# LAWS2150 Final Exam Notes

## 1 – Constitutional Interpretation

### *Engineers and Jumbunna*

- Significance of *Engineers* and *Jumbunna*:
    - *Engineers* represented an attempt to **develop a more certain and objective approach to constitutional interpretation** than mere consideration of what was necessary to make the federalist compact (as exemplified in the exploded state doctrines).
    - *Engineers* **has a centralising impact** by establishing interpretive system where States merely legislate in areas where the Cth had elected not to, because their powers are concurrent. There also thus remains a continuing political question surrounding **whether the Cth wishes to give the States more or less power** (in this way, it **combines elements of both political and legal constitutionalism**).
    - *Engineers* also addressed the federal SOP, noting that the distinct branches of government should adhere to their own responsibilities:
        - *'But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts'* ([151]).
        - *'… political accountability provides the ordinary constitutional means of constraining government power. You see the judicial power as an extraordinary constitutional constraint operating within that system not outside it. You see the judicious use of judicial power as tailoring itself to the strengths and weaknesses of the ordinary constitutional means of constraining government power. You see judicial deference as appropriate where political accountability is inherently strong. You see judicial vigilance as appropriate where political accountability is either inherently weak or endangered'* (**Gageler, 2009**).

### *Legalism*

- Defined by a **reliance on legal reasoning** and a desire to **minimise choice** (especially those involving policy/subjective considerations):
    a) Interpret the Constitution based on the **ordinary/natural meaning of the words** but **may refer to limited extrinsic sources** (*e.g. circumstances in which it was made, and common law/statutes existing at the time of drafting*) – see, e.g., *Engineers*.

b) **Limited reference to policy, politics or subjective choice** – legalism is based on methodology, technique and process, in order to require courts to follow a fixed process and thereby avoid subjective policy choice.

c) **Espouses rules of statutory interpretation/principles of legal reasoning** – interpretation should rely on technical legal solutions (*e.g. prior precedent/decisions*) rather than policy considerations – see, e.g., **Sir Owen Dixon** noting *'close adherence to legal reasoning'*.

- Passages from *Engineers* demonstrating a narrow formulation of legalism:
  - *'[C]hief and special duty of this Court faithfully to expound and give effect to [the Constitution] according to its own terms, finding the intention from the words of the compact, and upholding it precisely as framed.'*
  - *'[The implied immunities doctrine] is an interpretation of the Constitution depending on an implication which is formed on a vague, individual concept of the spirit of the compact, which is not the result of interpreting any of specific language to be quoted, nor referable to any recognised principle of the common law of the Constitution … but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions'.*
  - *'Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience … has proved both the elusiveness and the inaccuracy of this doctrine as a legal standard.'*
  - *'[P]ossible abuse of powers is no reason in British law for limiting the natural force of the language creating them.'*
  - *'The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then lucet ipsa per se …'*
  - *'When the text is ambiguous … recourse may be had to the context and scheme of the Act.'*
- **Barwick** – espouses a much more literalist approach by placing almost sole emphasis on the words of the constitutional text.
- **Heydon** – it is incorrect to dichotomise between 'literalist/strictly textual' judges and judges who go beyond the words, because all approaches to constitutional interpretation **depend to some degree on context going beyond the mere words of the Constitution:**

a) **Barwick CJ** – emphasis on words, but in light of history in order to ascertain 1900 meaning.

b) **Dixon CJ** – willing to look at history to detect implications that may only be found in context. Some of his judgments reveal a deep historical understanding.

c) *Engineers* – by no means literalist, indicated a willingness to look at context (*e.g. history, common law/statute at the time of constitutional enactment*).

**CRITIQUE**

- While legalism seeks to reduce judicial choice by confining consideration purely to authoritative legal materials, those materials themselves require recourse to external sources.

a) **Shklar** – legalism is less of an ideology/theory, and more of a professional/social outlook seeking to deny the scope for judicial choice. Tends to view law as an existing, discoverable entity that is discernibly different from morals and politics with deep roots in the legal profession's views on its own functions – a distinct entity independent from change and choice.

b) **Blackshield** – recent jurisprudential debate has focussed on the inadequacy of seeking to understand law in terms of 'rules', but noted the need to have regard for 'principles' and 'policies', even when considering the set of authoritative legal materials espoused by legalism:

a. Principles and policies help to solve 'hard cases' which are often characterised by a lack of rules, and require creative judicial choice reflecting the judge's ideal picture of the legal system and social order.

b. Often form the basis of future 'rules', and form an authoritative 'starting point' from which decisive choices are made.

c. Judicial decisions therefore involved unconscious and evolving value choices, not merely application of legal rules.

