FEDERAL CONSTITUTION OF AUSTRALIA

UNSW 2017 SEMESTER ONE

FUNDAMENTALS OF AUSTRALIAN CONSTITUTIONAL LAW

MAIN FEATURES AND INFLUENCE

- Main features of Australian constitutionalism
  - Federalism: both to channel and to check power (ensures federal government strong enough to promote interests of nation as a whole, while allowing for regional innovation and dispersal of power between Commonwealth and States)
  - Responsible government: both to channel and to check power (government by party enjoying majority support, and thus capable of taking nation with it, but responsible to electorate via Parliament)
  - Separation of judicial power: at federal level but less so at State level
  - Individual rights and freedoms historically less well developed in Australia as explicit *constitutional* check on governmental power – these rights and freedoms assumed to be adequately protected through common law and legislation
- These features reflect dual influence of American and English constitutionalism
- The American inheritance:
  - Federalism with enumerated Cth powers and residual State powers
  - High Court with power to strike down legislation for incompatibility with Constitution (but not, with a few exceptions, as against fundamental rights)
  - Separation of powers (but less absolute than US system – see s 64 providing federal ministers must be members of Parliament)
- The English inheritance:
  - Parliamentary sovereignty with rights protected through common-law and statute
  - Responsible government
  - Representative government
- Two inherited traditions slightly at odds:
  - Cth Prime Minister and Cabinet responsible to people via need for support in House of Reps
  - But power also constrained by Senate and State governments, over whom only relevant State electorates exert control
  - Two principles can be theoretically reconciled by strengthening Cth powers (so that electorate disciplines the most powerful government in country) or by strengthening State power (disciplined by regional electorates)
- WW1 exerted external pressure in favour of strengthening Cth powers vis-à-vis States that has continued ever since
- High Court's interpretation of Constitution has tended to support this trajectory
- Question is whether the High Court's interpretation was influenced by these external pressures or whether strengthened Cth powers was the internal logic of the Constitution all along (or a little bit of both)

AN OVERVIEW OF THE CONSTITUTION

- Constitution enacted as s 9 of the Cth of Australia Constitution Act 1900 (UK)
- Its first three chapters concern respectively the composition, functions and powers of the federal Parliament, the Executive and the Judiciary
- Chapter IV concerns Finance and Trade; Chapter V the States, Chapter VI the admission of new States and the territories power, Chapter VII two miscellaneous matters, and Chapter VIII the prescribed method for amending the Constitution
- Nearly half of the provisions are devoted to the federal Parliament, suggesting that it was the establishment and effective operation of this political institution that was the overriding preoccupation of the framers
- As we shall see, this course focuses for the most part on just one section of the Constitution, section 51, which sets out the Cth Parliament's legislative powers
- And then only on a few of the 40 heads of Cth legislative power in this section
- Other sections of the Constitution that receive some attention are the provisions on judicial power in Chapter III, some of the financial provisions in Chapter IV and the States' continuing powers in Chapter V

HISTORICAL ISSUES

- Constitution as enacted had little to say about State powers because these were known and could be assumed
- Today, the Constitution's silence on State powers reflects the diminished status of States in the Australian political system
- Constitution peppered with anachronistic references to no longer powerful institutions, and silent about some really powerful institutions:
  - E.g. Queen's power to disallow federal laws in s 59 and the vesting of executive power in Queen exercisable by Governor-General in s 61
- By contrast, no reference at all to the office of the Prime Minister or Cabinet
- Another historical artefact is the (frankly) embarrassing races power (s 51(xxvi)):
  - Originally excluded reference to indigenous Australians (to allow States freedom in this area)
  - Amended in 1967 to make it possible for Cth to enact 'special laws' for indigenous people (along with 'the people of any [other] race')
- But not clear whether power can be exercised only for positive discrimination
- Many other provisions now seem quaint and otherworldly (e.g. Cth Parliament's power to make laws with respect to 'lighthouses', lightships, beacons and buoys')

FUTURE DIRECTIONS

- Is the Constitution out of date?
  - 1901 Australian Constitution has survived much longer than average with comparatively few amendments
  - But politically and economically Australia is now much more centralised than it was in 1901
  - The High Court has interpreted the Constitution so as to accommodate centralisation, but this has led to certain forced doctrines/departures from text
  - There is also the enduring question of whether human rights need to be more directly protected than was thought necessary in 1901
- Need for change?
  - Constitutions can create the conditions for their own survival (federal/state politics clustering around constitutional framework and propping it up)
  - Is federalism still the best way of directing government power while preserving individual freedom, or should attention be given to protection of individual rights?
  - Aside from this, should Constitution be amended to provide for co-operative federalism?
  - And what about those references to the Queen?

THE HIGH COURT AND CONSTITUTIONAL INTERPRETATION

THE BASIC FRAMEWORK FOR CTH-STATE RELATIONS

- Main rationale of Constitution: to create federal Commonwealth (see Aroney's book)
- Requires division of powers between new political entity (Cth) and existing political entities (colonies renamed States)
- Framers opted for American model:
  - Enumerate Cth Parliament's powers (both concurrent (s 51) and exclusive (e.g. ss 52 & 90))
  - Leave powers of State Parliaments not expressly removed by conferral of exclusive legislative power on Cth Parliament to 'continue' (s 107)
- This model has two consequences:
  - In event of dispute between Cth and States/s over ambit of powers, first issue is: whether Cth legislation was within concurrent or exclusive power (and not contrary to any express or implied limitation)?
  - Second issue: assuming State legislation is within power, is it inconsistent with Cth legislation?
- These two issues are respectively resolved through the tests for characterisation and inconsistency

CONSTITUTIONAL INTERPRETATION

1. Division of powers

- Cth powers listed in **s 51** with residual state powers <u>continuing</u> UNLESS **(s 107)**:
  - Exclusively vested in the Cth e.g. Cth Gov. & public service **(s 52)**; customs, excise, and bounties **(s 90)**
  - Withdrawn from state

2. Concurrent powers

- Overlap where state powers continue and Cth powers are vested by **s 51**
- Where conflict arises from the concurrent powers of Cth and state, Cth laws prevail **(s 109)**
- *Pre – **Engineers Case***
  - Doctrine of implied immunity of instrumentalities:
    - Cth and States seen as separate sovereign entities 'within the ambit of [their] authority', subject to 'the Imperial connection and to the provisions of the Constitution' (*D'Emden v Pedder* (1904) at 109)
      - *D'Emden:* Cth and States each sovereign within own sphere of authority, and thus Cth officer not bound by Tasmanian stamp duty law (implied immunity of instrumentalities)
    - Cth legislation therefore does not bind State government officials and vice versa unless expressly provided for in Constitution or necessarily implied
  - <u>Doctrine of reserved (State) powers:</u>
    - Under s 107, States have plenary legislative powers, with exception of few powers exclusive to Cth (e.g. s 52 and s 90)
    - Cth's concurrent powers in s 51 to be narrowly interpreted so as not to intrude onto these plenary legislative powers, which were 'residual' or 'reserved'
    - Restrictions in one head of Cth power were used to read down ambit of other heads of power
    - For example, fact that s 51(xxxv) confers power to make laws w.r.t. conciliation and arbitration for the prevention and settlement of interstate industrial disputes means that power to regulate intrastate industrial disputes reserved to States
      - *R v Barger* (1908):
        - Challenge to s 2 of *Excise Tariff Act 1906* (Cth) as invalid exercise of taxation power in s 51(ii)
        - Section 2 provided that excise on agricultural implements not payable where goods manufactured according to labour conditions judged by Cth to be fair (either because remuneration declared by resolution of both Houses of Cth Parliament to be fair or because in accordance with *Commonwealth Conciliation and Arbitration Act 1904* (*Cth*))
        - Held: true 'nature and character' of Act is not taxation law but law regulating labour conditions
        - Invalid because regulation of labour conditions within States is an internal/domestic matter, falling under reserved State powers
        - B&W: real basis for decision is view that Cth power w.r.t. industrial relations limited by restriction in s 51(xxxv) of that power to industrial disputes 'extending beyond the limits of any one State' – leaving regulation of intrastate industrial disputes to States

- *Huddart, Parker & Co Pty Ltd v Moorehead* (1909):
    - Corporations power (s 51(xx)) could not be used to regulate *intrastate* trade practices because this section had to be read down in line with s 51(i) (interstate trade and commerce power)

- The ***Engineers Case***
    - Doctrines of implied immunity of instrumentalities and reserved State powers overturned in *Engineers* by resort to a particular method of constitutional interpretation: literalism
    - The majority decision in *Engineers* (co-authored by four, but attributed to Isaacs J):
        - Did award made under Cth industrial relations legislation bind govt. employers in WA?
        - Clearly not, if (a) govt. employers in this case regarded as state instrumentalities; and (b) doctrine of implied immunity of instrumentalities was good law
        - Judgment begins with assault on existing authority: lacking in principle and not based on text of Constitution but on implications said to be necessary but really based on 'personal opinion' of judges
        - To restore order, and in keeping with its proper institutional function, Court needed to return to literal meaning of Constitution interpreted as ordinary statute
        - Primary question is whether legislation in question validly enacted under s 51(xxxv) power to make laws w.r.t. conciliation and arbitration for prevention and settlement of interstate industrial disputes
        - Nothing in s 51(xxxv) suggests that Cth's industrial relations power cannot be used to bind State instrumentalities
        - Only other relevant provision is s 107, but this provision does not detract from s 51(xxxv): '[I]t is a fundamental and fatal error to read sec 107 as reserving any power from the Cth that falls fairly within the explicit terms of an express grant in sec 51' (at 154)
- *Post* **– *Engineers Case***
    - Assault on existing authority as lacking in principle and not based on the text of the constitution but on implications e.g. 'necessity' actually based on judge's discretion
    - Overruled "implied immunities" and "reserved state powers":
        1. Cth power can be used to bind state instrumentalities
        2. It is a fatal error to read any **s 107** as reserving any power from the Cth that falls within the explicit terms of an express grant in **s 51**
    - In *Victoria v Commonwealth* (*Payroll Tax* case) (1971), Windeyer J assessed reasons behind change of direction in *Engineers* as follows:
        - States were not sovereign before 1901 in any real sense, and thus the doctrine of implied immunity of instrumentalities was doomed from the start
        - Strengthening of Cth legislative powers at expense of States' powers is logical consequence of s 109
        - The two doctrines discarded in *Engineers* were influenced by understanding of federation immediately after 1901
        - The change in *Engineers* was likewise externally influenced by growing sense of nationhood
        - Suggests that interpretation of Constitution is not just a matter of strict legal technique, but varies and develops 'in response to changing circumstances' in the manner of common-law development
    - Richard Latham's assessment quite similar:
        - '[R]eal ground' for decision was majority's policy preference for strong Cth powers post WW1
        - To achieve this result, they needed to reject relevance of American doctrine of implied immunity of instrumentalities, even though that doctrine based on Constitution structurally similar to that of Australia
        - Thus, the majority's new, literalist method of constitutional interpretation in *Engineers* was not the cause of the decision but the way the Court sought to justify its legally unconstrained policy preference

THE *JUMBUNNA* PRINCIPLE

- *Jumbunna Coal Mine N.L. v Victorian Coal Miners' Association* (1908) 6 CLR 309 equally influential in High Court's approach to constitutional interpretation:

    - '[W]here it becomes a question of construing words used in conferring a power of that kind [i.e. a power to deal with a wide-ranging social problem such as 'industrial disturbances'] on the Cth Parliament, 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' (at 367-368)

    - '[W]here the question is whether the Constitution has used an expression in the wider or the narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose' (at 368) (emphasis added)

- Grants of power are quite bare, with no description of scope
- Intended to endure over time and applying over time and future unforeseen circumstances

- Cth powers should be construed with all the generality which the words used permit (***Public Vehicles in Grain Pool***)
  - The principle essentially advocates for an alternative approach to the Constitutional Interpretation technique of literalism on a close authoritative textual reading.
  - Cth powers should be 'construed with all the generality which the words used permit'.
  - This dictum repeated in *Grain Pool of WA v Cth* (2000) 202 CLR 479 at 492
- It is derived from the case of *McCulloch v Maryland* from the US: state cannot tax on a national bank; looking at the subject, the context, the intention of the person using them are all to be taken into view.
- *Pape v Commissioner of Taxation* (2009) 238 CLR 1:
  - Heydon J, dissenting, tries to rein in indiscriminate use of dicta from these three cases
  - Constitutional grants of power should not be given wide meaning where context indicates otherwise
  - Context includes federal nature of Constitution and history of its enactment

LEGITIMACY OF THE COURT'S INTERPRETATION

- Judicial interpretation of the Constitution has important consequences, not just for the immediate parties to the litigation but also for the validity of legislation and executive acts
- The judicial invalidation of legislation contradicts the express wishes of the elected representatives of the Australian people, and must therefore be justified according to some or other theory of the judicial function in a constitutional democracy
- It is not enough to point to the fact that the Constitution and the *Judiciary Act 1903* (Cth) clearly give the High Court the power to interpret the Constitution (s 76(i) of the Constitution read with s 30(a) of the *Judiciary Act*), because this power may be exceeded
- To avoid this charge, the Court's method of interpretation needs to appear to be *neutral*, i.e. not influenced by anything else other than purely technical legal considerations, and certainly not by the judges' personal preferences as to who should win or lose, or what the law should be
- The more it appears that the Court is simply giving effect to the democratic choice made by the Constitution's framers, as confirmed by subsequent generations, the more legitimate the exercise of the Court's powers will appear to be
- The debate over the *correct* method of constitutional interpretation must thus be understood as a debate about the most *legitimate* method
- Ideally, the Court should adopt one method, because the use of multiple methods, each capable of producing a different result, undermines the sense that the Court is doing law and not politics
- The least dangerous branch – Alexander Bickel
- The counter-majoritarian difficulty: courts will have to act against the majority at times when its doing constitutional work

LITERALISM AND LEGALISM

- Literalism – look at the original words
- Legalism – put the words into the context/purpose/circumstance
- Famous extra-curial statement on judicial function in relation to federal-state conflicts by Sir Owen Dixon on occasion of his swearing in as Chief Justice in 1952:
  - 'There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'
- Legalism is a broader concept that literalism:
  - may be applied to all adjudicative functions, not just constitutional interpretation; &
  - makes use of legal materials other than text of Constitution (e.g. pre-existing common law & statute)
- *Engineers' Case* supports legalism not literalism because it acknowledged that the Constitution had to be interpreted:
  - 'considering the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it' (at 152)
- Rationale behind legalism is that High Court, in order to be accepted as a neutral arbiter in 'great conflicts', must use objective legal reasoning methods
- Problem is that these methods are not determinative of outcome in many cases, especially appellate cases, making legalism an impossible ideal
- In these circumstances, it is better view to acknowledge the reality of judicial choice than to hide behind a cloud of legalistic rhetoric

- There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism. – Sir Owen Dixon
- Gleeson court is more progressive than the Mason court
- Judicial Activism critiques
- Originalism (intention and textual): what the framers meant or the words meant in the time of the legislating
- Juristic classification (connotation and denotation): contemporary meaning or extended meaning

AN OVERVIEW OF THE DIFFERENT METHODS

- Over last 100 years, three main methods of constitutional interpretation have emerged:
  - Originalism: giving effect to the original meaning of the Constitution, as it would have been understood in 1900
  - Textualism: giving effect to the plain/ordinary meaning of the words used in the Constitution
  - Incremental accommodation: giving effect to the modern ('ambulatory') meaning of the Constitution, by taking account of changing social values, technological change and/or new legal institutions
- These methods are not mutually exclusive:
  - Literalism/textualism can be used with originalism where the plain meaning of the constitutional text is used as a guide to the meaning that the Constitution had in 1900
  - Literalism can also be used in support of incremental accommodation, where ordinary meaning today is taken to be the correct meaning (e.g. 'chosen by the people' in ss 7 and 24)
  - Originalists can take account of change through connotation/denotation distinction (see below)
- More than one of these methods may be used by the same judge in the same case, the same judge in different cases or by different judges in the same case

ORIGINALISM

- Originalism has always been one of the accepted methods of interpretation, but the way this method is pursued has undergone some changes over the years
- *Tasmania v Commonwealth and Victoria* (1904) 1 CLR 329: (Drawbacks Case)
  - Section 88 of Constitution: there should be a uniform system of customs duties within two years of establishment of Cth – such a system came into force on 8/10/1901
  - Pending the establishment of such a system (from 1/1/1901-8/10/1901), s 89 provided that the Cth should collect customs using the officials previously employed by the State departments, deduct its expenses and credit the remaining revenue to the State in which the customs duties were collected (= importing State)
  - Section 93 provided that this scheme should continue for a further five years after the imposition of uniform duties of customs (8/10/1901-7/10/1906), but that customs collected by Cth on importation should be credited not to the importing State, but to the State of ultimate consumption (if goods shipped inter-State)
  - In this case, goods imported into Victoria between 1/1/1900 and 8/10/1901 but shipped to Tasmania after 8/10/1901 – so Tasmania wanted s 93 scheme to apply, and Victoria wanted s 89 scheme to apply
  - Early High Court reluctant to accept extrinsic evidence of framers' actual intention, over and above the intention as manifest in the words of the Constitution itself
  - Expressly rejects reference to 'expressions of opinion of members of the Conventions' (at 333, in argument)
  - But allows reference to earlier drafts of Constitution where these throw light on framers' intent (ibid)
  - Did not assist Tasmania as 1891 and 1897 drafts, which would have supported claim, had been changed
- The bizarre situation where some historical material (drafts of Constitution and Quick and Garran's 1901 annotated commentary) could be used, but not the Convention Debates themselves, continued until *Cole v Whitfield* (1988)
- For current purposes, note the exact holding in *Cole v Whitfield*:

- Convention Debates may be used to identify 'the contemporary [i.e. historical] meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged'
- But 'not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have'

- This approach endorses reference to historical materials as a guide to the meaning the text would have had to 'literate and informed' readers of the Constitution in 1900 (textual originalism) not to subjective intention of framers (intentional originalism)
- This approach confirmed in *New South Wales v Commonwealth* (2006) 229 CLR 1:'To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage' (at 96)

TEXTUALISM

- Textualism approaches give primacy to words used in Constitution over other legal materials that may be used to aid interpretation
- As we have seen, one version of textualism supports originalism, i.e. textual originalism (using text as guide to what Constitution would have meant in 1900)
- Danger of this approach is that the text of the Constitution becomes a 'dead hand' preventing modern understandings of legal institutions such as 'marriage' from informing the meaning of the Constitution
- The standard way of getting round this difficulty is to draw a distinction between the 'connotation' and the 'denotation' of the words used:
- For example, connotation of 'vehicle' is machine for human conveyance, but denotes more and more things as new such machines are invented
- *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Professional Engineers' Association* (1959) per Windeyer J: 'We must not, in interpreting the Constitution, restrict the denotation of its terms to the things they denoted in 1900. The denotation of words becomes enlarged as new things falling within their connotations come into existence or become known.'
- Windeyer J's dictum approved in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551-52 (per McHugh J) in passage linking distinction to Dworkin's distinction between concepts and conceptions

INCREMENTAL ACCOMMODATION

- Connotation/denotation distinction thus provides one way of updating Constitution in line with modern understandings of concepts and institutions
- More radical way would be to interpret constitutional words and phrases without reference to their historical meanings and purely in line with modern meanings
- Model for this approach is common-law adjudication, i.e. notion that the function of judges is to adapt the law to make it relevant to the present day
- Question is whether the legitimate role of judges in updating the common law can be so easily used as a justification for judicial updating of the Constitution
- Early proponent of this approach was Deane J, who thought that Constitution was a 'living tree', the meaning of which changes as social values change
- Kirby J famously took over this approach: (not been endorsed by other judges)
- Words must be given their contemporary meaning, i.e. the meaning they have today (*Brownlee v Queen* (2001) 207 CLR 278, 320-22)
- 'Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights' (*Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417)

SUMMARY

- The High Court has never settled on a single, preferred approach to constitutional interpretation (see, in particular, Callinan J's comments in Work Choices (2006))
- Any one of originalism, textualism or incremental accommodation may be used, alone or in combination
- A morally defensible (in democratic theory) combination of these various methods would go something like this:
- A judge should attempt, at least in the first instance, to give effect to the original meaning of the Constitution as manifest in the constitutional text
- To ascertain the original meaning, regard may be had to historical materials such as the Convention debates, earlier drafts, and other materials that help us to understand what the words of the Constitution meant at the time they were enacted
- Where the original meaning is not clear, either because it is ambiguous in itself, or because its application to changing circumstances is uncertain, recourse to constitutional policy arguments is justified, since judges cannot abdicate responsibility to give a decision
- Constitutional policy arguments necessarily take into account changing social values, technological and legal change, and the likely consequences of the competing interpretations contended for

ILLUSTRATION

- In the *First Territory Senators Case* (1975), the High Court was asked to decide whether statute providing for territorial representation in the Senate (Senate (Representation of Territories) Act 1973 (Cth)) was constitutionally valid
- This required it to reconcile the following two provisions and give them a determinate content:

1. Section 7: The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate
2. Section 122: The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth ... and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit

- The Convention debates were inconclusive as to what the Framers intended, and in any case, could not at that stage be referred to; the meaning of each section of itself is actually quite clear, whatever method of interpretation is applied – the problem is which provision trumps the other. That required the Court to make a constitutional policy choice between federalism (s 7) and democracy (s 122)

THE HIGH COURT AND CHARACTERISATION

INTRODUCTION OF CHARACTERISATION

- Two intersecting conceptual fields:
  - The **scope** of the power (what type of legislation does the Constitution empower the Cth Parliament to pass?) and the **subject-matter** of the law (what is the law about?)
  - Defining scope of power is matter of **constitutional interpretation**; ascertaining subject-matter of law is what is properly called **characterisation**
- The characterisation process:
  - Judicial prudence ('one case at a time') counsels against broad statement of scope of power
  - Court does not, for example, set out in one decision to give a comprehensive definition of what kinds of corporation fall within s 51(xx). As it said in *Work Choices* (2006) at 75: 'Any debate about those questions must await a case in which they properly arise.'
  - Rather, Court begins by ascertaining character of law and then decides whether the law thus characterised is within power
  - This approach results in case-by-case development of scope of various heads of power, and allows for adjustment in conceptual understanding of the scope of Cth's powers over time
  - Once the Court decides that the impugned Cth law is within power, the law will be valid unless it is contrary to an express or implied prohibition elsewhere in Constitution (e.g. s 92)
  - A valid Cth law will override a valid State law that is inconsistent with it (s 109)

TWO STEPS

- **Step 1: Identify the relevant HOP, and the limits and scope of the subject matter purpose [scope of law]**
  - Construe HOPs independently; one HOP cannot fetter the scope of another HOP **(*Engineers*)**
    - Where two HOP produce different outcomes, one HOP cannot be used to restrict another (***Pidato v Victoria***)
      - E.g. **s 51 (xxxv)** (regulating inter-State industrial disputes through conciliation/arbitration) could not be used to inhibit attempts to regulate IR under some other power (e.g. defence power s 51(vi)))
    - Where not valid under one HOP, may still be valid under another HOP **(*Work Choices*)** [***Work Choices:*** Not valid under conciliation and arbitration power s 51 (xxxv), but valid under corporations' power **(s 51 (xx))** thus *Work Choices Act* was valid.]
  - Exception: Where law falls under multiple HOPs, one HOP may be restricted EXPRESSLY by the wording of another **(*Pidato; Bourke*)**
    - E.g. law prohibiting private banks was invalid because it infringed s 92, even though its subject matter and operation was valid under the banking power **(*Banking Nationalisation case*)**
    - 'Other than State banking' limits the 'banking power' in s **51(xiii)** but also restricts the corporation power **(s 51(xx))**; i.e. corps power cannot 'touch or concern' State banking unless the interference is so incidental as to not affect the character of the law other than state banking' **(*Bourke v State Bank of NSW*)**
    - 'Other than State insurance' **(s 51(xiv))** as above ***Attorney-General (Vic) v Andrews***
    - Exception to exception: grants power not restricted by express words of taxation in T&C powers against discrimination b/w states **(*Moran's Case*)**
  - Law will be invalid if it conflicts with an express or implied constitutional prohibition
    - Tax laws can only deal with taxation **(s 55)**
    - Trade and commerce **(s 92)**
    - Religion **(s 116)**
    - Political communication **(*Nationwide*)**
- **Step 2: Is the law within the HOP? [subject matter of the law]**
  - 'within: looser connection' than 'on not as loose as 'touches & concerns' **(*Bank Nationalisation*)**
    - Must be understood broadly to avoid artificial definitional limitations **(Dixon J)**
    - It is not enough that a law should refer to the subject matter **(Latham CJ)**
  - **Subject matter powers**: Apply test of *sufficient connection* (most HOPs) **(*Dingjan*)**
    - Define subject matter of law by reference to the 'rights, powers, liabilities, duties and privileges that it creates'

- Decide whether law so characterised is sufficiently connected to HOP
  - Question of degree – discretionary judgment about the closeness of the connection between the law and the HOP (***Burton v Honan***)
  - 'Connection must be more than 'insubstantial, tenuous or distant' **(Dingjan)**
  - Law's practical AND legal operation must be examined **(Dingjan)**
- No requirement that the law 'assist' that subject matter **(*Bank Nationalisation*)**
  - E.g. A law which prohibits banking still a law with respect to banking
- Policy of law is irrelevant if there is sufficient connection **(*Fairfax*)**
- The justice and wisdom of the law, and the means it adopts are matters for Parl **(*Leask*)**
  - **[*Grain Pool*:** issue was whether Commonwealth laws regulating development of new varieties of plants fell within s 51(xviii) (copyrights, patents, and trade marks)]

– **Purpose powers:** apply test of *proportionality* (defence, external affairs [treaties only], implied incidental)

- Means adopted by the law must be 'appropriate and adapted' or 'proportionate' to the HOP's purpose **[*War Crimes Case*:** Act that almost completely rewrote War Crimes Act to permit the pros and trial in Aus of alleged war criminals in Europe WWII valid under external affairs]
- Question if proportionality test is the same as sufficient connection **(Mason CJ in *Nationwide News*)**
- However, Court has affirmed a more cautious view of the extent to which 'purpose' and proportionality may be relevant to characterisation **(*Leask*)**

THE GENERAL APPROACH

- General approach to interpreting heads of power is to give each head a broad meaning compatible with notion that Constitution is meant to endure over time (*Engineers; R v Public Vehicles Licensing Appeal Tribunal*; *Jumbunna Coal*)
- Illustration from *Bank of NSW v Cth (Bank Nationalisation* case) (1948) 76 CLR 1:

a. Was a law that effectively closed down private banks a law within banking power in s 51(xiii)?

b. Latham CJ in High Court rejects usefulness of 'pith and substance' test

c. Makes more sense in original Canadian context where powers of federal and state parliaments both enumerated – less helpful where only federal parliament's powers enumerated, as in Australia

d. Majority finds portions of Banking Act 1947 invalid, not for falling outside banking power, but for violating duty not to acquire property except on just terms (s 51(xxxi)) and for violation of s 92

e. Dixon J's judgment foreshadows modern approach: citing *Jumbunna Coal*, holds that Court should 'lean to the broader interpretation' of a particular head of power unless the context or the Constitution suggests otherwise (at 332)

f. On this approach, no reason to restrict banking power to laws regulating banking as an ongoing activity, or 'transactions entirely consensual' or 'transactions between subject and subject' (at 333)

g. Dissents by Rich and Williams JJ apply 'pith and substance' approach now out of fashion

h. Privy Council later decides case on basis of violation of s 92 (barred from considering federal issues

DUAL CHARACTERISATION

- A law will not be invalid because it also concerns other subjects outside the HOP **(*Fairfax*, overturned *Barger*)**
  - in context of reserved State powers doctrine (excise tax on agricultural implements construed as regulation of conditions of employment and therefore within power implicitly reserved to States by s 51(xxxv))
  - This case also indicative of early approach to characterisation, where Court searched for 'true character' of impugned law, and gave the law a single characterisation on that basis
  - With rejection of 'pith and substance' test in *Bank Nationalisation* case, it became possible to see that one and the same law may be characterised in two (or more) ways, neither (none) of which predominates, and one (or more) of which may be outside power
  - One year before *Bank Nationalisation*, Dixon J formulated this principle of dual characterisation in *Melbourne Corporation v Cth* (1947) 74 CLR 31 at 79:

a. 'Speaking generally, once it appears that a federal law has an actual and immediate operation within a field assigned to the Cth as a subject of legislative power, that is enough. It will be held to fall within power unless some further reason appears for excluding it. *That it discloses another purpose and that the purpose lies outside the area of federal power are considerations which will not in such a case suffice to invalidate the law*.' (Emphasis added.)

