

Constitution and the Australian Federation
[International/ Comparative]

HOW TO BEGIN:

1. What is the question about, look at laws, see what laws say and what they are trying to implement.
 - a. Is something being taken away from someone? Some kind of property being taken or acquired or adjusting someone's rights to certain property? – Express Rights.
 - b. Is it about something external to Aus, relations between our government and international governments or a law implementing a treaty? – External Affairs.
 - c. Is it implementing one Cth law instead of state laws, making states deal with Cth banks, limiting size of state public service, affecting state employers, requiring state police to help federal police, requiring ministers to review state decisions? –Intergov immunities
 - d. About judges, etc? – Judicial power

Defence Power – Roadmap

Section 51(vi) – Purposive Power

1. Initially, there is a presumption in favour of a law's validity under s 51(vi) – (*Stenhouse v Coleman*).
2. State that the power is purposive, so Commonwealth needs to show that legislation will achieve a desired defence purpose, or be incidental to it, not just that it's about defence (*Polyukhovic v Commonwealth*).
3. The scope of defence power fluctuates (*Andrews v Howell; Stenhouse v Coleman*).
 - a. If total war – power is extremely broad.
 - b. If peace time – power is narrow.
 - c. State which situation appears to apply, to preempt the analysis.
4. Can the legislation be characterised under the defence power?
 - a. First aspect – Is it directly related to defence against a threat?
 - i. *Protecting against terrorism* is fundamentally the first aspect (*Thomas v Mowbray*).

There is a legitimate perceived internal to nation, to avoid civil unrest defence powers would be applied. Despite this not being an act of terrorism, an analogy can be drawn between *Thomas v Mowbray* and this issues, and this therefore using the defence powers as a preventative measure. The issue would fall within the first aspect of the defence power as discussed in the *Communist Party* case due to there being direct Military involvement.

- b. Second aspect – Is it incidental to a defence purpose, in combination with s 51(xxxix)?
 - i. Eg, consequences of war, or punishing terrorists – see note in *Thomas v Mowbray*.
 - ii. Eg, rationing of particular foods – see *Andrews v Howell; Stenhouse v Coleman*.
5. Is there some kind of imminent threat to Australia – Eg, direct, external, internal, etc?
 - a. If yes, of which facts may the Court take judicial notice?
 - b. Judicial notice generally only includes facts of public knowledge (*Stenhouse v Coleman*).
 - c. Why? Because some matters cannot be perused publicly for national security reasons.
6. Has the government recited itself into power, as in *Communist Party Case*?
 - a. Do not need to address this in a written answer if the answer is 'no'.
 - b. If so, court can refuse to take judicial notice.
Defence outweighs civil liberties
7. Is the legislation appropriate to achieving the defence purpose? (*Polyukhovic v Commonwealth*)
 - a. Answer this based on the facts provided.
 - b. Generally does not apply to legislation that is firmly within the first aspect (eg, raising an army).
 - c. Proportionality is important to consider (*Polyukhovic v Commonwealth; Stenhouse v Coleman*).
 - d. Example: Authorising defence force personnel to take blood samples, when they are not trained to do so, cannot be considered appropriate due to the risk of injury/infection for the patient.
8. Is the legislation adapted to achieving the defence purpose? (*Polyukhovic v Commonwealth*)
 - a. Answer this based on the facts provided.
 - b. Generally does not apply to legislation that is firmly within the first aspect (eg, raising an army).
 - c. Meaning: Is the legislation over the top? Does it go too far?
 - d. Example: Indefinite quarantine of medical refugees, who can be cleared of a disease within 24 hours, is not adapted to the purpose of protecting Australia from a medical threat.

Cases – Defence

Commonwealth Shipping Board Case (1926)

Commonwealth v Australian Commonwealth Shipping Board (1926) 39 CLR 1

- Peace time example.
- Even during peace, the Commonwealth can legislate under s 51(vi) for defence preparedness, but...
- Shipping Board attempted to entering into commercial agreement unrelated to defence.
- Naval and defence power was relied upon in the enabling Act.
- To remain viable, the Board had to be able to work on general commercial activities.
- Majority (5) held these powers did not warrant these activities in peace time (not purposive).
- Cf *Clothing Factory Case* – difficult to reconcile.

Clothing Factory Case

Attorney-General (Vic) v Commonwealth (1935) 52 CLR 533

- Peace time example.
- Clothing factory set up under legislation, to manufacture defence uniforms, predominantly, but also commercially supplied clothing to government departments and the Boy Scouts.
- Majority held that military uniforms was the main purpose, so was valid under defence powers.
- Stark J dissented, applying the *Shipping Board Case*.
- Note: Fullagher J described this case as borderline in the *Communist Party Case*.

Andrews v Howell (1941)

65 CLR 255

- Example of broad application during war time.
- Regulations were incidental to defence power.
- Andrews charged by Howell (an officer of the Apple and Pear Board) with transporting crates of apples, under *National Security (Apple and Pear Acquisition) Regulations*.
- Regulations purported to regulate transport disorganisation due to shipping issues caused by the war.
- Stated defence powers fluctuate in times of war and peace.
- Regulations were upheld as valid as achieving a purpose incidental to the defence power.

