

DIVISION OF LAW MAKING POWER

THE CONST. DIVIDES LEGISLATIVE POWER B/W STATE AND FED PARL

SPECIFIC POWERS: Powers that are stated in the constitution that belong to the Cwth parliament (**exclusive**) or the Cwth and State parliaments (**concurrent**).

EXCLUSIVE POWERS:

Powers to make laws that are stated in the constitution that only the Cwth Parliament has.
eg. S90 customs laws

CONCURRENT POWERS:

Power to make laws that are stated in the constitution that are shared by Cwth and State parliaments.
S51 Taxation laws

RESIDUAL POWERS: Law making powers that are **not stated in the constitution** that remained **with the state** following federation.

Impact of S109:

- 109 deals with inconsistencies of laws between the state and the Cwth
- States that when the state and Cwth laws conflict, the Cwth' prevails and the state law becomes invalid to the extent of the inconsistency.

eg. The Victorian Marriage Act 1858 was rendered redundant by the Cwth' Marriage Act 1961 due to S109, this made marriage an exclusive power of the Cwth.

RESTRICTIONS BY THE CONST ON LAW MAKING POWERS OF STATE AND CWTH

Sections in the constitution can place restrictions on the types of laws made by State and Cwth parliament.

*Restrictions are generally placed to **protect the rights of an individual or for state parliaments to maintain some autonomy.***

STRUCTURE OF THE COMMONWEALTH PARLIAMENT

FOLLOWS A BICAMERAL STRUCTURE CONSISTING OF THE UPPER HOUSE, LOWER HOUSE AND THE CROWN

COMMONWEALTH

Crown: Governor General
(appointed by the Queen on the recommendation of the Prime Minister)

Upper House: Senate
(equal number of representatives from each state)

Lower House: House of Reps
(provide equal representation – one member of parliament from each electoral division)

GOVERNMENT VS PARLIAMENT

GOVERNMENT: The political party that achieves a **majority of seats** in the lower house.

- The governor general appoints the leader of the party as Prime Minister.
- The prime minister chooses members of their party (from upper or lower house) to form government.
- These members are called ministers with individual portfolios (responsibility for a particular area of government activity)

PARLIAMENT: the legislative branch of the government of Australia. It consists of three elements: the Queen, the Senate and the House of Representatives.

CABINET: core decision making body that comprises of Prime Minister and senior ministers.

- Develop policies, initiate new law and administer existing laws.

OPPOSITION: the main non-government party to win seats in the HOR

- Challenge and scrutinise the conduct of government
- The part that commands the majority of seats in the HOR does not always receive majority in the Senate

LEGISLATION

- Legislation is made by Parliament, whereas, delegated legislation is made by the executive
- Legislation is made in response to matters of public concern e.g. Clean Energy Act 2011 passed that sets out ways to reduce carbon pollution and encouraging clean energy.
- Legislation is an important reflection of prevailing political, social, economic or cultural attitudes at a particular time.

DELEGATED LEGISLATION: Delegated (or subordinate or subsidiary) legislation refers to those laws made by persons or bodies to whom parliament has delegated law-making authority

BILL: a proposed law that has not yet received Royal Assent

LATIN MAXIMS

EJUSDEM GENERIS

- Where general words follow a list of specific items, the general words are read as applying to other items akin to those specifically enumerated
- Used as a narrowing tool
- The general words must be interpreted in relation to the specific words that precede them
- Is there an identifiable category? If not, the rule can not be used to limit general words
- Look for a dominant feature, look for combination of specific and general words, check if the outside word shares similarity
 - **Wills Act:** “A Will may be revoked by burning, tearing or otherwise destroying it” Does writing “cancelled” on it or scribbling on it suffice?
 - **Stewart v Lizards [1965]**, does motor oil fall within the definition of “Litter includes bottles, tins, cartons, packages, paper, glass, food or other refuse or rubbish.” of the Litter Act 1964.
 - **In Malouf v Manly Council, 2002**, does an outdoor eating area fall within the definition of “restaurants, cafeterias, coffee lounges and other eating places”?