- E.g. Law Encouraging trustees of super funds to invest in Cth bonds by exempting funds from income tax and subjecting them to a special rate of tax was in scope of tax power **(*Fairfax*)**
    - Principle of dual characterisation now typically illustrated by reference to *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1:

- Section 11 of Income Tax and Social Services Contribution Assessment Act 1961 (Cth) denied tax exemption on investment income of superannuation fund unless certain amount invested in 'public securities' (Cth or State bonds, debentures, stock or other securities)
- Appellant sought to characterise law as regulating investment of superannuation funds
- Court held that it was enough that the law could be characterised as dealing with taxation (s 51(ii))
- Crucial issue was that the obligation that was imposed was the taxation obligation (satisfying the direct characterisation test) whereas it could not be said that superannuation fund managers were obliged by the law to invest in public securities (at 13 per Kitto J)
    - *Fairfax* followed in *Herald &Weekly Times Ltd v Cth* (1966) 115 CLR 418 (restrictions on shareholding and directorships as condition for grant of television licence within communications power in s 51(v) (as extended to television services in *Jones v Cth* (No 2) (1965) 112 CLR 206))
    - See also *Murphyores Incorporated Pty Ltd v Cth* (1976) 136 CLR 1 (s 51(i) trade and commerce power allows Cth to condition approval of export of certain mineral concentrates mined on Fraser Island on outcome of environmental inquiry)

- It is enough that the law is 'with respect to' a HOP, even if it may be equally described as a law to another subject matter **(*Fontana*)**
  [Actors and Announcers: Law protecting a corporation against. trade union action preventing a corporation from maintain supplies was valid re **s 51(xx)]**
- Where a law relates to 2 subject matters and 1 does not fall under HOP, it will be valid even if there is no independent connection between two subject matters **(*Re F; Ex parte F*)**
    1. Ulterior motive could even be its *dominant* purpose **(*Fairfax*)**
    2. However, P cannot 'cloak' laws in a disingenuous form in order to extend its powers
    - If a law imposed *conditions* that may not fall under the HOP, it will still be valid so long as the conditions do not affect the conclusion that the law is 'with respect' to services covered under the HOP **[Kitto J in *Herald & Weekly Times:*** Laws authorising grants of TV licences on conditions that limited ownership and control were valid under s 51(v)]
    - If an unqualified prohibition against participation in an activity is within a constitutional power, then a qualified or conditional prohibition is necessarily within power **(*Murphyores*)**
- E.g. power to legislate on T&C with other countries, including exportation from Aust., includes the power to select and identify persons who would be engaged in that activity as well as the goods related to that activity **(*Murphyores*)**
    - Exception: If the 2nd subject matter is both outside power and *is the subject of a positive prohibition or restriction'* the law will be invalid **(*Bourke*)**

INTERACTION BETWEEN HEADS OF POWER

- The general principle, as seen in *Engineers*, is that, in construing heads of power, one head of power should not be read down in relation to another:
    - s 51(xxix) (external affairs) should be read broadly even though this renders s 51(xxx) (relations of the Cth with islands of the Pacific) redundant; and
    - s 51(xxxv) can't be read so as to prevent Cth from regulating industrial relations under defence power (*Pidoto v Victoria* (1943) 68 CLR 87) or corporations power (*Work Choices* (2006))
- This principle is subject to exception where the head of power contains an express limitation on Cth power

- E.g., because banking power expressly excludes state banking, once law characterised as dealing with banking, it will be outside power if it deals with state banking (*Bourke v State Bank of New South Wales* (1990) 170 CLR 276 at 288)
- This exception can also be understood as an exception to the dual characterisation principle:
    - Where 'the second subject-matter w.r.t. which the law can be characterised is not only outside power but is the subject of a positive prohibition or restriction', the law will be outside power (*Bourke* at 285)

SUBJECT MATTER AND PURPOSE POWERS

- Major distinction between powers on basis whether they are subject matter or purpose powers – has important consequences
- Most powers (e.g. corporations, trade and commerce, races power) are subject matter powers in sense that they permit Cth to make laws w.r.t. a particular subject
- The defence power, however, does not define its sphere of application by subject matter, but by the purpose for which the power may be exercised, i.e. for purposes of defence
- Other heads of power may require attention to purposes (e.g. where external affairs power is used for purposes of domesticating an international treaty)
- In respect of these heads of power, consideration of purpose of law is unavoidable (*Stenhouse v Coleman* (1944) 69 CLR 457 at 471)
- Test for characterisation w.r.t. subject matter powers is sufficient connection, test w.r.t. purpose powers is proportionality

SUFFICIENT CONNECTION

- In respect of subject matter powers, the test for characterisation is broad in the sense that the law does not have to fall directly on the power but must merely be 'sufficiently connected' to it
- This flows from language at beginning of s 51: 'make laws with respect to ...'
- Laws that fall directly on power are said to fall in the *core* of the power, whereas laws less directly within head of power may yet be 'sufficiently connected'
- But in reality, there is just one characterisation test, which has two steps:
- Step 1: Define subject matter of law by reference to the 'rights, powers, liabilities, duties and privileges which it creates' (*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368)
- Step 2: Decide whether law so characterised is 'sufficiently connected' to head of power (ibid)
- Step 1 is a purely legal test, which does not concern itself with the motive underlying the law or any attempt to discern its 'true character'
- Step 2 involves 'questions of degree' (*Burton v Honan* (1952) 86 CLR 169 at 179), where Court is essentially making a discretionary judgment about the closeness of the connection between the law and the head of power

GRAIN POOL PRINCIPLE ← IMPORTANT CB 782

a. *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 concerned question whether Cth laws regulating development of new varieties of plants fell within s 51(xviii) (copyrights, patents, and trade marks)

b. Law on characterisation summarised in the form of five principles (at 492):

c. **Principle 1:** Construe constitutional text 'with all the generality which the words used admit' (citing *R v Public Licensing Appeal Tribunal (Tas)* (1964) 113 CLR 207 at 225-26)

d. **Principle 2:** Determine character of law by reference to rights, powers, liabilities, duties and privileges which it creates

e. **Principle 3:** Examine practical and legal operation of law to determine if there is sufficient connection between law and head of power (*Re v Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 368-69 and *Leask v Cth* (1996) 187 CLR 579 at 601 -02, 621, 633-34)

f. **Principle 4:** Disregard fact that law may be characterised in another way that can't be brought under head of power, even if no 'independent connection' between the two subject matters (*Re F; Ex parte F* (1986) 161 CLR 376 at 388 per Mason & Deane JJ)

g. **Principle 5:** If a sufficient connection with head of power exists, 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 (*Leask* at 602)

- These principles do not displace detailed rules of characterisation w.r.t. each head of power

INCIDENTAL POWERS

A. Express Incidental **(s 51 (xxxix)):** gives Cth power to legislate wrt 'matters incidental to the execution of any power' under the Cstn [applies to judiciary, legislature, parliament]
B. Implied Incidental:
   - Under each HOP **(*Grannal v Marrickville Margarine*)**
   - Extends to matters necessary to fulfil the legislative power **(*Burton v Honan*)** *[applies only to parliament]*
   - Availability of an incidental power depends on if the power is 'reasonably incidental' or 'necessary for the reasonable fulfilment of the legislative power' **(Dixon in *Burton v Honan*)**
   - Must be 'sufficiently connected' with the central subject matter/purpose **(*Burton v Honan*)**
   - A reasonable connection between the law and the deemed relevant HOP must be shown before the law can be sustained under the incidental power **(*Burton v Honan*)**
     1. E.g. Permitting continuance of property proceedings after one of the parties to a marriage dies was within the central areas of the marriage power, so did not have to look to connexion with subject matter **(*Fisher*)**
   - When the validity of an enactment depends on an incidental power, the sufficiency of its connection with the main HOP may be a matter of degree **(*Burton v Honan*)**
     1. While finding a 'sufficient connection' may sometimes be established by the purpose of the challenged law, it may also often be established by factual subject matter or practical operation of the law **(*Leask*)**
C. There will be obvious cases where law is clearly within power because it creates, changes or destroys 'rights, duties, powers and privileges' within the conceptual field demarcated by the head of power (*GrainPool* principle 2)
D. In other cases, the law may not be within core of power, but nevertheless 'sufficiently connected' to the head of power
E. In some cases, sufficient connection may be established by showing that the law falls within the Cth's 'implied incidental power' in relation to that head of power
F. This rule is said to follow from the general principle that the grant of a power includes any power that may be said to be incidental to its proper exercise (*Grannall v Marrackville Margarine Pty Ltd* (1955) 93 CLR 55 at 77)
G. The 'implied incidental power' attaching to a head of power must be distinguished from the Cth's 'express incidental power' in s 51(xxxix) to pass legislation required to support the exercise of its legislative, executive or judicial powers
H. Overlap between implied incidental power and express incidental power to pass legislation in support of exercise of Cth's legislative powers
I. The question that arises is whether the Cth's implied incidental power justifies the passing of legislation that would not otherwise be 'sufficiently connected'
J. Recall that criterion of 'sufficient connection' relies on prefatory words to s 51: 'power to make laws ... with respect to ...'
K. Blackshield & Williams's view is that there is a broad overlap between these issues, i.e. that any law that could be said to be 'sufficiently connected' to a head of power could be said to fall within the Cth's implied incidental power in respect of that head of power, and vice versa
L. At various stages different judges have developed different verbal formulae in an effort to make the test for incidental characterisation more determinate
M. Thus Court has at various times said that means adopted in law must be 'appropriate and adapted', 'reasonably necessary' or 'reasonably considered to be appropriate and adapted' to a legislative purpose that is within power
N. Modern trend is to avoid such language w.r.t. subject-matter powers, but incidental characterisation inevitably requires consideration of purpose of law since it is the fact that the law pursues a purpose that is within power that provides basis for validity on this ground

PROPORTIONALITY

- **Purpose powers**

- **Implied incidental powers**
- **Limitations**
    - Judicial test that requires that means adopted in law that violates a protected right or freedom be proportional to end that the legislation seeks to achieve
    - Applied in a number of different jurisdictions in different contexts
    - E.g. limitations clause analysis, where proportionality test is used to decide whether law that *prima facie* violates a constitutional right is nevertheless 'reasonable and justifiable in an open and democratic society'
    - Unlike other jurisdictions (Canada, Germany), High Court has no power to assess *legitimacy* of end sought to be achieved against constitutional values
    - Characterisation issue is simply whether law is within head of power
    - If it is, Court cannot assess validity of law except in relation to the limited number of express and implied constitutional limitations on power (e.g. s 92)
    - Within these limits, test for proportionality has nevertheless been applied in Australia in three situations:

➢ Where law is within power, but touches on an express or implied right or freedom

➢ In characterisation of law enacted under purpose power (e.g. defence or external affairs power)

➢ In incidental characterisation of law enacted under subject matter power (as part of, or a substitute for, the 'appropriate and adapted' test)

- Of the three situations in which proportionality test has been applied, the first two are now accepted as good law, whereas the third is contested:

➢ For example of first situation see *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (proportionality test applied in relation to s 92)

➢ For example of second see Brennan J's dissenting judgment in *Polyukhovic* (2007) 233 CLR 307 (proportionality test applied w.r.t. defence power in case decided by majority under external affairs power)

- Use of proportionality test as substitute for 'appropriate and adapted test' first mooted by Deane J in *Tasmanian Dam* case (1983) at 260:

➢ 'Implicit in the requirement that a law be capable of being reasonably considered to be appropriate and adapted to achieving what is said to provide it with the character of a law with respect to external affairs is a need for there to be reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it.'

- This approach taken up by Mason CJ in several judgments (*Cunliffe*, *Nationwide News*)
- But see *Leask v Commonwealth* (1996) 187 CLR 579 at 605 (per Dawson J):

➢ 'the terms "appropriate and adapted" and "reasonable proportionality" are best avoided when enunciating a test to determine whether a law exceeds a non-purposive head of power under section 51'

- Not clear whether this was a majority view in that case, and in any event the dictum was obiter because *Leask* determined on basis that law fell directly within power
- Nevertheless, better view is that, outside purpose powers, proportionality test should *not* be used in establishing sufficient connection

a. *Nationwide News Pty Ltd v Wills* (1992)

- Facts: Legislation gave the Industrial Relations Commission protection against written or verbal criticism.
- This case represents high-water mark of use of proportionality test as part of incidental characterisation:

- Section 299(1)(d)(ii) of *Industrial Relations Act 1988* (Cth) protected Industrial Relations Commission against verbal or written criticism
- Cth relied on s 51 (xxxv), a subject matter power

- Four judges decide case on basis of implied freedom of political communication (week 10)
- Mason J decides on basis that means adopted in law not proportionate to ends and therefore not within incidental power associated with s 51(xxxv)
- Mason J does not restrict his view to purpose powers, but takes view that *whenever* a law is defended on grounds that it is within incidental power the Court is entitled to assess whether the means it adopts are 'reasonably proportionate' to the ends it seeks to achieve (at 30)
- At one point in his judgment Mason J seems to be trying to push Australian constitutional law in direction of Canadian and German law by saying that test for incidental characterisation must consider whether law disproportionately interferes with 'fundamental values traditionally protected by the common law', such as freedom of expression (at 31)
- This approach did not receive majority support in *Nationwide News*
- At most, proportionality will be relevant to characterisation of law alleged to be within a purpose power and also to alleged infringement of constitutional prohibition, where Canadian/German approach more appropriate.

PRECEDENT AND OVERRULING

a) Ordinary doctrine of precedent cannot apply to High Court because it is the apex court, i.e. there is no other court higher up the judicial hierarchy

b) For doctrine to apply, High Court would need to develop rigid practice of abiding by its own past decisions, even where it thought these were wrong

c) House of Lords adopted this practice until 1966

d) But High Court early on preferred the Privy Council approach: court may overrule a prior decision where it regards it to be manifestly wrong (*Australian Agricultural Co v Federated Engine-Drivers and Fireman's Association of Australasia* (1913) 17 CLR 261)

e) Particularly important that High Court can overrule itself, as Parliament cannot correct erroneous constitutional interpretations (other than through s 128)

f) Today, the overruling of a past decision requires a two-stage procedure:

- Party sought overruling must formally request leave to do so
- In considering whether to overrule a past decision, High Court will look at how embedded that decision has become in the law, whether there were differences of opinion among the majority, whether decision has produced inconvenience, and whether it has been extensively relied on

g) Separate question concerns whether individual judges may depart from precedent, either set in a decision in which they participated or not

h) Different judges have taken different views on this, from one extreme (an individual judge is never bound by a decision s/he believes to be plainly wrong) to the other (dissenting judges must fall into line in the next case)

i) Classic case illustration is *Queensland v Commonwealth* (*Second Territory Senators* case) (1977) 139 CLR 585:

- Issue of territorial representation in Senate had been decided in *Western Australia v Commonwealth (First Territory Senators* case) (1975) 134 CLR 201 (interpretation of ss 7 and 122 of Constitution)
- Issue re-litigated after Barwick CJ expressly invited such litigation in *AG (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527, 532, taking advantage of impending retirement of McTiernan J
- New judge, Aikin J (replacing McTiernan J), voted with Barwick CJ, but two of original 3-judge minority, Gibbs and Stephen JJ, abided by precedent set in earlier case
- *Second Territory Senators* case understood as entrenching tradition that High Court will not overrule a decision merely because the composition of the Court has changed – but this is almost always the reason why past decisions are overruled
- Seems to depend on how blatantly attributable to changed composition of Bench the overruling is

READING DOWN AND SEVERANCE

- **Purpose:** Reading down and severance are types of remedy that may be used by the High Court to avoid declaring a provision invalid, or to declare only so much of a statute invalid as is found to conflict with the Constitution. Used to clear only so much of statute invalid as found to conflict with the Constitution (to avoid declaring a whole provision invalid)
- **Reading down:**

• Where a provision of a statute, if applied in a particular way, would be unconstitutional, the Court orders that the statute should not be read so as to apply that way: s 15A of *Acts Interpretation Act*

- E.g. 'person' should be read as excluding a judge **(*Wilson v Minister for A&TSIA*)**
- Bars to reading down: ultimate guide is what is the intention of parliament
- Where intention is unclear, provision was going to be struck down
  - **Severance:** Used to preserve parts of document that can stand independently of other parts found to be unlawful; HC must specific which parts it declares invalid
  - Used where rest of statute is capable of operating on its own, if not entire statute must be declared invalid
  - Severance is a standard legal technique for preserving those parts of a document that can stand independently of other parts that have been found to be unlawful
  - In constitutional law, this means that the High Court must specify precisely which parts of the statute it declares invalid, and which not
  - Severance may only be used where the rest of the statute is capable of operating on its own – if not, the entire statute must be declared invalid

THE EXTERNAL AFFAIRS POWER

INTRODUCTION

❖ Section 51(xxix) gives Cth Parliament power to make laws w.r.t. 'external affairs': **(only need to fulfil one of five)**

- Relations with other countries –potentially has some degree of a purposive element (*Sharkey; Thomas v Mowbray*, subject matter + purpose)
- Geographic externalities (*submerged land*, subject matter, no recognised as independent standing)
- Treaty implementation – purposive power
- Jus cogens (fundamental international law principles)
- Matters of international concern

❖ High Court case law has mainly concerned extent to which this power may be used to give effect to international treaties (purposive dimension of this power)

❖ Federal executive's power to enter into such treaties (both signing and ratifying) is part of common-law prerogative power as incorporated in s 61 of Constitution

❖ Ratification has effect of imposing international legal obligation on Australia to abide by treaty – enforceable at international law

❖ Such treaties not part of Australian domestic law until incorporated

❖ Central issue regarding external affairs power is whether federal executive can effectively confer on Cth Parliament power to pass legislation on a range of issues that would otherwise be outside power by:

a. ratifying a treaty that deals with a subject matter not covered by s 51 (e.g. Human rights); and

b. justifying any ensuing legislation as an exercise of the Cth Parliament's external affairs power

RELATIONS WITH OTHER COUNTRIES

❖ In first half of 20th century, responsibility for international relations with countries outside British Empire tended to be deferred to Britain

- Modern interpretation of external affairs power begins with ***R v Sharkey*** (1949):

– Section 24A of the *Crimes Act 1914* (Cth) made it a criminal offence 'to excite disaffection against the Government or Constitution of any of the King's Dominions'

– Held to fall within external affairs power as part of general power to preserve friendly relations with other Dominions, but scope of external affairs power expressly extended to "all countries outside Australia"

– Latham CJ: the relations of the Commonwealth with countries outside Australia are matters that fall within the external affairs power.

a. External affairs power extended to relations with international organisations in ***Koowarta v Bjelke-Petersen*** (1982) 153 CLR 168 at 258 (per Brennan J)

b. In *Seas and Submerged Lands Case* (1975) external affairs power held to encompass assertion of sovereignty over territorial sea, even though international relations in this respect may be non-consensual

- Stephen J: Treaties and conventions to which a nation may become a party form, no doubt, an important part of those affairs – but external affairs will also include matters which are not consensual in character.
- The continental shelf is relevant because its geographic externality

c. In ***Thomas v Mowbray*** (2007) three judges agreed that Part 5.3 of *Criminal Code* (Cth) providing for control orders was valid exercise of external affairs power since efforts to combat terrorism connected to Australia's relations with other countries

- Kirby J dissented that although terrorism is a concern of the community of nation, the provision would not affect Australia's relations.
- However, global movement justified those preventative national security measures under EA power.

MATTERS EXTERNAL TO AUSTRALIA

- Two judges in *Seas and Submerged Lands Case* (Barwick CJ and Mason J) suggested alternative basis for decision was that s 51(xxix) extended to matters geographically external to Australia
- First case to provide majority support for this proposition was *Polyukhovich* (1991) (*War Crimes Act Case)*:
  - Section 9 of *War Crimes Act 1945* (Cth) (as amended in 1988) provided that an Australian citizen or resident who had committed a 'war crime' between 1939-1945 could be indicted in Australia
  - The *War Crimes Act* also raised questions of retrospectivity (no crime in Australia at time of commission) and usurpation of judicial power (exclusion of judiciary from determination of guilt)
  - For current purposes, question was whether Cth Parliament had power to criminalise acts committed *outside* Australia
  - Majority (Mason CJ, Deane, Dawson and McHugh JJ) held that fact that s 9 applied to matters external to Australia was sufficient, since Cth power w.r.t. external affairs needs to be plenary. Mere geographic externality is sufficient
  - Brennan J dissented on ground that the 'external affairs' being regulated must have some connection to Australia (at 550-51) – conferred power cannot be expanded beyond their true scope merely to supply what is thought from the public viewpoint to be desirable or convenient
  - Toohey J agreed with this, but found sufficient connection in Australia's participation in WWII
  - Gaudron J held that fact that Cth Parliament had legislated on issue was sufficient to establish that Australia's interests were affected, and that Court should defer to Parliament judgment in this respect
- Majority affirmed that mere externality is enough (*XYZ*)

XYZ V COMMONWEALTH (2006)

a. Challenge to ss 50BA and 50BC of *Crimes Act 1914* (Cth) (inserted in 1994) prohibiting Australian citizens and residents from engaging in sexual intercourse or committing acts of indecency with persons under 16 while outside Australia ('child sex tourism')

b. Plaintiff asked Court to restrict external affairs power to power to make laws w.r.t. relations between Australia and other countries (by overruling *Polyukhovich* and *Horta*)

c. Gleeson CJ states ratio of *Polyukhovich* as being that external affairs power extends to Australia's relations with other countries *and* 'to make laws w.r.t. places, persons, matters or things outside the geographical limits of, that is, external to, Australia' (at 539, citing Dawson J's judgment in *Polyukhovich* at 632)

d. For this reason, unnecessary to consider Cth's alternative argument, based on allegation that sex tourism clearly an issue of 'international concern' (at 543 per Gleeson CJ)

e. Gummow, Hayne and Crennan JJ decide on basis that 5-judge joint judgment in *Industrial Relations Act Case* authoritative statement of 'mere externality' approach, as adopted in *Polyukhovich* (at 546)

f. Kirby J: sufficient to decide that law deals with Australia's relationship to foreign nations and to international treaty body responsible for implementation of the CRC

g. Callinan and Heydon JJ dissent: 'mere geographic externality' approach contrary to original meaning

- Some cases (*Horta v Cth*) may require an obvious and substantial nexus between the matter and Australia, it cast doubt on *Polyukhovich*

HORTA V COMMONWEALTH (1994)

– Bilateral treaty between Australia and Indonesia regarding exploration for, and exploitation of, petroleum resources in Timor Gap (outside territorial waters of both)

– Legislation passed pursuant to this treaty challenged on basis that Indonesia's annexation of East Timor in 1975 invalid under international law and therefore that Indonesia did not have power to enter into treaty

– Court bypassed this question by holding that, irrespective of validity of treaty under international law, the legislation at issue was supported by the external affairs power

– This was because the legislation implementing the treaty concerned matters that were geographically external to Australia, *and* affected or touched its interests (at 194)

- Once that established, fact that treaty might be invalid irrelevant, since validity of Cth law under *this aspect of* the external affairs power did not depend on conformance of Cth law to international law or on whether Cth law could be construed as implementing a valid treaty
- Court's reference to fact that there was an 'obvious and substantial nexus' between the matters covered in the legislation and Australia appears to place the same qualification on this power that Brennan J placed on it in dissent in *Polyukhovich*, i.e. that mere geographic externality not sufficient
- Any doubt about this was, however, eventually dispelled in *Victoria v Cth (Industrial Relations Act Case)* (1996) 187 CLR 416, in which 'mere externality' approach confirmed in 5-judge joint judgment: 'The power extends to places, persons, matters or things physically external to Australia' (at 485)

❖ Final case on this aspect of external affairs power is *Pape v Commissioner of Taxation* (2009)

PAPE V COMMISSIONER OF TAXATION (2009)

- Challenge to Rudd stimulus package as contained in Tax Bonus for Working Australians Act (No 2) 2009 (Cth)
- Three judges (other four did not need to decide) rejected argument that Cth's power to enact stimulus package legislation could be founded on s 51(xxix)
- Argument was that Global Financial Crisis originated outside Australia, and stimulus package legislation therefore law w.r.t. external affairs
- Also, argued that Australian action would help ease the GFC – impacted relations with other countries to this extent
- Heydon J: first argument slippery slope to expansion of Cth power to cover virtually any problem that could be said to have an external cause – would make nonsense of federal division of powers
- On second issue: Act not 'specifically structured' to combat GFC
- Rather dealt with internal Australian affairs (tax bonus to Australian tax payers paid into bank accounts administered in Australia to stimulate domestic demand)
- Hayne and Kiefel JJ: irrelevant that cause of GFC may be external – stimulus package was directed at Australian economy = internal matter
- Although not a majority decision, these views likely to be influential in event that similar question arises again, i.e. attempt to use s 51(xxix) to support legislation combating externally caused social or economic problem

INTERNATIONAL LAW OTHER THAN TREATIES

- More uncertain subject-matter dimension of external affairs power concerns whether power extends to power to vest courts with jurisdiction recognized by international law as a universal jurisdiction, and also to implementation of UN Security Council resolutions
- Universal jurisdiction includes jurisdiction to trial war crimes
- Considered by Brennan J in dissent in *Polyukovich* (because he had rejected mere externality principle and found insufficient connection to head of power)
- Accepts that external affairs power indeed extends to making laws w.r.t. prosecution of international crimes, but rejects argument in this instance because *War Crimes Act* defined war crimes in a way that was significantly different from international law definition
- Related question is whether external affairs power may be used to meet Australia's obligations arising from UN Security Council Resolutions
- Not yet settled, although Kirby J accepted this understanding of power in *Thomas v Mowbray* (2007)
- To what extent does ratification of an international treaty justify exercise of Cth legislative power in purported implementation of the treaty?

IMPLEMENTATION OF TREATIES

- Early case on this issue was ***R v Burgess; Ex parte Henry* (1936) 55 CLR 608:**

R V BURGESS; EX PARTE HENRY

– Section 4 of *Air Navigation Act 1920* (Cth) authorised making of regulations for control of air navigation within the Cth and territories
– Court held that s 4 was not supported by trade and commerce power (s 51(i))
– But upheld s 4 under s 51(xxix) as giving effect to Int. Convention for the Reg. of Aerial Navigation
– 3 of 5 judges (Latham CJ, Evatt and McTiernan JJ) accept unqualified principle that Cth Parliament has power to implement binding international treaties, even though resultant legislation regulates matters of purely *domestic* concern (as in this case – air navigation within Australia)
– Evatt and McTiernan JJ say Parliament competent to give effect to non-binding recommendations
– Starke J suggests possible limitation of this power to legislate on matters 'of sufficient international significance to make it a legitimate subject for international co-operation and agreement' (at 658)
– Dixon J likewise suggests limitation to matters 'indisputably international in character' (at 669), there should be qualifications evince concern over possible expansion of this power to detriment of states if no additional limit placed on subject matter of law
– Although s 4 thus held to be within power, regulations held invalid as not in conformance with provisions of Convention – an early example of means-end proportionality test used in this context
– Kirby J accepted this understanding of power in *Thomas v Mowbray* (2007)
    a. External affairs power includes power to execute within the Cth treaties and conventions entered with foreign powers **(*Burgess*)**
    b. Kind of treaties?
        ○ Not limited to the subject matters otherwise falling within **s 51 (*Burgess*)**
    c. International Concern
        ○ The implementation of a treaty is a valid use of power *at least* when the matter is of "international concern" **(*Koowarta*)**

KOOWARTA V BJELKE-PETERSEN (1982)

– *R v Burgess; Ex parte Henry* had seemingly established unqualified rule that Cth Parliament could legislate to give effect to any obligation or even non-binding recommendation contained in an international treaty once ratified
– Control on Cth Parliament via 'back-end' requirement that law actually give effect to the treaty
– Law rendered less certain after decision in *Koowarta*:
– Queensland Minister for Lands (Bjelke-Petersen) had refused to transfer pastoral lease to Aboriginal Land Fund Commission because of policy against acquisition by Aborigines of large parcels of land
– Sued under *Racial Discrimination Act 1975* (Cth) by aggrieved member of affected aboriginal tribe
– Minister in defence impugned validity of ss 9 and 12 of *Racial Discrimination Act 1975* as invalid exercise of races power and external affairs power
– Challenged sections prohibited racial discrimination generally (s 9) and racial discrimination in respect of disposal of interests especially in land (s 12)
– Races power did not provide support for provisions as Act held by majority not to be special law for people of any race (see Races Power)
– But 4:3 majority upheld provisions as valid exercise of external affairs power implementing 1966 *International Convention on the Elimination of All Forms of Racial Discrimination*
– *Koowarta* left law uncertain because no majority view on test to be applied:

a) Mason, Murphy and Brennan JJ saw no limitation on Cth legislative power to implement international agreements – provided law can be related to implementation of *bona fide* agreement, it will be valid, even if it addresses purely domestic issues

b) Murphy J: narrow interpretation of clause would leave Australia an 'international cripple' (at 241)

c) Gibbs CJ, Aickin and Wilson JJ in dissent adopted qualified view that subject matter of agreement must itself be an external affair in sense that it 'in some way involves a relationship with other countries or with persons or things outside Australia' (per Gibbs CJ at 201)

d) Gibbs CJ rejected 'doctrine of bona fides' as providing 'at best ... a frail shield... available in rare cases (at 200)

e) Stephen J, adding crucial fourth vote to uphold *Racial Discrimination Act*, applied Starke J's test of 'international concern' (at 217), but decided that this test was satisfied as *International Convention on the Elimination of All Forms of Racial Discrimination* clearly did touch on such an issue (at 218)

f) Result: no majority view on test, but four judges (the minority and Stephen J) held that external affairs power was *not* unqualified in sense that it did not extend to implementation of all treaties

g) Difference between judges attributable to different conceptions of the extent to which the need to reserve some power to the States over purely domestic affairs may be factored into interpretation of s 51(xxxix) and to varying levels of concern about the extent to which an expansive interpretation of the external affairs power might lead to destruction of 'federal balance' (per Gibbs CJ at 198)

❖ It can be used to implement any treaty to which Australia is a party, regardless of whether it was a matter of international concern: ***Tasmanian Dams,*** a complex case involving several different heads of power:

COMMONWEALTH V TASMANIA (1983)

– Liberal govt. in Tasmania authorised construction of dam by State Hydro-Electric Commission (HEC) on Franklin River for purposes of generating electricity – economic development
– PM Hawke's federal Labour govt. issued regulations under s 69 of *National Parks and Wildlife Conservation Act* 1975 (Cth) prohibiting construction of dam without consent of Minister
– Regulations under this Act purported to give effect to 1972 UNESCO *Convention for the Protection of the World Cultural and Natural Heritage*
– Regulations later backed up by passing of *World Heritage Properties Conservation Act* 1983 (Cth), which prohibited much the same conduct as the regulations (but not dam construction specifically) and provided for payment of compensation
– Proclamation made under s 6(3) of 1983 Act identified area of dam as under threat, and brought into operation s 9(1) prohibiting certain conduct, including construction work of various kinds
– In defending legislative package, Cth placed reliance on four heads of power: external affairs; races power; corporations power; and nationhood power
– Focus for this topic falls on High Court's treatment of external affairs power
– Section 6 of Act clearly drafted with prior cases in mind, seeking to defend legislative conferral of power to issue proclamation either as aspect of Australia's relationship with international organisation (World Heritage Committee); implementation of treaty (with or without obligation); fulfilment of an international law obligation (whether created by treaty or otherwise); or as addressing an issue of international concern (in absence of any treaty or obligation)
– External affairs component in this case decided as follows:
    - 4:3 majority (Mason, Murphy and Brennan JJ – joined by new judge Deane J) adopt wide, unqualified view of external affairs power
    - **Mason J** rejects 'international concern' test as being too 'elusive' (at 123) and yielding no 'acceptable criteria or guidelines' (at 125): (overruling *Koowarta*) 'The existence of international character or international concern is established by entry by Australia into the convention or treaty'; Court cannot second-guess executive and legislative judgments of this sort (at 125-26)
    - **Brennan J** adds qualification, viz. that law must implement obligation (not recommendation), failing which Stephen J's test for 'international concern' in *Koowarta* should be applied (at 220)
    - **Minority (Gibbs CJ, Wilson and Dawson JJ)** follow Stephen J's 'international concern' test as lowest common denominator ratio in *Koowarta* (per Gibbs CJ at 101)
    - **Gibbs CJ** holds that 'the protection of the environment and the cultural heritage ... cannot be said to have become such a burning international issue that a failure by one nation to take protective measures is likely adversely to affect its relations with other nations...' (at 101-102)
    - Because of qualification in Brennan J's judgment, the ratio in *Tasmanian Dam Case* was restricted to implementation of international legal obligations (not recommendations)
    - **Deane J:** a law would not properly be characterised as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute… or if the treaty which the law was said to carry into effect was demonstrated to be no more than a device to attract domestic legislative power: *Burgess* and *Koowarta*.
    - National Parks Regulation struck down as well as various provisions in *World Heritage Act*, but s 6 and prohibition on dam construction in s 9(1)(h) upheld under external affairs power
    - In summary, to implement a treaty, it must be entered bona fide
– Cannot merely be a device to procure additional jurisdiction **(*Burgess*)**
– The evidentiary burden to show not bona fide is that it requires "colourable attempt" **(*Koowarta*)**
    - Must impose obligations, more than aspirational
– Must impose some obligation on government to implement the treaty at a domestic level (*Industrial Relations*)

VICTORIA V COMMONWEALTH (INDUSTRIAL RELATIONS ACT CASE) (1996)

- 1993 amendment to *Industrial Relations Act 1988* (Cth) relying partly on external affairs power (Pt VIA) and partly on corporations' power (Pt VIB)
- Part VIA, dealing with various workers' rights (min. wages, equal pay, unfair dismissal, parental leave) relied on various ILO Conventions and on recommendations of General Conference of ILO
- Mostly upheld in joint judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ
- Joint judgment stresses that scope of s 51(xxix) will expand as subject matter of international agreements expands (at 482)
- To provide basis for legislation under s 51(xxix), international agreement must not be merely aspirational, but must specify the manner of implementation required of signatory states (at 486)
- Also confirms Deane and Gaudron JJ's view in *Richardson* that exercises of external affairs power by way of treaty implementation will be scrutinised to ensure that law is 'reasonably capable of being considered appropriate and adapted to implementing the treaty' (at 487)
- Majority then applies this test to strike down certain provisions of Part VIA which it considers go beyond what was required by 1982 ILO Convention Concerning Termination of Employment at the Initiative of the Employer
- No decision on whether recommendations of General Conference of ILO could independently found power to legislate on subject matter of recommendation, rather used to reinforce decision on whether relevant measure 'appropriate and adapted' to implementation of main Convention

- Sufficient if there is reasonably apprehended obligation in the treaty (*Richardson v Forestry Commission*)

RICHARDSON V FORESTRY COMMISSION (1998)

- *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987 (Cth) established Commission to investigate whether certain forests in Tasmania could qualify as world heritage area under 1972 UNESCO Convention
- Section 16(1) of Act prohibited forestry operations and road construction in areas under investigation
- Clear majority upholds Act as valid exercise of external affairs power, including Wilson and Dawson JJ who had dissented in *Tasmanian Dam Case*
- Dawson J re-iterates view that *Tasmanian Dam Case* wrongly decided, but decides that he is now bound by precedent established in that case, viz. that 'the legislative implementation of an international treaty concluded in good faith is within the ambit of the external affairs power' (at 322)
- Remaining condition, used by Deane and Gaudron JJ in dissent in this case, is that a law purporting to give effect to a treaty must be 'appropriate or adapted' to the implementation of the obligations it is purporting to implement
- This has since grown into separate 'conformity doctrine'
    - The implementation is reasonably appropriate and adapted to giving effect to the terms of the Convention (*Industrial Relations*)

CONFORMITY DOCTRINE

A Separate issue in *Tasmanian Dam* case, once expansive view of power to implement treaty obligations accepted, concerned test for deciding whether law could be said to conform to treaty

- Brennan and Deane JJ held that law giving effect to treaty must 'be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs' (at 259 per Deane J)

- Applying this test, Deane J invalidated all but ss 9(1)(h) and 9(2)

- Brennan and Deane JJ's test in *Tasmanian Dam Case* followed approach first taken in *R v Burgess* (1936), i.e. that the *Air Navigation Regulations* went too far in implementing the 1919 *Int. Convention for the Reg. of Aerial Navigation*

- Likewise, Deane and Gaudron JJ in dissent in *Richardson* (1988) would have invalidated s 16 of *Lemonthyme and Southern Forests (Commission of Inquiry) Act* 1987 (Cth) on grounds that it afforded general environmental protection rather than protection of world heritage, as required by 1972 Convention (at 347-48 per Gaudron J)

- 5-judge joint judgment in *Industrial Relations Act Case* confirms conformity doctrine, which has two parts:

    - to found legislative power under s 51(xxix), treaty must be specific about what countries are required to do to fulfil obligations imposed on States parties; and

  - the means adopted in Cth law must be appropriate and adapted to the fulfilment of these specific obligations

- It is in this sense that the external affairs power, like the defence power, has a purposive aspect:
  - laws purporting to be valid under external affairs power because they implement treaties are only valid to the extent that the means they adopt are reasonably appropriate and adapted to implementing the treaty in question
- This formulation of test preferred to 'reasonable proportionality' (at 488)
  - Applying this test, majority in *Industrial Relations Act* case invalidated several provisions in *Industrial Relations Act 1988* (Cth) as going beyond what was required to implement the relevant ILO Convention
  - Conversely, fact that law only partially implements treaty not necessarily fatal, unless this leads to inconsistency or to doubt about characterisation (at 459)

INTERNATIONAL RECOMMENDATION

- A mere recommendation, except insofar as it offers a guide to the suitable implementation of a treaty, will not be sufficient to support legislation under s 51(xxix) (*Industrial Relations*) and it do not create international obligations EXCEPT certain conditions (*Pape v Commissioner of Taxation*)
- Treaty must direct the general course to be taken by signatory states (*Industrial Relations*)
- *Industrial Relations Act Case* left undecided question whether recommendations of international organisation (such as ILO) could enliven the external affairs power
- Although recommendations referred to in joint judgment, context was finding that measures taken by Cth were 'reasonably appropriate and adapted' to implementing the ILO Convention
- This issue arose again in *Pape v Commissioner of Taxation* (2009) because the Tax Bonus for *Working Australians Act (No 2) 2009* (Cth) was defended inter alia as an attempt to implement recommendations of the G-20, the IMF and the OECD
- Again, only the dissenting judges needed to consider the issue. Heydon J's judgment most instructive:
  - In G-20 Declaration of 15 November 2008 members of G-20 committed themselves to use fiscal measures to stimulate domestic demand as appropriate
  - Not specific as to which fiscal measures should be used, however
  - Heydon J holds that Declaration therefore 'no more than aspirational' (at 162)
  - Decision still leaves door open for recommendations to found exercise of external affairs power, but extremely unlikely because recommendations in nature of things rarely specify the precise course of conduct that is required to be taken
- Partial implementation is permissible unless deficiency is so substantial as to deny the law the character of a measure implementing the treaty (Industrial Relations)
- International law can be used to guide interpretation of statutes (s 15AB IAI)
- The HCA reluctant to use as a guide to interpretation of Constitution (*Al-Kateb*)

THE ECONOMIC POWERS

TRADE AND COMMERCE POWER

- Cth has power to make laws on trade and commerce with other countries, and among the States (s 51(i))
- s 92 Trade within the Commonwealth must be absolutely free.
- Words *trade and commerce* are very broad
  - Includes the mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery **(*W&A McArthur Ltd v Qld*)**
  - It considers meaning of phrase 'trade, commerce, and intercourse' in s 92 (freedom of interstate trade and commerce) but applicable to s 51(i) as well
  - Court declines to give precise legal definition, deferring rather to commercial understandings
  - All that it is prepared to say is that phrase not confined to 'transportation'
- What type of activities? And to what extent can intrastate trade and commerce be regulated?