**CONTEMPORARY RESPONSES**

- **Williams, Brennan, Lynch** – contemporary theories reject the simplistic idea that a pre-existing body of authoritative legal materials contain a **uniquely pre-determined 'right answer'** to any legal problem and that the task of a judge is to **mechanically ascertain this:**

  - On the contrary, they recognise that application of old text to new problems may yield <u>contradictory, inconclusive or indeterminate meanings</u> from which the judge must make **choices**.

  - The foundation of the other interpretive approaches are <u>not methods of avoiding choice</u> but rather <u>different responses to the unavoidable need for choice</u>.

- A distinct influence in Australian jurisprudence has been an **acceptance of the judge's responsibility for the shaping of social and legal policy**, rather than mere application of mechanical legal rules.
    - **Stone (1946)** – choice is inherent in the judicial function, and it is impossible for decisions to be rooted solely in mechanical legal application, *e.g. dealing with ambiguities, indeterminate terms, logical circularities, contradictions, alternative starting points and arguments*.
- **Sir Anthony Mason (1986)** – the danger with 'strict and complete legalism' is that it will act as a **cloak for undisclosed/unidentified policy values**:
    - Because legalism is a procedural approach rejecting the influence of subjective policy choice, judges may omit to discuss underlying values influencing their decisions, resulting in a lack of transparency and failure to debate the appropriateness of those values.
    - Legalism, coupled with the doctrine of *stare decisis* has a formidable conservative influence – a lack of the aforementioned discussion and subsequent application of precedent may lead to  has a formidable conservative influence – a lack of the aforementioned discussion and subsequent application of precedent may lead to reproduction of given values, even though community values have changed.
        - Given the difficulty of amending Constitutions, judicial decisions may thus be one of the only means to discuss changing community values.
    - **NB:** The 'Mason Court' was characterised by the supplanting of a strict legalist approach with judicial candour about the way in which the choices presented by 'authoritative legal materials' were actually resolved. Key decisions during this time, and in the following 'Brennan Court' included *Mabo* and other rights-oriented cases.
- **Gleeson (2000)** – more measured view of legalism, arguing that judges are appointed to interpret and apply values inherent in the law, and may disagree about those values. However, this must occur within the legal methodology of legalism, which they have no right to dispense with. In particular, judges may not base their decisions as to the validity of legislation upon their personal approval/disapproval of legislative policy.

### *Originalism*

The purpose of originalism is to **ground constitutional interpretation in an interpretation of the Constitution as it was in 1900**, whether this is the subjective view of the framers or the view that informed members of the public would have had at that time:

1. Intentional Originalism – establish the actual subjective intentions of the framers/convention delegates of the Constitution.

2. Textual Originalism – focus on the actual text to establish what the provisions of the Constitution would have meant to an objective, reasonably informed member of the public in 1900.

3. Incremental Accommodation – allows accommodation of new meanings over time. The basis of what the words mean stays the same as when they were created, but they adopt new meanings over time.

    a. Courts look for the connotation (core or essence of the words), noting that their denotation (understanding of the words according to the times) will change as the core or essence is applied to new circumstances.

**INTENTIONAL ORIGINALISM**

- **Fish (2008)** – intentional originalism **cannot provide us with any practical guidance on 'how' to interpret constitutional provisions**. It merely provides us with a common-sense **explanation of what the purpose of interpretation is** – in this case, to ascertain the subjective intentions of the framers.

- **Craven (1990)** – the ultimate duty of a fundamentally 'originalist' court will be to find the intention of the framers:

    - The words of the Constitution are the servants of the framers' intentions, not the other way round. Hence, if words are imperfectly drafted, the court will not read their natural meaning but look at what the framers intended in giving effect to the provision in question.

