

Facts: S 13 of the Electoral Distribution Act 1947 (WA) required an absolute majority in both Houses for 'any Bill to amend this Act'. Electoral Distribution Repeal Bill 2001 (WA) would repeal the 1947 Act. The Electoral Amendment Bill 2001 (WA) would set out a new electoral distribution in its place. Passed by ordinary and not absolute majority.

High Court:

- 'amend' in s 13 includes 'repeal'
- The expression 'constitution...of the Parliament' includes matters like how many Houses but also extends to the scheme of electoral distribution for those Houses
- The two Bills were to do away with and then provide a new structure for the constitution of the two Houses with more MPs and a different electoral distribution
- The Repeal Bill was for a law respecting the constitution of the Parliament, and so was the Amendment Bill
- Bills ineffective

Topic 4: Separation of Judicial Power - Commonwealth

Outline of Topic

1. Nature of judicial power
2. *Boilermakers* doctrine
3. Military justice
4. Delegation of judicial power
5. *Persona designata* and incompatibility

Legislation

- Constitution Chp III, s71

Cases:

- *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330
- *Momcilovic v The Queen* (2011) 245 CLR 1
- *R v Trade Practices Tribunal, Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361
- *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245
- *Duncan v New South Wales* [2015] HCA 13 (*download from Austlii*)
- *Australian Communications and Media Authority v Today FM* [2015] HCA 7 (*download from Austlii*)
- *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83
- *Lutton v Lessels* (2002) 210 CLR 333
- *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542
- *Thomas v Mowbray* (2007) 233 CLR 307
- *New South Wales v Commonwealth (Wheat case)* (1915) 20 CLR 54
- *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434
- *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers case)* (1956) 94 CLR 254; on appeal *Attorney-General v The Queen* [1957] AC 288
- *Lane v Morrison* (2009) 239 CLR 230
- *Haskins v Commonwealth* (2011) 244 CLR 22
- *Harris v Caladane* (1991) 172 CLR 84
- *Drake v Minister for Immigration & Ethnic Affairs* (1979) 46 FLR 409
- *Hilton v Wells* (1985) 157 CLR 57
- *Grollo v Palmer* (1995) 184 CLR 348
- *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1

Notes

Chapter III, s71 Commonwealth Constitution: The Judicature

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 71

Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

The Commonwealth judicial power is vested in:

- High Court

Plus

- Other federal courts created by Parliament.
 - Ie: Federal Court, Family Court, Federal Circuit Court

- Such other courts as Parliament invests with federal jurisdiction
 - Ie: Parliament can (and has) vested federal jurisdiction in State Courts. The “autochthonous expedient”.

Jurisdiction of the High Court:

S75 – entrenched original jurisdiction

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 75

Original jurisdiction of High Court

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

S76 – additional original jurisdiction

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 76

Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

S73 – appellate jurisdiction

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 73

Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

- The effect of Chp III is that there is a single common law in Australia
- S74 contemplates appeals to the Privy Council in certain types of cases

What is judicial power?

There is no precise definition of what constitutes judicial power, however the most classical definition is given by Chief Justice Griffith in *Huddart*.

Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330

Griffith CJ: *"I am of the opinion that the words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."*

Brandy v Human Rights and Equal Opportunity Commission (1995) 183 CLR 245

Facts: The Racial Discrimination Act empowered HREOC to make findings that a person had engaged in unlawful conduct, to declare that the person should perform some act to redress loss or damage caused by their unlawful conduct, and to declare that the person should pay compensation. Legislation required HREOC to lodge such declarations in a Registry of the Federal Court, whereupon the declaration would have effect as if it were an order made by the Federal Court. Declarations were made against Brandy. Brandy said the registration of declarations and their taking effect as if orders of the FedCt meant that HREOC was exercising judicial power (contrary to *Boilermakers*) and the relevant provisions were therefore invalid. High Court agreed and discussed the nature of judicial power.