AUSTRALIAN NATIONAL AIRWAYS PTY LTD V COMMONWEALTH (1945) 71 CLR 29:

- *Australian National Airlines Act 1945* (Cth) created government-owned airline service operating interstate to exclusion of all other airlines
- Validity under s 51(i) challenged on basis that that head of power restricted to 'regulation' of interstate trade and commerce, rather than creation of government-owned company that would itself engage in interstate trade and commerce, and monopolistically at that
- Dixon J confirms broad approach to interpretation of Cth power, in keeping with character of Constitution as 'instrument of gov. meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances' (at 81)
- Monopolistic operation of airline service, however, invalidated under s 92

INTERPRETIVE ISSUES

1. Section 51(i) implicitly deprives Cth of power to regulate intrastate trade – is this an express prohibition comparable to the express prohibition on the regulation of state banking in the banking power?
2. If it is, then as soon as law characterised as dealing with intrastate trade and commerce it should be beyond power (under exception to dual characterisation principle, following rule in *Bourke v State Bank of New South Wales* (1990))
3. If not, then it is open to Cth to regulate intrastate trade and commerce under other heads of power, e.g. corporations power
4. Given that interstate and intrastate are inevitably intertwined, to what extent does the Cth's power to regulate interstate trade in any case extend to intrastate trade?
5. Does the American doctrine of 'commingling' apply in Australia, in terms of which intrastate trade is said to fall within the Congress's legislative power under the equivalent commerce clause of the US Constitution?
6. What is the relationship between s 51(i) and s 92, which provides that 'trade, commerce, and intercourse among the States ... shall be absolutely free?"

R V BURGESS; EX PARTE HENRY (1936)

- Section 4 of *Air Navigation Act 1920* (Cth) authorised making of regulations for control of air navigation in "the Commonwealth and the territories"
- Relied on State legislation referring this power to Cth as provided for in s 51(xxxvii)
- But only Tasmania enacted relevant referral legislation, opening legislation to constitutional attack
- Validity defended inter alia under s 51(i): to ensure safety of interstate air navigation, Cth needed power to regulate intrastate air navigation (regulations covered uniform flying rules, pilot qualifications and airworthiness of planes)

- Court rejects this argument, upholding strict distinction between interstate and intrastate trade and commerce:
    - 'Considerations of wisdom or expediency cannot control the natural construction of statutory language' (at 628 per Latham CJ)
- In course of judgment, Court declines to follow US 'commingling' approach
- Strict distinction between interstate and intrastate trade and commerce reminiscent of reserved powers thinking, but Court does entertain alternative argument under external affairs power, and thus does not preclude Cth regulation of intrastate trade and commerce under other heads of power

TRADE AND COMMERCE WITHIN STATES

– Trade and commerce within the states has been specifically omitted **(*ANA Case*)**
– Cannot accept 'commingling doctrine': that interstate and intrastate are so commercially interdependent that power to regulate the former must necessarily extend into the latter

ANA CASE

- *Australian National Airlines Act 1945* (Cth) created government-owned airline service operating interstate to exclusion of all other airlines
- Validity under s 51(i) challenged on basis that that head of power restricted to 'regulation' of interstate trade and commerce, rather than creation of govt-owned company that would itself engage in interstate trade and commerce, and monopolistically at that
- Dixon J confirms broad approach to interpretation of Cth power, in keeping with character of Constitution as 'instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances' (at 81)
- Monopolistic operation of airline service, however, invalidated under s 92 (see Freedom of Interstate Trade and Commerce)

CONCESSIONS TO PREVENT PHYSICAL INTERFERENCE

1. **s 51** does not reserve power of regulating intrastate trade to the states – no explicit prohibition **(*ANA Case*)**
2. Distinguish between physical efficiency/safety/practicality/necessary for effectual control **(*Second Airlines Case*)** and economic effect/connection **(*R v Burgess*)** or to conduce competitiveness and profitability **(*AG (WA) v ANAC*)**

SECOND AIRLINES CASE

1. Concession for Cth licencing operating intrastate to protect of danger of physical interference with the activity within federal power to regulate safety in airline operations. *R v Burgess* helps the profitability of air industry across Australia
2. Marks slight shift in approach, as majority here prepared to accept commingling argument insofar as it applies to regulation for purposes of physical safety
3. Reg 198 of *Air Navigation Regulations* (Cth) prohibited use of aircraft in regular public transport operations unless licensed by Director-General of Civil Aviation
4. Reg 199(4) determined issues for consideration by Director-General in granting intrastate licence, including safety, regularity and efficiency of air navigation
5. Airlines of NSW had acquired licence under this regulation for regular intrastate flight, but wanted to avoid having to comply with NSW licensing provision
6. To do this, it had to have Cth regulation declared valid, and then NSW regulation declared inoperative under s 109 for inconsistency with Cth regulation
7. High Court majority held both Regs 198 and 199 valid:

- Intrastate trade may be regulated under s 51(i) 'where the law, by what it does in relation to intra-State activities, protects against danger of physical interference the very activity itself which is within federal power' (per Kitto J at 115)
- But Reg 200B, which allowed Reg 198 licencees to operate feeder flight to hubs irrespective of contrary State laws, was struck down, i.e. power doesn't extend to regulating intrastate trade so as to make interstate trade more profitable (at 115)

ATTORNEY-GENERAL (WA) V AUSTRALIAN NATIONAL AIRLINES COMMISSION (1976)

- This case confirms distinction drawn between physical and economic integration of intrastate and other trade
  - ANAC (state-owned airline) established under *Australian National Airlines Act 1945* (Cth)
  - Section 19 of Act authorised Commission to transport passengers between States, between a State and a Territory, and within a Territory (but not intrastate)
  - Section 19B inserted in 1973 authorising *intrastate* transport for purposes of 'efficient, competitive or profitable' conduct of the Commission's business, i.e. economic integration
  - Particular rationale for amendment was to allow Commission to operate a flight from Perth to Darwin stopping in Port Hedland (WA)
  - The Port Hedland stop was required to make this flight commercially viable
  - Ansett, a competitor airline operating on this route, challenged the validity of s 19B
  - Majority upheld *Airlines of NSW (No 2)* distinction between physical and economic integration and declared s 19B to be outside power conferred on Cth by s 51(i)
  - But different majority upheld s 19B under s 122 (territories power) subject to reading down s 19B under s 15A of the *Acts Interpretation Act* (Cth) so as to apply only to State-Territory flights
  - Preservation of State powers over intrastate trade now generally undermined by expansive interpretation of corporations power, but see Heydon J's judgment in *Pape* insisting that laws founded on s 51(i) must still 'have some definable relationship with 'trade and commerce with other countries and among the States'

INCIDENTAL POWER

- Distinction between two branches of trade and commerce **must** be maintained – existence makes impossible any operation of the incidental power which would obliterate the distinction **(*Wragg v NSW*)**
- Potential that scope of incidental power *with other countries* may be greater as laws w.r.t this are less likely to impinge on intrastate trade
- All matters which affect beneficially/adversely the export trade of Australia in any commodity produced/manufactured in Australia must be the legitimate concern of the Cth **(*O'Sullivan v Noarlunga Meat*)**
- Includes grade and quality of goods, but also packing, get-up, description, labelling and handling, extended to the supervision and control of all acts/processes which can be identified as being done/carried out for export **(*O'Sullivan v Noarlunga Meat*)** [e.g. prohibiting export of meat without licence demonstrating meeting of health requirements within implied incidental power]:

O'SULLIVAN V NOARLUNGA MEAT

- Reg 5 of *Commerce (Meat Export) Regulations* (Cth) provided that premises used for slaughter of meat for export had to be registered, on pain of penalty
- Part of case concerned consistency of this regulation with relevant SA legislation
- Characterisation question was whether Reg 5 was valid under trade and commerce power (s 51(i))
- Fullagar J gave leading judgment on this question (majority of 3:3 under s 23(2) of *Judiciary Act 1903* (Cth) because supported by Dixon CJ)
- Refers to *D'Emden v Pedder (1904)* passage on implied incidental power (at 597)
- Trade & Commerce power necessarily includes power to make provision for the quality of goods to be exported
- Cth has legitimate concern in any matter that may affect beneficially or adversely Australia's export trade (at 598)
- Power of Cth extends to 'supervision and control of all acts or processes which can be identified as being done or carried out for export' (at 598)
- Trade and commerce in the territories could be regulated under s 122

R V BURGESS

- Section 4 of *Air Navigation Act 1920* (Cth) authorised making of regulations for control of air navigation in "the Commonwealth and the territories"
- Relied on State legislation referring this power to Cth as provided for in s 51(xxxvii)
- But only Tasmania enacted relevant referral legislation, opening legislation to constitutional attack
- Validity defended inter alia under s 51(i): to ensure safety of interstate air navigation, Cth needed power to regulate intrastate air navigation (regulations covered uniform flying rules, pilot qualifications and airworthiness of planes)
- Court rejects this argument, upholding strict distinction between interstate and intrastate trade and commerce:
- 'Considerations of wisdom or expediency cannot ... control the natural construction of statutory language' (at 628 per Latham CJ)
- In course of judgment, Court declines to follow US 'commingling' approach
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SUFFICIENT CONNECTION

- It suggested by not relied on thus not authority in *Pape*
- In *Pape*, the HCA considered the validity of a Cth taxation law, which made no distinction between intrastate and interstate trade in grading one-off bonus payments to taxpayers whose taxable income in 07-08 was less than $100,000.
- The Act was upheld by a 4:3 majority on the basis that a national response to the crisis was a valid exercise of executive power, and the legislation was incidental to that exercise.
- Not sufficient to show Act is for maintenance of vigorous national economy and would be beneficial to trade and commerce, must show definable relationship (*Pape*)
- Any legislation having effect on trade and commerce in Australia does not inevitably bring legal or practical effects on trade with other countries and among the states (*Pape*)

THE CORPORATION POWER

THE EARLY APPROACH

- First sixty years, corporations power jurisprudence dominated by decision in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330:

*HUDDART, PARKER & CO PTY LTD V MOOREHEAD (*1909) 8 CLR 330

- Challenge to ss 5 and 8 of the *Australian Industries Preservation Act 1906* (Cth), which prohibited foreign corporations and trading or financial corporations formed within the Cth from engaging in restrictive trading practices like unfair competition and monopolisation.
- Provisions prohibited foreign corporations and trading or financial corporations formed within the limits of the Cth ('constitutional corporations') from engaging in certain restrictive trade practices
- Provisions unremarkable, except that there was no obvious head of power that allowed Cth to regulate domestic (i.e. intrastate) activities of corporations in this way
- Company and manager fined for refusing to answer questions relating to suspected offences
- Constitutional validity of fines challenged under s 51(xx)
- Four-judge majority decided that corporations power should be narrowly construed in context of federal Constitution that left regulation of intrastate trade to States, and therefore that challenged provisions were invalid
- Three of majority judges (Griffith CJ and Barton and O'Connor JJ) decided case on basis of reserved State powers doctrine
- Higgins J, supporting majority, decided case consequentially, on basis of list of 'horribles', discussing the implications if the argument were to succeed and the act were to be held valid
- Isaacs J dissented on grounds that key to understanding this head of power is two questions: (1) What types of corporation may be regulated under this power? (2) What activities of corporations may be regulated?
- The power over corporations is exercisable wherever the specific objects are found, irrespective of whether they are engaged in foreign or interstate commerce, or commerce confined to a single state.

THE START OF NEW APPROACH

- *Huddart Parker* eventually overruled in *Concrete Pipes* case (1971):

CONCRETE PIPES CASE

- Challenge to s 35 and ss 41-43 of *Trade Practices Act 1965* (Cth), which agreements between competitors restricting competition were made examinable, and the examinable restrictions were defined to include those in agreement made by s 51(xx) corporations.
- Provisions required all corporations (i.e. not just trading and financial corporations) to provide anti-competitive agreements to Cth Commissioner of Trade Practices
- Rocla Concrete Pipes Ltd charged under Act for entering into anti-competitive agreement w.r.t. concrete pipe manufacture, even though its trading activities were restricted to Queensland
- So case raised squarely question whether Cth could regulate *intrastate* trading activities of trading corporations
- Unanimous High Court overruled *Huddart Parker* as being incorrectly decided on basis of dysfunctional reserved State powers doctrine
- But declared challenged provisions invalid on different ground, i.e. that *Trade Practices Act* was not restricted, as it should have been, to *constitutional* corporations

- Case is nevertheless start of new approach to corporations' power because clear that Cth could henceforth regulate all trading activities of trading corporations
- Case does not, however, conclusively answer either of the two main questions raised by Isaacs J in *Huddart Parker*, i.e. what corporations fall under the ambit of this power and which of their activities are covered, apart from the sorts of trade practices at issue in *Concrete Pipes*
- This case gave a clear indication that the Cth could enact legislation by relying chiefly on s 51(xx).

CONSTITUTIONAL CORPORATION

❖ The requirements to be a constitutional corporation:

- Constituted as a corporation under the Corporations Act or via other legislation (*UNSW Act* 1989 etc.). - A government may also remove corporate status for the government bodies (*Local Government Industrial Relations* Act in Queensland).
- A foreign corporation must have been formed outside the limits of the Commonwealth (*Incorporation* Case).

NSW V COMMONWEALTH (INCORPORATION CASE)

- Facts: A major legislative package by which the Commonwealth sought to establish a national regime of corporations and secures law. *The Corporations Act* was based on the assumption that the corporations power empowered the Commonwealth to legislate for the incorporation of a company if the subscribers to the memorandum of associated intended that its activities would substantially be trading of financial activities.
- Held: The relevant sections of the Act were invalid because s 51(xx) authorises laws only with respect to formed corporations (Deane J dissenting).
- Majority: Looking at the two requirements, the word 'formed' is a past participle used adjectivally and for the partial phrase 'formed within the limits of the Commonwealth' is used to describe corporations which have been or shall have been created in Australia.
- The subject of the phrase is that the corporations have undergone or shall have undergone the profess of formation in the past, present or future. This refers to formed corporations, excluding the process of incorporation itself.
- A limitation on s 51(xx) is that they should be trading or domestic corporations, they be of trading or financial character, and would create undeniable difficulties if that paragraph were to be construed as extending to the incorporation of companies.
- Deane J: At least in that sense, a law providing for the local incorporation of foreign corporations is a law within the grant of power with respect to such corporations.
- It extends to the incorporation of corporations. Considers alternative examples; such as what if the Commonwealth did not have the power to erect lighthouses, but merely regulate them.
- The constructive interpretation of the word 'formed' is quite unjustified.
- Note: The *Incorporations Case* meant that the Commonwealth could not rely on s 51(xx) to enact the national corporations law. Instead, the Commonwealth was driven to rely on the co- operative arraignments with the States.
- In *St George Council*, the HCA held that a local government body whose sole purpose was for the supply of electricity was not a corporation, and reached that view by employing the purposes test: it was not a corporation because it had been constituted for the purposes of providing an essential service to inhabitants. **The purposes test is that you look at the purposes for creating the entity.**

FOREIGN CORPORATIONS

❖ Definition of foreign corporations has never been an issue: Any corporation, whether trading or financial, incorporated under the law of a foreign country (*Incorporation Case* (1990) at 498)

TRADING CORPORATIONS & FINANCIAL CORPORATIONS

- ❖ Another false started in *R v Trade Practices Tribunal; Ex parte St George County Council* (1974)
- County Council's only *current* activities were supply of electricity and electrical appliances, but had originally been incorporated for broader local government purposes
- Was it a trading corporation for purposes of *Trade Practices Act*?
- Court split 2:2 over whether test should be activities-based or based on purposes of corporation, with McTiernan J joining two judges favouring purposes test, but on slightly different grounds
- ❖ *R v Federal Court of Australia; Ex parte WA National Football League (Adamson's case)* (1979) swung pendulum decisively in favour of activities test

ADAMSON'S CASE

- Facts: Adamson is a football player playing in Perth applied to move to SA. When his application was refused, he brought an action under s 45(2) of the TPA for restraint of trade. This Act only applied if the football clubs and leagues were trading corporations under the Constitutional definition.
- Issue: Were West Perth football club and SA and WA football leagues 'trading corporations' covered by Act?
- Held: 4-judge majority applies activities test to answer in affirmative, but does not clarify whether trading activities must be the corporation's predominant activity or merely a substantial part thereof. They were trading corporations because of their substantial trading activities. Gibbs J dissented and applied the purposes test, he held that they were not trading corporations because of their original purposes.
- Mason J:
  - The term trading corporation is a definition to be given to a corporation when its trading activities form a sufficiently significant proportion of its overall abilities as to merit its description as a trading corporation.
  - Not every corporation engaged in a trading activity is a trading corporation (trading activity may be so slight and incidental to some other activity, such as in schools).
  - The club's activities included selling souvenirs and advertising, television and catering rights, renting premise
  - Whether the trading activities of a corporation are sufficient is a question of fact and degree.
  - The financial revenue of the Leagues is so great and the commercial means by which it is achieved so varied that I have no hesitation in concluding that trading constitutes their primary activity.
  - This is not limited to businesses only earning a profit, but rather can be applicable to those only earning revenue.
- Stephen J:
  - I agree that they are corporations, but I do not believe that they are trading corporations.
  - Their principal objectives are regulation, promotion etc. Where revenue is something that is incidentally derived from carrying out its principal objectives.
  - To engage in trade is not itself a trading a corporation (applying some degree of the purposes test).
  - The activities and purposes tests are to determine whether a company is a trading corporation.
- ❖ Note: A question arising from this case was: when applying the activities test, do the trading activities of a corporation need to be its predominant activities for it to be a trading corporation or merely a substantial part of its business?

FINANCIAL CORPORATIONS

- ❖ Transactions in which the subject is finance (such as borrowing or lending money) as distinct from where the subject is transaction, although involving payment of a price, cannot be seen to be finance (such as a purchase or

sale) (*Re Ku-ring-gai Co-operative Building Society*), it defines financial transactions as 'transactions in which the subject of the transaction is finance (such as borrowing or lending money')

- And this corporation must engage in financial activities, need not be its predominant activity but only needs to form substantial portion of its total activities (*State Superannuation*), which applied current activities test to decide that the SSB of Victoria was a financial corporation for purposes of *Trade Practices Act*

STATE SUPERANNUATION BOARD OF VICTORIA V TRADE PRACTICE COMMISSION

- Facts: The SSBV managed and administered a superannuation fund providing pensions. A question arose as to whether it was a financial corporation under s 51(xx) and whether it may therefore be regulated under the TPA.
- Held: Majority Mason, Murphy, Deane JJ approached financial corporations in the same way as trading corporations, and stated that in order to classify it must be engaged in financial activities. TEST: The financial activities need not be their predominant activity, but merely form a substantial proportion of its total activities. Gibbs CJ and Wilson J dissented on that point, arguing that the predominant activity threshold must be met.
- Majority: A corporation may be both a trading corporation and a financial corporation; the terms are not mutually exclusive.
- Primary business was provision of superannuation benefits, but to do this it is engaged in financial activities such as investment of funds in housing and granting of commercial loans
- Two judges said that these activities had to be the predominant activity, but 3-judge majority opted for test that is satisfied if financial activities form a 'substantial' proportion of overall activities or are of 'sufficient significance' (without completely excluding consideration of purposes)

- Note: Together, the *Adamson's* case and *State Superannuation Board* established that a corporation is a trading or financial corporation when respectively, it is engaged in substantial trading or financial activities.
- While it is not clear whether predominantly or substantially carry out those activities is the threshold, the latter test appears to be more persuasive.
- However, in *State Superannuation Board*, the majority found not reject the purposes test, and stated that when a corporation has not begun, or has barely begun, the purposes test may be decisive. In addition, the dissenting judgments of Gibbs CJ and Wilson J argued that in *Adamson* it may have been circumstantially necessary to use the other test, but advocate for retaining the purposes test.

INACTIVE CORPORATION

- Current activities test clearly does not work where corporation not trading nor engaging in any activities, as is case with shelf companies
- Issues arose in *Fencott v Muller* (1983):

FENCOTT V MULLER (1983):

- Facts: Oakland Nominees was a shelf company that was formed to facilitate a conveyancing transaction. It doesn't exist yet. The question was whether it was a trading or financial corporation.
- Held: Mason, Murphy, Brennan and Deane JJ who had up to that point favoured the activities test now, and held that it was a valid trading or financial corporation by applying the purposes test.
- Gibbs CJ, Wilson and Dawson JJ dissented, holding that it was not a corporation under either the activities or purpose test.
- Majority reverts to purposes test based on corporation's objects and powers as manifest in memorandum and articles of association. Oakland has not engaged in any trading activities. Before it can bear that character of a corporation, the question is whether it may be held to be a trading corporation under these circumstances.
- In *Adamson's* case, its character as a trading corporation did not suggest that trading activities were the sole criterion. There are other indicia.
- TEST: The purposes test would be more applicable in cases where the activity of a corporation had not yet begun. You will usually look at the Company Constitution to determine the purposes it was created for.
- Gibbs CJ applies subjective-intention test: what activities did the directors intend?
    - The purpose test will apply to determine why the corporation was formed.
    - The evident shows that at no time during its existence has Oakland been intended to engage or engaged in trading or financial activities.

- Therefore, it is not a constitutional corporation.

- In the absence of current activities, look to the original purpose for which it was formed
  - There is no better guide to a corps' character than its constitution establishing its character as a trading or financial corporation
  - It is immaterial which of those characters its future activities may give
- It may be necessary to determine the corporations' true character from its circumstances, activities and purposes

❖ A public authority with public purposes is not a trading corporation, even if as significant proportion of its current activities are constituted by trade (Gibbs CJ in dissent in *Tasmanian Dam Case*)

TASMANIAN DAM CASE

- Facts: The Hydro-Electric Commission was a government-controlled corporation created by the relevant Act. Liberal State government proposed construction of hydro-electric dam on Franklin River, south-west Tasmania, by Tasmanian Hydro-Electric Commission (HEC). Federal Labour government enacted *World Heritage Properties Conservation Act 1983* (Cth) in part to stop construction.
- Issues: Validity considered under several heads, including corporations power. One of two corporation issues was whether HEC was a trading corporation.
- Held: The majority (Mason, Murphy, Brennan and Deane JJ) held that the Hydro-Electric Commission as a trading corporation. Gibbs CJ dissented.
  - Wilson and Dawson JJ saw no need to decide the issue, but Dawson J added that he would be inclined to agree with Gibbs CJ.
  - Activities included generation and distribution of electricity and construction and maintenance of the generation plants, including dams. But HEC was State authority with extensive public powers, including policy-making
  - Majority (Mason, Murphy, Brennan and Deane JJ) applied current activities test to decide that 'sufficiently significant proportion' of HEC's overall activities constituted trade in electricity
- Mason J:
  - 1. *St George's County Council* is erroneous as it had been considered wrongly decided in the *WA National Football League Case*.
  - 2. As Barwick CJ (in dissent) noted in *St George County Council*, the fact that a corporation was connected with the government or State did not take it out of the category of 'trading corporations'.
  - 3. The Commission's connexion with the government of Tasmania is closer than that of the St George County Council with NSW.
  - 4. The trading activities of the Commission form much less prominent feature of its overall activity than in the case of St. George.
  - 5. The case of *WA National Football League* demonstrates that these considerations do not exclude the Commission from the category of trading corporations.
  - 6. The agreed facts show the Commission sells electrical power in bulk and by retail on a very large scale. The activity itself designates the Commission as a trading corporation.
  - 7. There is no suggestion in the paragraph looking to some hypothetical or notional incorporation which covers only the trading activities of a trading corporation.
- Gibbs CJ in dissent persisted in view that Court must search for 'true character' of corporation, based both on activities and purposes – on facts, HEC was a public authority with public purposes, and thus not, in his view, a trading corporation. To say the Commission is a trading corporation would be to rob those words of their meaning.
  - It is necessary to determine the corporation's true character, where the purpose for which a corporation was formed provided the described by which its character should be determined.

- Latter cases have shown that its activities as well as the purposes of its formation need to be taken into account.
- In this case, the corporation is not a trading corporation; it is a corporation sui generis.
- Its activities include trading, but they also discharge a public function of vital interest to the State.

❖ Note: It has now become more difficult to determine what is a Constitutional Corporations reforms in 1998 which did not require a company to adopt its own Constitution, which Gibbs CJ noted may be used to ascertain its purpose. Rather, it merely needs to adopt generic rules. The opportunity for the HCA to consider those generic rules has yet to arise.

SUMMARY ON VALIDITY OF CORPORATIONS POWER

- First Question: What corporations can be regulated?
- Second Question: What aspects of the corporations can be regulated? (this changes through the cases).
- It is the characterisation of the **law** not the corporation, and we look for a sufficient connection.

REACHES OF THE CORPORATIONS POWER

❖ Once clear that corporation is a constitutional corporation, the second issue is the permissible subject matter of the law (what aspects of the corporations power can be regulated?)

❖ In the *Concrete Pipes* case, the question rose whether the very generality of a subject matter defined by reference to legal persons of a particle description provokes the question whether it is intended that Parliament should have the power to make any laws outside constitutional prohibitions regarding persons of that description.

- Two interpretations
  - Narrow view: Cth law dealing with constitutional corporations may only regulate aspects or activities of a corporation that are connected to the activities that identify it as either a trading or financial corporation. Aspects or activities that Commonwealth can regulate must have something to do with corporations, such as trading activities of trading corporations.
- Narrow view requires additional test to see whether challenged provision is within power – does law also regulate trading or financial activities?
  - Broad view: There are no limits provided that corporation falls within s 51(xx), any aspects or activity of a constitutional corp. can be regulated. Once it has been established that the law applies to constitutional corporations, then any aspect or activity of such a corporation may be regulated, and there is therefore effectively no basis for a constitutional challenge to the law

❖ Broad view collapses characterisation question into single question: does law have as its object constitutional corporations? If so, all its provisions are within power

PROTECTING TRADING CORPORATIONS

❖ *Concrete Pipes* established that trading activities of trading corporations could be regulated under s 51(xx), but did not limit power to regulation of such activities

❖ *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) involved question whether Cth law made under corporation power could regulate the behaviour of persons other than corporations:

ACTORS AND ANNOUNCERS EQUITY ASSOCIATION V FONTANA FILMS

- Facts: Considered the validity of s 45D of the TPA which protected a corporation from a secondary boycott which is when trade union action, which prevented a supplier of a corporation from maintaining supplies to it. Union is preventing the supply of actors to the company. Fontana wanted an injunction to prevent them from engaging in conduct that restricted the supply of actors. Injunction granted, Actors appealed.

- Held: the majority upheld s 45D(1)(b)(i) on basis that corporations power could be used to regulate activities of natural persons in order to *protect* trading corporations (cf. Brennan J: 'discriminatory protection') although certain ancillary provisions were held invalid on other grounds. You can only impose obligations on the corporation itself and not external bodies that interact with it

- A good example from *Fairfax* direct characterisation test: s 45D(1)(b)(i) conferred rights on trading corporations to resist secondary boycotts and therefore was a law w.r.t. corporations, even though it did not regulate the trading activities of trading corporations per se
- Distinctive Operation Test: the law must distinguish between trading corporations and the public at large.
- Gibbs CJ: Words of s 51(xx) suggest that nature of corporation must be significant as an element in the nature or character of the law; he seems to suggest that in the case of trading or financial corporations, laws which relate to their trading and financial activities should be within power.
- From *Strickland v Rocla Concrete Pipes*, a law which governs the trading activities of trading corporations formed within the limits of the Commonwealth is within the scope of s 51(xx).
- The law in question does not regulate the conduct of corporations; but regulates the conduct of others - but the conduct to which the law is directed may cause substantial loss or damage to the business of a trading corporation. Therefore, I don't see why it should fall outside the scope.
- Murphy J (who went out of his way to argue that s 51(xx) is not limited to the regulation of trading activities of a trading corporation): A constitutional grant of legislative power should be construed liberally and not in any narrow or pedantic fashion.
- The correct approach to interpretation of legislative powers conferred was expressed in *Public Vehicles Licensing Appeal; Ex Parte ANA*: We must read the paragraph and apply it without making implications or imposing limitations which are not found in the express words. It is constitution we are constructing and it should be constructed with all the generality which the words admit.
- From *Seas and Submerged Lands Case*: Nowhere in the Constitutions there footing for the implication that the power is to be read down when it relates to the trading activities of trading corporations. It would be mere speculation to say that it was intended to confine legislative power so given to these activities. Is that it intended to confer a compressive power with respect to the subject matter so as to ensure that all conceivable matters of national concern would be comprehended.