    - The intention of the framers is legitimate:

        a) Their words reflect the will of the people – they were elected representatives of the colonies, debates were public, their wider activities were heavily-publicised and significant public discussion was involved.

        b) They were the actual authors of the Constitution, and chose the words deliberately to convey their intentions concerning the federal compact.

    - An originalist interpretation is more plausible in the Australian context (cf. US):

a) Appointment of framers and ratification of their work was far more democratic in Australia, than in the US – the constitutional legitimacy of their intentions is thus correspondingly strengthened.

b) Relative youth of Australian Constitution makes it far easier to discern the framers' intentions.

c) US Supreme Court has departed from the framers' intentions for practically laudable reasons such as securing fundamental human rights while in Australia, the HCA has departed merely to reallocated power from the regions to the centre.

**TEXTUAL ORIGINALISM**

- In **textual originalism**, the focus is not on the subjective intentions of its authors, but rather on attempting to establish the meaning that the language would have had in 1900.
    - **Kay (2009)** – called this 'original public meaning'.
- **Heydon (2007)** – argues that 'textual originalism' is simply the traditional interpretative approach exemplified by the judgment of **O'Connor** in the *Drawbacks Case*:

a) The meaning of constitutional provisions should be construed akin to rules of statutory interpretation.

b) It is permissible to refer to context, such as historical facts surrounding its creation, the technical meaning of the language as used in a legal context, the subject-matter of the legislation, and the state of the law at the time of enactment.

c) Relevant historical facts includes:

i. What the framers of a Constitution at the end of the 19th century may be supposed to have known.
ii. Object of the advocates of Australian federation.
iii. The mischief and defect which the constitutional provision under examination was remedying.

d) The appropriate meaning of the provisions should be the meaning they possessed in 1900 (this should not change over time due to fluctuations in popular opinion).

- **Fish (2008)** – approaches predicated on 'intention' are dangerous because they lead the process of interpretation away from the solidity of the text towards unconstrained speculation, through which judges may advertently or inadvertently pursue their own objectives and desires, under the guise of pursuing 'unexpressed legislative intents'.
    - US Supreme Court Justice **Antonin Scalia** argues that the relevance lies in 'what is said', rather than 'what is intended', since *'Men may intend what they will, but it is only the laws they enact which bind us'*.

- In *Eastman v The Queen*, **McHugh J** noted that the traditional approach to constitutional interpretation in Australia can best be described as **'textualism'** or **'semantic intentionalism'**, which focusses on finding the objective intention as expressed in the words of the Constitution, as opposed to the subjective intention of the framers.
    a) The meaning of provisions is not necessarily constant, since the framers drafted them with sufficient generality and abstraction for future generations, knowing they needed to apply to emerging circumstances while retaining its existing integrity.
        i. Interpretation therefore permits appreciation of 'contemporary circumstances', recognising that the Constitution was intended to endure, and be responsive and relevant to changing community needs, including unforeseeable circumstances and conditions.
        ii. Even leading legalist **Dixon CJ** saw no inconsistency between textualism and an evolving approach to the Constitution.
    b) The HCA has frequently considered the consequences of particular interpretations, as well as the history and circumstances surrounding the making of particular provisions, in undertaking constitutional interpretation.
    c) Although *Engineers* is viewed as confirming the HCA's commitment to literalism, it is better viewed as a blend of legalism and textualism – although the majority rejected the use of policy or political principles (thereby committing the court to strict legalism), they did make allowance for external considerations such as relevant history and background.