NOSCITUR A SOCIIS

- The meaning of an unclear word can be determined by the words surrounding it, same CLASS of items or words – different to *Ejusdem generis*
- A word is known by its associates
- Looking for words that fall under the same category
- The ambiguous word is to be interpreted in relation to the words that proceed it
 - **R v Ann Harris, 1936** ‘... if a person shall unlawfully and maliciously stab, cut or wound...’ What about biting?

➤ **You use EJ when you find a combination of specific words and general words.**

➤ **You use EJ also when there is there a recognizable/identifiable/similar category**

➤ **If there are words with the same width (e.g. stab, cut, wound have a distinct feature) you use the Noscitur Rule**

REDDENDO SINGULAR SINGULIS

- By rendering each his own, where a text exhibits the pattern “A and B are Y and Z”, Reddendo suggests that A should be matched with Y and B should be matched with Z, achieving a sort of symmetry in the text.
 - **Example:** “Any person who buys any marijuana or cocaine without a chemist permit or a doctor’s certificate commits an offence” *different if it was ‘and’. Marijuana requires chemist permit and cocaine requires doctor’s certificate

EXPRESSIO UNIUS EST EXCLUSION ALTERIUS

- When things are normally paired together, this maxim says that if they aren’t, it is intentional
- Look at the purpose to see if this intentional exclusion fits in alignment
- The express mention of one thing is to the exclusion of others
- Some things we say together i.e. “barristers and solicitors” (the words are said together usually) and when one is said without the other, this is a deliberate exclusion
 - **Salemi v McKellar:** The court was asked to consider two contrasting deportation provisions in the *Migration Act 1958*. The first provision - in respect of ‘prohibited immigrants’ - made provision for a court hearing prior to deportation, while the corresponding provision for ‘aliens’ was silent as to this. The court concluded, by use of the maxim, that aliens were not entitled to a hearing prior to deportation.

"MAY" AND "SHALL"

Section 45 ILA

Construction of "may" and "shall"

1. Where in this Act or any Act passed or subordinate instrument made on or after the commencement of this act the word "**may**" is used in conferring a power, that word shall be construed as meaning that the power so **conferred may be exercised, or not, at discretion**
2. Where in this Act or any Act passed or subordinate instrument made on or after the commencement of this Act the word "**shall**" is used in conferring a power, that word shall be construed as meaning that the power so conferred **must be exercised**.

****The provision applies only to legislation made after 1 July 1984, therefore only applies to legislation enacted after 1984**

Common law

- At common law, expression like 'may' were sometimes read as creating a duty. E.g. *"The Registrar may correct errors in the birth register upon proof of the error"*
- **Samad v District Court of NSW (2002) (High Court)** : *"The Director-General may suspend or cancel a [methadone] licence or authority on any one or more of the following grounds:...(a)-(f)...causing disruption to the amenity of the area..."*. D-G concluded methadone clinic was causing disruption, so the issue was whether the D-G had to cancel or suspend license or still had a choice.
HELD: The High Court considered context of section. If the section demanded suspension, this could occur for minor reasons. Although the court read the section as granting a discretion this was not simply because of the use of the word may but because of a consideration of the context and purpose of the provision and the consequences of the interpretation.
- **Leach v R (2007) 230 CLR 1(High Court)**: Applicant was convicted of two murders and rape in 1983 and received mandatory life sentence. The *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT) enacted in 2003. Section 18 provided for the fixing of a non-parole period of 25 years for two or more convictions of murder.

LEGISLATION: s19. DPP may apply for longer or no non-parole period...

(5) The Supreme Court may refuse to fix a non-parole period (i.e. refuse to reduce the sentence) if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.

HELD: DPP's request was granted

- The word may is used *"not to give a discretion, but to confer a power which is to be exercised upon the Court being satisfied of the matters described in the provision."*
- Once the Court was "satisfied" under s 19, the answer will "dictate and order under subs(5)".
- i.e. 'may' was interpreted as 'must'

**** Generally if the sentence is like 'if _____ may', then it is common law**

How do you reconcile the ILA and common law?

- There is no case that deals with this issue:
 - So→ start with s45 (if legislation was passed after 1984) ILA and apply common law value presumptions
 - If legislation passed before 1984 – 'may' is open to argument
 - 33 2A of ILA