Held: HREOC in breach of boiler makers doctrine after the amendments for the enforceability of declarations took place

Reasoning: Nature of Judicial Power – enforceability of the power is relevant to determine if it is a judicial power

Deane, Dawson, Gaudron and McHugh JJ: [at 267] *"Difficulty arise in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not."*

[at 268] *"Another important element which distinguishes a judicial decision is that it determines existing rights and duties and does so according to law. That is to say, it does so by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion..... But again... the exercise of non-judicial functions for example, arbitral powers, may also involve this too."*

[at 268] *However, there is one aspect of judicial power which may serve to characterize a function as judicial when it is otherwise equivocal. That is the enforceability of decisions given in the exercise of judicial power.*

However, if it were not for the provisions providing for the registration and enforcement of the Commission's determinations, it would be plain that the Commission does not exercise judicial power. That is because, under s.25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions."

Australian Communications and Media Authority v Today FM [2015] HCA 7

Facts: TodayFM held a radio broadcasting licence under federal legislation. It is a condition of that licence, that the licensee not use the broadcasting service in the commission of an offence. ACMA has power to cancel, suspend etc licences for breach TodayFM presenters rang the London hospital where the Duchess of Cambridge was being treated pretending to be the Queen and Prince Charles. The phone prank was recorded and broadcast. Broadcasting a conversation recorded without a person's consent is an offence under NSW law. ACMA conducted an investigation and took action against TodayFM's licence. TodayFM contended, first, that the ACMA was not authorised to find that it had breached the licence condition unless and until a competent court adjudicated that it had committed the NSW offence. In the alternative, Today FM argued that, if the ACMA was so authorised, the authorising legislative provisions are invalid because they are inconsistent with the separation of executive and judicial power under the Constitution, because finding criminal guilt is a judicial function. Today FM ('the station') holds a licence under the Broadcasting Services Act 1992 (Cth) to run a commercial broadcasting service. All such licences are subject to certain standard conditions, including that

'the licensee will not use the broadcasting service or services in the commission of an offence against another Act or a law of a State or Territory' (Schedule 2, clause 8(1)(g)). If one of those conditions is breached, the Australian Communications and Media Authority ('ACMA') has the power to seek a civil penalty order, issue a remedial direction or suspend or cancel the licence.

Federal Court at first instance: The case raised issues of statutory interpretation and of the constitutional separation of powers – specifically the separation of judicial power. The first issue arose from the station's argument that the ACMA 'was not authorised to find that it had breached the cl 8(1)(g) licence condition unless and until a competent court adjudicated that it had committed the SDA offence.' [para 16] The second issue was based on an argument that the Broadcasting Services Act 1992 (Cth) (BSA) had invalidly purported to confer judicial power on the ACMA.

High Court Held: ACMA was successful in its appeal to the High Court of Australia.

Reasoning: (The nature of judicial power- ACMA right to make determination for suspension of licence upheld) Held that that the legislation gives ACMA power to make an administrative determination that a licensee has committed a criminal offence as a preliminary step to taking enforcement action under the legislation, notwithstanding that there has been no finding by a court exercising criminal jurisdiction that the offence has been proven. In making such a determination, ACMA is not adjudging and punishing criminal guilt. It is a step in the determination of breach of the cl 8(1)(g) licence condition and is the foundation for ACMA to institute civil penalty proceedings in the Federal Court of Australia or to take administrative enforcement measures. The High Court emphasised that a particular function might be characterised as judicial or non-judicial depending on the character of the body exercising the function.

In this way the HC disagreed with the FC reasoning that it would not normally be up to an administrative body to determine if conduct constitutes as an offence [at para 35]. HC pointed out several scenarios in the legal system where bodies other than courts exercising criminal jurisdiction "determine facts which establish whether a person has engaged in conduct that constitutes as a criminal offence as a step in the decision to take disciplinary or other action" [at 33].

Rather than the determination by ACMA being about a determination of criminal guilt the court found that it was likened to the administrative processes that involves the formation of "*an opinion as to the legal rights of an individual as a step in a body's ultimate determination*". [at 55]

Duncan v New South Wales [2015] HCA 13

Facts: The Independent Commission Against Corruption made findings that certain mining licences had been issued corruptly. Parl passed legislation to cancel those licences, including a licence granted to Duncan. Duncan argued that the legislation constituted an exercise of judicial power by the NSW Parl in that it punished him (by taking away his property, ie the licence) as consequence of conduct that was unlawful. Duncan further argued that Parliament cannot exercise judicial power, thus aking the legislation invalid and saving his licence.

