

LAW 2111 Constitutional Law Sample Notes

TOPIC 1: FUNDAMENTAL CONCEPTS, INSTITUTIONS &
INSTRUMENTS

What is Constitutional Law?

- Main body of law that **regulates the three arms of government**; and the relationship **between** these arms of government
- The **Constitution**: **Three** arms of government:
 - i. **Executive** – **Administers and enforces the law**. This consists of the **Government** – includes public service, police and army. **Crown** is the head of the Executive branch. Crown representative at Cth level is **GG**, and at State level is Governor
 - ii. **Legislative** – **Drafts the law. Consists of the Parliament**.
 - **Cth Level**: House of Representatives, Senate and the Crown.
 - **State Level**: Legislative Assembly, Legislative Council and Crown; and Bicameral (except for Qld)
 - **Legislature** = Parliament – body that exists to enact laws
 - iii. **Judiciary** – **Interprets the law** = Courts

Fundamental Concepts and Institutions

- i. **Parliamentary Sovereignty**
 - **No** Australian Parl. (Federal/State) → **absolutely sovereign** → powers of **all** Australian legislature is constrained by the **Constitution** (sovereign)
 - Considerable constraints on Cth; cf. **flexible** State Constitutions (mostly stemming from *Cth Constitution*)
 - **Criticisms** of Parliamentary Supremacy: no *check and balance*; *tyranny of the majority*; breaches of HR
- ii. **Rule of Law**
 - Ruled by law and not by men or people
 - Preventing **arbitrary exercise of power**
 - **Equality before the law**
 - **Individual rights**: rights of citizens (bottom-up)
 - Inconsistent with Parl. Sovereignty: Parliament can do what it likes cf. ROL setting boundaries
- iii. **Rule of Law: Australia's interpretation**
 - '[T]he **Australian Constitution** is framed upon the assumption of the **rule of law**.'

LAW 2111 CONSTITUTIONAL LAW

SUMMARY NOTES

iv. Bicameralism

- Australia's **Federal Parliament** is **bicameral**: two houses, **Lower House** (House of Reps); **Upper House** (Senate – democratically elected)
- **VIC: Legislative Council** (Upper House); **Legislative Assembly** (Lower House)
 - **Lower House**: represents **interests of individual voters**; popularly elected
 - **Upper house**: represents the **interests of the States**. States are **equally represented**, regardless of population
- Bill must pass through **both** houses to be considered a law

v. Representative Government: Composition of **lower house** of government (HoR)

- Democratically elected: Parliament's source of authority is in the **population**

vi. Responsible Government

I. **Executive (Government) is responsible to the Legislature (Parliament)**

- **Crown (G-G)** acts on the advice of its **Ministers**
- **Ministers** (including **PM**) may only remain in government while having the confidence of the **Lower House** (i.e. majority in HoR)
- Once **Government** loses majority → Constitutional convention that Government will resign and call an election
- **No clean separation** between **Legislative** and **Executive** branches: because **Executive** run by Cabinet (PM and several Ministers); but members of **Cabinet** also part of **Parliament** (Legislative); PM head of both **Executive** and **Legislature**

II. **Ministerial Responsibility**: Ministers **individually** responsible to Parliament

- Responsible for the activities of the administrative departments they head
- Accountability in public service: can be made to resign for failure of proper oversight

vii. Parliamentary Control of Supply

- **Supply** (*ordinary annual budget for government services*) must be authorised by **Parliament**: **S 81, 83**; with supply

CHARACTERISATION OF CTH LAWS

Characterisation: Definition

- Process of determining whether a Cth law falls within a HoP

General

- **Essential question:** Does this law fall within one of the Cth's heads of Power (HoP)? Is it a law '*with respect to*' the subject matter?
- **Nature:** Cth legislative power is limited ('*enumerated*' powers – express topics)
 - Cf. State's HoP: States have plenary legislative power
 - Cf. other legislative powers: concurrent powers (both Cth and State can legislate)

