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INTRODUCTION

Overview of Constitutional Structure

The Constitution is Section 9 of the Australian Constitution Act and was originally enacted by Great Britain. It has 8 Chapters - this course will focus on Chapter 1 (The Parliament).

Preamble: The preamble is important for understanding the history of the Constitution and has subsequent effects on the interpretation of the Constitution. It mentions the “people” have “agreed to unite” in an “indissoluble federal Commonwealth” which refers to successful referendums in the 1800’s. Australia contains self-governing States within the context of a larger nation.

- The word “indissoluble” originating from the American Civil War (Southern States wanting to secede), was intended to prevent secession. WA tried to secede from Australia and asked Britain to allow for secession from Australia and the Constitution. Britain was unable to take on the matter because Australia did not request it from them (Statute of Westminster).
- There remains a way for NZ to become part of the Commonwealth of Australia in the preamble however the NZ public refused a referendum.
- “On the blessing of Almighty God” is a result of a campaign to include a reference to the Almighty - it was agreed to be simple, ecumenical (not religion-specific) and so not to establish a State religion. S115 of the Constitution removes the idea that there is a State religion.

Federal Principles

The Constitution empowers the federal Parliament to pass laws with respect to certain subjects (*‘Head of Powers’*). These laws are effective across the whole of Australia and most Cth powers are ‘concurrent’ with State laws but to the extent to which they are not, State law is invalid or inoperative. State laws on subject exclusive to the Cth are invalid (S90).

Federalism: This involves two levels of Government - federal and state. State law only applies within their jurisdiction and most powers between the two levels are concurrent. Ss 52 & 90 outline exclusive Commonwealth powers. The High Court adjudicates conflict between the levels of government.

States have their own constitutions that are recognised in S106 of the Cth Constitution.

How do we know if a law is unconstitutional?

Two steps are involved:

- Is the Commonwealth law supported by a Head of Power?
- Does it breach a prohibition or limitation (express or implied)?
 - o “Characterise” the Law: What is the subject of the law? Then we see whether it can answer the above two questions.

The ‘Engineers’ Case

Before *Engineers* (1920), the Cth and States were thought to be immune from each other’s laws which implied immunity of inter-governmental instrumentalities and reserved states’ powers (certain powers were “reserved” to the States and prohibited to the Cth). This was based on the historical doctrine of self-government by the States that was agreed upon before Federation.

Section 51 (xxv): The Commonwealth has power, with respect to: Conciliation and arbitration for the prevention and settlement of industrial disputes *extending beyond the limits of any one State*. If the dispute involves 2 or more States, the Commonwealth has jurisdiction to pass laws to arbitrate and settle the dispute. After 1920, it was apparent that industrial disputes were frequently extending beyond one State so it fell within the Cth ‘head of power’.

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920): Federal Union (*Engineers*) was seeking an award against 843 employers; three of these were WA State Bodies. The question for the Court was whether there was an ‘industrial dispute’ for the purposes of s 51 (xxv) with the three State employers? WA State bodies argued that they were sovereign from Cth power.

- The Court departed from the ‘implied immunity’ doctrine and look at the constitution - that the Cth has the power to pass laws for the arbitration and settlements of *disputes*. This was a dispute and there were no words that limited this power from acting in disputes where a party is a State body. The decision has been called a very bad judgement.

- Court took a literal interpretation: Commonwealth heads of power are to be interpreted in accordance with the natural meaning of the words: a limitation on the scope of those powers is not to be implied, unless that implication follows *necessarily or logically from the Constitution's text*.

The decision meant that the Cth was no longer bound by the historical limitation on State matters because a literal approach was adopted and the text of s51 of the Constitution was "so general" as to apply no matter the State's involvement in the dispute. S109 mentions that in a case of inconsistency, Cth law prevails of State law - the entire argument could be solved by considering this if the issue was thought about as a matter of inconsistency.

Legalism/Literalism

Literalism is not a literal interpretation of only the relevant section, but a literal approach of the relevant section and the entire surrounding document. In the case of *Engineers*, it involved a literal interpretation of the entire Constitution and not the words in isolation. See *Dixon CJ, B & W, Blackshield & Heydon J's reasoning on the slides*.

CONSTITUTIONAL INTERPRETATION AND CHARACTERISATION

History

In 1999 a referendum was held to determine if the public wanted to change from a constitutional monarchy to a republic. An issue arose as to where to put the preamble (which refers to the monarchy). The preamble is the preamble to the Constitution Act, not the Constitution itself.

Section 51 (Heads of Power): Sets out the Heads of Power on which the Cth has powers to make laws. These were National Matters at the time. These include trade and commerce, taxation, naval military and defence, lighthouses, astronomy, fisheries beyond territorial limits, marriage etc. In order to *determine* if a law is constitutional, it must be 'with respect to' a subject of a Head of Power. If it is, it should then be considered whether it breaches a prohibition/limitation on the exercise of power. In order to know what the subject of the law is, we must *characterise* the law.

- We should *not* conclude the subject of a law from the title of an Act. Said that examiners commonly try to mislead with their titles because they want us to be able to characterise the subject matter.

Settled Rules of Construction

Golden/Universal Rule: Language of a Statute must be read in its plain and natural sense (Statute as a whole). According to *Engineers* this applies to the Constitution as well - which is in Statute form. This meaning is found in the natural meaning of the words or what is implied by **necessary intendment** (intended that something is implied).

- For example, if a notice said "Vehicles not allowed in park, penalty \$500". By necessary intendment, the word 'park' intends to refer to that *particular* park.

Manifest absurdity and Injustice are to be avoided. When text is ambiguous, recourse must be had to the context and scheme of the whole Act or Constitution.

No Political Considerations or fear of misuse can be taken into account.

Assumptions of Statutory Interpretation

A law is assumed **not to abrogate common law rights** (fair trial, impartiality etc.) unless the contrary is made clear ('principle of legality'). An Act will be assumed to **conform to international law** unless the contrary is expressly made clear. An Act will be read as **conforming to the Constitution** as far as possible.

Statutory Rules of Interpretation

Section 15A Acts Interpretation Act 1901 (Cth): *Construction of Acts to be subject to Constitution* - If a law is manifestly unconstitutional, it will be found as that. If it is not manifestly unconstitutional, it will be taken to be constitutional And not investigated/scrutinised.

Extrinsic Materials provision

Characterisation

The process of determining whether a law falls under a head of power by ascertaining the subject matter and the purpose of the law. This is ascertained by looking at the “actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges” (Latham CJ in *Bank of NSW v Cth*).

It is not enough that the law should refer or apply to a subject matter - for example, income tax laws apply to clergyman and hotel keepers, building regulations apply to banks but such regulations cannot