## 3 – Corporations Power – s 51(xx)

### 'Constitutional Corporation'

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| **Foreign Corporations** | Any corporation incorporated overseas (*NSW v Commonwealth*). |

<table>
<tr><td rowspan="4">Trading Corporations</td><td>Adamson's Case, Mason J:<br><br>'Trading' means activities such as the buying and selling of goods and services.<br><br>Profit is not an essential element of trade.</td><td>Adamson's Case – trading activities of AFL corporations held to meet this definition, including promotional, catering and advertising activities.</td></tr>
<tr><td>Must be substantial or not insignificant trading activities (Adamson's Case, adopted by a majority in State Superannuation Board and Tasmanian Dam Case).<br><br>a) Need not be the predominant activities of that corporation.<br><br>b) There is no fixed percentage which denotes what is a 'substantial proportion'. Rather, this is a broader test – in fact, the proportion could change over time such that a corporation fluctuates in its constitutional status.</td><td>Adamson's Case – held that promotion and encouragement of AFL was merely incidental to their primary activities, which were trading in nature.</td></tr>
<tr><td colspan="2">Purpose is still relevant if the corporation has yet to commence activities (shelf companies) (Fencott v Muller).</td></tr>
<tr><td colspan="2">May be a government-owned corporation (Tasmanian Dam Case).</td></tr>
<tr><td rowspan="2">Financial Corporations</td><td colspan="2">Subject of transaction must be financial (Re Ku-ring-gai).</td></tr>
<tr><td colspan="2">Otherwise, test is the same test as for trading corporations, i.e. substantial or not insignificant activities.</td></tr>
<tr><td colspan="3">There are two corollary requirements:<br><br>1. s 51(xx) only authorises laws with respect to formed corporations – it is not a power to create corporations (Incorporation Case).</td></tr>
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| 2. The corporation must be constituted as such under the *Corporations Act 2001* (Cth) or some other legislation. |
| **Possible Legal Changes:**<br><br>Although the ambit of **s 51(xx)** is very broad, a future Court may narrow the scope of the power by regarding domestic corporations engaged in certain activities (*e.g. those constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading'* as falling outside the class of trading or financial corporations (*Work Choices Case*, **majority obiter**). |

## Regulated Activities

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| **Test** | *Work Choices Case*, **Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ:**<br><br>The corporations power may validly regulate:<br><br>1) Regulation of the activities, functions, relationships and the business of a corporation; the creation of rights, privileges belonging to such a corporation, the imposition of obligations on it; and<br><br>2) In respect of those matters, the regulation of the conduct of those through whom it acts, its employees and shareholders;<br><br>3) Regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business. | |
| **Application Cases** | *Work Choices Case*<br><br>a) Upheld provisions which prevented inclusion of prohibited content and the making of false representations in that regard, with respect to workplace agreements to which **s 51(xx)** corporations were the employer-party.<br><br>b) Upheld provision preventing trade unions from entering premises occupied or otherwise controlled by **s 51(xx)** corporations. | |
| | *Actors & Announcers Equity*<br><br>**s 51(xx)** extends to regulation of third parties whose conduct is capable of affecting the activities, functions, relationships or business of a corporation.<br><br>a) **NB:** Same as the third limb of the *Work Choices* test above. | Court unanimously upheld **s 45D** of the *Trade Practice Act 1974* (Cth), which protected a corporation against action (*e.g. trade union action*), which prevented the supplier of a corporation from maintaining supplies to it. |

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| | *Tasmanian Dam Case*<br><br>**s 51(xx)** extends to laws that regulate a trading corporation with regard to activities undertaken for the purposes of its trading activities. | Court unanimously upheld **s 10(4)** of the *World Heritage Properties Conservation Act 1983* (Cth), which regulated activities done by a trading corporation *'for the purposes of its trading activities'*. |
| | *Re Dingjan*<br><br>For a law to be validly characterised under **s 51(xx)**, the standard of connection is that of 'significance':<br><br>1) A law enacted under the power must be significant 'for the activities, functions, relationships or business of the corporation'.<br><br>a. Includes direct regulation and regulation of outsiders.<br><br>2) A law which 'merely refers to or operates upon' those aspects or elements of corporate identity will not be sufficient. | The majority rejected the validity of **s 127C(1)(b)** of the *Industrial Relations Act 1988* (Cth), which gave the Industrial Relations Commission the power to examine unfair contracts imposed on independent contractors, including in cases where they related to the business of a **s 51(xx)** corporation.<br><br>It was held that the law merely provided the IRC with jurisdiction on contracts 'relating to the business' of a **s 51(xx)** corporation, and had no significance for those corporations, since the jurisdiction of the IRC did not depend upon any benefit/detriment impacting on the corporation, but merely required the existence of a relationship. |