I. TRADITIONAL APPROACH: Doctrine of RESERVED STATE POWERS

General

- Historically, HC adopted a very narrow approach to the **characterization** of Cth laws
 - Certain legislative areas → reserved for the **State**, and cannot impinge on them, otherwise Cth law will be invalid
- **Negative characterization** (looking at what laws could **not** do, rather than what they could do) and interpreted narrowly to ensure preservation of **maximum area of unimpeded State regulation**
- **Rationale:** States form the Constitution – did not want to forfeit all their power

See ***R v Barger (1908)***

FACTS:

- Soon after **Federation**, Cth passed the ***Excise Tariff Act 1906 (Cth)*** which imposed a tax on manufacturers of agricultural implements
 - Concerned with the validity of certain provisions
- **S 2** concerned the **exemption of tax**: Cth argued validity under **S 51(ii)** re taxation
 - Exempted manufacturers from tax if complied with working conditions deemed by Cth government to be **fair** and **reasonable** (working conditions of farm workers)

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- Cth argued **valid law** pursuant to **S 51(ii) Cth Constitution** → gives Cth power to legislate re **taxation**

ISSUE: Whether **Excise Tariff Act** fell within **taxation** HoP

- Mr Barger (B) argued **not** a law regarding **taxation**: had **ulterior purpose** (beyond raising tax/revenue) → to **encourage the adoption of certain labour practices** within the agricultural sector
 - Evident from how manufacturers that complied with certain labour conditions → exempt from paying tax

HELD: Majority agreed with B

- Found that the law could **not** be characterized under **S 51(ii) Cth Constitution** (**'tax power'**) because **not** a law re **taxation**
 - Regulations of the **conditions of labour** **not** part of HoP
 - Disguising by title of legislation is not valid: **substance** of the act trumps **form**
- Cth laws **incapable** of **dual characterization**
 - Although **ETA** objectively about **taxation** and **labour conditions** → Court held it to be regarding '**conditions of manufacture of agricultural implements**'
 - Could not be about **both** → hence constitutionally invalid
- **Substance** of the SM of law trumps **form**
 - Disguising **substance** of subject matter by title of legislation → invalid excuse
 - **HC** drew from **Communist case** as per **Fullagar J**: **validity of a law/ administrative act under the law cannot be made to depend on the opinion of the lawmaker...**
 - Inquiry is concerned about the **substance** of the legislation, not the **motives**
 - Cf. **Isaacs J (Higgins J agreed)** in **dissent**: Doctrine of **equivalence** regarding **differentiation** between **tax** and **penalties** i.e. in various scenarios of taxation – tax is on the **goods**, but for various purposes and intentions
- **Assumption:** Certain SM of legislation **reserved** for State Parliament's **sole legislative power**
 - Court decided here that it was a law about **working conditions**, not **taxation**, and hence **constitutionally invalid**

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

Judicial Review by HC: see *Australian Communist Party case (1951)* as per Fullagar J re **substance > form**

- A power to *make laws with respect to lighthouses* does not authorize the making of a law with respect to anything which is, *in the opinion of the law-maker, a lighthouse.*
 - **Directly translated:** A power to *make laws re taxation* does not authorize the making of a law with respect to anything which is, *in the opinion of the Parl, taxation*

II. Explosion of RESERVED STATE POWERS i.e. rejection of reserved power doctrine: *Engineers*

See *Engineers*

FACTS:

- The Engineers Trade Union lodged an industrial claim in the **Cth Arbitration Ct** against 843 employers – would not be controversial, WA govt was one of the employers involved
- **S 51(xxxv) of the Cth Constn** gives the Cth power to make laws wrt the *conciliation and arbitration* of inter-state industrial disputes

ISSUES: Whether the **Cth** could make laws binding the **WA govt** under this HoP

- According to **RSP** doctrine → law invalid because *labour relations* involving a state government – area of **state reserved power**
- However, the Court did not apply the **RSP** doctrine in this case