❖ Note: Decision not conclusive as between broad and narrow views (Gibbs CJ and Wilson J clearly favoured narrow view by retaining a nexus with trading activities. By contrast, Mason, Murphy and Aickin JJ held the broader view, and committed themselves to the view that the power was not confined to any such nexus. All of them found it unnecessary to decide this point)

TASMANIAN DAMS AND ***ACTORS EQUITY*** WERE BOTH INCONCLUSIVE

❖ ***Concrete Pipes*** established that trading activities of trading corporations could be regulated but did not limit power to regulation of such activities
❖ ***Tasmanian Dams*** extended the power to regulating non-trading activities undertaken for the purpose its if trading activities

- The majority (4-judge) held that HEC was a trading corporation and thus in principle subject to regulation under s 51(xx)
- Second part of corporations power issue in this case was whether s 51(xx) supported regulation of HEC's activities in ss 7 and 10 of *World Heritage Properties Conservation Act 1983* (Cth):
  - Section 7 allowed Governor-General to declare property threatened by development to be property to which s 10 applies
  - Section 10 made it unlawful for trading corporation to carry out various construction activities, either at all (sub-ss (2) and (3)) or when done 'for the purposes of its trading activities' (sub-s (4))
- Five judges found s 10(4) valid:
  - Gibbs CJ and Brennan J because it regulated activities undertaken for purposes of trading and was therefore within incidental power on narrow view; and
  - Mason, Murphy and Deane JJ because corporations power could be used to regulate all activities of trading corporations
- Only the latter three found s 10(2) and (3) valid on broader view (no majority)

- So result is that s 51(xx) at least allows Cth Parliament to regulate non-trading activities of trading corporation undertaken 'for the purposes of its trading activity'
- This why it went further than *Concrete Pipes*, but still left broad/narrow views open

❖ Where a real relationship with the subject power exists, it does not matter, when the power is not purposive, that the object of the exercise is to attain some goal which lies outside of the scope of Cth power (***Jumbanna**; **Tasmanian Dams***)
❖ A law under **s 51(xx)** will not apply only to the foreign activities of a foreign corporation **(*Actors Equity*)**
❖ The direct legal operation of a law within power on trading corporations does not have to be limited to its trading activities **(*Actors Equity*)**
❖ A law may be regarding to a trading corporation, although it casts obligations upon a person other than a trading corporation **(*Actors Equity*)**

QUESTION OF SUFFICIENT CONNECTION

❖ Two questions from *Re Dingjan*
1. What is the character of the law by reference to the rights, powers, liabilities, duties, privileges it creates?
2. Does the character of the law allow it to operate in a way connected to the head of power conferred in its practical as well as legal operation?

RE DINGJAN; EX PARTE WAGNER (1995)

▪ This case did not so much resolve uncertainty between narrow and broad view as change the nature of the question, viz. it is not corporations and their activities that need to be characterised, but the law that is being challenged:

▪ Facts: 1992 amendment to *Industrial Relations Act* 1988 (Cth) gave Industrial Relations Commission power to set aside or vary a contract that was unfair, harsh or against the public interest if the contract was one relating to the business of a s 51(xx) corporation
- Mr and Mrs Dingjan and Mr and Mrs Ryan were sub-contractors to independent contractors, Mr and Mrs Wagner, who had entered into timber supply contracts with a constitutional corporation
- Sub-contractors sought review and variation of contract under s 127B of the Act read with s 127C(1)
- Independent contractors raised validity of s 127C(1)(b) of Act under Constitution s 51(xx)
- This provision allowed review of contracts relating to 'the business of a constitutional corporation'

▪ Held:
- 4-judge majority (McHugh, Brennan, Toohey, Dawson JJ) held that s 127C(1)(b) beyond power because it did not directly regulate or necessarily have any significance, 'for the activities, functions, relationships or business of [a 51(xx)] corporation' (per McHugh J at 369). Significance assessed by looking at legal and practical operation of law and assessing whether it conferred some 'benefit' or imposed some 'detriment' on constitutional corporation (ibid at 370-71)
- Minority (Mason CJ and Deane J supporting Gaudron J) felt this issue could have been dealt with by reading down, and that corporations power generally extended to any attempt to regulate business functions, activities and relationships of constitutional corporations (effectively, the wide view)
- Sufficient connection where the law regulates the activities, functions relations or business of a **s 51(xx)** corporation or those who deal with it in that capacity **(*Re Dingjan*)**

❖ A law regulates the conduct of those who control, work for, or hold shares or office in those corporations is sufficient **(*Re Dingjan*)**
❖ The fact that it is a trading or financial corporation should be significant in the way in which the law relates to it; the involvement of trading or financial corps is the *discriminate* (distinguishing factor) that determines the ambit of operation **(*Re Dingjan*)**
❖ The power extends at least to their business functions and their business relationships **(*Work Choices Case*)**
❖ Extends to the regulation of the conduct of those through whom it acts, its employees and shareholders, and whose conduct is or is capable of affecting its activities, functions, relationships or business **(*Work Choices Case*)**
  - It is not sufficient if a law which merely refers to or operates upon the existence of a corporate function or a category of corporate behaviours **(*Re Dingjan*)**

- ❖ A law operating on the conduct of outsiders will not be within power unless the conduct has significance by way of beneficial or detrimental effect on trading, financial or foreign corps **(*Re Dingjan*)**
    - Corps power does not extend to the regulation of internal affairs, however, relationships with employees may be regarded as external **(*Work Choices* Case)**

WORK CHOICES CASE (2006) – MOST RECENT DECISION ON CORPORATIONS POWER

- Facts: Howard government instead relied on corporation power to enact the *Workplace Relations Amendment (Work Choices) Act* 2005 (Cth), comprehensively redefining workplace relations along free-market lines.
    - Constitutional corporations are one of several federal system employers under the Act. On basis of definition of constitutional corporation, the Act applied to all trading and financial corporations, including some not-for-profit bodies that had 'significant' or 'substantial' trading activities (following activities test first adopted in *Adamson's* case). The Act covered between 75-85% of work force.
    - Five ALP-controlled States (NSW, Vic, Qld, SA and WA) challenged Act along two main lines:

      (1) corporations power did not extend to regulation of internal affairs, such as corporation's relationship with workforce; and

      (2) scope of corporation power must be read down in line with s 51(xxxv)
    - In so arguing, plaintiffs asked High Court to prefer the narrow 'distinctive character' test or the broad 'object of command' test (see definition of these terms at p. 103 of the majority judgment)
- Held: Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ rejected these arguments, with Kirby and Callinan JJ unwillingly to bedfellow in dissent
    - Major difference between majority and dissenters concerns whether scope of Cth's legislative power under s 51(xx) may be restricted by reference to the 'federal balance' struck in 1901.
        - On the scope of the corporation power itself, the majority held: Distinction between constitutional corporation's internal and external relationships has no support in Convention debates or drafting history (at 87). In any case, corporation's relationship with its employees may be regarded as external.
    - Gaudron J's dissenting view of the scope of the corporation power in *Re Dingjan* (as amplified in *Re Pacific Coal*) should be adopted, viz. that the power extends 'at the very least' to the business functions and activities of constitutional corporations and to their business relationships (at 114-5)
        - The power also extends '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' (ibid, citing *Re Pacific Coal* at 375)
        - Distinctive character test wrongly inserted 'additional filter' in characterisation process (at 104)
        - All other attempts to impute distinctions into corporation power, or to read previous decisions as having done so, are based on unsustainable concept of federal balance (at 103, 119)
    - Kirby and Callinan JJ in dissent:
        - Gaudron's judgment in *Re Dingjan* taken out of context and in any case dissenting (at 206-7, 366)
        - Some weight should be attached to fact that corporations power has long been regarded as inadequate to support expansive Cth industrial relations legislation, as evidenced by successive (failed) attempts to amend Constitution so as to expand the Cth's power to regulate in this area

- Looking back to *Incorporation* Case (1990)
- In *Huddart Parker* the court had been unanimous on corporations power could not be used to regulate the form of corporations
- *Concrete Pipes* and later *Tasmanian Dam Case* suggested that this approach might be overruled, and thus *Corporations Act 1989* (Cth) passed regulating formation, internal affairs and winding up of trading and financial corporations
    - New company's registration papers required to indicate nature of proposed activities, thus allowing identification as constitutional corporation
    - Act challenged by several States in *New South Wales v Commonwealth* (the *Incorporation* Case) (1990)
    - Surprise 6:1 decision declared incorporation provisions of Act invalid on basis that corporations power could be exercised only in respect of corporations already 'formed' in terms of some other law, whether Cth or State
    - Majority's decision based on practical difficulties together with:
        - grammatical analysis of phrase 'formed within the limits of the Commonwealth';
        - drafting history (Convention Debates and 1891 and 1897 draft constitutions); and
        - fact that this aspect of *Huddart Parker* not affected by abandonment of reserved State powers doctrine in *Engineers* (as applied to corporations power in *Concrete Pipes*)

THE RACE POWER

INTRODUCTION

- Parliament can make special laws about a particular race of people
  - Section 51(xxvi) originally provided that the Cth Parliament had the power to make laws with regarding to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws
    - The Convention debates reveal that the intention behind the clause was to give Cth power to pass special legislation for non-European races, both beneficial and detrimental
    - In its original formulation, the races power was thus undeniably racist
    - The words "other than the aboriginal race" were removed in the 1967 Referendum, same with s 127
- Exclusion of aboriginals was, according to Kirby J in *Kartinyeri v Cth* (1998) at 403, mainly aimed at leaving the regulation of 'aboriginal affairs' to the States
- Post-1967 meaning of s 51(xxvi) unclear: did deletion simply re-instate Cth's power to legislate on aboriginal affairs, or did it also remove the discriminatory intention behind the clause?
- This issue not yet been satisfactorily resolved
- Test: A valid law under s 51(xxvi) must be: [A "special" law that protected all races rather than one particular race] (*Koowarta*)
  - With regarding to people of a particular race and not apply equally to people of all races AND
  - Be *special* in that it has some special connection with people of that race
  - A law which, on its face, does not discriminate in favour of people of a race may nevertheless be valid if it discriminates by its operation upon its subject matter **(*Tasmanian Dams*)** [Conservation of World Heritage sites by "special" laws for the people of the Aboriginal race]

PRE-*KARTINYERI*

"PEOPLE OF ANY RACE"

- "Race" is a fluid and not a static or precise concept, it can refer to the biological element, physical similarities, a common history, common religions/beliefs, or culture that are characteristics of a race (*Tasmanian Dams*). It includes laws for a subject or part of a race (*Kartinyeri*)
- Before decision in *Kartinyeri* (1998), races power considered in three other cases, two of which we have encountered already in relation to the external affairs power (*TasDam* & *Koowarta*)

KOOWARTA V BJELKE-PETERSEN (1982)

- It challenged validity of *Racial Discrimination Act 1975* (Cth) on the basis that it was beyond the races power:
- 5-judge majority decided that Act not supported by races power as it extended protection from discrimination to all races, and was thus not a 'special law' with respect to the people of any one race (per Gibbs CJ at 186; Stephen J at 210; Aickin J at 243; Wilson J at 245; Brennan J at 261)
- Mason J did not decide this issue because he had decided that *Racial Discrimination Act* was valid under the external affairs power (at 222)
- Murphy J alone in expressing view that Act was supported by races power, adding (obiter) that s 51(xxvi) could only be used to support beneficial laws because the word 'for' in s 51(xxvi) must be construed to mean 'for the benefit of' (at 242)
- Other dicta tend to reject view that races power had changed character because of 1967 amendment to become power to be used exclusively for positive discrimination in favour of historically disadvantaged races, but no conclusion on this issue
- Thus, ratio of *Koowarta* is that, for a law to be considered a valid exercise of the races power, it must affect a particular race, either negatively or positively, rather than confer a benefit (such as protection from racial discrimination) on the Australian people generally.

"DEEMED NECESSARY" – MAIN INSTRUMENT FOR COURT TO INVALID THE ACT

- A valid law w.r.t a race must confer rights or duties on members of a race or on persons in relation to their dealings with members of a race (*Tasmanian Dams*)
- The power includes conferring benefits which protect or foster the common intangible heritage or common sense of identity of a race of people (*Tasmanian Dams*)
  1. Law may protect property which is of particular significance to that spiritual and cultural heritage to the race of people
  2. A law for the preservation archaeological relics of significance to all mankind is special

TASMANIAN DAM CASE

- Challenge to ss 8 and 11 of the *World Heritage Properties Conservation Act 1983* (Cth):
  - Section 8 expressly declared that s 8, as well as ss 11, 13(7) and 14(5), were special laws necessary to be enacted for the Aboriginal race
  - Sections 8 and 11 gave Governor-General power to issue proclamation restricting development on aboriginal site where likelihood of damage or destruction
  - After proclamation, various development activities listed in s 11 could proceed only with written consent of Minister
- Court divided as follows:
  - Mason, Murphy, Brennan and Deane JJ upheld use of races power for this purpose, but ss 8 and 11 invalidated because Deane J found that they provided for acquisition of property without just terms
  - *Koowarta* distinguished on basis that *World Heritage Properties Conservation Act* had special significance for Aboriginals, although all 'mankind' was interested in preservation of Aboriginal sites (per Brennan J at 243-45 and Deane J at 275; *contra* Gibbs CJ at 109)
  - Universal value rather than aboriginal interest, aboriginal people don't have greater right than the other races
  - Brennan J held, obiter, that 1967 amendment was 'an affirmation of the will of the Australian people ... that the primary object of the power is beneficial' (at 242)
  - Deane J appeared to say that, since 1967 amendment, Parliament may only positively discriminate in favour of Aboriginal people, but may discriminate either way in relation to other races.
  - Murphy J in obiter dictum, said "for" means "for the benefit of". It does not mean "with respect to", so as to enable laws intended to affect adversely the people of any race. If there was such intention, it should have been used expressively in the part of s 51.

"SPECIAL LAW"

- A "special" law confers a right or benefit or imposes an obligation or disadvantage especially on people of a particular race (*Native Title Act Case*)
  - This includes a law which confers a benefit generally, provided the benefit is of special significance or importance to people of a particular race

WA V CTH (NATIVE TITLE ACT CASE) (1993)

- Challenge to *Native Title Act 1993* (Cth) enacted post-*Mabo*
- 6-judge joint judgment decides extent of High Court's review powers w.r.t. Cth Parliament's judgment that particular law 'necessary' for the people of any race:
  - Whether law 'necessary' is a 'political value judgment' for Parliament, not Court to make (at 460)
  - 'If the Court retains some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the races power, this case is not the occasion for an examination of that jurisdiction' (at 460)

- On the other hand, the word 'special' in s 51(xxvi) qualifies 'law' (not 'necessary'), and thus the question whether the law is 'special' is justiciable
- Test here, in line with basic characterisation rules, is whether 'law confers a right or benefit or imposes an obligation or disadvantage especially on the people of a particular race' (at 461)
- Confirms *Tasmanian Dam* that the benefit may be conferred generally (on all Australians) provided it has 'special significance or importance to the people of a particular race' (ibid)
- *Native Title Act* confers unique benefit on Aboriginal Australians and thus special

- The special quality of the law must be ascertained by referring to its differential operation upon people of a particular race, not by referring to circumstances which led the Parliament to deem it necessary
- The question that whether a law is "deemed necessary" is non-justiciable (*Native Title Act Case*)
  - Manifest abuse of power of judgment of necessity can invalidate a law (*Kartinyeri*), the court has a say on whether the necessary is appropriate/reasonable adopted or not

THE *KARTINYERI* CASE

❖ This case appeared to raise squarely for decision to the question whether, after the 1967 amendment, the races power should be understood as a positive discrimination clause

❖ But this issue again left unresolved because two of 5-judge majority bypassed scope of races power (Kirby J in dissent, Callinan J not delivering judgment)

KARTINYERI V CTH (1998)

- Facts and issue:
  - Declaration under s 10 of *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) for protection of Aboriginal area threatened by proposed bridge overturned on review after investigation by Prof Cheryl Saunders found to be procedurally flawed
  - Second report stopped when objection taken to nomination of judge to prepare report (see *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996))
  - *Hindmarsh Island Bridge Act* 1997 (Cth) enacted to preclude further possibility of proclamation under s 10
  - Section 4 of *Bridge Act* expressly excluded application of *Heritage Act* to construction of Hindmarsh Island bridge
  - Validity of *Bridge Act* was challenged in High Court, with Cth basing its defence of the Act on express argument that s 51(xxvi) could be used to enact adversely discriminatory legislation
- Brennan CJ and McHugh J decided case on basis that 'the power which supports a valid Act supports an Act repealing it' (at 356)
- Because Brennan CJ and McHugh J's judgment based on this issue, case did not produce clear majority on positive discrimination point:
  - Gaudron J held that question whether law was necessary *was* justiciable to extent that Court could determine reasonableness of Parliament's judgment in this respect, and that the relevant test was whether the law was 'reasonably capable of being viewed as appropriate and adapted to' a 'relevant difference' between the races (at 365)
  - Adds that this test would tend to give s 51(xxvi) a positive discrimination slant in respect of Aboriginal Australians because of their situation of 'serious disadvantage' (at 367)
  - Gummow and Hayne JJ hold that races power, even if it may not support discriminatory laws, at least supports law withdrawing statutory benefit previously extended to Aboriginal people (at 380)
- Kirby J in dissent draws on Convention debates and debates surrounding 1967 referendum to conclude that s 51(xxvi) provides only for laws beneficial to targeted race (at 401-417)
- Four judges (Gaudron, Gummow, Hayne and Kirby JJ) decided that races power *did* support a law w.r.t. a sub-group of a particular race (in this case, the Ngarrindjeri people) – the only actual rule emerging from this case

- Law must be “appropriate and adapted” to a relevant difference
    - Law must discriminate against that race in a way that is “appropriate and adapted” to a relevant difference between people of particular race and people of other races (*Kartinyeri*)
    - It is difficult to conceive of circumstances where a law operating to disadvantage of a racial minority would be valid, only laws directed to remedy their disadvantage could reasonably be viewed as appropriate and adapted to their different circumstances

- ONLY for the benefit of a race? – not solved
    - Issue of whether valid law must benefit a race has not been solved by authority
    - Power only to make laws for the benefit of a race
    - *Racial Discrimination Act* manifested Parliament’s intention that power will hereafter be used only for the purpose of discriminatorily conferring benefits upon people of a race (Brennan J in *Tasmanian Dams*)
    - After 1967 Referendum, bringing Aboriginals within reach of the power, did so in a way that the power can only be used for their benefit (Murphy J in *Koowarta*)
    - Power to make detrimental as well as beneficial laws
    - Gauldron J in *Stolen Generations Case* found that it is arguable that power only authorised laws for the benefit of people of a race
    - Gummow J in *Stolen Generations Case* observed that detrimental as well as beneficial laws were permitted at least in its original form
    - “For” in s 51(xxvi) means ‘with reference to’, rather than ‘for the benefit of’ (Gibbs J in dissent in *Tasmanian Dams*)
    - Valid power to repeal a statutory right (*Kartinyeri*)
    - Rights conferred by statue, as opposed to common law rights, can be taken away by statute
    - A head of power which supports an Act will also support its repeal
        - Power can be used to withdraw statutory benefit granted to Aboriginal people (and impose disadvantage at least in that sense)

THE TAXATION AND GRANTS POWERS

THE TAXATION POWER

FISCAL PROVISIONS

- Parl can make laws with regarding to taxation
  - Parl shall have power to make laws for the Peace Order & Good Governance of the Commonwealth with regarding to taxation; but so as not to discriminate between States or parts of States (s 51(ii))
  - Proposed laws appropriating revenue/imposing taxation, shall not originate in the Senate and Senate's ability to amend such laws is restricted (s 53)

- Cth's fiscal (and therefore political) domination of States is largely attributable to the interaction of three provisions:
  - s 51(ii) (taxation power);
  - s 53: proposed law imposing taxation shall not originate in the Senate.
  - s 55: laws imposing taxation shall deal only with the imposition taxation and with one subject only
  - s 90 (exclusive power over customs and excise); and
  - s 96 (grants power)
  - s 114: a state shall not without consent of the Cth Parl. impose any tax on property of any kind belonging to the Cth and Cth shall not impose any tax on State's property

- The first two provisions have been interpreted in a way that sees the Cth raising 80% of taxation revenue, and the third in a way that allows the Cth to control policy-making in areas over which it has no s 51 power (e.g. health and education)

- Other relevant provisions are ss 53 and 55:
  - s 53 bars Senate from proposing appropriation or taxation laws, and restricting its role in relation to such laws to passing them or returning them to House of Reps with request for amendment
  - s 55 provides that laws imposing taxation may not deal with any other matter, that each law should deal with 'one subject of taxation only', and that customs and excise laws should be kept separate
  - s 53 is not justiciable because it deals with proposed laws (*Osborne v Commonwealth* (1911)), but s 55 is subject to low-level review (*Resch v Federal Commissioner of Taxation* (1942))
  - Traditional splitting of law imposing tax and law providing for assessment not strictly necessary, but means that Senate may amend assessment Act in ordinary way

DEFINITION OF A TAX

WHAT IS A TAX?

- Tax identifiable by the following non-exhaustive features (***Air Caledonie***):
  - A compulsory *extraction of money* (***Matthews***)
  - Collected by a *public authority* for *public purposes* (***Matthews***)
  - Enforceable by law (***Matthews***)
  - *Not a payment for services rendered* (***Matthews***)
  - Not a penalty or arbitrary (***Air Caledonie***)
- Tax does NOT have to involve extraction of money (***Air Caledonie***)
- Tax does NOT have to be extracted by a public authority or for public purposes
  - May be a solution to a necessary problem of public importance (***Tape Manufacturers***)

AUSTRALIAN TAPE MANUFACTURERS V COMMONWEALTH (1993) 176 CLR 480:

- 1989 amendment to *Copyright Act 1968* (Cth) inserted provision requiring vendors of blank tapes to pay a percentage of sales price to a collecting society on behalf of copyright owners
- Key issue was that payment was not made to Consolidated Revenue Fund, but collecting from society
- 4:3 majority holds that it is 'not essential to the concept of a tax that the exaction should be by a public authority' (at 501) and that fact that levy not paid into Consolidated Revenue Fund did not mean that it was not a tax or that the levy was not exacted for a public purpose (at 503)
- Public purpose here is pursuit of fairness as between copyright holders and sellers of blank tapes
- McHugh J in dissent saw crucial issue as being whether levy raised to fund government expenditure, as opposed to expropriating money from one group of people to give to another
- For McHugh J, therefore, public purpose = governmental purpose, and all taxation funds must flow through Consolidated Revenue Fund before being applied for Cth governmental purposes

- Payment into CRF is for public purpose, but NOT necessarily a tax
  - E.g. if it has no revenue raising purpose, more like debt from one person to another with role of Cth as a go-between (***Lutton v Lessels***)
- The revenue-raising burden can be secondary to some other purpose
  - E.g. policy affecting matters not directly within legislative power of parliament (***Northern Suburbs General Cemetery Reserve Trust***)

NORTHERN SUBURBS CEMETERY RESERVE TRUST V COMMONWEALTH (1993) 176 CLR 555:

- *Training Guarantee (Administration) Act 1990* (Cth) required employers to spend specific percentage of payroll on employee-training, failing which, to pay balance into Training Guarantee Fund
- *Fairfax* dual characterization principle applied (purpose = training, but also taxation)
- Construed as tax rather than penalty (cf. s 53) because no conduct mandated or proscribed, no obligation to train imposed, and no criminal offence or civil penalty created (at 571)
- *Australian Tape Manufacturers* established that it is not necessary for money exacted under statutory authority to pass through the Consolidated Revenue Fund (CRF) for it to be construed as a tax
- Showing the tax is an excise will invoke **s 90**
  - Application of **s 90** confers on Cth exclusive power over customs, excise, & bounties

TAX LAWS SHALL DEAL ONLY WITH THE SUBJECT OF TAXATION

- Definition contains both positive and negative criteria, corresponding to s 53 (fines/penalties and fees for licences/services not *per se* taxation)
  - Laws imposing taxation shall deal only with taxation, and any provision dealing with any other matter shall be of no effect **(s 55)**

MATTHEWS V CHICORY MARKETING BOARD (VIC) (1938) 60 CLR AT 263:

- Victorian levy on producers of chicory challenged as excise duty contrary to s 90
- In course of decision, Court offers this definition of a tax: *'a tax ... is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered'* (at 270)

1. Compulsory exaction
2. From Public authority (*Australian Tape Manufacturer*)
3. For Public purpose (Distinguished from *Luton v Lessels*)
4. Enforceable by law
5. Not payment for services rendered or penalty or arbitrary (*Air Caledonie*)

- Includes: Main subject and ancillary provisions
    - 'Taxation' is defined based on common understanding and general concepts rather than any analytical or logical classifications **(*RMR v FCT*)**

ROY MORGAN RESEARCH PTY LTD V FEDERAL COMMISSIONER OF TAXATION (2011) CLR 97

- *Superannuation Guarantee (Administration) Act* 1992 (Cth) set amount of employer contribution to employee's superannuation fund
- *Superannuation Guarantee Charge Act 1992* (Cth) imposed superannuation guarantee charge on employers not paying full contribution equal to deficit
- On payment of charge, Commissioner of Taxation required to pay exact amount into employer's superannuation fund
- Seemingly analogous to *Luton v Lessels* because funds could be said to be 'earmarked' as they passed through Consolidated Revenue Fund and exactly same amount paid out to employees, making it look like a forced transfer between private parties in which CRF simply used as conduit for funds
- But 6-judge joint judgment says closer to *Northern Suburbs:*
    - Public purposes criterion clearly satisfied (to ensure payment of employer contribution)
    - Superannuation guarantee charge also has secondary revenue-raising purpose
    - When charged paid into CRF its identity is lost – separate appropriation made
- Heydon J: distinction between this case and *Luton v Lessels* lies in fact that employer obligation not terminated by imposition of charge, merely reduces liability
    - Once the main subject is ascertained, ancillary provisions are determined by their natural connection or relevance to the main subject **(*RMR v FCT*)**

LUTON V LESSELS (2002) 210 CLR 333

- It established the reverse proposition, i.e. that the mere fact that funds flow through the CRF do not mean that they are taxes:
    - *Child Support (Registration and Collection Act) 1988 (Cth)* and *Child Support (Assessment Act) 1989 (Cth)* provided for registration of payments due to carers of children, after which payment collected by Cth from person liable for payment and paid into CRF, and then paid out to carer
    - Was liability thus created a tax? Acts clearly provided for compulsory exaction of money by a public authority for a public purpose, enforceable by law, and thus satisfied Matthews definition
- Crucial difference was that Cth was playing role of go-between, with non-carer's obligation to pay carer substituted for an obligation to pay the Cth, which was in turn obligated to pay out the exact amount paid to it to the carer (at 354 per Gaudron and Hayne JJ)
- The legislative scheme thus had no revenue-raising purpose, although this was also true of the scheme in *Tape Manufacturers*
- Difference was that in *Tape Manufacturers*, '[t]here was no necessary correspondence between a copyright holder and the purchaser of a blank tape' (at 384 per Callinan J)
    - The wording is broad enough to insert any provision 'fairly relevant' or incidental to the imposition of a tax on a subject of taxation **(*Permanent Trustees*)**
    - It is not unlawful to include provisions incidental or auxiliary to the assessment and collection of tax **(*Permanent Trustees*)**
- Finding a provision related to tax
- By the common sense approach if there is only one section on tax, and the rest of the Act relates to a different subject e.g. migration, the section should be struck out **(*Air Caledonie*)**

AIR CALEDONIE INTERNATIONAL V COMMONWEALTH (1988) 165 CLR 462

- *Migration Act* amendment imposed fee on international airline passengers entering Australia
- *Fee* collected by private airline companies, but passed on to government
- If fee was a tax, amended *Migration Act* contrary to s 55 as mixed tax and non-tax provisions
- Court decided fee = tax, and declared amending provision invalid (rather than entire Migration Act)
- Main considerations were that fee was compulsory (airline passengers had no option but to accept 'service') and amount bore no relationship to value of service rendered
- In so doing, Court expands *Matthews* definition of tax to include compulsory exaction of money by private company on behalf of government

FEES FOR SERVICES

INTRO

- Together, *Air Caledonie* and *Tape Manufacturers* expand definition of tax in *Matthews* to include compulsory exactions of money by non-public authorities
- But the other three positive criteria remain:
  - Exaction must be compulsory
  - For public purposes
  - Enforceable by law
- What about statement in *Matthews* that a tax is 'not a payment for services rendered'?
- This was the second issue litigated in *Air Caledonie*, i.e. whether the fee paid by international passengers, including Australian citizens, on entering Australia constituted a fee for services rendered (and was thus excluded by s 53)
- Fee could conceivably have been construed as payment for 'privilege of entering Australia' (at 469) – but citizens are entitled to enter Australia as of right
- Further consideration was that money collected used to defray general administrative costs of Cth department rather than cost of immigration clearance
- Earlier cases had established the following indicia for identifying whether a particular charge should be construed as a fee for services:
  - Specific identifiable service
  - Fee payable by the person who receives the service
  - Fee proportionate to the cost of supplying the service

ELEMENTS OF FEES FOR SERVICES

- Fines/pecuniary penalties, or payment of fees for licences/services is not a tax **(s 53)**
- A tax is not a *payment for services rendered* **(*Matthews*)**
- Fee for services identified by four elements:
- Specific identifiable service **(*Air Caledonie*)**
- Contribution by dairymen to fund to improve quality of milk and finance activities of milk board which provided 'no particular service' is a tax **(*Parton v Milk Board*)**

PARTON V MILK BOARD (VIC) (1949) 80 CLR 229:

- Victorian law required dairymen and owners of milk depot to make a contribution to a fund that was used to improve quality of milk and generally to finance activities of Victorian Milk Board
- Board provided 'no particular service' to those from whom the contribution was exacted (at 258)
- Accordingly construed as a tax

- Fee charged to producers for grading eggs to 'defray the cost of services' provided by the Egg Board is a fee for services (***Harper v Victoria***)

HARPER V VICTORIA (1966) 114 CLR 361:

- Victorian law authorised Egg and Egg Pulp Marketing Board to charge producers a fee for grading eggs
- Fees collected by Board paid into its general funds, and any excess on general funds repaid to producers
- Legal issue: if construed as excise, form of tax, would have been contrary to s 90
- High Court held that fees were charged for purposes of cost-recovery, and did not amount to tax
    - 'Immigration' fee charged to defray the general administrative costs of the Cth rather than the cost of immigration clearance is a tax (***Air Caledonie***)
- Fee is rendered to, or at the request or direction of, the person required to make the payment (***Air Caledonie***)
    - Does NOT include fees of services where the person required to pay has no choice about whether or not s/he acquires the services and amount has no discernible relationship with the value of what is acquired (***Logan Downs***)
    - Fee must be levied only against persons who use the services & can be levied against all such users with commercial justification for discriminating between different users (***Airservices***)

AIRSERVICES AUSTRALIA V CANADIAN AIRLINES INTERNATIONAL LTD (1999) 202 CLR 133:

- *Civil Aviation Act 1988* (Cth) authorised Civil Aviation Authority (CAA) to charge aircraft operators fee for services rendered based on maximum take-off weight of aircraft
- Section 67 of Act provided that charge should be 'reasonably related to the expenses incurred' and 'shall not be such as to amount to taxation'
- Canadian Airlines owned aircraft operated by Compass Airlines, which went into liquidation. CAA imposed statutory lien on aircraft to recover unpaid fees
- Canadian Airlines contested statutory lien on basis that fees charged were taxes contrary to s 67
- Crucial issue was whether mere fact that the fees charged to Compass Airlines exceeded the cost of providing the services to it meant that they should be construed as taxes, even though the user pays scheme as a whole did not generate a 'profit' for government (apart from 7.5% rate of return on Cth's capital investment allowed in costing structure)
- In rejecting Canadian Airlines' claim (i.e. construing scheme as fees for services rendered not tax) High Court established general principle that a user pays scheme may redistribute services and charges between users (i.e. charge some users less, and some users more, than the value of the services provided to them) without turning such a user pays scheme into a taxation scheme
- Case indicates that the test for a fee for services is that the fee must be payable by the person who receives the service, but that the fee need not necessarily correspond exactly to the cost of providing the service to the particular user. The fee is proportionate to the cost of the service
- Fee was reasonably and appropriately adapted to achieving legitimate public purpose (other than revenue raising) which was related to the functions, powers and duties of a public authority
- Fee need not correspond exactly to cost of providing the service, the mere fact that the fees exceeds the cost does not mean it is a tax e.g. maximum take-off weight charged to aircraft operators
- Charges not set to provide the Cth with additional revenue may be a fee
- Where fee exceeds the cost of providing a service, there is a rebuttal presumption that pricing structure is employed for revenue making purpose
- Other elements characterising fees for services collected by a statutory authority (***Airservices***):
    - Services provided by authority which has as one of its statutory functions the provision of those services
    - Natural monopolist

- Directed under statute to cover the cost of providing services from users
- Exhibited large degree of financial independence from the executive and was intended to operate on a commercial basis

THE GRANTS POWER

- Appropriations power in s 81 provides that Cth funds may be appropriated 'for the purposes of the Cth' (with prior parliamentary approval – s 83)
- One important way in which a significant proportion of these funds is spent is through grants made to the States under s 96 (the grants power)
- Section 96 provides:
  - 'During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.'
- What was clearly intended to be a temporary measure to assist States in immediate period after federation has been used by the Cth to control vast areas of State activity, including housing, health services, social security, and roads
- Basic method of control is for grants to be conditioned on implementation of Cth policy (specific purpose grants)
- Other types of grant: general revenue (States' share of income tax) and special assistance grants (equalisation grants to overcome horizontal fiscal imbalance)
- Since 1999: last two grants replaced by single GST Revenue Grant

THE EARLY CASES

- The crucial early case that expanded the scope of the grants power was *(Federal Roads case)*

VICTORIA V THE COMMONWEALTH (1926):

- *Federal Aid Roads Act 1926* (Cth) enacted to encourage rural development
- Authorised making of agreements between Cth and States for building of roads co-funded by Cth
- Some of these roads did not cross State borders, and thus could not be justified under s 51(i)
- Victoria *inter alia* argued that conditions could not be imposed if they went beyond scope of s 51
- The Act was valid as it was plainly warranted by s 96, and not affected by s 99
- High Court dismissed this argument without reasons, but implied that such conditions permissible

DEPUTY FEDERAL COMMISSIONER OF TAXATION (NSW) V WR MORAN PTY LTD (1939)

- *Wheat Industry Assistance Act 1938* (Cth) allowed Cth to control price of wheat by imposing excise tax on millers (in separate Act) and redistributing this via s 96 to growers; alternatively, if price rose too high, to tax growers (in separate Act) and redistribute this tax via s 96 to millers
- Very little wheat grown in Tasmania, and it was thus agreed between Cth and Tasmania that excise tax on millers should go back to millers in terms of s 14 of Cth Act and *Flour Tax Relief Act 1938* (Tas)
- On being sued for unpaid tax, defendant argued that this arrangement was discriminatory against States, and thus contrary to ss 51(ii) & 99
- High Court rejected this argument on basis that federal excise tax itself was not discriminatory (applied to all millers in all states equally) and s 96 was not subject to s 51(ii) or s 99
- This decision confirmed on appeal to PC, which found use of s 96 in this instance not 'colourable', i.e. device to get around s 51(ii) prohibition on discrimination

SOUTH AUSTRALIA V COMMONWEALTH (FIRST UNIFORM TAX CASE) (1942)

- WW II legislative scheme to transfer collection of income tax from States to Cth challenged in *South Australia v Commonwealth* (*First Uniform Tax* case) (1942)
- Scheme consisted of four interlinked statutes:
    - *Income Tax Act 1942* (Cth): set very high income tax rates equivalent to Cth and State tax combined
    - *States Grants Act 1942* (Cth): provided for s 96 grant to States not levying income tax
    - *Income Tax (War-time Arrangements) Act 1942* (Cth): transfer of State collection machinery to Cth
    - *Income Tax Assessment Act 1942* (Cth): required that Cth tax should be paid before any State tax
- Majority refused to consider Acts as a scheme, rather each Act individually:
    - *Income Tax Act* not invalid because Court has no power to review rate of taxation
    - *Grants Act* not invalid because it induced States not to levy tax rather than compelling them to do so (relying on *Federal Roads* case, in which states induced to exercise powers by offer of money grant)
    - Neither of these Acts invalid because of their 'indirect effects' on an essential State function or capacity – only question is whether Act is within power (cf. later *Melbourne Corporation* principle)
    - *War-time Arrangements Act* valid as exercise of defence power
    - *Income Tax Assessment Act* upheld as within incidental scope of taxation power
    - It was not coercive but rather just a significant inducement
- Starke J dissented on ground that object of *Grants Act* was to destroy State tax-raising powers (majority, by contrast, looked only at direct legal operation of Act); even if it was an inducement, the option was suspicious. This would just throw off the federal balance.