The Amending Act inserted Sch 6A into the Mining Act. The stated purposes of Sch 6A are to restore public confidence in the allocation of resources; promote integrity in public administration above all other considerations; and place the State in a position as near as possible to the position it would have occupied had the licences not been granted. These statutory purposes are preceded by a statement that:

The Parliament, being satisfied because of information that has come to light as a result of investigations and proceedings of the Independent Commission Against Corruption known as Operation Jasper and Operation Acacia, that the grant of the relevant licences, and the decisions and processes that culminated in the grant of the relevant licences, were tainted by serious corruption (the tainted processes), and recognising the exceptional nature of the circumstances, enacts the [Amending Act] for the following purposes ... [Emphasis added]

High Court Decision: The High Court held that the legislation did not constitute an exercise of judicial power by the Parl (and therefore it did not need to decide whether Parl had power to exercise judicial power).

Reasoning: (nature of judicial power- consequences of a legislative determination of prohibited conduct distinguished from punitive judicial powers.)

The Court held that the Amending Act does not, either in form or in substance, exhibit either of the 2 features that are commonly considered to identify a bill of pains and penalties – a legislative determination that a

person has breached a standard of conduct; and the legislative imposition of punishment on that person because of that breach (at [43]).

Significantly, the Amending Act does not adopt any of the specific findings made by ICAC about any individual and those individuals remain subject to the ordinary criminal law. While the Amending Act deprived certain persons of valuable assets, the Court found that it did not follow that they were being 'punished' in a relevant sense.

As the Court observed, "*legislative detriment cannot be equated with legislative punishment*" (at [46]). This was so despite a statutory purpose in the Amending Act of "*detering future corruption*" (at [47]). The termination of a statutory right is not an exclusively judiciary power, an Amending Act is not a judicial power.

French CJ, Hayne, Kieffel, Bell, Gageler, Keane and Nettle JJ: [at 41] "Some functions of their nature pertain exclusively to judicial power. The determination and punishment of criminal guilt is one of them. The non-consensual ascertainment and enforcement of rights in issue between private parties is another (citing Brandy). The termination of a right conferred by statute is not of that nature. That is so even where the basis for termination is satisfaction of the occurrence of conduct which, if proved on admissible evidence to the criminal standard, would constitute a criminal offence (citing ACMA v TodayFM)."

[at 42] "In terminating exploration licences issued under the Mining Act and in making consequential provision, the Amendment Act exhibits none of the typical features of an exercise of judicial power. It quells no controversy between parties. It precludes no future determination by a court of past criminal or civil liability. It does not determine the existence of any right that has accrued or any liability that has been incurred."

[at 45] "What the New South Wales Parliament has done in the Amendment Act is of a different nature. Having informed itself by reference to the Operation Acacia report, the Operation Jasper report and the December report, but without having limited its consideration or linked its conclusions to any one or more specific findings in those reports, the Parliament has formed and expressed its own satisfaction that the administrative processes by which the three specified exploration licences were issued were tainted by corruption. The Parliament has gone on to express, and to give effect to, its own determination that it was in the public interest that the products of those tainted processes – the licences themselves – be cancelled, that the State be restored so far as possible to the position the State would have been in had those licences not been issued, and that those who had held the licences not obtain any advantage from having done so."

[at 46] "That [the plaintiffs] were deprived by those provisions of valuable assets, for which they were not compensated by the State, does not mean that they were thereby punished in the sense in which that term is used when describing an exercise of judicial power consequent on a finding of criminal guilt. Legislative detriment cannot be equated with legislative punishment."

Thomas v Mowbray (2007) 233 CLR 307

Facts: Federal control order case. 'Jihad Jack' Thomas trained with Al-Qa'ida. Returned to Australia. An interim control order in relation to Mr Thomas was made under s 104.4 of the Criminal Code, on the ex parte application of the Manager, Counter-Terrorism, Domestic, Australian Federal Police (the second defendant). Among other things, the order required Mr Thomas to remain at his home (or another place notified to the police) between midnight and 5 am each night and to report to police three times a week; restricted his access to communication devices (for example, he could have only one home phone, one mobile phone, and one internet service provider); and prevented him from leaving Australia without approval.