HELD: CONSTITUTIONAL INTERPRETATION

- Majority championed a *legalistic, literal approach* to constitutional interpretation
 - Cth HoP to be interpreted in accordance with *natural meaning of the word therein*
 - **S 51(xxxv)** should not be read to **exclude States from its jurisdiction**, because it does not explicitly state that States are excluded
- **No** implied limitations should be read into HoP – unless such implication *necessarily* or *logically* flows from the text
- HC held that RSP doctrine not a valid doctrine: reasoning premised on the idea that those powers not *explicitly given to the Cth*
 - Assumed that Cth has power if it falls under one of the Cth HoP
 - However, no *automatic presumption* that implicitly **solely** belongs to the State

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- **DIRECT CHARACTERISATION:**
 - **Fairfax & Murphy** tell us that we look at the **subject matter of the law** and determine whether it goes to the **subject matter of a head of power** (substance > form, intention, incidental policies, purposes etc.)
 - **Dual characterisation is possible**
- **INCIDENTAL CHARACTERISATION:**
 - **Definition:** Even if SM of the law does not go to the **heart** of the SM of the HoP → look at whether it is **related** (**O'Sullivan v Noarlunga Meat**)
 - ▶ HC held that a law that required the registration of slaughterhouses fell within the **international trade and commerce** HoP because it fell w/in the **process chain** of **exporting** meat from those slaughterhouses
- **PROPORTIONALITY:**
 - Relevant in determining whether a law falls within a **purposive** HoP **and** whether a law falls within the **incidental scope** of a **non-purposive** HoP (**Nationwide News**)
 - Will not be relevant in determining whether a law falls within the **direct scope** of a **non-purposive** HoP (**Plaintiff S156/2013 v Minister for Immigration**)

VI. **CONSTITUTIONAL REMEDIES** (where HC rules that Cth law cannot be categorised under any of the HoP)

- i. Law will be **STRUCK DOWN**, and declared **ab initio**
- ii. Law will be **SEVERED** i.e. to give effect to the will of Parliament, sever section from rest of the law (which remains valid)
 - Possibly problematic: easy to sever if it does not inherently affect other sections of the act
 - However, if section is **integral** to other sections of the act: cutting it out would defeat the act → severance not possible
- iii. Law will be **READ DOWN**: construe more narrowly than why it currently is written as, so that it can be regarded as **constitutionally valid**

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- **Two** considerations:
 - i. Corporations act through **natural persons**
 - ii. In order to be effective, a regulation of the activities of corporations calls for the **imposition of duties upon those natural persons**
 - Corporations oft **artificial entities** → does **not** make sense to prohibit an abstract entity if people are not **also** prohibited from engaging in that behaviour
- **Valid** under the **incidental scope** of **corporations** power

See **Re Dingjan; Ex Parte Wagner (1995) 183 CLR 323**

Facts:

- Involved a challenge to certain sections of the **Industrial Relations Act 1988 (Cth)**
 - **ss 127A & 127B**: Industrial Relations Commission had **power to review and vary contracts** to which **independent contractors** were a party, if those contracts were **unfair, harsh or contrary to public interest**
 - **S127C(1)** defined the contracts as:
 - a) **Those contracts to which a const corp is a party**; (would be valid if **broad** view from **Tassie Dams** adopted)
 - b) ****A contract relating to the business of a const corp**; (would be valid if an even **broader view** than the **broad** view from **Tassie Dams** adopted)
 - ▶ Provides the link to **constitutional corporations**
 - c) **A contract entered into by a const corp for the purposes of the business of the corp** (would be valid if **narrow** view from **Tassie Dams** adopted >> fall-back)
- Concerned a **trading** corporation → **Tasmanian Pulp and Forest Holdings** engaged in woodchip business → first limb fulfilled
 - **TPFH** contracted with **Mr and Mrs Wagner** to harvest and transport timber
 - **Mr and Mrs W** then **subcontracted** task to **Mr and Mrs Dingjan**
- Contract falls either under **SS 127C(1)(a)** which allows industrial commission to review contracts **to which a constitutional corporation is a party**;
- and **127C(1)(c)** which allows industrial commission to review contracts entered into by the constitutional corporation **for the purpose of the business of the corporation** (Ws were harvesting and transporting the timber)