VICTORIA V COMMONWEALTH (SECOND UNIFORM TAX CASE) (1957)

- After WW II, two amendments made to scheme:
    - *State Grants Act* replaced by *States Grants (Tax Reimbursement Act) 1946* (Cth)
    - Section 221 of *Income Tax Assessment Act* prioritising collection of Cth tax amended to become indefinite and stated as being 'for the purposes of the Cth'
- Revised scheme challenged in *Victoria v Cth* (*Second Uniform Tax* case) (1957):
    - No challenge to main *Income Tax Act* (accepting point that rate of taxation not subject to review) or to *War-time Arrangements Act* (considered 'spent')
    - 4:3 majority declared s 221 invalid as being beyond incidental scope of taxation power
    - But *States Grants (Tax Reimbursement) Act* upheld under s 96 on basis that the only restrictions on use of that section are that it must be used for providing financial assistance (rather than for enacting ordinary legislation) and must not be used coercively
    - In particular, s 96 may be used even where 'financial assistance' passes straight through State (as mere 'conduit') into private hands (Dixon CJ's restatement of ratio in *Moran*)
    - Provided law provides for financial assistance, Cth may set any conditions it likes
    - Section 96 may also be exempt from *Melbourne Corporation* principle because that principle only applies to exercise of Cth power to make laws with respect to a general subject matter
    - Dixon CJ: these rules flow not so much from plain meaning of s 96, as from precedential effect of past decisions (*Federal Roads* case, *Moran and First Uniform Tax case*)

SECTION 96 AND CONSTITUTIONAL LIMITATIONS

- Clear from *Federal Roads*, *Moran* and two *Uniform Tax* cases that conditions on grant made under s 96 may go beyond Cth's s 51 legislative power, and are not subject to prohibition on discrimination in s 99 and s 51(ii)
- In *P J Magennis Pty Ltd v Commonwealth* (1949) the *War Service Land Settlement Agreements Act 1945 (Cth)* was invalidated as providing for acquisition of property without just terms, contrary to s 51(xxxi)
- Problem with Act was that it expressly provided for agreement between Cth and States for acquisition of land for returning soldiers at historic (1942) values
- This problem later overcome by device of intergovernmental agreement between Cth and States, to much the same effect, coupled with State legislation for acquisition of property at 1942 values – upheld in *Pye v Renshaw* (1951) (state legislation not subject to s 51(xxxi)
- *ICM Agriculture Pty Ltd v Commonwealth* (2009), a case involving intergovernmental agreement for conversion of water licences from one form to another, affirms that s 96 terms and conditions are subject to constitutional limitations in s 51(xxxi)

AG (VIC); EX REL BLACK V COMMONWEALTH (THE *DOGS* CASE)

- *The DOGS* case (1981) had to do with question whether Commonwealth funding of Church schools contravened s 116 (prohibition on establishment of religion)
- Given that mechanism for funding of Church schools by Commonwealth was s 96 grants, preliminary question was whether s 96 is subject to s 116 ← religious power
- Court (per Gibbs J) distinguished *Federal Roads* and *Moran* on basis that s 99 prohibition against State discrimination only applies to 'any law or regulation of trade, commerce or revenue' and that s 96 'cannot properly be regarded as such a law' (at 592)
- Section 116 itself not 'subject to the Constitution' and thus limits s 96 (ibid)
- Concurring on this point, Wilson J confirmed troubling implication of *Moran,* picked up on by Dixon CJ in *Second Uniform Tax Case*, that s 96 may turn States into mere 'conduits' for dispensing of Cth funds, i.e. that State Treasury need not benefit in any way from s 96 grant (at 659-60)
- Only controls on s 96 are that it must be used in a way that is legally (as opposed to politically) non-coercive and that it must provide for financial assistance to the States (ibid)

DEFFENCE POWER

NATURE OF DEFENCE POWER

- Section 51(vi):
  - Parliament may make laws w.r.t. 'the naval and military defence of the Cth and of the several States, and the control of the forces to execute and maintain the laws of the Cth'
- Two fundamental characteristics of this power:
  - Elastic power: extent of Cth's power under s 51(vi) depends on factual assessment of nature of threat to Cth at particular time (*Andrews v Howell* (1941) 65 CLR 255 at 278 per Dixon J)
  - Purpose power: law must be reasonably conducive to defending Australia against some threat
- Fact that much information pertaining to prosecution of war or other defensive measure will be confidential means that:
  - Court often restricted, when ascertaining extent of threat, to facts in common knowledge of which it is able to take judicial notice (*Stenhouse v Coleman* (1944) 69 CLR 457 at 469-71)
  - Standard of review must perforce be quite deferential as executive is in possession of all facts and best placed to make judgment as to nature of threat (ibid)
  - Modern test is whether the law is 'reasonably appropriate and adapted' to achieving the stated defensive purpose in light of the gravity of threat (judicial notice + govt. assurances taken on trust)
- See Brennan J's dissenting judgment in *Polyukhovic v Cth* (1991)
  - Challenge to 1988 amendment to *War Crimes Act 1945* (Cth) (upheld by majority under external affairs power)
  - Brennan J: amending Act not valid exercise of power under s 51(vi), as means adopted (retrospective criminal law) disproportionate to stated defensive purpose (protection of Australians in time of war)
- Test: law must be reasonably appropriate and adapted (i.e. proportionate) to achieving a defence related purpose (*Polyukhovich*)
  - To determine if a law has a defence related purpose, look to **(***Stenhouse***)**:
    - Text of the Act
    - facts that it applies to, and
    - circumstances that called it forth

WARTIME

WW II CASES

- Defence power most extensively relied on during WW II
- Federal system more or less suspended to allow Curtin government to fight war (see extract from Brian Galligan, *Politics of the High Court* (1987))
- Main piece of legislation was *National Security Act 1939* (Cth):
  - Provided for delegation of vast powers to executive
  - Some of regulations made under delegated power found to be *ultra vires* (admin law)
  - Other provisions of Act found to be invalid under s 51 (vi) for delegating too extensively
- Isaacs J's approach in *Farey v Burvett* (1916) (allowing executive prosecution of war under s 61 read with s 51(xxxix)) not tested in WW II cases, but his expansive reading of defence power to same effect *was* tested and found wanting.
- WWII cases established important principle that, however broadly s 51(vi) is interpreted, exercise of defence power is subject to other constitutional guarantees:

- Section 51(xxxi) (acquisition of property on just terms) (*Minister for the Army v Dalziel* (1944)); and
- Section 92 (freedom of interstate trade and commerce) (*Gratwick v Johnson* (1945))

- Nevertheless, scope of Cth power under s 51(vi) in time of total war very wide.

WOMEN'S EMPLOYMENT CASE (1943)

- Women's Employment Board (WEB) initially established by regulations made under *National Security Act 1942* (Cth) to determine wages and conditions for women entering labour force to replace men in armed services
- When Senate disallowed these regulations, new legislative basis for WEB provided by *Women's Employment Act 1942* (Cth), which restored determinations made under disallowed regulations
- Constitutional validity of *Women's Employment Act* tested in *Victorian Chamber of Manufactures v Cth* (*Women's Employment Case*) (1943):
  - Point of contention was that Act did not just cover women working in war-related jobs (category 1), or women working in jobs vacated by men going to war (category 2), but all jobs for which women had previously not been employed (overarching category 3)
  - Latham CJ and McTiernan and Rich JJ upheld Act on broad basis that it regulated new economic conditions prevailing as consequence of war, and therefore 'reasonably ... necessary' (at 357 per Latham CJ)

- As the consequence of the war
- For the purpose of the war
  - Williams J read down Act to apply to categories 1 and 2 only (at 399)
  - Starke J denied that there was a distinct test for defence power as purposive power, and dissented on grounds that Act not sufficiently connected to subject of defence

POST-WAR TIME

- Question is extent to which defence power may be used to deal with consequences of war.
- Cth's power to legislate for certain consequences, such as repatriation and rehabilitation of soldiers which is uncontroversial.
- But other consequences, such as general social and economic conditions prevailing as an indirect consequence of war, may not be indefinitely regulated under defence power (*R v Foster* (1949))
- As with use of power during time of war, scope of defence power after cessation of hostilities depends on factual assessment
- Power does not cease completely because of cessation of hostilities, but survives to cover transitional period during which peace-time conditions restored
- Defence power during transitional period includes power to wind up laws made under defence power during war
- Basic test is whether laws can reasonably be said still to be necessary for regulating some consequence of war (*R v Foster*)

PEACETIME

- Defence power may obviously be used during times of peace for maintaining Australia's defence capabilities
- This aspect of power covers military conscription, training of personnel, manufacture and acquisition of weaponry, construction and maintenance of defence systems etc.

CTH V AUSTRALIAN CTH SHIPPING BOARD (1926):

- Defence power used to legislate for establishment of dockyard on Cockatoo Island
- Shipping Board = managing body responsible for dockyard

- Authorised to engage in general manufacturing and engineering activities
- Argument that this was justified by need to maintain dockyards in state of readiness for war failed

ATTORNEY-GENERAL (VIC) V CTH (CLOTHING FACTORY CASE) (1935):

- Cth legislated to establish clothing factory that manufactured uniforms for defence forces but also Cth and State govt. departments and Boy Scouts Association
- Use of power in this way upheld on basis that manufacture of uniforms for non-military purposes allowed factory to continue functioning at scale, which in turn allowed it to retain staff who might later be needed to produce uniforms for military purposes in time of war

COMMUNIST PARTY CASE (1951)

- The definition of a concept on which Parl.'s power depends must be determined by court
- It is for the court to determine whether there is connection to power exist.
- Act providing for the dissolution of the Community Party & confiscation of members' property was invalid - Cth did not provide link b/w the Act and the defence power. Act also attempted to judicial review, by stating that the Government gets to decide what it within power. → did not concern state of war that Australia was involved in.
- Challenge to *Communist Party Dissolution Act 1950* (Cth):
    - Section 4 of Act declared Australian Communist Party (ACP) unlawful and provided for its dissolution
    - Other measures targeted affiliated organisations and individual communists
    - In respect of these organisations and individuals, very broad discretionary power to dissolve organisation or declare a person to be a Communist was conferred on Governor-General
    - Consequences of dissolution of organisation were forfeiture of property and of declaration of individual as Communist were ban on holding Cth office or employment in defence industries
    - Individuals could contest decision of Governor-General under s 9(4)
    - Preamble to Act claimed that dissolution of ACP was necessary for 'security and defence of Australia' (s 51(vi)) and for execution and maintenance of Constitution and Cth laws (s 61 read with s 51(xxxix)) (referred to in judgments of Dixon and Fullagar JJ as 'the other power')
    - General question raised was whether Court could second-guess legislature's judgment of threat posed by ACP
    - At time of royal assent, Australian forces active in Korea, but country not 'at war'
    - 6:1 majority struck down Act as beyond defence power
    - First principle established by case is that Parliament cannot 'recite itself into power' (per McTiernan J at 205-06), i.e. factual assertions made in preamble to Act are not conclusive of the facts that need to be proved in order to establish basis for exercise of this (or any other) power
- Principles said to be relevant to exercise of defence power in Dixon J's judgment:
    - Mere fact that Australian forces involved in hostilities does not mean that Australia 'at war' in sense required for expansive use of defence power (at 196)
    - Defence power may not be used to confer 'unreviewable discretion' on executive to decide whether circumstances justifying the deprivation of civil liberties exist (at 200)
    - This is especially the case where the legislation deals with subject matter that is not obviously within power (at 201-202)
- Fullagar J's judgment:
    - Distinguishes between use of defence power in peace or war for purposes immediately related to defence aka 'primary aspect', and 'secondary aspect' of power used to address circumstances arising in anticipation of or in consequence of war, and during war (at 254)

- Where secondary aspect of power relied on, there is no exception to general rule of constitutional law that the Court may review the legislature's view on whether the grounds for valid exercise of a constitutional power exist:

'[A] stream cannot rise higher than its source.... The validity of a law ... cannot be made to depend on the opinion of the law-maker ... that the law ... is within the constitutional power upon which the law in question itself depends for its validity' (at 258)

- There were no *notorious* facts of which the Court could take judicial notice that justified the exercise of the *secondary aspect* of the defence power to the extent provided for in the Act, i.e. Dissolution of ACP by legislative fiat (at 267-68)

❖ *The Capital Issues Case* was distinguished because the administrative decision was reviewable

TERRORISM AND NATIONAL SECURITY

- Defence power can extend to terrorism cases but it is not confined to defence against external aggression.
- Interim control order issued to prevent potential terrorist act. Legislation valid as 'terrorist act' fell within the purpose envisaged under s 51(vi).

THOMAS V MOWBRAY (2007)

- Challenge to Division 104 of Part 5.3 of the *Criminal Code* (Cth) authorising imposition of control order on person to prevent terrorist attack or on person who has received training from, or provided training to, a listed terrorist organisation
- Control order, which must be issued by the Federal Court, the Family Court or the FMC, may prohibit range of activities and restrain freedom of movement
- Section 104.4 provides that court must be satisfied that each prohibition or restriction is 'reasonably necessary, and reasonably appropriate and adapted, for protecting the public from a terrorist attack'
- Cth defended control order provisions as valid exercise of defence and/or external affairs powers
- Key issue in respect of defence power leg of case was whether this power is restricted to defending Australia against:
  - *external* threats, such as those arising from conventional war; and
  - threats against collective bodies politic (Cth and States) rather than citizens
- Gummow and Crennan JJ rejected both these contentions and held that measures to protect Australians against domestic terrorist acts fell within core of power
- Gleeson CJ:
  - Sees measures to combat terrorism as falling with core of defence power
  - Seems to imply that, where this is the case, no question of proportionality arises
- Gummow and Crennan JJ:
  - Draw analogy between threat posed by domestic terrorism and crime of treason in English law, which covered internal threats
  - Conclude that s 51(vi) not limited to legislation dealing with threat of aggression from foreign nation
  - Fact that s 51(vi) refers to 'Cth and the several States' cannot be used to restrict power to countering threats posed to entire body politic as opposed to individual citizens/inhabitants and their property
  - 'The notion of a "body politic" cannot sensibly be treated apart from those who are bound together by that body politic.'
  - Combating of terrorist acts falls within core of power (= Fullagar J's 'primary aspect') and therefore no need to consider whether there existed constitutional facts of which the Court could take notice as justifying the exercise of the power on some or other proportionality test

- Hayne J:
  - Dissented from majority on Chapter III grounds
  - Agrees with Kirby J that defence power must be used to defend body politic, but satisfied here
  - Control order measures reasonably appropriated and adapted to level of threat
- Callinan J:
  - Criticizes *Australian Communist Party* majority for being naive about threat posed by international communism
  - Suggests that case might have been decided differently had facts known today about communism been known then
  - Code has in-built proportionality test that must be applied by courts and therefore passes constitutional muster (506)
- Kirby J (in dissent):
  - Internal or external threat justifying exercise of power must be directed at body politic (at 395)
  - Curtailment of civil liberties in Div 104 of Part 5.3 of Criminal Code not appropriated and adapted to level of threat (at 399)
  - It is precisely when threats to nation are highest that respect for civil liberties must be enforced (at 442-43)
- Remaining uncertainties therefore:
  - Does threat posed by terrorism enliven primary aspect of defence power?
  - Where primary aspect enlivened, will Court apply any kind of proportionality test, or will law be held to be within power as being clearly for a defensive purpose?

INCONSISTENCY

BASIC PRINCIPLES

- Section 109:
  - 'When a law of a State is inconsistent with a law of the Cth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'
- 'Law of Cth' here means (provisions of) Acts of Cth Parliament, including provisions authorising making of delegated legislation
- Section 109 does not apply to Territory laws – governed by s 122
- Main area of application is s 51, as it is these laws that fall into area of concurrent State law-making power, which gives rise to possible inconsistency
- Only the particular inconsistent provision in State legislation will be affected, not the whole statute, unless the provision that is found to be inconsistent with Cth law is not severable (*Wenn v Attorney-General for Victoria* (1948) 77 CLR 84)
- Inconsistency of State law dates from time of coming into effect of Cth law
- State law revives without re-enactment when Cth law repealed (*Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557 at 573)
- The word 'invalid' in s 109 is thus interpreted to mean 'inoperative' (ibid)

THE TESTS AND WHEN TO APPLY THEM

- Only valid laws may be inconsistent with each other – thus test for inconsistency is only applied once it has been established that both Cth and State law are otherwise valid and within power
- Cth law that is not within power cannot override a State law under s 109
- Likewise, a State law that falls in the area of the Cth's exclusive powers under s 52 is invalid whether or not inconsistent with a Cth law
- And Cth or State laws that contravene an (implied) right or freedom will also not be subject to test for inconsistency
- Three principal tests are used:
  - the 'simultaneous obedience' test
  - the 'conferral of rights' test
  - the 'cover the field' test
- First two are so-called 'direct tests' and the third an 'indirect' test, although usefulness of this terminology has been called into question

TEST 1: SIMULTANEOUS OBEDIENCE TEST

- Basic idea underlying this test: laws will be inconsistent with each other where it is impossible to obey both at the same time
- E.g. Qld law requiring referendum to be held on same day as federal Senate elections and Cth law prohibiting State referenda on days when federal Senate elections held (*R v Brisbane Licensing Court; Ex parte Daniell* (1920) 28 CLR 23)
- Cf. Cth law prescribing higher minimum wage than State law in particular sector – possible to obey both by paying higher minimum wage, so not inconsistent on this test (*Australian Boot Trade Employees Federation v Whybrow* (1910) 10 CLR 266))
- Where Cth and State laws prohibit same conduct, with differing penalties, Cth law will prevail (*Ex parte McLean* (1930) 43 CLR 472 at 483)

- But where same conduct gives rise to separate offences under Cth and State law, both may be valid:
  - *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 (failure to answer questions at joint federal and State inquiry); and
  - *McWaters v Day* (1989) 168 CLR 289 (soldier driving under the influence may be convicted both under State driving law and Cth military law)

TEST 2: THE CONFERRAL OF RIGHTS TEST

CLYDE ENGINEERING CO LTD V COWBURN (1926) 37 CLR 466:

- Award under *Conciliation and Arbitration Act 1904* (Cth) fixing 48-hour working week with deductions from pay where fewer hours worked
- *Forty Four Hours Week Act 1925* (NSW) prescribing 44-hour working week
- Cowburn worked 44-hour week and employer made deduction from wages for hours not worked
- Employer's right to expect 48 hours' work denied by State law and workers' right to full wage for working 44 hours denied by federal award
- Either employers or employees could obey both by waiving rights but, why should they?
- '[O]ne statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it') (per Knox CJ and Gavan Duffy J at 489)

COLVIN V BRADLEY BROTHER PTY LTD (1943) 68 CLR 151:

- Cth law provided that employers could employ women to work on milling machines, whereas State law made it an offence to do so
- Both could be obeyed by not employing women, as Cth law permissive rather than mandatory, but State law took away rights conferred by Cth law (i.e. of women to work on milling machines)
- Court accordingly declared State law unenforceable

OPERATIONAL INCONSISTENCY

- Rule emerging from *AMP* is that State law that 'would alter, impair or detract from the operation of a law of the Cth Parliament' must be found inconsistent (at 337)
- Does this give rise to a fourth test, for operational inconsistency?

APLA LTD V LEGAL SERVICES COMMISSIONER (NSW) (2005) 219 ALR 403:

- *Legal Profession Amendment (Personal Injury) Regulation* (NSW) prohibited advertisement by lawyers for services related to personal injury claims
- Various Cth statutes provided rights to compensation for personal injury victims
- Kirby J, in dissent, held that *AMP* rule supported plaintiffs' contention that State prohibition on advertising for legal services detracted from various Cth scheme for recovery of compensation
- To vindicate rights, personal injury claimants must know what their rights are
- Majority distinguishes *AMP* on grounds that discrimination 'is of the essence of life insurance' whereas '[n]one of the federal legislation depends for its efficacy upon the unrestricted promotion of legal services' (at 416 per Gleeson CJ and Heydon J)
- Callinan J draws distinction between significant and marginal impact on Cth law, saying impact here so marginal as to be inconsequential (at 528-29)

– Possibility still exists, however, that in appropriate case Court might refuse to enforce State law on grounds of operational inconsistency where 'cover the field' test would not have produced inconsistency (because fields regulated by Cth and State not the same)

TEST 3: COVERING THE FIELD

- Three steps to cover the field test (*Clyde Engineering* at 489-90 per Isaacs J):
- Identify or characterise the field that the Cth law deals with
- Decide whether field covered by State law overlaps with that field
- If so, decide whether Cth intended to cover the field to exclude State law
- Indirect test in sense that operation of law does not generate conflict, rather Cth's intention to regulate the particular provision- *Clyde Engineering* (1926) (at 489):
  - *'If, however, a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field'*
  - Once established that Cth intended to cover the field (whether expressly or impliedly) there is no need to compare Cth and State provisions to see whether they conflict (at 490)
- Test endorsed by majority in *Ex parte McLean* (1930):

EX PARTE MCLEAN (1930):

- Section 44 of *Conciliation and Arbitration Act 1904* (Cth) provided for penalty up to maximum set by Court of Conciliation and Arbitration or Conciliation Commissioner for breach of an award
- *Masters and Servants Act 1902* (NSW) set maximum penalty of £10 for breaching contract of service
- Itinerant shearer (Mclean) breached contract of service
- Successfully argued that he should be penalised under Cth law only
- Dixon J held that inconsistency in this case 'depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed' (at 483)

STEP 1: IDENTIFYING OR CHARACTERISING THE FIELD

- Process of identification of subject matter similar to that followed in characterisation (what is the law about?)
- Cover the field test open to judicial discretion/manipulation at this point as much depends on how widely or narrowly the two fields are defined
- In *O'Sullivan v Noarlunga Meat* (1954) (see economic powers), fields of Cth and State legislation defined as licensing of premises for slaughtering of stock for export, thus overlapped, whereas, on narrow definition, Cth law dealt with matters of hygiene and production quality, and State law with identity of proprietor ('fit and proper persons') and location of abattoir
- In *Airlines of NSW v NSW (No 2)* – both Cth law and State law set licence conditions for operating commercial aircraft but found not to overlap (or to conflict?) because different considerations set for grant of licence in each case (air safety v facilitation of competition in air industry)

STEP 2: DECIDE WHETHER STATE LAW ENCROACHES ON FIELD COVERED BY CTH LAW

ANSETT TRANSPORT INDUSTRIES V WARDLEY

- Issue: Did State law on discrimination encroach on Cth award regulating conditions of dismissal?
- There was a clear overlap between two areas of regulation, as the facts of the case illustrated, but majority decided that the two laws in effect dealt with two separate fields (dismissal procedure and substantive grounds for dismissal)

COMMERCIAL RADIO COFFS HARBOUR V FULLER

- Radio station argued that, having been granted a licence to broadcast under *Broadcasting and Television Act 1942* (Cth), its broadcasting activities could not be restricted by State legislation
- Court held that Cth law did not 'purport to state exclusively or exhaustively the law with which the operation of a commercial broadcasting station must comply', but merely prohibited broadcasting without a licence (at 56)
- Grant of licence therefore did not exempt licensee from compliance with State law (ibid)

AUSTRALIAN MUTUAL PROVIDENT SOCIETY V GOULDEN

- AMP refused to vary policy to permit waiver of premium payments in event of total disability
- *Life Insurance Act 1945* (Cth) found to cover field of insurance to exclusion of *Anti-Discrimination Act 1977* (NSW) prohibiting discrimination on ground of disability

STEP 3: INTENTION TO COVER FIELD MAY EITHER BE EXPRESS OR IMPLIED

- Express intention may either be to cover the field or to leave it open for complementary State laws

WENN V ATTORNEY-GENERAL (VIC) (1948) 77 CLR 84:

- Post WWII Cth statute silent on question whether preferential treatment should be given to returned servicemen in employment promotion, whereas Discharged Servicemen's Preference Act 1943 (Vic) expressly provided for such preferential treatment
- Cth statute contained express intention clause saying that its provisions were in general intended to override inconsistent State law
- Express intention clause crucial to Court's determination that the Cth statute's silence on this issue was deliberate, i.e. that it intended to override State law
- Provided subject of Cth legislation within power (as here: defence power), a statement that the Cth law overrides State law not invalid interference with State legislative powers
- Obviously, clause in Cth law expressing intention to cover the field will fail where Cth has no legislative power over issue in question (*Airlines of New South Wales Pty Ltd v NSW (No 2)* (1965))

MANUFACTURED INCONSISTENCY AND IMPLIED INTENTION TO COVER THE FIELD

BOTANY MUNICIPAL COUNCIL V FEDERAL AIRPORTS CORPORATION (1992) 175 CLR 453

- Extension of Sydney Airport undertaken i.t.o. Cth regulations that expressly excluded applicable State law
- Regulations made after Sydney local councils had tried to stop construction of airport in NSW Land and Environment Court alleging EIS required under *Environmental Planning and Assessment Act 1979* (NSW)
- Clear that purpose of regulations was to exclude application of State law
- But Court held that regulations were within power, and that provided this is so, provisions that expressly oust State laws will not be unconstitutional
- Two bases on which implied intention may be inferred:

1. From the detail of the legislative regime (generally, the more exhaustive the detail, the more likely that an intention to cover the field will be inferred – but in some cases the absence of detail founds inference of intention to cover field, e.g. empowering provision)

2. From the subject matter of legislation (does subject matter by its nature require uniform regime across all States? E.g. currency, intellectual property, weights and measures, quarantine)

- Either or both of these indicators may be used, but neither is decisive

CLEARING THE FIELD AND RETROACTIVITY

- Cth may validly declare intention *not* to cover field
- E.g. s 75 of *Trade Practices Act 1974* (Cth):
  - Provides that Act 'not intended to exclude or limit the concurrent operation of any law of a State or Territory'
  - Also prohibits double criminal punishment under Cth and State law
- Such clauses do not, however, immunise State laws from tests for direct inconsistency because these have nothing to do with intention to cover field but with question whether the text or operation of the two laws conflict

R V CREDIT TRIBUNAL; EX PARTE GENERAL MOTORS ACCEPTANCE CORPORATION (GMAC CASE)

- Considers s 75 of *Trade Practices Act 1974* (Cth)
- '[A] Cth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Cth law, to have an operation. Here again the Cth law does not of its own force give State laws a valid operation. All that it does is to make it clear that the Cth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Cth law.'