Thomas also made two Ch III arguments

- The provision conferred non-judicial power on a federal court,
- In the alternative, the provision authorised the exercise of judicial power in a manner contrary to Ch III

Criminal Code (Cth) s 104.4:

- (1) The issuing court may make an order under this section in relation to the person, but only if:
 - (a) the senior AFP member has requested it in accordance with section 104.3; and
 - (b) the court has received and considered such further information (if any) as the court requires; and
 - (c) the court is satisfied on the balance of probabilities:

- (i) that making the order would substantially assist in preventing a terrorist act; or
- (ii) that the person has provided training to, or received training from, a listed terrorist organisation; and
- (d) the court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

High Court Decision: Thomas argued provision not supported by any head of power: putting judicial power issues aside, all justices except Kirby J (that the interim control order provisions were supported by the defence power).

In relation to whether the making of control orders was an exercise of non-judicial power by the court, the HC disagreed and upheld the validity of the orders.

Reasoning: (judicial power of courts and control orders) The HC concluded (Gleeson CJ and Gummow, Callinan, Heydon and Crennan JJ) that the issuing of a control order was a valid exercise of judicial power of the courts.

Gleeson CJ: [at 15] *“The power to restrict or interfere with a person’s liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done ... and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.”* (eg: bail orders and AVOs)

Courts examples:

Two strands to this reasoning: In reaching this conclusion, the Court had regard to historical and contemporary examples of powers exercised by courts that were similar in some ways to the power to issue an interim control order, including:

- the power of justices of the peace to bind a person over to keep the peace (involving restrictions on liberty based on predictions of future risk) ([16], [79], [116]–[121], [595]; cf [334]–[338])
- apprehended violence orders (involving restrictions on liberty based on predictions of future risk) ([16], [28], [79], [595]; cf [331], [337]–[338])
- orders made in matrimonial causes, bankruptcy, probate, business regulation, and winding up companies (involving creation of new rights and obligations and/or application of broad standards) ([15]–[16], [22], [74]–[75], [119]; cf [331], [476]–[477])
- sentencing (involving protection of the public and predictions) ([28], [109], [595])
- bail (involving creation of new rights and obligations restricting liberty, or being temporary in nature) ([16], [520]; cf [331], [337]–[338]).
- Historical: courts have historically done things analogous to the Control Orders in question, so history shows that kind of function may be judicial in character.

Reasoning: Manner of exercise of Judicial Power

The Court said that the interim control order provisions provided for or assumed all the usual indicia of the exercise of judicial power (for example, evidence; legal representation; cross-examination; a generally open hearing; and the application of law to facts, argument and appeals) ([30], [55], [59], [599]). There was nothing novel or impermissible about an ex parte hearing (particularly where the matter is urgent), as had occurred in this case ([30], [112], [598]). Further, Parliament’s selection of the balance of probabilities as the applicable standard of proof was consistent with Ch III ([113], [598]).

Gleeson CJ concluded (at [30]): *“The outcome of each case is to be determined on its individual merits. There is nothing to suggest that the issuing court is to act as a mere instrument of government policy. On the contrary, the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the justice of the individual case. In particular, the requirements of s 104.4, which include an obligation to take into account the impact of the order on the subject’s personal circumstances, are plainly designed to avoid the kind of overkill that is sometimes involved in administrative decision-making. Giving attention to the particular circumstances of individual cases is a characteristic that sometimes distinguishes judicial from administrative action.”*

‘Chameleon doctrine’: if a function might be regarded as either administrative or judicial, it will take its colour from the institution to which it is entrusted

- Thomas also argued that the standards in the provision were indeterminate in nature and involved predictive considerations incapable of judicial assessment:
- Predictive considerations involved in sentencing, bail, AVOs, orders about parental access to children etc; so argument that foreign to the nature of the judicial process untenable.
- 'I am unable to accept that there is a qualitative difference between deciding [these kinds of things] and deciding whether someone who has been trained by terrorists poses an unacceptable risk to the public.'
- The legislative criteria for the imposition of an interim control order, including the requirement that each of the obligations, prohibitions and restrictions imposed on a person by a control order was reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act, were not too vague or indefinite as to be insusceptible of strictly judicial application. Conferral of such a power on the judiciary gave rise to an inference that the power should be exercised judicially and in accordance with the standards that characterise judicial activities.

