

# Australian Constitutional Law exam notes

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## Ordinary claim skeleton

To weave in authority (case and legislation):

- \_\_\_ is authority for the proposition that \_\_\_. In these circumstances therefore \_\_\_\_\_.
- \_\_\_\_\_ is authority that there is justification for a \_\_\_\_\_.
- - 'the application of s\_\_ will result in \_\_\_\_\_'

When using case law, consider:

- Does the case apply? Are the facts sufficiently similar or can it be distinguished?
- What is the ratio of the case? Is it binding precedent or just persuasive?
- Why is the current scenario similar to justify applying the case?

NOTE: This process is to determine if the law made by the Commonwealth, or a State, is Constitutionally valid. Repeat this process for every section under examination – do section by section (or sub-section by sub-section).

1. Clearly determine and state which section of the legislation applies to the question, which is under examination.
2. State if it is a Commonwealth or State law under examination.
3. **If STATE:** Does the State have power to pass the law:
  - a. 'States (i.e. SA) have plenary legislative power, per the *Constitution Act 1934* (SA) s 5. The Commonwealth Constitution ss 106-107 'saves' these powers, subject to the Commonwealth Constitution. Accordingly, it has the power to make laws for any area including \_\_\_\_\_.'
  - b. See below if the State is using tax power – *See notes for more detail!*
4. **If COMMONWEALTH:** Does the Commonwealth have power to pass the law under the *enumerated heads of power*? i.e. is the law made 'with respect to' the heads of power – undertake characterisation:

McHugh J in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369, affirmed in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492, is authority for the two stage process:

  - a. **Interpret** the following applicable heads of power:

*Note: the Engineers Case (1920) 28 CLR 129 is authority that the Constitution is to be viewed as a statute, with legalism as the guiding interpretive principle. So, the ordinary meaning is to be given to the words, informed by the common law and statutory context.*

*NOTE: O'Connor J in Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309, 367 is authority that 'the Court should... always lean to the broader interpretation unless there is something in the context pf in the rest of the*

*Constitution to indicate the narrower interpretation will best carry out its object and purpose.'*

- i. Corporations power s 51(xx) – *see topic below for in depth detail.*
    1. \*\*Determine scope of power using *Work Choices* definition – only include relevant aspect of the Gaudron J quote. *See below*
    2. Do b. and c. below – applying the subject matter power test.
    3. Conclude whether the law is valid.
    4. \*\*Determine whether the law applies to the entity in the question.
      - a. Is it a foreign, trading or financial Corporation? Mention *Adamson, Superannuation* and *Tasmanian Dams*. *See below*
      - b. Apply the tests to the facts i.e. to the operation of the entity. Include For and Against!
      - c. Conclude likely result. Advise client based on the question.
  - ii. External Affairs Power s 51(xxix) – *see topic below for in depth detail.*
    1. Relations with other nations?
    2. Matters external to Australia?
    3. Implementing treaties and conventions?
      - a. Is the treaty *Bona fide* and have precise obligations?
      - b. No need for the matter to be of 'international concern'.
      - c. Is the law reasonably appropriate and adapted to achieving the purpose of the treaty? - *Steps b. and c. below.*
  - iii. Defence power s 51(vi)
    1. Characterise the power using Fullagar J's two aspects from the *Communist Party Case*.
    2. Consider constitutional facts that give rise to a threat for which there is a defence need.
    3. Determine whether the action taken is proportionate to the threat.
      - a. Steps b. and c. below.
  - iv. Taxation s 51(ii): *NOTE: Always need to consider this, due to s 55 as if the law imposes a tax, it can't do anything else!*
    1. (Step b. below) Is the law imposing a 'compulsory extraction of money, by a public authority, for public purposes, enforceable by law and is not a payment for services rendered'?
    2. If so, is it a:
      - a. Fee for services
      - b. Fee for privilege
      - c. An arbitrary exaction
      - d. A penalty
      - e. A charge for the use or acquisition of property?
    3. *Note: s 96 – Commonwealth can grant financial assistance to States on any terms.*
- b. **Analyse** the legislation in question:
- i. Determine 'the character of the law' by reference to the 'rights, powers, liabilities, duties and privileges that it creates'.
  - ii. Consider 'the practical as well as the legal operation of the law.'