RETROACTIVE LAWS AND THE PURPOSE OF S 109

UNIVERSITY OF WOLLONGONG V METWALLY (1984) 158 CLR 447:

- Student successfully lodged complaint of victimisation against UW under *Anti-Discrimination Act* 1977 (NSW)
- University appealed to NSW Court of Appeal, and then to High Court
- Question of inconsistency between State Act and *Racial Discrimination Act 1975* (Cth) had been decided by High Court in *Viskauskas v Niland* (1983) 153 CLR 280 (declaring State Act inconsistent with Cth Act)
- Cth Act amended in 1983 expressly to indicate intention not to exclude State law, and that intention should be deemed never to have been to do so
- Alleged discriminatory treatment had occurred in period covered by retrospective application
- 4-3 majority of High Court in *Metwally* held that 1983 amendment incapable of giving the State Act a valid operation prior to 1983 as the invalidity of the State Act arose by operation of s 109:
  - *'The Commonwealth Parliament cannot enact a law which would affect the operation of s 109, either by declaring that a State law, although not inconsistent with any Commonwealth law, shall be invalid, or that a State law which is inconsistent with a Commonwealth law shall be valid'* (per Gibbs CJ at 455)
- According to principle of constitutional supremacy, Cth Parliament cannot enact a law which would retrospectively deprive s 109 of its operation (at 457)

CLEARING THE FIELD AND CONCURRENCY

- *Momsilovic v The Queen* (2011) 245 CLR 1 raises question of extent to which Cth may clear field for concurrent application of state laws:

MOMSILOVIC V THE QUEEN

- Section 300.4 of Pt 9.1 of federal Criminal Code provided that Pt 9.1 not intended to exclude or limit concurrent operation of State law
- Appellant convicted under s 71AC of *Drugs, Poisons and Controlled Substances Act 1981* (Vic)
- That act contained reverse onus provision in s 5 (possession deemed after proof of occupation)
- State offence similar to offence under s 302.4 of Pt 9.1 of federal Criminal Code
- Section 4C (2) of *Crimes Act 1914* (Cth) further provided that persons punished under state law not punishable for same offence under Cth law
- 6:1 majority of High Court upholds s 300.4 of Code as constitutionally compatible clearing the field clause – despite earlier holding in *Dickson v The Queen* (2010) 241 CLR 491 that suggested that, where Cth and state criminal offences in respect of same conduct have different elements, Cth can't provide for concurrent application (direct inconsistency overrides a clearing the field provision)
- Majority holds that s 300.4 of Pt 9.1 of federal Criminal Code and s 4C(2) of *Crimes Act 1914* (Cth) must be factored in to interpretation of s 302.4, thereby reducing possibility of direct inconsistency
- Hayne J in dissent reasons that state and Cth criminal provisions that cannot on their face operate concurrently cannot be saved by a clearing the field clause
- Note that majority decision premised on inapplicability of s 5 of state law to s 71AC – meant that state law 'less stringent' than federal law – the converse of situation in *Dickson*

RELATIONSHIP BETWEEN TESTS

- Cover the field test may produce inconsistency where tests 1 & 2 do not, and conversely tests 1 & 2 may produce inconsistency where no intention to cover field
- In *Telstra Corporation Ltd v Worthing* (1997) 197 CLR 61 authority for proposition that absence of intention to cover field does not save State law that is invalid by reason of direct inconsistency (tests 1 & 2)

COMMERCIAL RADIO COFFS HARBOUR V FULLER (1986) 161 CLR 47:

- Commercial radio licence granted under *Broadcasting and Television Act 1942* (Cth) made conditional on erection of two antennae
- Local environmental group sought further environmental impact assessment under *Environmental Planning and Assessment Act 1970* (NSW) in Land and Environment Court
- Question of consistency removed to High Court, which applied all three tests
- Duty to comply with licence condition construed as being subject to State law (test 1)
- No inconsistency under test 2 since Cth law did not confer absolute right to erect antennae
- Held that Cth legislation and State legislation occupied different fields (test 3)

- Often, however, the three tests overlap in the sense that they produce the same result, either inconsistency or no inconsistency
- *Ansett Transport Industries Operations Pty Ltd v Wardley* (1980) 142 CLR 237 is another example of a case where all three tests were applied to find no inconsistency:

ANSETT TRANSPORT INDUSTRIES OPERATIONS PTY LTD V WARDLEY

- Award under *Conciliation and Arbitration Act 1904* (Cth) gave airlines right to dismiss employees without following standard procedure within first six months
- *Equal Opportunity Act* 1977 (Vic) prohibited discrimination on grounds of sex or marital status

  - Female trainee pilot (Wardley) dismissed contrary to State law after being employed for six months
  - Victorian Equal Opportunity Board found dismissal unlawful and ordered her re-employment
  - Airline argued before High Court that Cth law gave unrestricted right to dismiss, overriding State law
  - Majority held that intention behind Cth award was only that dismissal procedure should not be restricted, not grounds for dismissal, which were subject to State law (at 262-64 per Mason J)
  - Provision in award allowing for dismissal on 7 days' notice should be read subject to substantive criteria supplied by State industrial law
  - State law does not detract from rights conferred by Cth law (test 2) because Cth law did not confer absolute right to dismiss for any reason whatsoever (Mason J at 259; Stephen J at 252)
  - Aickin J dissents on ground that Cth award was intended to provide for an absolute right to dismiss to exclusion of State law

- Difference between judgments does not relate to disagreement over nature of tests but to application of covering the field test and construction of Cth award

AMP FUND SOCIETY V GOULDEN (1986)

  - *Ansett* case may be compared with this case:
  - Like *Ansett*, involved interaction of State anti-discrimination law, in this case *Anti-Discrimination Act 1977* (NSW), with Cth law of more general application (*Life Insurance Act 1945* (Cth))
  - Goulden, who was blind, sought to vary life insurance policy by adding a clause that provided that he would not have to pay premiums if disabled by illness, accident or injury
  - AMP's refusal to grant variation found to be discriminatory under NSW Act
  - High Court overturned this decision in unanimous judgment
  - At first blush, case looks exactly the same as *Ansett*
  - Distinction seems to be that effective carrying out of AMP's business depended on its being able to make the sort of discriminatory risk assessment at issue, i.e. that blind people would pose a higher risk of total disability and therefore could not be offered the premium waiver option
  - Life insurers' capacity to manage risk seen by Court as being to advantage of insured persons generally, and therefore essential to proper functioning of Cth Act
  - This line of reasoning appears to subordinate principle of non-discrimination to business interests
  - Had AMP been forced to offer premium waiver, it could have mitigated risk by higher premiums
  - Enforcement of rights such as non-discrimination has costs that society must be prepared to bear

FEDERAL COMPACT – THE MELBOURNE CORPORATION PRINCIPLE

BACKGROUND

- As we have seen, the doctrine of implied immunity of instrumentalities adopted in *D'Emden v Pedder* (1904) 1 CLR 91 was overruled in the *Engineers* case (1920)

- Since then, however, this doctrine has crept back in a different form, on the assumption that there must be some limitations on Cth power to make laws affecting the States and vice versa
- Crucial difference from earlier doctrine is that there is now no assumption that the immunities enjoyed by Cth and States from each other's laws are identical, i.e. that what the Cth can do to the States mirrors exactly what the States can do to the Cth
- In this course, we look only at Cth legislative power over the States
- The implied limitation on Cth power in this respect is said to derive from the fact that 'the Constitution assumes the continuing existence of the States, their co-existence as independent entities within the Cth, and the functioning of their governments' (*Clarke v Commissioner of Taxation* (2009) per French J)
- The textual basis for this implied limitation is the reference to 'one indissoluble Federal Cth' in the Preamble, covering clauses 3, 5 and 6, and Ch. V (ibid)

MELBOURNE CORPORATION (1947)

- Section 48 of *Banking Act 1945* (Cth) provided that banks could not provide banking services to States and their authorities without consent of Cth Treasurer
- Challenged as invalid exercise of power under s 51(xiii) (banking power)
- Dixon J enunciates new principle limiting Cth legislative power w.r.t. States:
  - Starts by drawing distinction between Cth laws of general application that happen to affect State governments and laws 'singling out [State] governments and placing special burdens upon the exercise of powers or the fulfilment of functions constitutionally belonging to them' (at 81-82)
  - Such laws, even if connected to head of Cth power, will not be valid unless Constitution expressly contemplates control of State activities under that head of power (such as s 51(xxxiii)
  - Another phrase often quoted from this judgment: 'The Constitution predicates [the] continued existence [of Cth and State governments] as independent entities' (at 82)
  - Later dictum suggests that Cth laws hit by this principle must be 'calculated to destroy or detract from the independent exercise of [State functions]' (much harder for States to show)
  - Principle not reciprocal: 'the question what the federal Govt. may do regarding to the States and the question of what a State may do about the federal Govt. are two quite different questions and they are affected by considerations that are not the same' (at 82)
  - Dixon J also careful to distinguish new principle from reserved State powers doctrine: 'The considerations upon which the States' title to protection from Cth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions' (at 83)
- Other judgments in *Melbourne Corporation* case provide slightly different slant
- Starke J:
  - Implication to be drawn from federal character of the Constitution is that it is beyond the power of Cth and States 'to abolish or destroy the other' (at 70)
  - Disagrees with Dixon J's view that key test is whether Cth law discriminates against State governments in sense of targeting them alone
  - Law of general application may, as a practical matter, curtail or interfere in a substantial manner with the exercise of State constitutional powers (at 75)
- Latham CJ:
  - Also rejects Dixon J's emphasis on laws that discriminate against States in sense of specifically targeting them (at 60-61)
  - Real issue is whether challenged legislation may properly be characterised as legislation targeting a State function, or whether its effect on State functions is indirect (at 61)

- Finds test of 'undue interference' too vague (at 61-62).

- Rich J:
  - Key issue is whether Cth legislation threatens States continued existence, either because States or their agencies are singled out, or because they are indirectly affected by law of general application (at 66).

LATER ATTEMPTS TO CLARIFY THE PRINCIPLE

- Upshot is that *Melbourne Corporation* case does not stand for a clear principle, other than that there is some limit on what the Cth can do to the States, either by singling them out specifically and placing special burdens on them, or by indirectly interfering, albeit in a law of general application, with their continued existence or capacity to function as governments
- But not clear whether laws that single out States for special treatment are *per se* invalid, because discriminatory, or whether they also have to interfere in their functions to a sufficiently serious extent to warrant constitutional censure

RESTATEMENT I: 2 PRINCIPLES

- In *Tasmanian Dam* case (1983) Mason J identified two limbs to principle:
  1. Cth law may not discriminate against States by placing special burden or disability on them;
  2. Cth law of general application may not inhibit or impair States' continued existence or capacity to function
- Mason J appeared to see these two limbs as independent principles, i.e. resulting in invalidity if either limb is breached (see particularly p. 139 of his judgment)
- This approach seemingly confirmed in *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

QUEENSLAND ELECTRICITY COMMISSION V COMMONWEALTH (1985)

- *Conciliation and Arbitration (Electricity) Act 1985* (Cth) specifically targeted an industrial dispute between the Electrical Trades Union, the QEC and other Queensland electricity authorities and provided for an expedited settlement procedure in Commonwealth Conciliation and Arbitration Commission
- Plaintiff challenged the validity of these provisions under *Melbourne Corporation*
- Mason J re-iterated the 'two elements' of the principle and then added sub-rules:
  - First element of principle protects both States individually and collectively (at 218)
  - Principle protects both State legislatures and executives (ibid)
  - Cth may deprive State of a right, privilege or benefit not enjoyed by others (e.g. State prerogative) to place that State on an equal footing with other States (ibid)
  - Principle applies to agencies of State, even where they act independently of govt. direction (ibid)
- Held that the Act singled out industrial disputes to which agencies of Qld were party and subjected them to special procedures different from general law (at 219)
- On this basis Act invalid in its entirety, appearing to provide majority support for Mason J's suggestion in *Tasmanian Dam* that violation of first element of principle would suffice (there was no suggestion that Qld government's continued existence or capacity to function was threatened)

RE AUSTRALIAN EDUCATION UNION (1995)

- To what extent does Cth's conciliation and arbitration power under s 51(xxxv) (and other heads of power) allow it to regulate employment relationship between State governments and their employees?
- *Re Australian Education Union; Ex parte Victoria* (1995) addressed this question in relation to dispute over redundancy package between Victoria and public school teachers and public sector health workers:

- Six-judge joint judgment rejected earlier blanket 'administrative services exception', i.e. view that all employees in administrative service of State be exempt from federal regulation
- Instead, Court based decision on distinction between 'lower level' and 'higher level employees', and between determining number and identity of employees employed and their wages and conditions
- In respect of 'lower level employees', State has exclusive power to determine 'the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds' (at 232)
- However, federal award prescribing minimum wages and working conditions would be valid, provided it took account of 'any special functions or responsibilities which attach to the employees'
- Higher level employees would be exempt from federal regulation altogether (at 233)
- Thus held that Victoria's decision to dismiss employees on ground of redundancy not subject to federal award because Cth regulation of this issue would curtail State's capacity to function

- Second aspect of case concerned discrimination leg of *Melbourne Corporation* principle:
  - Section 111(1)(g) of *Industrial Relations Act 1988* (Cth) conferred discretion on Commission to dismiss a matter if further proceedings not in public interest
  - Section 111(1A) inserted in 1992 fettering Commission's discretion in matters involving 'an order, award, decision, or determination of a State industrial authority' that 'cannot be dealt with by a State arbitrator by compulsory arbitration'
  - This provision inserted in direct response to Victorian law denying access to compulsory arbitration
  - Argument was that s 111(1A) discriminated against Victoria by providing for differential application of s 111(1)(g) in cases where compulsory arbitration not available at State level
  - Six-judge joint judgment holds that subjective motives of Cth Parliament could not be considered – rather objective purpose as manifest in actual operation of law
  - Here, objective purpose was to ensure that *all* industrial disputes should be resolved by compulsory arbitration
  - Viewed thus, 1992 amendment simply implemented this policy position and was not discriminatory
- In light of rejection of separate discrimination limb (in *Austin* below), this aspect of case must now be read as affecting overall determination of whether law impairs, curtails or weakens State's capacity to function or the actual exercise of its powers

VICTORIA V COMMONWEALTH (1996)

- Applied first part of *Re Australian Education Union* case to 1993 amendments to *Industrial Relations Act*
- In provision by provision analysis five-judge joint judgment took view that amending provisions must be read down wherever they appeared to apply to high-level officials or to State prerogative to dismiss employees on grounds of redundancy
- Otherwise *Melbourne Corporation* principle found to have no application
- Thus, provisions dealing with minimum wages found not to discriminate against States as these provisions applied generally to all employees (whether employee of State or not) with no differential impact on States when actual operation considered
- But same provisions read down in accordance with s 15A of *Acts Interpretation Act* as not binding the States in respect of high-level employees or low-level employees in so far as these provisions purported to interfere with States' capacity to determine the number and identity of those it wished to employ or dismiss on redundancy grounds

RESTATEMENT II: 1 PRINCIPLES

- In *Austin*, Gaudron, Gummow and Hayne JJ rejected the dictum of Mason J in the *Melbourne Corporation* and proposed a fundamental return to Stake J's judgment
- Starke J disputed the emphasis that the other judges placed on discrimination in favour of the principle
- The conceptual shift in *Austin* turned away from the earlier importance that had a decisive turning away placed on the importance of discrimination as discrete limb in earlier cases.

AUSTIN V COMMONWEALTH (2003)

- *Queensland Electricity Commission*'s treatment of two limbs of principle as independent reversed in *Austin v Commonwealth* (2003):
    - Ordinary Cth tax on superannuation contributions in hands of employer not applicable to judges as their pensions not drawn from superannuation contributions but from consolidated revenue
    - Two 1997 Cth statutes targeted 'high-income members of constitutionally protected superannuation funds' (a group that included judges), deemed them to have made contributions to their respective pension funds, and then taxed them on the yearly deemed amount
    - Austin, a judge of the Supreme Court of NSW, challenged law under *Melbourne Corporation* principle
    - Joint judgment of Gaudron, Gummow and Hayne JJ s in 6-judge bench held that there was 'but one limitation' on Cth legislative power, and that breach of this limitation depended on 'assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments"' (at 249)
    - Here, Cth law imposed a special burden on States that had opted to provide for judicial pensions from consolidated revenue and to that extent interfered with their 'constitutional power' to determine how best to remunerate their judges (at 262)
    - Gleeson CJ decided case as one of discrimination, i.e. differential treatment of high-income earners (at 219), but had earlier said that 'discrimination is an aspect of a wider principle' (at 217)
    - Four judges thus held that there was only one implied limitation, the infringement of which should be assessed cumulatively on the basis of a range of factors (Kirby J, though in dissent, agreed with this particular proposition (at 301); McHugh J supported outcome but followed two-element approach in *Queensland Electricity Commission* (at 281))

CLARKE V COMMISSIONER OF TAXATION (2009)

- Confirms 4-judge majority holding in *Austin* that there is 'but one limitation' on the Cth's legislative power w.r.t. the States that may be implied from the Constitution:
    - *'The Cth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions ... or significantly impair, curtail or weaken the actual exercise of those powers or functions'* (per French CJ at para 32)
- French CJ sets out multifactorial test for whether this limitation has been infringed, with factors to be considered cumulatively:
    - Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally
    - Whether the operation of a law of general application imposes a particular burden or disability on the States
    - The effect of the law upon the capacity of the States to exercise their constitutional powers
    - The effect of the law upon the exercise of their functions by the States
    - The nature of the capacity or functions affected
    - The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application
- While not expressly endorsing this test, Gummow, Heydon, Keifel and Bell JJ in joint judgment agree that *Austin* should be read in this way

FORTESCUE METALS GROUP LTD V COMMONWEALTH (2013)

- Cth Mineral Resource Rent Tax (MRRT) levied on mining profits above a certain threshold, less any state mining royalties already charged
- Effect of MRRT was to negate any competitive advantage a state might be able to gain by lowering rate of mining royalties in comparison to other states
- MRRT clearly within s 51(ii) and did not discriminate between states or otherwise infringe s 99 as tax applied equally to mining in all states
- Tax imposed on mining companies and thus not contrary to s 114
- This left *Melbourne Corporation* principle argument that MRRT interfered with states' capacity to function as independent constitutional entities on grounds that it compromised ability to adjust state mining royalties rate in line with state economic development priorities
- Hayne, Bell and Keanne JJ applied range of factors from past cases (at 67) to reject:
  - MRRT not aimed at states
  - Does not impose any special burdens or disability on exercise of powers and fulfilment of functions
  - Does not formally deny capacity of states to fix rate of mining royalties
  - To extent that it affects capacity to vary rate to attract mining investment, this 'does not impose limit or burden on any state in the exercise of its constitutional functions'

WORK CHOICES CASE (2006)

- Section 117 of amended *Workplace Relations Act 1996* (Cth) empowered Australian Industrial Relations to Commission (AIRC) to restrain State industrial authority from dealing with any matter that was subject to a proceeding before it
- This provision no different from earlier provisions enacted under s 51(xxxv)
- Five-judge joint majority thus not inclined to invalidate it without good reason
- Read provisions to mean:
  - AIRC's power to restrain State industrial authority from hearing a matter applied only where matter exactly same as matter to be dealt with by AIRC
  - Provision did not prevent enforcement of valid State law because State law would in any case be inoperative under s 109
  - Section 117 did not give AIRC power to restrain State courts from exercising their ordinary criminal and civil jurisdiction
- Understood in this way, s 117 did not infringe *Melbourne Corporation* principle:
  - *'The interest of a State in having a 'State industrial authority' determine a matter in a way which is likely to lead to a conflict with the handling of that matter by a Full Bench of the AIRC is not so vital to the functioning of the State that it can be said ... that it affects the capacity of the State to "function as a government" or to "exercise constitutional functions"'* (at 174)

FREEDOM OF INTERSTATE TRADE AND COMMERCE

EARLY APPROACHES

- Section 92 provides in part:

  - On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

- Most litigated section of Constitution until unanimous decision in *Cole v Whitfield* (1988) cleared up many of the interpretive difficulties.
- Before federation, Vic, SA, Tas and Qld pursued protectionist policies vis-à-vis other colonies, including imposition of tariffs and quotas on imported goods.
- So, clear intention behind s 92 was to prevent protectionist regulation of interstate trade and commerce by States (and in theory also Cth).
- As discussed in s 51(i), *WA McArthur v Queensland* (1920) defined 'trade' and 'commerce' by reference to commercial usage, i.e. as understood by traders and commercial people.
- Early 'free trade' interpretation targeted *discriminatory* burdens on interstate trade (e.g. higher State liquor licence fee for sale of out-of-State alcohol).
- This theory gradually whittled away by 'individual rights theory', which interpreted s 92 as establishing a private right to engage in interstate trade and commerce, subject only to minimal regulation.

INDIVIDUAL RIGHTS THEORY

- Individual rights theory finally endorsed in *Bank of NSW v Cth* (1948) 76 CLR 1

BANK OF NSW V CTH

- *Banking Act 1947* (Cth) provided for nationalisation of banks, but did not discriminate against interstate trade, so was not contrary to s 92 on 'free trade' theory
- High Court invalidated the Act on ground that it prohibited private banks from engaging in business of interstate banking, i.e. on basis that there was an individual right to engage in particular types of trading and commercial activity:
  - '[T]he freedom guaranteed by s 92 is a personal right attaching to the individual' akin to guarantees in ss 116 and 117 (at 283-84)
- *Banking Act* also declared invalid against s 51(xxxi) (acquisition of property).
- Section 92 part of case appealed to Privy Council (*Cth v Bank of NSW* (1949) 79 CLR 497), even though it involved a so-called *inter se* question i.t.o. s 74.
- PC confirmed High Court approach, i.e. Cth and States may *regulate* interstate trade and commerce, but may not impose direct and immediate *restriction or prohibition*

COLE V WHITFIELD (1988)

- Distinction between mere regulation of interstate trade and commerce and direct and immediate restriction or prohibition virtually impossible to draw.
- Case law became a mass of incomprehensible formalistic distinctions
- New approach to s 92 laid down in *Cole v Whitfield* (1988) 165 CLR 360:
  - Tasmanian sea fisheries regulations prohibited trade in crayfish below specified minimum size
  - This size larger than size set in SA, where crayfish matured sooner
  - Whitfield imported and traded in SA minimum-size crayfish, but breached Tas regulation
  - When prosecuted, based defence on invalidity of Tas regulation against s 92
  - High Court reverted to historical object of 'free trade', relying on Convention Debates for first time
  - Rejected 'individual right theory' as creating a kind of 'protectionism in reverse', i.e. resulting in stricter regulation of intrastate trade and commerce as opposed to interstate trade and commerce

- New test is that s 92 prohibits imposition of discriminatory burdens on interstate trade and commerce of a protectionist kind, i.e. subjection of *interstate* trade and commerce to disabilities or disadvantages for purposes of protecting *intrastate* trade and commerce from external competition
- On facts, regulation applied equally to all crayfish and therefore not discriminatory (at 409)
- Even if discriminatory, purpose was not to protect Tas industry from competition but to protect Tas crayfish from extinction (at 409-10)

OTHER ISSUES ARISING FROM *COLE V WHITFIELD*

- Discrimination may be factual (effect) or legal (clear from face of legislation):
  - *'The concept of discrimination in its application to interstate trade and commerce necessarily embraces factual discrimination as well as legal operation. A law will discriminate against interstate trade and commerce if the law on its face subjects that trade and commerce to a disability or a disadvantage or if the factual operation of the law produces such a result'* (*Cole v Whitfield* at 399)
  - In both cases, law will be contrary to s 92 if discrimination found to be protectionist
  - Leaves open question of whether protectionism must be primary purpose or mere incidental effect
- Relationship between s 92 and s 51(i)
  - Conferral of plenary power on Cth to makes laws w.r.t. interstate trade and commerce clearly means s 92 can't be interpreted as guaranteeing absolute freedom from regulation of any kind
  - Rather, s 51(i) gives Cth the power to pass laws that s 92 does not forbid, i.e. laws that do not discriminate against interstate trade and commerce in a protectionist sense
  - Not likely, but also not impossible that Cth law that is neutral on its face as between intrastate and interstate trade and commerce will be discriminatory in effect and protectionist (at 407)
  - Section 92 also limits laws enacted under heads of Cth legislative power other than s 51(i) (at 400)
  - Having said that, main target of s 92 is State laws
- Scope of freedom of interstate intercourse not necessarily same as scope of freedom of interstate trade and commerce (*Cole v Whitfield* at 394)

DEVELOPMENT OF *COLE V WHITFIELD* TEST

- Further illustration of *Cole v Whitfield* test in *Bath v Alston Holdings Pty Ltd* (1988):

BATH V ALSTON HOLDINGS PTY LTD

- Victorian law imposed licence fees on retail tobacconists calculated as percentage of value of tobacco sold, but exempted tobacco purchased from Vic wholesalers where licence fees already paid
- Presents similar sort of problem as *Cole*: purpose to avoid double taxation or protectionism?
- Court splits 4:3
- Majority: facial discrimination clear as distinction made between wholesale tobacco purchased in Victoria and out-of-State wholesale tobacco
- Also, substantively discriminatory in a protectionist sense: either out-of-State wholesalers would have to pay equal or higher taxes in their State, in which case additional Victorian licence fee would make it impossible for them to operate in Victoria at all
- Or out-of-state wholesalers would have to pay no or lower licence fees in their State, in which case Victorian wholesalers will be protected from competition
- Even if purpose of tax is to equalise taxes as between States, would still be protectionist
- Only legitimate tax on retailers is one that applies equally to goods sourced within and outside State

- Minority (Wilson, Dawson and Toohey JJ) argue that majority ignores actual economic operation of tax, i.e. that any disadvantage imposed on out-of-State wholesalers by the exemption from retail licence fee of tobacco sourced from Victorian wholesalers will be offset by imposition of tax on Victorian wholesalers

CASTLEMAINE TOOHEYS LTD V SOUTH AUSTRALIA (1990) 169 CLR 436:

- *Beverage Container Act 1975* (SA), as amended in 1986, imposed certain disadvantages on sale of beer in non-refillable bottles (higher deposit that could be recouped from any retailer of non-refillable bottles - not necessarily seller of returned bottle - and no central collection depot)
- This regulation prevented Bond Brewing companies from expanding share of SA market because their beer was sold in non-refillable bottles and it was too expensive to convert their manufacturing plants to use refillable bottles
- South Australia argued that the purpose of the law was to prevent litter and conserve energy and resources (re-filling bottles more energy efficient than melting them down and remaking them)
- Law did not discriminate on its face against interstate trade and commerce, but imposed burden on interstate trade and commerce in so far as plaintiff unable to increase share of SA beer market
- Mason CJ, and Brennan, Deane, Dawson and Toohey JJ apply a proportionality test to decide whether a law that is protectionist in effect, but has a purpose other than protectionism, is 'necessary or appropriate and adapted' to that other purpose (at 472-73)
- Deposit on non-refillable bottles higher than necessary to achieve stated purpose (at 474) and imposition of burden on bottles manufactured out of State could not possibly serve purpose of conserving SA energy and resources (at 477)
- Gaudron and McHugh JJ apply test for discrimination: differential treatment in law (as here between refillable and non-refillable bottles) must be reasonably capable of achieving object (litter reduction, energy conservation) – amounts to rational basis test under constitutional right to equality

COLE V WHITFIELD AND *CASTLEMAINE* COMBINED

- After decision in *Castlemaine*, the new test for violation of s 92 could be said to consist of two parts: an invalidity test and a savings test

INVALIDITY TEST:

- Step 1: Does the challenged law impose a burden on interstate trade?
- Step 2: If so, is that burden discriminatory on its face or in its practical effect?
- Step 3: If so, is the law protectionist in character?
- Alternatively, combine steps 2 and 3 in single inquiry: Is the burden that the law imposes on interstate trade and commerce discriminatory in a protectionist sense?

SAVINGS TEST:

- Step 1: Is main purpose of the law protectionist, or is protectionist effect of law merely incidental to the pursuit of some other, legitimate purpose?
- Step 2: If the latter, ascertain whether the law is 'necessary or appropriate and adapted' to that other purpose

- Note some peculiarities about this two-parted test:
  - Unlike s 116 test, effect of law may bring it within ambit of s 92 even if purpose not protectionist

- Proportionality inquiry similar to the test applied to the characterisation of a law that is claimed to be within a purposive head of power (such as defence or external affairs)

BETFAIR PTY LTD V WESTERN AUSTRALIA (2008)

It is the first of three betting cases:

- Betfair ran internet 'betting exchange', which allowed punters to bet against each other regarding outcome (including losing outcome) of various sporting events, in return for commission on winnings
- Betfair granted licence in Jan 2006 under Tasmanian law, but customers located outside Tasmania, and facilitated bets on events outside Tasmania, including, inter alia, WA horse and greyhound races
- Betting exchanges prohibited by amendment to *Betting Control Act 1954* (WA) (effect from 29/1/07)
- Section 24(1aa) made it an offence to place a bet through a betting exchange (read with *Criminal Code* (WA) at least one act in offence required to occur in WA, e.g. using WA-based computer)
- Section 27D (1) made it an offence to publish details of WA race field without ministerial approval
- Plaintiffs (Betfair & WA punter) challenged these two provisions as protectionist laws contrary to s 92
- After reviewing various American authorities, joint judgment held that 'a law the practical effect of which is to discriminate against interstate trade in a protectionist sense is not saved by the presence of other objectives such as public health which are not protectionist in character' (at 464)
- *Castlemaine Tooheys* proportionality test interpreted (at 478) as a test to see whether a law that has a differential impact on interstate trade 'offers an acceptable explanation or justification'
- WA argued here that ban on betting exchanges was necessary to protect integrity of horse racing industry, as betting exchanges allowed negative bets, i.e. bets on losing result is problematic
- Even if they pose such a threat, joint judgment held, total ban on betting exchanges disproportionate to this purpose and thus unduly protectionist towards WA horse racing industry (at 479)

BETFAIR PTY LTD V RACING NEW SOUTH WALES (2012)

- Concerned fee of 1.5% of turnover payable by online betting exchange operator to statutory authorities regulating horseracing for use of race lists
- Fee imposed by regulations under s 33A(2) of the *Racing Administration Act 1998* (NSW)
- Legislation facially neutral between types of wagering operators (bookies, totalisators and betting exchanges) and whether wagering in- or out-of-state
- Betfair's case, like Castlemaine Toohey's, based on its particular business model, which was allegedly more affected by the fee than its competitors
- Five-judge joint judgment warned of return to individual rights theory if subjective impact of law on particular interstate trader made the focus (at 233)
- Rather, focus needs to fall on whether objective effect of law is to burden interstate trade in a way that makes it harder for interstate traders to compete
- No evidence of that on the facts (236)
- Question of whether s 92 applies to markets conducted without reference to state boundaries left for another day (236)

SPORTSBET V NEW SOUTH WALES (2012)

- Similar issues to those considered in *Betfair (No 2),* but plaintiff this time a corporate bookmaker based in Darwin offering telephone and internet betting across Australia
- Argued that NSW legislation inconsistent with s 49 of the *Northern Territory (Self-Government) Act 1978* (Cth), which guaranteed absolute freedom of trade and commerce between NT and the states

- Necessary to argue s 109 inconsistency as s 92 does not apply to trade and commerce between states and a territory
- Decided on same basis as *Betfair (No 2),* i.e. that plaintiff's argument incorrectly focused on impact on individual business model rather than objective effect of fee on interstate trade relative to intrastate trade
- Both intrastate and interstate traders subject to same exemption from fee where turnover <$5million – not protectionist in favour of NSW traders

THE STATE OF THE LAW AT PRESENT

- Two ways of applying *Cole v Whitfield* test:
  - Start by asking whether law burdens interstate trade and commerce and then proceed to step 2 (discriminatory on face or in effect) and step 3 (protectionist?)
  - Or go directly to effect of challenged law and decide whether the law discriminates in a protectionist sense (i.e. in one composite inquiry)
- Does it make any difference which form of test is applied?
  - No, because if law does not burden interstate trade and commerce it is hardly likely to be protectionist, and therefore step 1 will always be passed in relevant cases
  - And Step 2 requires consideration of effect of law even where no discrimination on face
- But this still leaves the problem of purpose and effect:
  - A law with a perfectly legitimate purpose may in effect discriminate in a protectionist sense
  - *Betfair* implies that such a law will not be invalid if there was no alternative means to achieve the legislative purpose in question (because it would then not be disproportionate to a legitimate end)
  - But *Betfair* also says that a law 'the practical effect of which is to discriminate against interstate trade in a protectionist sense is not saved by the presence of other objectives such as public health which are not protectionist in character' (para 47)
  - Two dicta may be reconciled if second dictum is understood to mean that the law is 'not saved *merely by the fact* that it has some other legitimate purpose' (i.e. only saved if proportional)

EXPRESS GUARANTEES: TRIAL BY JURY AND FREEDOM OF RELIGION

TRIAL BY JURY

- Section 80 of the Constitution provides:

- The trial on indictment of any offence against any law of the Cth shall be by jury ...