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- However, the Ws then **subcontracted their work** to Mr and Mrs D → this K became the subject of the case
- **1992:** W sought to **vary** certain K provisions with the **Ds**
 - **Ds** were not in agreement – asked the **Industrial Relations Commission** to review the K, claiming that it fell within the purview of this law because related to the **business of a constitutional corporation**
 - Even though TPFH not privy to K – because it was a K re **business of a constitutional corporation**, the Commission had power to review
 - Ws then sought to terminate the K
 - Commission *reviewed* and *reinstated* the K

ISSUES:

- Whether the provision of the **IRA** – which gave the Commission the power over this K was valid
- Was **S 127C(1)(b)** a **valid section** of the K?
 - The only section giving Commission power over the K
 - Test for whether a law can be characterised under the **incidental scope** of the corporations power

HELD: Majority found that **S 127C(1)(b)** was invalid on the basis that it fell outside the scope of the corporations power

- Clearly did not fall within the **direct scope** of the power: was not directed at any constitutional corporation, or rights and duties of a constitutional corporation (first limb)
- Further, to be characterised under the **incidental scope** → needs to have **some beneficial or detrimental effect** on the constitutional corporation (**McHugh J**)
 - K relating to the **business of a constitutional corporation** → would not necessarily have such an effect e.g. K between **W** and **D** was varied so as to change the route by which timber was transported → probably would not have any **actual** effect on the constitutional corporation

MINORITY: Deane & Gaudron JJ seemed to agree in principle with the majority

- To fall within the **incidental scope** of the corporations power: law must have some kind of **beneficial** or **detrimental effect** on the constitutional corporation
- **Disagreed** on the facts of the case:

TOPIC 9: IMPLIED INTERGOVERNMENTAL IMMUNITIES

General: Limits to legislative power

- Once an act can be validly characterized under a relevant HoP: is there any other basis on which the act is *invalid*?
- IGI: Specific issue of
 - i. **Whether the Cth can pass legislation which is binding on the States as an entity**; and conversely,
 - ii. **Whether the States can pass their own legislation which binds the Cth**

Contextual Background

- **RECIPROCAL (IMPLIED) IMMUNITIES**: Pre-**Engineers** - States immune from Cth laws, and Cth immune from State laws
 - **Rationale**: HC will draw on the **fundamental constitutional principle** of **FEDERALISM**
 - ▶ Cth and States act as independent and autonomous entities → cannot pass legislation that affect each other
 - **Cth immune from State laws** (**D'enden v Pedder**)
 - ▶ Tasmanian statute could not impose a Cth law on an officer (rep. of Cth)
 - **States immune from Cth laws** (**Railway Servant's** case)
 - ▶ Cth Industrial Award and whether it could bind the way the NSW government treated its own employees – no

See **Engineers (1920)**

FACTS:

- Industrial Trade Union launched an **industrial claim** in the Cth Arbitration Court, lodged against 843 employers – not controversial
- However, controversy arises because Western Australian government part of employers

ISSUES:

- Whether Cth Arbitration Court has jurisdiction over the WA govt (state)

HELD:

- Pursuant to the doctrine of IGI (established in **Railway Servants**): WA govt would have been immune to the jurisdiction of the Cth Court
- However, Court held that Cth Arbitration Court did have jurisdiction over the WA govt

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- **Majority** upheld a textual/ literal approach to constitutional interpretation
 - Cth HoP to be interpreted in accordance with the **natural meaning** of the words therein i.e. **no implied limitations** to be read into Cth HoP, unless flowing naturally or logically from the text itself
- **Cth Arbitration Court** established pursuant to the conciliation and arbitration power (**S 51(xxxv) Constitution**)
 - Court held **not** necessary or logical to **imply** that state instrumentalities were *immune* from laws enacted under the Cth's conciliation and arbitration power
- **Ratio**: Clearly authorises Cth to pass legislation which **binds** state government instrumentalities → States no longer immune from Cth laws
- **Obiter**: Courts authorised **reciprocal** power by the States → Cth no longer immune from State laws
- HC rejected the doctrine of implied intergovernmental immunities: implications to be avoided in constitutional interpretation
 - However, certain exceptions have developed to maintain the **Federal balance of powers**
 - Developed differently re State immunity for Cth laws; and Cth immunity for State laws (not completely reciprocal)