Women's Employment Case (1943)

Victorian Chamber of Manufacturers v Commonwealth (1943) 67 CLR 347

- Example of broad application during war time.
- Act was incidental to defence power.
- 'An Act to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war'.
- Plaintiffs argued the general subject-matter was not so connected with the war as to authorise Parliament to legislate under the defence power. Also argued, if that power existed, there was no authority to deal with the matter in the way Parliament did.
- Latham CJ said it did not compel women to work, only provides means to regulate wages and conditions to encourage women into the workforce, and so dealt with a problem caused by the war (lack of men), and was directed toward efficient supply of goods/services for the war effort.
- McTiernan, Williams and Rich JJ agreed the legislation was valid.

Stenhouse v Colman (1944)

69 CLR 457

- Example of broad application during war time.
- Regulations were incidental to defence power.
- Regulations allowed the Minister to regulate or prohibit the production, movement, distribution, sale and purchase of essential items – in this case bread – so he initiated licences to operate as a master baker.
- Stenhouse carried on the business of a master baker without a licence and she was convicted, on information from Coleman (Officer at Dept of War Organisation).
- Regulations upheld.

R v Foster (1949)

Ex parte Rural Bank of NSW (1949) 79 CLR 43

- Example of post-war control under defence power.
- Some regs not valid, purpose had ceased, others valid such as repatriation.
- Commonwealth attempted to continue war-time regulations, three years after the war.
- Unanimous court said Federal regulations validly enacted under the power do not necessarily stop with the cessation of fighting as it may still be dealing with issues brought about by the war.
- Despite no express constitutional power to deal with the aftereffects of war, some undeniably fall within the scope (eg. repatriation and rehabilitation of soldiers). This would be 'incidental to' the defence power.
- Note: The court put an end to other regulations: *Women's Employment Regulations*, petrol rationing, and court-enforced preferential housing for ex-service personnel.

Communist Party Case (1951)

Australian Communist Party v Commonwealth (1951) 83 CLR 1

- Example of recitation into power and lack of proportionality.
- *Communist Party Dissolution Act 1950* (Cth) passed to dissolve the Australian Communist Party and declare individuals or groups guilty without any factual connection.
- Prefacing recitals at the beginning of the Act purported to bring the legislation under the heads of defence power (s 51(vi)), and express incidental power (s 51(xxxix)) in conjunction with the executive power (s 61).
- Court held:
 - Recitals are not probative of any matter of fact relating to whether Parliament had the power.
 - That is, Parliament cannot recite itself into power.
 - Court refused to take judicial notice of the recital.
 - Act was disproportionate to the purpose of defence – ie, not appropriate and adapted.
 - 5/1 decision, Latham CJ dissenting.
 - A breach of civil liberties is relevant, but because it's not appropriate and adapted.

Capital Issues Case (1952)

Marcus Clark & Co Ltd v Commonwealth (1952) 87 CLR 177

- Example of defence power in times of international tension.
- Regulations under the Defence Preparations Act required the Treasurer's consent for raising loans and issuing shares above a certain limit.
- Act opened with a preamble, similar to the Communist Party Case, where it outlined a state of emergency requiring defence preparation in regard to economic and financial resources.
- Marcus Clark was a retailer looking to remodel stores and factories, rejected by the Treasurer.
- Court held:
 - Legislation and regs were valid for the purpose of defence.
 - Took judicial notice of the international situation (Chinese communists had entered the Korean War and Australian soldiers were in Korea).
 - Distinguished the *Communist Party Case* because in this one there were objective tests to ascertain a connection with the defence power.
 - In addition, the recitals were not an attempted recitation into power, but statement of purpose.
 - Court noted that in times of marked international tension, the Commonwealth can validly enact laws that effect significant economic controls.

Illawarra District Council v Wickham (1959)

101 CLR 467

- Example of defence power legislation extending past the cessation of hostilities.
- Highlights the preference for a time limit on this sort of legislation.
- *Re-establishment and Employment Act 1945* (Cth) enacted to give preferential hiring to ex-servicemen.
- Question for the court was whether the extension to 1958 was valid, answer was no because no longer characterised within second aspect of the defence purpose.
- Same question for the amendment extending it to 1960, answered the same way.

Thomas v Mowbray (2007)

(2007) 233 CLR 307

- Example of terrorism (internal threats).
- Thomas was the first Australian convicted under anti-terror laws, placed on interim control order.
- Challenged Div 104 of the *Criminal Code* (Cth) under which the control order was made.
- Court held:
 - Defence power extends to internal threats (unanimous).
 - As in *Farey v Burvett*, the words 'naval and military' were not words of limitation.
 - Gummow and Crennan JJ said *protecting against* terrorism is fundamentally within the first aspect of the defence power.
 - Note: *Bringing terrorists to justice* is more likely the second aspect. Be careful of wording.