- Appears to guarantee right to trial by jury for serious Cth offences (cf. s 11(f) of Canadian Charter – imprisonment > 5 years), but in fact guarantees nothing
- Reason for this is that High Court has declined to take up potential role of specifying what offences ought to be tried on indictment
- Instead, Court has deferred to Cth Parliament's power to determine whether offence will be tried by jury by specifying in legislation whether offence is to be tried on indictment or summarily – if latter, s 80 does not apply
- Origins of this view in two cases:
  - *R v Bernasconi* (1915): 'If a given offence is not made triable on indictment at all, then sec 80 does not apply' (per Isaacs J in case deciding s 80 not applicable where Cth exercises territories power)
  - *R v Archdall & Roskruge; Ex parte Carrigan and Brown* (1928): 'The suggestion that P'ment, because of s 80 of the Constitution, could not validly make the offence punishable summarily has no foundation and its rejection needs no exposition' (per Knox CJ, Isaacs, Gavan Duffy and Powers JJ); 'if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment' (per Higgins J)
- Contrary view put in joint dissenting judgment of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy: Ex parte Lowenstein* (1938):

R V FEDERAL COURT OF BANKRUPTCY: EX PARTE

- Australian provision derived from art III(2) of American Constitution, which provides that '[t]he trial of all crimes, except in cases of impeachment, shall be by jury' (at 581)
- Insertion of words 'on indictment' in s 80 of Australia Constitution ostensibly meant to solve some problems with American formulation, but instead introduced problems of its own (at 581)
- To say that protection of s 80 may be avoided by providing for summary trial of serious offences makes a 'mockery' of the Constitution (at 582)
- Suggest that indictment, and therefore trial by jury, required where the accused, if convicted, would be liable 'to a term of imprisonment or to some graver form of punishment' (at 583)
- Court split 2:2:2 in *Lowenstein* and hence no majority judgment on this issue
- Narrow view of s 80 confirmed by seven-judge majority in *Zarb v Kennedy* (1968) (accused sentenced to two years imprisonment for refusing to perform military service)
- Minority view on s 80 as guaranteeing fundamental right to trial by jury in serious criminal cases kept alive by Murphy J in *Beckwith v The Queen* (1976) and in his dissenting judgment in *Li Chia Hsing v Rankin* (1978)
- High Court splits again in *Kingswell v The Queen* (1985) 159 CLR 264:

KINGSWELL V THE QUEEN

- Gibbs CJ, Wilson and Dawson JJ (and Mason J in separate judgment): Now 'settled' that protection of s 80 only triggered if Cth Parliament provides for trial on indictment (at 276)
- Deane J: Traces history of right to trial by jury as fundamental common law right back to Magna Carta and beyond (at 299)
- In Australian legal history, colonists fought for right to trial by jury as important marker of passage from military rule to civilian government (at 298-99)
- Improbable, therefore, that framers of Australian Constitution intended to do away with guarantee
- Robust right to trial by jury is also supported by constitutional policy arguments, including argument that this right ensures that criminal trials are run in a way that it is intelligible to lay people, and therefore the accused (at 301)
- Supports Dixon and Evatt JJ's view in *Lowenstein* that 'there lies at the heart of the concept of "trial on indictment" in s 80 the notion of the trial of a "serious offence"' (at 310)

- Liability to term of imprisonment, however, not the crucial distinguishing feature – rather question whether offence is or isn't 'one which can appropriately be dealt with summarily by justices or magistrates' (at 310)
- Circularity of this definition obvious on its face – later says serious = imprisonment > 1 year (at 318)
- Brennan J dissents for other reasons (s 80 invalidates a law that that allows a judge to increase the length of a sentence for an indictable offence according to factual findings made by the judge)
- Most recent case to consider issue was *Cheng v The Queen* (2000) 203 CLR 248:

CHENG V THE QUEEN

- McHugh J holds, with reference to the Convention Debates, that s 80 deliberately drafted so as to give Parliament the power to decide what types of offences should be subject to trial by jury (at 292)
- In any case, minority view has failed to suggest basis on which High Court could define the sorts of offences that should be subject to jury trial without breaching the separation of powers (at 298)
- All attempts to date have simply resulted in circular definitions (at 296)
- Failed 1988 attempt to amend s 80 so as to confer right to jury trial in cases where accused was liable to imprisonment for more than two years or to corporal punishment shows that Australian people do not feel strongly about this right (at 299)
- Gaudron and Kirby JJ dissent in *Cheng*, following Brennan J's approach in *Kingswell*
- Clear from earlier case, however, that Kirby J had taken over mantle of Murphy and Deane JJ in upholding minority view of s 80
- But Kirby J does not offer any fresh arguments on how s 80 might sensibly be read as conferring a right to a trial by jury in serious cases, other than to assert that the current meaning of the Constitution is not beholden to the intentions of the drafters (at 322)
- Kirby J also wrong in reading two other cases, *Brown v The Queen* (1986) 160 CLR 171 and *Cheatle v The Queen* (1993) 177 CLR 541 as marking a change in attitude to s 80 on the part of the Court
- Those cases deal with whether right to trial by jury may be waived and whether jury unanimity is an essential element of a trial by jury

BROWN V THE QUEEN (1986) 160 CLR 171:

- Concerned s 7 of *Juries Act 1927* (SA), which permits accused to waive his or her right to a jury trial
- Section 68 of *Judiciary Act 1903* (Cth) provides that, where a trial on indictment for a Cth offence is held in a State Court, the State's procedural rules should apply
- Brennan, Dawson and Deane JJ held that s 7 not applicable to a person charged with a Cth offence as s 80 conferred a constitutional guarantee 'for the benefit of the community as a whole as well as for the benefit of the particular accused', and thus could not be waived (at 201 per Deane J)
- Gibbs CJ and Wilson J dissented on basis that s 80 conferred an individual right
- Some commentators, like Kirby J, read both sets of judgments as indication of shift to minority view

CHEATLE V THE QUEEN (1993) 177 CLR 541:

- Another South Australian case, in which issue this time was whether provision in *Juries Act* allowing for majority verdict (10 of 12 jurors) applied to trial under s 86A of the *Crimes Act 1914* (Cth)
- High Court held unanimously that decision of jury in trial of Cth offence must be unanimous

- History of criminal trial by jury showed that, in 1900, guarantee of jury in trials on indictment implied guarantee that no one would be convicted except by unanimous decision of jury (at 522)
- Constitutional policy reasons: unanimity requirement affects quality of discussion by jury and supports application of criminal standard of proof (beyond reasonable doubt) (at 552-53)
- Neither *Brown* nor *Cheatle* undermines *Kingswell* in any way since these cases are directed at substance of trial by jury guarantee once it has been found to apply

FREEDOM OF RELIGION

- Section 116 of the Constitution provides:
  - The Cth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Cth.
- Note position in Chapter V of Constitution, suggesting that real purpose of s 116 was to leave regulation of matters affecting religion to States
- Four separate guarantees:
  - (1) Non-establishment clause
  - (2) No imposition of religious observance clause;
  - (3) Free exercise clause;
  - (4) No religious test as qualification for office clause
- Cases have mostly concerned free exercise clause, as in *Krygger v Williams* (1912):

KRYGGER V WILLIAMS

- Section 135 of *Defence Act 1903* (Cth) criminalised evasion or refusal to do military service
- Section 143(3) allowed people with religious objections to serve in non-combatant role
- Free exercise clause challenge dismissed on grounds that compulsory military service does not amount to prohibition of free exercise of religion, simply to imposition of duty to do something that may be contrary to one's religion
- Plaintiff's objection to doing any kind of training dismissed as 'absurd'

- Second case that illustrates approach to free exercise clause is *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116:

ADELAIDE COMPANY OF JEHOVAH'S WITNESSES INC V COMMONWEALTH

- *National Security (Subversive Associations) Regulations* (Cth) empowered Governor-General to declare bodies, which were in his opinion prejudicial to defence of Cth, unlawful
- Effect of declaration was that body was dissolved and its property forfeit to State
- Plaintiff body declared on 17 January 1951. Defence power challenge succeeds, but s 116 challenge fails 5:0
- Rich J: s 116 not absolute, but subject to limitation in interests of community
- Latham CJ: takes very broad approach to definition of religion, including absence of any religion, and holding of beliefs that some might regard as mere superstitions (at 123-26)
- But tempers this with equally broad view of Cth's capacity to make laws regulating free exercise of religion in public interest, subject to Court duty to determine whether level of infringement 'undue'

- In conceptual outline, this approach to the free exercise clause is same as approach followed in those countries that divide analysis of rights infringements into two stages (e.g. Canada, Germany and South Africa):

- Stage 1: Give right a broad meaning that is likely to result in a finding that Constitution engaged
- Stage 2: Strike down only those limitations of right that are either not contained in a law of general application or, if so contained, are not reasonable and justifiable in an open and democratic society

- Latham CJ's approach to definition of religion followed in *Church of The New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983):

CHURCH OF THE NEW FAITH V COMMISSIONER OF PAY-ROLL TAX (VIC)

- Religion is any belief in supernatural being that manifests itself in 'the acceptance of canons of conduct ' (at 136, per Mason ACJ and Brennan J)
- On this basis, Scientology accepted as religion for purposes of pay-roll tax exemption

KRUGER V COMMONWEALTH (STOLEN GENERATIONS CASE) (1997) 190 CLR 1:

- Free-exercise-clause challenge to *Aboriginals Ordinance 1918* (NT), which authorised removal of aboriginal children from their homes, and thus deprived them of their indigenous culture
- Ordinance made by Cth and thus subject to s 116 (per Gaudron, Toohey and Gummow JJ; Dawson and McHugh JJ decide question on basis that s 116 has no application in territories)
- Toohey J and Brennan CJ interpret 'for' in s 116 as meaning that the impugned law must have had as one of its purposes the *purpose* of prohibiting the free exercise of a religion – not shown
- Gummow J follows *Krygger* in holding that no religious conduct prohibited by Ordinance
- Gaudron J: takes wider view of s 116 as extending not just to laws which prohibit a particular religion, but which (authorise acts which) *prevent the free exercise* of a religion
- Whether ordinance in fact authorised such acts was a factual question to be determined
- Second question is whether purpose of Ordinance was to prohibit free exercise of religion
- Even if plea amended to argue that real purpose was welfarist, Ordinance would still be invalid if it interfered with free exercise of religion using means disproportionate to welfares purpose

ATTORNEY-GENERAL (VIC); EX REL BLACK V COMMONWEALTH (DOGS CASE)

- Only case on establishment clause. Concerned question whether federal funding of church schools under s 96 of Constitution (grants power) amounted to establishment of religion contrary to s 116
- 'Establishment' construed as meaning the selection of one religion in particular as the national religion, enjoying privileged status (per Wilson J at 653). Mere giving of financial support to a particular religion does not amount to establishment (ibid)

- Mason, Aikin and Gibbs JJ and Barwick CJ support this basic approach
- Stephen J's approach slightly broader, holding that establishment would include 'the favouring of one church over another' (at 610)
- Murphy J's dissent based on US authority, despite difference in wording between American and Australian provisions ('Congress shall make no law respecting an establishment of religion')
- As with the use of the word 'for' in the free exercise clause, the use of the word 'for' in the establishment clause construed as meaning that the purpose of the law must be the establishment of a particular religion as the national religion (per Barwick CJ at 579)
- This is narrower than American test, which hits laws that touch on, or relate to, the establishment of a religion (per Mason J at 615). 1988 referendum to amend s 116 so as to make it applicable to States and Territories failed
- The plaintiff in *Williams v Cth* relied on a different limb of s 116. In 2007, the principal of the Christian school sought funding from the Cth to extend chaplaincy service at eh school.

IMPLIED FREEDOM OF POLITICAL COMMUNICATION

MAIN ISSUES TO COVER

- Legitimacy of the legal reasoning methods used to derive the freedom:
  - Representative and responsible government as free-floating principles generative of freedom or tied to ss 7 and 24?

  - Deane and Toohey JJ in *Nationwide News;* Mason CJ in *ACTV*; McHugh J in *ACTV*, *Theophanous* and *McGinty*; Brennan J in *ACTV*

- Scope of the freedom:
  - What is political communication?
  - The levels of government issue
  - Is freedom applicable only during election periods?
  - Is it a personal/positive right or limitation on legislative power?
- Emerging test for violation of the freedom
  - Mason CJ's two levels of scrutiny in *ACTV*
  - Proportionality test
- Impact of implied freedom on common law of defamation:
  - Interaction between common law and freedom: Mason CJ, Toohey & Gaudron JJ; Deane J; Brennan J
  - Special constitutional defence or modified common law defence?

IMPLICATIONS OF FREEDOM

- *Engineers* case authority for proposition that broad implications should not be drawn from nature of Australian federalism
- But rule against drawing implications had begun to weaken with decision in *Melbourne Corporation* case, which imposed limits on Cth's legislative powers with regard to States
- Dixon CJ, in particular, had waged a long campaign against the strict approach to implications, saying in *West v Commissioner of Taxation* (NSW) (1937) at 681:
  - 'Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.'
- In *Payroll Tax Case* (1971), Windeyer J said:
  - 'implications have a place in the interpretation of the Constitution' and 'our avowed task is simply the revealing or uncovering of implications that are already there.'
- In a series of decisions, Murphy J, who had unsuccessfully introduced a Human Rights Bill into Parliament when he was A-G in 1973, found implied rights against slavery; equality of voting power; freedom of movement; and freedom from cruel and unusual punishment – but not joined by other judges in these cases

NATIONWIDE NEWS V WILLS (1992)

- First of two cases handed down on 30 September 1992 in which High Court held that Constitution contained an implied freedom of political communication
- Case concerned challenge to s 299(1)(d)(ii) of the *Industrial Relations Act 1988* (Cth), which criminalised public statements bringing Industrial Relations Commission (IRC) into disrepute
- Nationwide News prosecuted for article in *The Australian* critical of the IRC
- Four-judge majority (Brennan, Deane, Toohey and Gaudron JJ) decides case on basis that provision infringes implied freedom of political communication
- Deane and Toohey JJ:
  - Infer existence of this freedom from doctrine of representative government underlying Constitution
  - Freedom covers 'communication of information and opinions about matters relating to the government of the Cth' (at 73)

- Three other judges (Mason CJ, Dawson and McHugh JJ) decide that s 299(1)(d)(ii) beyond implied incidental power attaching to Cth's industrial relations power
- Significant point about this case is that the impugned provision did not touch directly on the electoral process, but on particular institution of government

AUSTRALIAN CAPITAL TELEVISION (1992)

- Challenge to *Political Broadcasts and Political Disclosures Act 1991* (Cth):
  - Added new Part IID to *Broadcasting Act 1942* (Cth)
  - Section 95B prohibited political advertisements on radio and television during federal elections
  - Sections 95C and 95D imposed similar bans w.r.t. Territory, State and local-government elections
- Exceptions: policy launches, news/current affairs, talkback radio, adverts for charities where no particular party favoured
- Australian Broadcasting Tribunal required to allocate free time to political parties for advertising, 90% of which reserved for existing political parties with threshold number of candidates
- Further restrictions on time and form of presentation of these adverts
- Parliamentary debates had justified legislation as necessary regulation of political process, inter alia to prevent corruption caused by need to raise large sums of money to pay for advertising; to remove advantage enjoyed by wealthy persons; and to prevent trivialising of political debate by short, sloganeering adverts
- Mason CJ, Deane, Toohey and Gaudron JJ find Part IIID wholly invalid:
  - Mason CJ emphasizes principle of representative government as contained in ss 7 and 24 (at 137)
  - Freedom extends to discussion of public affairs at Cth *and State, Territory, local gov't* levels (at 142)
  - Distinguishes restrictions that target ideas or information from restrictions that target activity or mode of communication: former type of restriction requires 'compelling justification', whereas latter type must not be disproportionate to achievement of legislative objective (at 143-44)
  - Applies stricter of two tests in this case because of the type of communication targeted (at 144)
  - Balances justification for restriction (maintaining integrity of political process) against extent of restriction on freedom of political communication (at 145)
  - Holds that prohibition on radio and television broadcasting 'sweeping' because it excludes individuals and other groups from participating in political process around federal elections, and discriminates against new political parties and independents (at 145)
- McHugh J finds Part IID invalid with exception of s 95C :
  - Unlike other judges, restricts implied freedom to political communication regarding federal *elections*
- Dawson J takes *Engineers* approach to implications, but applies test for violation of ss 7 and 24 similar in effect to McHugh J's stricter reading of freedom
- Brennan J upholds legislation as reasonable restriction on political advertising, referring to similar legislation in other constitutional democracies

IMPLIED FREEDOM OF POLITICAL COMMUNICATION AND COMMON LAW OF DEFAMATION

- In other jurisdictions, constitutional rights may impact interpretation of common law, either directly, by giving rise to new causes of action for violation of constitutional rights or to new constitutional defences based on constitutional rights, or indirectly, by influencing development of common law within existing causes of action and defences

- The latter process is variously known as *Drittwirkung* (Germany) or indirect horizontal application (South Africa)
- Since High Court is final court of appeal in respect of all questions relating to Australian common law, it was in a position to determine impact of newfound freedom of political communication on common-law action for defamation
- High Court's position on this issue developed in series of cases beginning with *Theophanous v Herald & Weekly Times Ltd* (1994) and including authoritative statement of law in *Lange v Australian Broadcasting Corporation* (1997)
- Although it deals with common-law aspect of the implied freedom of political communication, *Lange* also established a test for determining whether a particular law violates the implied freedom

THEOPHANOUS V HERALD & WEEKLY TIMES LTD (1994)

- Applies freedom of political communication to common law of defamation:
  - Theophanous = member of House of Representatives and chairman of Joint Parliamentary Committee on Migration Regulations suing newspaper for publishing allegedly defamatory letter
  - Mason CJ, Toohey and Gaudron J in joint judgment for 4-judge majority (Deane J writing separately) hold that political discussion 'includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office' (at 124)
  - Beyond this, not necessary to decide where distinction between political communication and other forms of speech lies (at 124-25)
  - Joint judgment then simply asserts that '[i]t is also clear that the implied freedom is one that shapes and controls the common law' and that 'Constitution must prevail' over common law (at 126)
  - Partially follows famous US Supreme Court decision in *New York Times Co v Sullivan* (1964) in holding that freedom of political communication provides separate constitutional defence against action for defamation distinct from traditional common-law defences of truth, privilege and fair comment
  - Where object of political communication is a member of the Cth P'ment, defendant need not prove that statement was true, merely that reasonable steps were taken to establish truth of statement, or that the defendant was otherwise justified in not taking such steps (at 137)
  - Defendant also has onus to show it was 'unaware of the falsity' and did not publish 'recklessly' (ibid)
  - Deane J takes more expansive view of freedom but joins majority for sake of clear decision (at 187)
  - Brennan, Dawson and McHugh JJ dissent for different reasons: viz. that common law informs Constitution (Brennan J), that there is no implied freedom of political communication (Dawson J) or that this freedom should be narrowly confined to the electoral process (McHugh J)

POST-*THEOPHANOUS* CASES

- First case after *Theophanous* was *Stephens* (1994), in which same 4:3 majority affirmed existence of constitutional defence in respect of an action brought by a State member of Parliament (freedom also implied by *Constitution Act 1889* (WA))
- In *McGinty* (1996), after Mason CJ and Deane J's retirement, High Court declined to infer principle of equality of voting power from WA Constitution, which contained similar provision on representative government to Cth Constitution
- Replacement of *Theophanous* majority and McHugh J's repeated attacks on legitimacy of interpretive methods used to derive implied freedom of political communication resulted in two more cases shortly after *McGinty*: *Levy* and *Lange*
- In *Levy* (1997), the freedom of political communication was extended to cover expressive (i.e. non-verbal) conduct, although legislation ultimately found to be valid:
  - Regulation 5 of the *Wildlife (Game) (Hunting Season) Regulations* (Vic) prohibited persons not in possession of valid game licence from entering into duck hunting area. Levy, an animal rights activist, prevented from entering area to collect dead duck for display.

- Court accepts that reg 5 restricts implied freedom of political communication, but held that it was proportionate to pursuit of legitimate purpose, viz. public safety.

LANGE V AUSTRALIAN BROADCASTING CORPORATION (1997)

- Reconstituted Court's commitment to *Theophanous* tested in *Lange:*
  - Defamation action by former NZ Prime Minister in which ABC raised both new constitutional defence outlined in *Theophanous* and defence of qualified privilege
  - Unanimous Court implicitly overruled *Theophanous* by holding that constitutional defence not available, but developed common-law defence of qualified privileged to much same effect
  - Court questions whether Deane J's support of 3-judge joint judgment in *Theophanous* produced a clear majority ratio (at 555)
  - Holds that implied freedom of political communication should be derived from textual references to *responsible* as well as representative government, rather than free-standing principle of representative government as held by Deane and Toohey JJ *in Nationwide News* (at 558)
  - Scope of freedom not changed – *not* restricted to time surrounding federal elections
  - Major difference is that Court interprets freedom as an immunity from legislative or executive action rather than personal individual right (cf. s 92 freedom of interstate trade and commerce) (at 559)
  - Follows that freedom cannot found a separate constitutional defence in sense of personal immunity from suit for defamation
  - Common law must be developed consistently with Constitution: development of mass communication requires new balance between freedom and right to reputation (at 565-66)
  - State statute law and common law of defamation may not restrict defendant's rights in a way that infringes implied freedom of political communication, but may diminish the rights or remedies of persons defamed since right to reputation not constitutionally protected (at 566)
- Test for determining whether a law of a State or federal parliament or a Territory legislature infringes the implied freedom of political communication:
  - 1st, determine whether law burdens freedom of communication about government or political matters, either in its terms, operation or effect
  - 2nd, if it does, determine whether law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government
- As to law of defamation, Court in *Lange* held:
  - Above test may be applied to common law and State statute law regulating actions for defamation
  - Common law of defamation clearly burdens freedom of communication about government or political matters and therefore first part of test is satisfied
  - Protection of reputation is a legitimate end for purposes of second part of test, but current common-law and statutory defences in NSW do not provide defence to person who mistakenly but honestly publishes a false statement about a government or political matter to a large audience
  - Such defence may be provided by extending defence of qualified privilege to communications made to a large audience on government or political matters where the defendant acted reasonably
  - Test for reasonableness includes whether defendant had reasonable grounds for believing statement to be true and took reasonable steps to verify accuracy of material

BROWN V CLASSIFICATION REVIEW BOARD (1998)

- Decision by Federal Court that helps to clarify *Lange* test and contributes to understanding of scope of political communication:

- Student newspaper at La Trobe University in Melbourne, *Rabelais*, published step-by-step guide to shoplifting as part of critique of capitalism
- After complaint by Victorian Retail Trades Association, *Rabelais* refused classification by Cth office of Film and Literature Classification i.t.o. s 19(4) of National Classification Code
- Section 19(4) directs refusal where publication 'promotes, incites, or instructs in matters of crime or violence'
- By agreement between States and Cth, Cth decisions under Code effective in every State
- Decision of Cth office confirmed by Classification Review Board and by single judge of Federal Court
- On appeal to Full Federal Court, Heerey and Sundberg JJ focus on question whether *article* could be said to be political communication rather than whether *law* burdens political communication
- French J concedes that article might be considered to be political discussion, but holds that test is whether s 19(4) of the National Classification Code was appropriate and adapted to a legitimate end that is compatible with representative and responsible government
- All three judges ultimately agree that it is permissible for legislature to restrict publication of literature advocating crime because prevention of crime is a legitimate end compatible with representative and responsible government and refusing classification to publications that advocate crime is a measure that is appropriate and adapted to that end

COLEMAN V POWER (2004)

- *Coleman* adds important qualification to second limb of *Lange* test
  - Coleman was a student at James Cook University distributing pamphlets critical of police in Townsville and verbally accusing police officer (Power) of corruption
  - Coleman charged under s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which criminalised use of 'threatening, abusive or insulting words'
  - Only McHugh J addressed constitutional issue when matter reached High Court, and first part of *Lange* test conceded, so his judgment directed to second part
  - Clarifies that second part of *Lange* test means that *both* the end of the law and the means adopted in it must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government (at 50)
  - Thus, second part of test should read: determine whether 'law reasonably appropriate and adapted to serve a legitimate end [the fulfilment of] **in a manner** which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government' (at 50)
  - Where end of law is *not* promotion of system of representative government, then law will be invalid 'unless the objective of the law can be restrictively interpreted in a way that is compatible with the constitutional freedom' (at 52)
  - In *Coleman* two ends suggested for law: preventing breaches of peace and preventing intimidation of participants in debates on political and governmental matters
  - McHugh J: both ends compatible with representative government, but means disproportionate
  - Three other judges agree with suggested change to second part of *Lange* test

WOTTON V QUEENSLAND (2012)

- Queensland legislation (*Corrective Services Act 2006*):
  - criminalising interviewing of prisoners without permission; and
  - empowering parole board to impose conditions that the board 'reasonably considers necessary' to ensure good conduct and prevent commission of offence after release on parole
- In this particular case, bail conditions imposed on Aboriginal man who had served sentence for involvement in Palm Island riot following death of another Aboriginal man in custody

- Conditions restricted attending public meetings and talking to media
- Satisfaction of *Lange/Coleman* first leg conceded by Cth
- As to second leg, five-judge joint judgment confirms distinction in *Hogan v Hinch* (2011) 243 CLR 506 between direct and incidental restriction of political communication, with stricter test for former type
- Legitimate end here is community safety and crime prevention
- Fact that conditions may only be imposed where parole board deems them 'reasonably necessary' and that this decision is judicially reviewable builds proportionality into provision (at 16)

MONIS V THE QUEEN (2013)

- Section 471.12 of the *Criminal Code* (Cth) creates offence of using postal services in a way that reasonable person would regard as 'menacing, harassing or offensive'. 3:3 split decision with appeal dismissed i.t.o s 23(2)(a) of *Judiciary Act* 1903 (Cth)
- Three-judge joint judgment of Crennan, Kiefel and Bell JJ emphasises that *Lange/Coleman* test requires not only that the law must serve a legitimate end compatible with representative and responsible government, but that the measures adopted in the law must also be so compatible, in addition to being reasonably appropriate and adapted to that end
- Not clear exactly what that observation adds or whether it would ever be possible for a law found reasonably appropriate and adapted to an end compatible with representative and responsible government to be unconstitutional on basis that the measures it adopted were inconsistent with such a system
- Insisting on this approach also pulls test for violations of implied freedom of political communication even further from s 92 test, in terms of which end negatively conditioned (NOT discriminatory protectionism) and no further conditioning of means once law found to be reasonably necessary
- Crennan, Kiefel and Bell JJ otherwise stress connections between proportionality test here and proportionality test applied under s 92 (330):
- 'reasonable necessity', 'undue burden', 'reasonably appropriate and adapted' all signify the same thing
- Law sustained in their joint judgment on reading of legislation as criminalising only severely offensive postal communications with high standard of fault (intention or recklessness) – not by reading down but through ordinary statutory interpretation
- Impact on political communication is incidental and thus weaker standard of review applies (344)
- Legitimate end is to prevent invasion of home by seriously offensive, unsolicited mail (346)
- Proportionality evident in restriction of scope of communications burdened to seriously offensive material (347)
- French CJ finds end overbroad and therefore incompatible with constitutionally required system (283)
- Heydon J in dissent gives voice to 'rejectionist' line that test is subjective, allowing for 'judicial legislation (320-22)

UNIONS NSW V NEW SOUTH WALES

- Challenge to s 95G(6) and 96D of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW)
  - s 95G(6) allowed expenditure by an 'affiliated organisation' to be aggregated with that of a party for purposes of calculating cap
  - s 96D prohibited acceptance of political donations from anyone other than an enrolled elector
- French CJ, Hayne, Crennan, Kiefel and Bell JJ (and separately Keane J) found that provisions burdened IFPC:
  - Not because IFPC confers personal right to donate, but because provisions restricted funds to parties to meet costs of PC

- Provisions fail because no legitimate purpose identified beyond prohibiting the nominated conduct and thus connection to general anti-corruption purposes of the *EFED Act* unclear
- Keane J stresses differential treatment of sources of PC as distorting the free flow of PC required for the effective operation of the constitutionally prescribed system of government (relying on Mason CJ in *ACTV*)

MCCLOY V NEW SOUTH WALES

- Challenge to Div 2A, Div 4A and s 96E of the *EFED Act* imposing cap on political donations and prohibiting altogether the making or acceptance, directly or indirectly, of a political donation by a 'prohibited donor', including property developers
- Joint judgment restates *Lange/Coleman v Power* test in a way that:
  - Identifies clearly separate test for compatibility of ends and means
  - Gives greater structure to proportionality test
- Now seen as consisting of three questions:
  - 1. Does the law effectively burden the freedom in its terms, operation or effect?
  - 2. If so, are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
  - 3. If so, is the law reasonably appropriate and adapted to advance that legitimate object, on basis of its *suitability*, *necessity* and *adequacy in its balance*?
- For one Burden stage (terms, operation or effect) unchanged
- For two Compatibility testing
  - As seen in *Unions NSW*, impugned provisions must disclose a purpose compatible with system of representative government; Not enough that they are part of a general scheme that may be so compatible
  - This part of analysis now assimilated to *suitability* aspect of proportionality
- For three Proportionality testing:
  - *suitable* = having *a rational connection* to the purpose of the provision
  - *necessary* = there is no obvious and compelling alternative, *reasonably practicable means* of achieving the same purpose which has a less restrictive effect on the freedom (cf. Keane J's doubts about institutional appropriateness of this function in *Unions NSW*)
  - *adequate in its balance* = a criterion requiring *a value judgment*, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom (proportionality in the strict sense)
- Joint judgment quickly accepts that challenged provisions burden the freedom for reasons given in *Unions NSW* (para 24); Reiterates point that freedom is not a personal right and thus that unlimited right to donate not protected (paras 25-30)
- Accepts purpose of *EFED Act* as being to secure and promote the actual and perceived integrity of the NSW Parliament and other institutions of government, particularly as against corruption and undue influence (as asserted in new s 4A(c) added after *Unions NSW* (paras 32-33))
- Identifies three types of corruption (quid pro quo, clientelistic, war chest) and distinguishes Australian approach from approach in *Citizens United)*; Stresses legitimate purpose of protecting equality of participation in exercise of political sovereignty (the value protected by the freedom in *ACTV* and here by EFED Act itself)
- Recent history of political corruption in NSW justifies singling out property developers (paras 50-53) – thus this part of scheme rational and distinguishable from provisions struck down in *Unions v NSW* (paras 54-56)
- Second aspect of proportionality – necessity = existence of alternative means less invasive of freedom. This criterion similar to that deployed in s 92 analysis and in *Lange*

- But does present institutional competence problems, so alternative means must be 'obvious and compelling', as stated in *Monis* (para 58)
- Plaintiff puts up two alternative measures: targeting just donations that are intended to be corrupting and improving disclosure requirements (para 59)
- Both rejected as reducing the efficacy of the *EFED Act* (paras 60-62); Strict proportionality aspect is more than a test of 'impression' about whether legislation has gone too far.
- Assimilates *ACTV*'s 'compelling justification' standard into a test that requires 'more convincing' justification for 'direct and substantial' restrictions of the freedom (para 70)
- Proportionality is thus between 'importance of purpose' and 'extent of the effect on the freedom' (para 86); Here, 'the [moderate] restriction on the freedom is more than balanced by the benefits sought to be achieved (para 93)

<table>
<tr><td colspan="2">SHIPRA CHORDIA's summary</td></tr>
<tr><td>McCloy reformulation</td><td>Proposed further development</td></tr>
<tr><td colspan="2">Limb 1: Does the impugned law effectively burden freedom of communication about government or political matters either in its terms, operations or effect?</td></tr>
<tr><td colspan="2">Limb 2: Compatibility testing: Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?</td></tr>
<tr><td>Limb 3: Proportionality analysis:

1. Proper purpose – what is the true purpose being pursued by the law by reference to its stated objective and its practical and legal operation?

2. Suitability – does the provision have a rational connection to its purpose?

3. Necessity – is there an obvious and its purpose?

4. Adequate in its balance – does the importance of the purpose served by the impugned provision outweigh the restriction imposed on the freedom?</td><td>Limb 3: Proportionality analysis:

1. Suitability – does the provision have a rational connection to effectively burden freedom of communication about government or political matters either in its terms, operations or effect?

2. Necessity – is there an obvious and compelling alternative that has a less restrictive effect on the freedom?

3. Adequate in its balance – does the importance of the purpose served by the impugned provision outweigh the restriction imposed on the freedom?</td></tr>
<tr><td colspan="2">If this alternative view is embraced, we might start to see a conceptually sound application of structured proportionality to the problem of balancing raised by legislative burdens on the implied freedom. The advantage of this approach will be to enhance the clarity and coherence of the relevant stages of proportionality by ensuring that there is no repetition that may confuse the underlying analysis or open the door to a divergence in standards of review. In this way, some of the compelling alternative that has a less restrictive effect on the freedom?</td></tr>
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JUDICIAL POWER AND DETENTION

INTRODUCTION

- Recall two broad principles on separation of Cth judicial power*:*
  - Cth judicial power may be exercised only by Chapter III courts (*Wheat* case (1915))
  - Chapter III courts may exercise only Cth judicial power, subject to *persona designata* doctrine (*Boilermakers* case (1956) read with *Hilton v Wells* (1985))
- Cross-vesting case (*Re Wakim*): Ch III courts may not exercise State jurisdiction

- This topic deals with various questions related to the nature of Chapter III judicial power and the right of citizens and non-citizens in Australia not to be detained or have their liberty restricted without good reason as decided by a court of law:
    - May aliens be detained without an order of court for purposes of exclusion and expulsion?
    - May aliens who do not qualify to be admitted to Australia under immigration laws but who have no other country to go to be indefinitely detained in an immigration centre?
    - May citizens, who have been convicted for a criminal offence, and who are still incarcerated, be detained beyond the expiry of their prison term, on the basis of a judicial decision that, should they be released, they would pose a threat to society?
    - May citizens who have not committed a past offence be detained or have their freedom otherwise restricted on the basis of a judicial decision that they pose a threat to society?