- c. **Compare** the legislation to the interpreted head of power:
  - i. Is it a **Subject Matter** power? If so, use the test of *sufficient connection*: the connection is not 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' the head of power: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J), quoting *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).
    - 1. Purpose and proportionality are irrelevant (Kitto J in *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418)
    - 2. The wisdom of the law is irrelevant (*Grain Pool*)
  - ii. Is it a **Purposive** power? If so, use the test of *proportionality*: whether the law is proportionate, or appropriate and adapted, to the relevant purpose: *Text page 785*.
    - 1. Use for Defence power (s 51(vi)) and Treaty implementation aspect of external affairs (s 51 (xxix)).
  - iii. **NOTE**: 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; *Re F; Ex parte F* (1986) 161 CLR 376, 387.
- 5. **If Corporations Power**, refer above to see if law applies to the corporation in question.
- 6. IF use of **tax power, any limitations** apply?
  - a. If Commonwealth:
    - i. S 53 or 55 procedural limits?
    - ii. S 51(ii) or 99 substantive limits of discrimination or preference between States?
- 7. **Implied Freedom of Political Communication**
  - a. *Lange test*:
    - i. Does the law burden political communication?
    - ii. Is the law appropriate and adapted to achieving a legitimate purpose?
      - 1. What is the object of the law?
      - 2. Is this legitimate?
      - 3. Are the means appropriate and adapted?
        - a. Does the law achieve its purpose?
        - b. Any less-drastic means?
        - c. Is it an undue burden?
- 8. **Implied immunities**
  - a. Commonwealth law applying to State 'crown'?
    - i. Does the law actually apply to the crown?
    - ii. Does the law actually apply to the State as a matter of statutory construction? *Look for an express statement to rebut presumption*.
    - iii. Per *Austin*, does the law impose a 'special burden' or 'curtail' the 'capacity' of the States to function as governments?
      - 1. Does it apply to higher level State employees, or control hiring/firing? *Re AEU*.
  - b. State law applying to Commonwealth 'crown'?
    - i. Does the law actually apply to part of the Commonwealth Crown?

- ii. Does it apply to the Commonwealth as a matter of Statutory construction?
      - 1. Remember *SA Acts Interpretation Act*
    - iii. *Cigamic/Henderson's* test:
      - 1. Discriminate against the Commonwealth? *Invalid*
      - 2. Remove or regulate the capacities of the Commonwealth? *Invalid*
      - 3. Regulate the use of the capacities? *Valid*
    - c. IF invalid, read it down as to not apply to the crown?
- 9. **Apply freedom of interstate trade limitation:** Section 92
  - a. Per *Cole v Whitfield*, is there a 'discriminatory burden of a protectionist kind'?
    - i. Discriminatory burden – *Castlemaine Tooheys, Betfair (No 1) and Betfair (No 2)*.
    - ii. Protectionist purpose – *Cole, Betfair (No 1) and Betfair (No 2)*.
- 10. **If State law**, is the law imposing an **excise (s 90)?**
- 11. **S 109 inconsistency?** To make the State law inoperative.
  - a. Direct inconsistency – impossible to obey both laws
  - b. Direct inconsistency – conflict of rights/privileges/entitlements
  - c. Indirect inconsistency – Commonwealth covering the field?
    - i. Manufacturing inconsistency?
    - ii. Operational inconsistency?
- 12. If the Commonwealth makes a law within their limits, it is valid. Otherwise, it is invalid and has no force! *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 is authority that '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.'
- 13. If invalid, **read down or sever provisions?** – *see below*.

## The Corporations Power s 51(xx)

51. '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: (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. NOTE: This is a subject matter power!

SEE PROCESS ABOVE FOR ALL STEPS! Below are elaborated steps!

**4(a)(i)(1). Scope of the Corporations Power – uses of power that are ‘with respect to’ it:** The majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) in the *Work Choices Case* at 114 defined the scope of the Corporations power by adopting dissenting statements by Gaudron J in *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323 and *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346:

From *Re Pacific Coal* at 375: 'I have no doubt that the power conferred by s51(xx) of the Constitution extends to the

- regulation of the activities, functions, relationships, and the business of a corporation described in that sub-section, (*almost everything a corporation does*)
- the creation of rights, and privileges belonging to such a corporation,
- the imposition of obligations on it and, (*can force, or refrain, action of corporations*)
- in respect of those matters, to the regulation of the conduct of those through whom it acts,
  - its employees,
  - and shareholders and, also, (*BUT, only in relation to the above three dot points*)
- the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

NOTE: In answer, quote the relevant and applicable aspects of the passage above, not all of it!

HOWEVER, a law that merely ‘hooks’ a corporation onto a law in attempt to draw third parties or employee’s conduct within power will be invalid; there must be an active, real connection to the corporation – *Re Dingjan* (Gaudron J).

Also note: that laws relating directly to the subject matter of the power (the trading and financial activities of trading and financial corporations, respectively) go to the very heart of the power, and almost definitely fall within it – *Concrete Pipes Case* (Barwick CJ)

- Look for words like ‘trade’, ‘sale’ or ‘investment’ in the legislation

### Apply these examples and analogies where possible!

<p><i>New South Wales v Commonwealth (Work Choices Case)</i> (2006) 229 CLR 1</p> <p><i>I.e. Internal workings of corporations, indirect to trading.</i></p> <p><i>See above for full ratio!</i></p>	<p>The Howard Government created the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth) that regulated all aspects of relationships between corporations and their employees.</p>	<p>The majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) held the laws were valid. – see above for ratio of case. <i>‘the regulation of the conduct of those through whom it acts...’ example.</i></p>
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	<p>ss 365 and 366 – offence to place or deny prohibited content in workplace agreements</p> <p>S 775(1)(a) – restricted union officials from entering premises owned or occupied by corporations for any reason, including OH&amp;S checks</p> <p>Schedule 1 – required unions to register and incorporate.</p>	
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