If judicial, whether inconsistent with Chp III

“This argument fails. We are here concerned with an interim control order which was made ex parte, pursuant to subdiv B, but, as has been pointed out, in the ordinary case a confirmation hearing would have been held before now. Applications for control orders are made in open court, subject to the power to close the court under the court's general statutory powers. The rules of evidence apply. The burden of proof is on the applicant. Prior to the confirmation hearing, the subject of a control order is given the documents that were provided to the Attorney-General for the purpose of seeking consent to the application for the interim order, together with any other details required to enable the person to respond (s104.12A). The confirmation hearing involves evidence, cross-examination, and argument (s104.14). The court has a discretion whether to revoke or vary or confirm the order (s 104.14). An appeal lies in accordance with the ordinary appellate process that governs the issuing court's decisions. The outcome of each case is to be determined on its individual merits.

There is nothing to suggest that the issuing court is to act as a mere instrument of government policy. On the contrary, the evident purpose of conferring this function on a court is to submit control orders to the judicial process, with its essential commitment to impartiality and its focus on the justice of the individual case. In particular, the requirements of s 104.4, which include an obligation to take into account the impact of the order on the subject's personal circumstances, are plainly designed to avoid the kind of overkill that is sometimes involved in administrative decision-making. Giving attention to the particular circumstances of individual cases is a characteristic that sometimes distinguishes judicial from administrative action.”

Separation of Judicial Power

As early as *NSW v Commonwealth (Wheat Case) (1915) 20 CLR 54*, the High Court decided that strict insulation of judicial power was a fundamental principle of the Constitution.

New South Wales v Commonwealth (Wheat case) (1915) 20 CLR 54

Facts: In January, 1915, the Commonwealth applied to the Inter-State Commission for an order to prohibit the NSW Government and the NSW Inspector-General of Police from preventing the exportation of wheat to other States on the basis that this acquisition infringed the Constitution's guarantee of freedom of interstate trade and commerce. The commission consisted of a chief commissioner, Albert Piddington, who had been briefly appointed to the High Court but resigned before hearing a case, and two laypersons, George Swinburne and Nicholas Lockyer (Comptroller-General of Customs). The Inter-State Commission found that the NSW Wheat Acquisition was invalid and made the order sought by the Commonwealth, with Swinburne and Lockyer finding that NSW had contravened section 92 of the Constitution by compulsorily acquiring wheat which was the subject of contracts for interstate sale and was in the course of interstate transport. Piddington disagreed, holding that the Act was a valid exercise of the power of a State to compulsorily acquire food for the civilian population.

NSW appealed to the High Court, challenging the decision not only on the basis that NSW contended that it had not infringed the freedom of interstate commerce, but challenged the very foundation of the Inter-State Commission. The argument was that the Inter-State Commission Act 1912 was contrary to the separation of powers that was implicit in the Constitution. The argument had its foundation in the structure of the Constitution, where chapter 1 dealt with the Parliament, chapter 2 with the Executive Government and chapter 3 with the Judicature. The Inter-State Commission is not within any of these chapter, instead it is within

chapter 4 which deals with finance and trade.

Decision:

The High Court upheld the appeal by NSW on both grounds, the majority deciding that the strict insulation of judicial power was a fundamental principle of the Constitution. All judges held that the compulsory acquisition of all wheat, even though it included wheat that was the subject of interstate trade, did not contravene the freedom of interstate trade that was guaranteed by section 92 of the Constitution.

Reasoning: Insulation of judicial power under the Constitution

The High Court held that only a court established under Chapter III of the constitution can exercise the judicial power of the Commonwealth. The Inter-State Commission created by the Inter-State Commission Act 1912 could not exercise judicial power despite the words of section 101 of the Constitution, because it was set up by the executive and violated the conditions for being a Chapter III court.

Isaac J at 92: *“Thus the Constitution provided for the possible establishment of a novel administrative and consultative organ with incidental quasi-judicial functions, very much as a Commissioner of Patents has to exercise quasi-judicial functions before exercising the executive act of issuing a patent....*

[at 93] *The dominant words in section 101 are “the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of all laws made there under.” Those words denote the purpose and nature of the power to be conferred, and mark their limit. Courts do not execute or maintain laws relating to trade or commerce. Those words imply a duty to actively watch the observance of those laws, insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated.”*