CHU KHENG LIM V MINISTER FOR IMMIGRATION

- The first case to consider these questions in detail was *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1:
    - *Migration Act 1958* (Cth) amended to provide for executive detention (i.e. without a court order) of persons arriving illegally in Australia by boat between 19/11/1989 and 1/12/1992
    - Amending provisions challenged on basis that executive detention of aliens contrary to Ch III separation of judicial powers, i.e. that involuntary detention, even of non-citizens, could only be authorised by exercise of Cth judicial power
    - In rejecting challenge, Brennan, Deane and Dawson JJ drew a foundational distinction between 'status, rights and immunities' of aliens and citizens (at 29)
    - Whereas general principle applicable to citizens is that they may not be detained without a court order made in consequence of finding of criminal guilt, aliens may be detained for purposes of exclusion or deportation (at 27-28)
    - Exceptions to principle in respect of citizens are committal to custody pending trial; detention in cases of mental illness or infectious disease; detention for contempt of parliament; and detention by military tribunals for breach of military discipline (at 28)
    - Parliament's power to legislate for executive detention of aliens derives from s 51(xix) power to make laws with respect to 'naturalization and aliens' (at 32)
    - Chapter III not violated because power to detain aliens is not punitive in nature nor part of Cth judicial power and therefore not exclusive to Ch III courts (at 32)

INCOMPATIBILITY DOCTRINE – PREVENTS USE OF PERSONA DESIGNATA TO DETAIN

- Separation of Powers in Commonwealth (Ch III Courts)
    - What are Ch III courts?
        - Courts that are permitted to be vested with federal jurisdiction (High Court, Federal Court, State court (s 77), other courts Parliament creates); AND
        - Satisfying requirements of Ch III (security of tenure, method of appointment: s 72)
    - Ch III of the Cstn excludes any combination of any non-judicial power with federal judicial (*Boilermakers' Case*)
- Persona Designata Exception to Separation of Powers:
    - Power assigned to the individual as a persona designata and not in a judicial capacity (*Hilton v Wells*)
- Incompatibility Doctrine – Exception to the Persona Designata exception:
    - Persona designata principle does not apply if the functions to be performed are "incompatible" with the holding of judicial office (*Grollo v Palmer*)

KABLE V DIRECTOR OF PUBLIC PROSECUTIONS (NSW) (1996) 189 CLR 51

- Extends incompatibility doctrine developed in *Grollo v Palmer* (1995) and *Wilson* (1996) to state courts exercising federal jurisdiction:
    - *Community Protection Act 1994* (NSW) targeted single named individual (Kable) who had been imprisoned for the manslaughter of his wife and who had threatened to injure his deceased wife's sister and his children when released
    - Supreme Court of NSW given power by s 5 of the Act to prolong Kable's detention for up to six months at a time if it was satisfied 'on reasonable grounds' that it was 'more likely than not' he would 'commit a serious act of violence' and that his further detention was 'appropriate' for protection of particular persons or community generally
    - Difficulty: *Constitution Act 1902* (NSW) does not contain strict separation of powers principle, i.e. no S.o.P in the state level
    - High Court held that these functions were incompatible with the exercise of federal judicial power by Supreme Court of NSW, either in this particular matter (Toohey and Gummow JJ) or other matters (McHugh and Gaudron JJ)
    - *Ratio*: Because Supreme Court *sometimes* exercises federal jurisdiction under s 77(iii) of the Cth Constitution, or was doing so in this particular case, it cannot be asked to perform functions that would be incompatible with the role and status of courts under Chapter III
    - Functions conferred by CP Act were incompatible with Chapter III because the Supreme Court was empowered to order Kable's further detention because of evidence that would not necessarily have been admissible in ordinary criminal proceedings and even though he had not been found guilty of a fresh crime; also, made instrument of 'legislative' detention of single individual

PREVENTIVE DETENTION

BAKER V THE QUEEN (2004)

- Section 13A of *Sentencing Act 1989* (NSW):
    - Persons sentenced to life imprisonment could apply for 'determination' after eight years fixing minimum sentence, after which parole would be possible
    - Violent criminal, Crump applied in 1997 and was granted determination, with minimum sentence due to expire in 2003
    - Section 13A amended in 1997 so that persons sentenced to life imprisonment whose sentencing court had made a 'non-release recommendation' could only apply for determination after 20 years (this affected Crump's partner in crime – Baker)
    - In addition, Supreme Court had to certify that 'special reasons' existed for determination
    - Separate Act, the *Crimes (Administration of Sentences) Act 1999* (NSW) amended in 2001 to reduce grounds on which Parole Board could grant parole to a serious offender who was subject to a non-release recommendation – offender had to be in imminent danger of dying or incapable of posing physical threat
- Baker applied for determination under amended s 13A and NSW Supreme Court found no 'special reasons' existed, thus challenged constitutional validity of s 13 A under *Kable*:
    - Singling out of 'non-release' prisoners arbitrary, and targeted at class identified in parliamentary debates
    - Requirement of 'special reasons' impossible to satisfy and thus made Court instrument of legislative detention
- Gleeson CJ:
    - Singling out of non-release prisoners not arbitrary as basis for legislative choice that certain prisoners whose crimes were particularly severe should be subject to separate minimum sentence regime
    - Parliament would have been free to exclude targeted class by name

- ‘Special reasons’ not too lacking in content as to be incapable of judicial application, e.g. age of prisoner at time of commission of offence, assistance given in detection of crime

- McHugh, Gummow, Hayne and Heydon JJ:
  - Baker not sole target of 1997 amendment and no general principle of discrimination
  - Historical precedents for involvement of judges in post-trial determinations of sentence
  - 1997 Act as amended would have satisfied Ch III requirements if enacted as federal statute – since *Kable* standard lower (incompatibility) – no grounds for challenge
- Kirby J:
  - Relies on parliamentary debates to conclude that clear purpose of legislation was to use Supreme Court as instrument of legislative detention
  - Use of non-release recommendation discriminatory as depended on whim of sentencing court and in any case making of such recommendations not good judicial practice

FARDON V ATTORNEY-GENERAL (QUEENSLAND) (2004) 223 CLR 575

- Section 13 of *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) empowered Supreme Court to make interim and continuing detention orders against serving prisoners if satisfied that there was ‘an unacceptable risk that the prisoner [would] commit a serious sexual offence’
- Prisoner defined as someone already detained for a serious sexual offence
- Seemed to be analogous to legislation considered in *Kable* case:
  - Court required to order continued detention where no new offence committed or proved, and no new conviction imposed
  - Crucial difference: applied to all prisoners found to pose unacceptable risk of serious sexual offence – not one named individual
- Majority held that *Kable* distinguishable because of differences in Qld Act:
  - There had to be a ‘high degree of probability’ that prisoner posed an ‘unacceptable risk’
  - Attorney-General bore onus of proving this
  - Rules of natural justice (i.e. duty to hear other side) not excluded by Act
  - Court has ‘substantial discretion’ whether to make order for detention or release under supervision
- Strong dissent from Kirby J who argued that ‘retrospective application of new criminal offences and of additional punishment is offensive to the fundamental tenets of our law’

NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY LIMITED V NT [2015] HCA 41

- French CJ, Kiefel and Bell JJ summarised the propositions associated with the *Kable* principle as follows:
  - A State legislature cannot confer upon a State court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as a part of the integrated Australian court system.
  - The term ‘institutional integrity’ applied to a court refers to its possession of the defining or essential characteristics of a court including the reality and appearance of its independence and its impartiality.
  - It is also a defining characteristic of courts that they apply procedural fairness and adhere as a general rule to the open court principle and give reasons for their decisions.

- A State legislature cannot, consistently with Ch III, enact a law which purports to abolish the SC of the State or excludes any class of official decision, made under a law of the State, from judicial review for jurisdictional error by the Supreme Court of the State.
- Nor can a State legislature validly enact a law which would affect an impermissible executive intrusion into the processes or decisions of a court.
- A State legislature cannot authorize the executive to enlist a court to implement decisions of the executive in a manner incompatible with the court's institutional integrity or which would confer on the court a function (judicial or otherwise) incompatible with the role of the court as a repository of federal jurisdiction.
- A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.

PROTECTIVE DETENTION

KRUGER V COMMONWEALTH (1997)

- Outline of decision:
  - Section 16 of *Aboriginals Ordinance 1918* (NT) provided for detention by order of Chief Protector of 'aboriginal or half-caste' in 'reserve or aboriginal institution' and for relocation between same
  - Members of Stolen Generations challenged this provision inter alia on ground that it was contrary to Ch III and sued for damages for breach of constitutional rights
  - 3 of 6 judges (Brennan CJ, Dawson and McHugh JJ) decided this aspect of case on basis that separation of powers doctrine did not apply in Territories (but cf. below re Dawson and McHugh JJ)
  - Other 3 judges decided this part of case on basis that s 16 did not confer judicial power and therefore that Ch III not infringed
  - Toohey J: Power to detain provided for in s 16 was to be exercised for non-punitive, welfare purposes, and therefore was not of a judicial character, and did not have to be exercised by a Ch III court (at 84-85)
  - Gaudron J: The many exceptions to rule that only judges may order detention indicate that power to detain is not *per se* a judicial power, and thus a law authorising such detention without a court order 'is not, of itself, offensive to Ch III' (at 110)
  - Gummow J: Powers in s 16 are 'reasonably capable of being seen as necessary for a legitimate non-punitive purpose' and therefore Ch III not infringed (at 161-162)
  - Outcome: Dawson and McHugh JJ, though agreeing with Brennan CJ reapplication of Ch III to Territories, also support Gaudron J's reasoning: thus 5/6 judges i.f.o. view that Ordinance not contrary to Ch III, either because no general principle that power to detain is exclusively judicial subject to limited exceptions (contra *Chu Kheng Lim*) or because law proportional in this instance

IMMIGRATION DETENTION

AL-KATEB V GODWIN (2004)

- Like *Lim*, *Al-Kateb* had to do with detention of 'unlawful non-citizen' under ss 189 and 196 of *Migration Act 1958* (Cth), which allows for such detention until the detainee is removed, deported or granted a visa
- Section 196(3) provides that, other than for purposes of removal or deportation, an unlawful non-citizen who has not been granted a visa may not be released from detention 'even by a court'
- Section 198 provides that a person who is not granted a visa to reside in Australia must be removed to another country 'as soon as reasonably practicable'

- *Lim* had found that executive detention under Act was not contrary to Ch III
- Difference in *Al-Kateb* was that the plaintiff was a stateless person (born in Kuwait to Palestinian parents) and would not be accepted by any other country
- First issue was therefore one of statutory construction: did *Migration Act* authorise *indefinite* detention in such circumstances; secondly, if so, was it contrary to Ch III?
- Majority (McHugh, Hayne, Callinan and Heydon JJ) decided first question in affirmative and second in negative, i.e. *Migration Act* does authorise indefinite detention of unlawful non-citizen in these circumstances, and this is not contrary to Ch III
- McHugh J:
    - Ch III infringed where detention without court order is for purposes of punishment and, conversely, where detention is for punitive purposes, Ch III will not be infringed unless it prevents the courts from 'determining some matter that is a condition precedent to authorising detention' (at 584)
    - Here, purpose of detention is to make alien available for deportation and prevent entry to Australia, and thus Ch III not infringed (ibid)
- Hayne J:
    - Since question of whether another country will accept a person in Al-Kateb's situation is beyond Australia's power to control, and subject to change, the duty to remove a person who is not granted a visa 'as soon as reasonably practicable' remains unfulfilled, but in principle capable of fulfilment, until such time as a suitable country is found (at 639-40)
    - Decision whether a person is an unlawful non-citizen is not in first instance a judicial decision, and thus no exercise of judicial power is necessarily entailed by ss 189 and 196 (at 647)
    - Nor is immigration detention punitive in character, however long it endures (at 650)
- Gleeson CJ, Gummow and Kirby JJ in separate judgments in dissent:
    - All decide case on basis of statutory construction, i.e. because its meaning is unclear that *Migration Act* must be read in line with common-law freedoms to mean that, where all practical steps to find a country willing to take an unlawful non-citizen have been exhausted, that person may not be indefinitely detained

❖ The reasoning in *Al-Kateb* was applied in another case handed down the same day, *Minister for Immigration and Multicultrual and Indigenous Affairs v Al Khafaji*. The Court held that Abbas Al-*Khafaji*, an Iraqi national for whom there appeared to be no real prospect of successful removal in the foreseeable future, must also continue to be detained.

❖ Another decision handed down that day, *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs*, arose out of an escape by six people, including Mehran Behrooz, from the Woomera Immigration Reception and Processing Centre in the far north of South Australia. Charges were laid under s 187A of the *Migration Act*, In his defence, Behrooz sought to argue that the condition of detention were so obviously harsh as to render them punitiven, then the detention wet beyond that which was authorise dby the Act. The defence failed in the HCA, held that while inhumane conditions may attract the criminal law and entitle a person to remedies in tort e.g. breach of the Commonwealth's duty of care, yet they do not affect the legality of the immigration detention.

❖ Two months after the decisions in the above 3 cases, the HCA rejected another attack on mandatory immigration detention, this time from a different angle. The applicants in *Re Woolley; Ex parte Applicants M276/2003* were four children of Afghani nationality, aged 7-15, whose parents had brought them to Australia in 2001. Their applications for a visa had been refused and review proceedings had not yet concluded. Detained in the Baxter Immigration Detention Centre, they sought release through orders for habeas corpus, prohibition and injunction.

❖ The applicants did not dispute that they were 'unlawful non-citizens' under the Migration Act, but argued that the regime of mandatory detention set out in the Act did not apply to children. This was unanimously rejected by the court on the basis that the Act was expressed in clear terms, with no exceptions made for children. The second argument was that the Act was invalid to the extent that it applied the regime of mandatory detention. This was also unanimously rejected on the ground that it was enacted under the 'aliens' power and was not incompatible with any freedom from involuntary detention that might be derived from Ch III of the Constitution.

- ❖ McHugh J in *Re Woolley*: whether detention is penal or punitive must depend on all the circumstances of the case. Logically, the fact that courts punish persons by making orders for detention by the Executive cannot lead to the conclusion – subject to exceptions or otherwise – that detention by the Executive is necessarily penal or punitive.
- ❖ The dividing line between a law whose purpose is protective and one whose purpose is punitive is often difficult to draw. The is particularly so where a protective law has acknowledged consequences that would make the law punitive in nature.
- ❖ What then is the appropriate test or principle for determining whether a law of the Parliament infringes Ch III of the Constitution when it authorises the Executive of judicial power? The applicants contend that the test for assessing the validity of a law that authorises the Executive to detain an alien requires a two-stages process:
  - Identify a legitimate non-punitive objective to which the law is directed; and
  - If such an objective can be identified, determine whether the law that authorises detention is 'reasonably necessary' or 'reasonably capable of being seen as necessary' or 'appropriate and adapted' to achieve that purpose or objective.
- ❖ The validity of non-punitive detention did not hinge in any way on considerations of proportionality here.
- ❖ The law in this area remains conflicted. *Chu Kheng Lim* and *Al- Kateb* provide strongly contrasting approaches to determining the validity of ongoing immigration detention.
  - The former as Gummow J in *Kruger* and *Al Kateb* in dissenting based on *Lim* emphasised the role of Ch III in providing a broad immunity, admitting of different grades depending upon citizenship, and from which various exceptions were to be drawn. It openly embraces the relevance of proportionality as a test of validity.
  - In the latter case, the majority of *Al Kateb* and McHugh J in *Woolley* preferred instead to determine any limitation as a matter of characterisation under s 51. Ch III still imposes legislative constraints since the Commonwealth cannot enact a law permitting executive detention for a punitive purpose. It denies the proportionality test for validity.

PLAINTIFF M47-2012 V DIRECTOR-GENERAL OF SECURITY (2012)

- The HCA is yet to settle upon one of these two competing approaches was acknowledged in this case. In the decision, the Court considered regulations under which the Minister for Immigration and Citizenship was required to refuse to grant a refugee a protection visa if the ASIO assessed that individual to be directly or indirectly a risk to security.

- Regulations under *Migration Act 1958* (Cth) required Minister for Immigration and Citizenship to refuse to grant a protection visa to a refugee in event of negative ASIO security assessment

- Declared ultra vires for restricting's Minister's discretion under Act

- Dissenting judges (Gummow, Bell and Heydon JJ) had to revisit *Al-Kateb* as the effect of their decision was that valid decision had been made not to grant a protection visa, raising lawfulness of ongoing detention

- Gummow and Bell JJ support minority's statutory construction argument in *Al Kateb* and hold that ongoing detention not statutorily authorised

- Alone on constitutional issue, Heydon J holds that:

  - continued detention for protection of public should be recognised as additional exception to principle in *Chu Kheng Lim* (335)

  - Even on proportionality approach of Brennan, Deane and Dawson JJ in *Chu Kheng Lim* (as supported by Gummow J in *Al-Kateb*) no invalidity as continued detention reasonably appropriate and adapted to object of holding applicant unsuccessful available for deportation (336)

  - Repeats own preference for treating as characterisation question – executive detention of unlawful non-citizens falls within heart of aliens/immigration powers and no question of proportionality arises

- In *Plaintiff S4/2014 v Minister for Immigration and Border Protection*, the Minister has no power; it is necessary to determine the purpose of detention. Reaffirming Lim on constitutional construction.
- In *Plaintiff M68/2015 v Minister for Immigration and Border Protection*, the offshore detention process is limited.

CONTROL ORDERS

THOMAS V MOWBRAY (2007)

- Challenge to Division 104 of Part 5.3 of the *Criminal Code* (Cth) authorising imposition of control order on person to protect public from terrorist attack

- Control order, which must be issued by the Federal Court, the Family Court or the FMC, may prohibit range of activities and restrain freedom of movement in various ways, on a sliding scale from minimal impairment to virtual house arrest
- Section 104.4 provides that court must be satisfied on balance of probabilities:
    - that order 'would substantially assist in preventing terrorist attack' or that the person concerned has provided training to, or received training from, a listed terrorist organisation; and
    - that prohibition or restriction is 'reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist attack'
- Cth defended provisions as valid exercise of defence and/or external affairs powers
- Majority found Act validly enacted under these heads of power
- Further leg of challenge concerned whether Act conferred non-judicial power on Ch III courts contrary to *Boilermakers* principle
- Unlike *Kable* and *Fardon*, targets of control orders not already incarcerated and need not have committed any prior criminal offence
- Gummow and Crennan JJ's majority judgment:
    - Wilson case (on persona designata doctrine) had said that distinguishing feature of judicial power was that courts applied legal criteria to resolve justiciable controversies
    - Plaintiff argued that s 104.4 did not prescribe clear legal criteria for grant of control order and did not present a justiciable controversy for decision
    - Gummow and Crennan JJ consider range of contexts in which courts have been asked to apply broad criteria or standards, such as 'just and equitable' or 'unreasonable'
    - Control orders analogised to orders restraining liberty other than for purposes of punishment, such as apprehended violence orders in family law context
    - Question whether person has provided training to, or received training from, a listed terrorist organisation is one of fact that judges are well equipped to answer
    - Assessment whether making order would assist in prevention of terrorist act also amenable to judicial decision-making methods
    - Terms 'reasonably necessary' and 'reasonably appropriate and adapted' are legal criteria
    - Balancing exercise required by s 104.4(2) not incompatible with judicial power
    - On whether issuing of control order concerns a 'justiciable controversy', need to distinguish political judgment leading to enactment of legislation from legal judgment applying it
    - Principle that citizens may ordinarily only be deprived of their freedom on conviction for criminal offence not applicable because control orders fall short of detention in custody of State

- Hayne J's dissenting judgment:
    - Mere conferral of discretion on a federal court does not mean that power is not judicial
    - To be judicial, exercise of power must be governed by a 'defined or definable, ascertained or ascertainable standard' (quoting *In re Judiciary and Navigation Acts* (1921))
    - The problematic provision in this respect is s 104.4(1)(d), i.e. that control order may be issued where court is satisfied on balance of probabilities that the obligation, prohibition or restriction is required 'for the purpose of protecting the public from a terrorist attack'
    - 'That criterion is unlike any that hitherto has been engaged in the exercise of judicial power'

- Substance of objection is that federal courts are required to decide contribution that control order will make to prevention of terrorist attack where major part of preventing attack has to do with unknown future actions undertaken by police and intelligence services
- Rather than providing a clear legal standard, this provision invites court to prognosticate about the likely contribution of the order to the prevention of a terrorist attack
- Even repeated judicial determinations of such questions would not produce a legal standard, at least not one that emanated from the statute itself
- Facts necessary to make judgment about the propensity of a particular individual to commit a terrorist act are often within peculiar knowledge of intelligence services
- To ask courts to endorse those security-related judgments, without being in full possession of facts, and without having necessary skills, is to enlist them in performance of executive function

POST-*THOMAS* CASES

- Decision in *Thomas v Mowbray* inspired state anti-bikie legislation in SA and NSW on assumption that control orders could not infringe *Kable* if they did not infringe *Boilermakers* principle (since latter standard stricter than former)
- Anti-bikie laws struck down as interfering with decisional independence and thus integrity of state courts *in South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v New South Wales* (2011) 243 CLR 181
- But these decisions made it clear that such legislation not unconstitutional in principle – only by reason of improper procedural protections provided
- In *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 295 ALR 638, Queensland anti-bikie law (*Criminal Organisation Act 2009* (Qld)) upheld:
  - s 10(1)(c) required Supreme Court to be satisfied that an organisation posed an 'unacceptable risk to the safety, welfare or order of the community' as basis for declaring it a criminal organisation under rest of s 10
  - French CJ rejects argument that this power is either non-judicial or otherwise incompatible with Supreme Court's status as receptacle of federal jurisdiction (*Kable* doctrine)
  - The conferral upon the Supreme court of a state of a non-judicial function is not sufficient to cause the Supreme Court to be identified with the executive government of the state.
  - Though imprecise and requiring Court to make prospective decision about risk posed, discretion controlled by stipulation that risk must be 'unacceptable' and by need to have regard to objects of the Act

SUMMARY

- Cases where Ch III courts were **NOT** used to make orders for involuntary detention and question was whether Ch III courts ought to have been used:
  - *Chu Kheng Lim, Kruger, Al-Kateb, Plaintiff M-47*
- Cases in which Ch III courts or state courts were used, and question was whether this was contrary to Ch III (either *Boilermakers* principle or *Kable* doctrine) because of the criteria the courts were asked to apply:
  - *Thomas v Mowbray* (Ch III courts – *Boilermakers* principle)
  - *Kable, Fardon, Baker, Totani, Wainohu, Assistant Commissioner Condon* (state courts – *Kable* doctrine or *Boilermakers* principle as stricter test precluding need to apply *Kable* doctrine)
- Summary of emerging principle:
  - Cth Parliament may enact legislation providing for involuntary detention without a court order (i.e. administrative detention) if the law concerned pursues a legitimate, non-punitive purpose, e.g. protection of detainee or community, or promotion of welfare of detainee
  - Not yet conclusively decided, but appears that two-stage test for constitutional limitations may not apply in this situation, i.e. that the test is closer to that under s 116 than it is to that under s 92 or implied freedom of political communication

– Not available to plaintiff to argue that effect of detention is punitive, even if it endures for a very long time (*Al-Kateb*, *Plaintiff M-47*)

CASES IN TWO-SIDED MATRIX

State Court empowered by state legislation to order detention Governed by *Kable* doctrine, with possible application of *Boilermakers* as default stricter test *Kable, Baker, Fardon, Totani, Wainohu, Condon*	**Federal Court** empowered by Commonwealth legislation to order detention *Boilermakers* doctrine *Thomas*
State legislation conferring power of executive detention *Kable* doctrine **not applicable** in this setting and generally no strict separation of judicial power at state level No cases for this reason	**Cth legislation** conferring power of executive detention *Chu Kheng Lim* immunity (as currently understood) *Chu Kheng Lim, Kruger, Al-Kateb, Behrooz, Woolley, Plaintiff M-47*

REVISION

OUTLINE OF THE COURSE

	Commonwealth	State
1st Inquiry: Is there POWER to pass the law?	Enumerated heads of power – characterisation of laws • External affairs power (s 51(xxix) • Trade and commerce power (s 51(i)) • Corporations power (s 51(xx)) • Races power (s 51(xxvi)) • Grants (s 96) • Taxation (s 51(ii))** • Defence (s 51(vi)) **The tax power has internal/specific limitations	Plenary power – s 5 of the Constitution Act 1902 (NSW) - s 106-7 of the Constitution – Saving provisions
2nd Inquiry: Does the law breach any constitutional PROHIBITION?	Implied Immunities: Commonwealth's ability to bind the States (Melbourne Corporation Principle)	
	Section 92 of the Constitution Freedom of interstate trade and commerce	
	Express guarantees: Trial by Jury and freedom of religion	
	Implied Freedom of Political Communication	
	Boilermakers' limitation and detention	Kable limitation and detention
		Section 109 – State laws inoperative to the extent of inconsistency with federal laws

COMPARING LIMITS ON POWER

	Section 92 (all laws)	**Section 116 (Cth laws only)**	**IFPC (all laws)**	***Chu Kheng Lim* (Cth laws only)**
Burden?	Law must burden interstate trade and commerce as a threshold to this inquiry. If no burden, inquiry ends. If burden, continue to next stage.	There must be a burden on the free exercise of religion, but this is not really seen as a separate stage but rather as part of inquiry into whether the law is 'for' prohibiting the free exercise of religion.	Law must burden implied freedom of political communication in its terms, operation or effect. If so, move to next stage. If not, inquiry ends.	Equivalent idea here is to ascertain whether law provides for detention without order of Ch III Court made after adjudication of criminal guilt. If so, move to next stage. If not, inquiry ends.
Legitimate purpose?	Purpose of law must not be to confer unfair competitive advantage on intrastate trade (discriminatory protectionism). If so, law is invalid. If not, but its effect is to confer such an advantage, proceed to justification stage.	Law must not be 'for' the prohibition of the free exercise of religion. If it does have such a purpose, law is invalid. If it does not have such a purpose, inquiry ends (except on Gaudron J's approach in *Kruger*).	This is conceived as a compatibility test with two parts: compatibility of both means and ends with constitutionally prescribed system of representative and responsible government. If either form of incompatibility exists, law is invalid. If neither, proceed to next stage.	Purpose of law must not be punitive. If it is punitive, the law is invalid for violation of Ch III. If the purpose is not punitive, inquiry ends on McHugh J's approach, but continues to justification stage on *CKL* joint judgment and Gummow J's approach.
Justification?	Proportionality test to justify a law that has a legitimate purpose but a discriminatory protectionist effect. If purpose is discriminatory protectionism, can't be justified as justification stage assumes existence of a legitimate purpose.	No such stage except possibly on Gaudron J's approach in *Kruger*.	Three-stage proportionality test as set out in *McCloy*: suitable, necessary and adequate in its balance. Suitability is about means-end rationality, necessity about availability of alternative means, and 'adequate in its balance' amounts to a test for strict proportionality.	No such stage on McHugh J's approach. On *CKL* joint judgment and Gummow J's approach, a law that provides for executive detention must be reasonably necessary to give effect its non-punitive purpose. It is invalid once it is shown to be disproportional to that purpose.

REFLECTION ON THEMES OF COURSE

- The main underlying themes of the course are:
  - The centralising tendency of High Court constitutional law doctrine, i.e. the tendency for the Cth's legislative powers to be interpreted more and more expansively at the expense of State powers
  - The different methods of interpretation that allow judges to interpret Cth heads of power expansively in this way, or adapt it to changing circumstances
  - The role of implications drawn from the text or structure of the Constitution, and whether the High Court has followed a consistent approach in this respect
  - The increasing importance of constitutional safeguards related to the nature of judicial power
  - The institutional function of the High Court and the relationship between competing conceptions of its role and the various tests/standards of review that the Court has devised over the years
  - Extraneous influences on the High Court's jurisprudence, such as the economic integration of Australia, globalisation and changes in social attitudes

TYPES OF CONSTITUTIONAL CASE

- Main types of constitutional case encountered in this course:
  - Type 1: challenge to validity of Cth legislation on the basis that it is outside head of power
  - Type 2: challenge to validity of Cth legislation on the basis that, although characterisable as falling within a head of power, it violates an express or implied limitation on the Cth's legislative power
  - Type 3: challenge to State legislation on the basis that it is inconsistent with valid Cth legislation, is contrary to express or implied limitation, or falls within exclusive Cth power
- These types of case may be combined with each other
  - Party seeking to invalidate Cth law may argue types 1 and 2 in the alternative
  - Party seeking to have State legislation declared inconsistent may face initial challenge to validity of Cth legislation of type 1 or 2 before arguing inconsistency point
  - Conversely, party seeking to uphold State legislation against s 109 argument may use type 1 or type 2 to knock out otherwise inconsistent Cth legislation
- Challenge may come from private parties aggrieved by law or wishing to escape obligations imposed by law, or from other governments in federation
- Challenge may be to entire statute or just particular provisions
- Where challenge to particular provisions is successful, the severability of those provisions from the rest of the statute may be an issue

APPROACH TO PROBLEM QUESTIONS

- Two main judgments you need to make when answering a problem question:
  - What law to state as potentially governing the problem
  - The appropriate balance between setting out the law and applying it to the problem
- Higher marks are awarded for:
  - Succinct and accurate statement of the applicable law and no more than the applicable law (no scattergun approaches)
  - Detailed and nuanced application of the law to the problem
- Within these constraints, many different methods are acceptable (e.g. statement of law before single application, or continual movement between statement of law and application)
- The pitfalls are:

- Only arguing/seeing one side of the case
- Asserting legal conclusions without justifying them
- According equal weight to legal arguments that do not really have equal weight
- Hedging your bets in a way that makes it appear that you are not confident about your answer
- Citing cases that have no bearing on the problem (either because subsequently overruled/reconsidered or because they are not relevant)

APPROACH TO ESSAY QUESTIONS

- Essay questions obviously allow you much greater choice, both as to which cases to cite and as to your writing style
- Although you may wish to prepare a few 'stock answers', based around the central themes of the course, higher marks will be awarded to those students who stick closely to the precise issues raised by the particular essay question
- Each essay question, although relating to a general theme, will invite a slightly different take on the theme, and you need to be prepared to adapt your views, and do some original thinking, in the exam itself
- Generally speaking, a short, well-structured essay is better than a long, rambling essay that tries to cover every conceivable angle without being precise or coherent
- Try to go narrow and deep rather than wide and shallow, i.e. provide a single, rich example to illustrate what you mean rather than several superficial examples (unless the question clearly asks you to comment on a general trend)
- Write legibly in full, well-constructed, grammatically correct sentences
- Abbreviations are permissible if properly introduced (for case names, statutes etc.)
- Avoid bullet points and colloquialisms

OUTLINE ANSWER TO 2008 S2 EXAM

- Question 1:
  - Second part is whether s 102.3 of Code infringes implied freedom of political communication
  - This question assumes validity of s 102.3 under the defence power (or some other power) and merely requires application of three-stage test set out in *McCloy*
  - Here, facts illustrate that s 102.3 potentially has a very wide application, discouraging persons from joining political pressure groups that may have perfectly lawful aims and objectives
  - Breadth of s 102.3 stems from fact that individual members of organisation may not be able to control what is said by leaders in heat of moment, and may consequently find themselves members of a terrorist organisation on the basis of circumstances beyond their control
  - This in turn means that s 102.3 might be said to burden freedom of political communication by discouraging membership of organisations like the AAR which engage in forms of political protest that *could* be construed as political communication (see *Levy* on non-verbal, expressive conduct)
  - On the other hand, s 102.3 serves the legitimate end of protection of the community against acts of terrorism, in a manner which is arguably compatible with maintenance of the constitutionally prescribed system of representative and responsible government (reason through ...)
  - Remaining question is whether the measures adopted are proportional:
    - Conceivably suitable as criminalising membership is rationally related to prevention of terrorist act
    - Altenative means? Mere fact that other members of AAR Executive might in theory be charged under s 102.3 does not mean that they will be – speculation on this issue must not be used to construe objective meaning

- Burden on freedom is severe if it indeed discourages membership of perfectly legitimate organisations. The goal being pursued is important, however, and thus case will likely turn on alternative means – was there a less burdensome way of effectively achieving the same end?

- Question 2:
  - Head of power that might support s 8 is external affairs (s 51(xxix))
  - If supported, would need to ask whether s 8 infringes free exercise of religion clause in s 116
  - Section 8 enacted in purported implementation of binding obligation under para 2(b)
  - First question is whether obligation imposed by para 2(b) is specific enough to found exercise of external affairs power; second question is whether, if so, s 8 is reasonably appropriate and adapted to implementation of this specific obligation (*Industrial Relations Act Case*)
  - Para 2(b) obliges Australia to 'take the necessary steps to prevent the commission of terrorist acts' – this is not specific at all, and can't be used as licence to pass any measure alleged to be necessary
  - Even if obligation thought to be specific enough, difficult to see how prohibition of wearing of religious insignia is reasonably appropriate and adapted to prevention of terrorist acts
  - In *Thomas v Mowbray*, Gummow and Crennan JJ suggested that alternative basis for anti-terrorism legislation was mere externality dimension of external affairs power, but even if that is accepted, link between s 8 and prevention of terrorism is tenuous
  - In unlikely event that s 8 upheld as valid exercise of external affairs power, this section must be assessed a possible infringement of free exercise of religion clause in s 116
  - Law is not clear here: Latham CJ's undue interference test in *Jehovah's Witnesses Case* finds support in Gaudron J's judgment in *Kruger*, but two other judges in *Kruger* (Toohey J and Brennan CJ) interpreted s 116 strictly to mean that law must have purpose (not incidental effect) of prohibiting free exercise of religion
  - Key to successful challenge on narrow, purpose-based approach would be to separate s 8 from rest of statute by analogy with HC's approach in *Unions NSW* (different doctrinal area, but similar principle). Argue that overriding purpose of Act may not be to prohibit free exercise of religion, but this clause on its own does that and can't be related to the main purpose.