I. State Immunity from Cth law

General

- **Engineers**: Court established that the Cth can bind the States, but not the **extent** to which Cth can do so
 - There are limits to the Cth's power to pass legislation which is binding on states
 - a. **Express**: There has to be a HoP; and further limitations regarding **SOP** and **Freedom of Religion (S 116)**
 - b. **Implied**: Arise from Australia's **federal** nature and the **detrimental impact** that some laws might have on the r/s with Cth and the State → need to safeguard the continued existence of both Cth and State governments

TOPIC 10: SEPARATION OF JUDICIAL POWER (CTH)

- **General**
 - Cth does not have **plenary** law-making power: has enumerated law-making power i.e. only legislate over subjects that the Constitution specifically gives it power to legislate over
 - **Limits** on the Parl's law-making power: separation of powers
- **Separation of Powers: The 'pure' doctrine**
 - Functions of the **three** arms of government should be **clearly** and **institutionally** separated: **Executive, Legislature, Judiciary**
 - **Rationale:** Each branch have its own role
 - i. **Legislature:** *creates* the law
 - ii. **Executive:** *executes/ administers* the law
 - iii. **Judiciary:** *adjudicates* the law
 - **Check-and-balance:** Ensures power is not concentrated – less likely to be abused
- **SOP doctrine in Australia:**
 - However, **Australia's context:** Strict judicial separation; Incomplete Separation b/w **Legislative** and **Executive**
 - **Government (Executive)** forms part of the **Legislature** i.e. **Executive** sits w/in the Parliament → impossible in the Australian Constitution to have a **complete separation** of **Legislature** from **Executive**
 - Nonetheless, there is a clear separation of **JUDICIAL** power from **Legislature** and **Executive**
 - Notion of an independent judiciary: **ruled by law**, not **arbitrary** exercises of power/ politicized decisions
 - **HC** insists that **Chap III Const** requires the **separation of federal judicial power**, from the exercise of **federal legislative** or **executive** power
 - **Parliament (Legislative)** may delegate some of its **legislative authority** to the **Executive** e.g. subordinate legislation (**Victorian Stevedoring v Dignan**)

LAW 2111 CONSTITUTIONAL LAW SUMMARY NOTES

- Separation between Executive and Legislature (*Victorian Stevedoring v Dignan* (1931))

FACTS:

- **S 3 Transport Workers Act** authorised the GG (member of the **Executive**) to make regulations regarding the **employment of transport workers** → broad legislative authority conferred on the GG
- Alleged that it was **unconstitutional**: no guidelines regarding what GG should take into account re **employment** → GG had unfettered discretion regarding employment of transport workers
- Act also **specifically stipulated** that regulations made under this act by the GG (**Executive**) would **override** prior acts of the Parl (**Legislature**)
 - Traditional rule of statutory interpretation: **later** act overrides an **earlier** act – and this applied to regulations
 - Regulations that GG was given unfettered discretion to **unilaterally** enact would override any **prior, inconsistent legislation** → reasonably controversial
- **Broad authority** conferred onto GG challenged as unconstitutional because it **violated** the **SoP** doctrine
 - Separation of the **Legislature** from the **Executive**

HELD: HC found that **S 3** → **valid** delegation of **legislative** power

- GG allowed to continue making rules re **employment** of transport workers;
- Such rules did not have to pass through Parliament
- **Extension of Parliament's legislative power** necessary for effective government (**Evatt J**)
 - **Pragmatic approach**: Government would not be able to function properly w/o the ability of **Legislature** to **delegate** some of its law-making powers to the **Executive** or other authorities
 - Parliament could not possibly be tasked with enacting everything

VALIDITY OF A DELEGATION OF LEGISLATIVE POWER: TWO factors of consideration

1. **Responsible Government**: Executive is **responsible** to the Legislature (Parliament) (**Evatt J**)
 - Executive as the best body to deal with the **delegation** of legislation
 - Necessary for legislation & delegated legislation to fall within the **HoP**