Constitutional law

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Seminar 2: Interpretation and External Affairs Power

PART I – Interpretation of the Heads of Federal Legislative Power

- S 51 lists 40 matters over which Cth Parliament can exercise legislative power, known as 'heads' of legislative power
- **Characterisation= process of determining whether a particular Cth law is one 'with respect to' a head or subject matter of Cth legislative power**

- ***Engineers' Case*** (1920) – overturned two principles of interpretation that had previously dominated judicial understandings of the Constitution. These were known as **the doctrine of 'reserved state powers' and 'implied intergovernmental immunities'.**

Commonwealth Constitution, s 51 (xxxv)

Parliament shall have power to make laws…with respect to: **conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State**

Introductory notes on 'reserved state powers doctrine' and 'doctrine of immunity of instrumentalities', p 1111-1117

Reserved state powers doctrine

- Idea that there is some rather vaguely defined body of legislative powers that have been reserved to the states and into which federal legislative power cannot extend. The doctrine is subject to 3 lines of criticism:
    1. The doctrine seems to lack any real foundation in the text of the Constitution – s 107 says that state powers shall 'continue' but it provides no guidance as to what those powers might be
    2. The doctrine seems to reverse the proper order of inquiry required by s 107, for it suggests that the first question is one of identifying the powers reserved to the states and only after that is there a question of identifying the powers conferred upon the Commonwealth
    3. The doctrine appears to be a recipe for uncertainty and subjectivity

However, it was said in the Griffith Court that its foundations are firmer than this account would suggest. These foundations included:

1. A clear and defensible account of the political origins, underlying ideas, structural features and intended purposes of the Constitution
2. A careful articulation of the grounds upon which the specific content of the powers reserved to the states can be identified
3. A sophisticated recognition that constitutional interpretation inevitably requires choices to be made and that these choices can be guided by a general orientation either to expand federal power as far as possible or to read federal power with an eye to the resulting impact on the remaining legislative powers of the states

- **Scope of the power***: while most Australians are residents of states as well as of the Commonwealth, they are also part of humanity…*
    - Parliament has the authority to take Australia into the 'one world', sharing its responsibilities and cultural and natural heritage.
- Although external affairs are predominately concerned with other States, they are not exclusively so:
    - *Powerful transnational corporations*
    - *International trade unions*
    - *And other groups who can affect Australia*
- To be a law with respect to external affairs it is sufficient that it:
    - *Implements any international law*
    - *Implements any treaty or convention*
    - *Implements any recommendation or request of the UN or a subsidiary organisation such as the WHO…*
    - *Fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia*
    - *Deals with circumstances or things inside Australia of international concern*

- The fact that a subject becomes part of external affairs does not mean that the subject becomes, as it were, a separate, plenary head of legislative power
- *If the only basis upon which a subject becomes part of external affairs is a treaty, then the legislative power is confined to what may reasonably be regarded as appropriate for implementation of provisions of the treaty*
- The world's cultural and natural heritage is part of Australia's external affairs. It is the heritage of Australians, as part of humanity. As soon as it is accepted that the Tasmanian wilderness area is part of world heritage, it follows that its preservation as well as being an internal affair, is part of Australia's external affairs.

Deane J

- *A law cannot properly be characterized as a law with respect to external affairs if its direct operation is upon a domestic subject-matter which is not in itself within the ambit of external affairs and if it lacks the particular operation which is said to justify such characterization*. (**639**)
- ***A law would not properly be characterised as a law with respect to external affairs if it failed to carry into effect or to comply with the particular provisions of a treaty which it was said to execute (*p 639)**
- ***Or if the treaty which the law was said to carry into effect was demonstrate to be <u>no more than a device to attract domestic legislative power</u>***
    - Signing an international treaty just so the Commonwealth could legislate domestically on the topic
- ***The law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to external affairs***
- Implicit within this is the requirement for it to proportionate to what it is trying to achieve
    - E.g. A law to kill all sheep to enact an international obligation to try and stop the spread of a disease is disproportionate
- The overall effect of the provisions, and the prohibitions contained is sub-sections (a) to (g) of s 9(1) is that the prohibitions are automatically imposed regardless *of whether any relationship at all exists between all or any of the prohibited acts and the nature and source of the likely damage*

Seminar 9: Limits on legislative power from federalism: Intergovernmental immunities

- **Today:** How the Constitution limits the power of the Commonwealth and State governments to apply their laws to each other
- **Issue:** How does the Constitution limit the application of Commonwealth laws to the States?

Engineer's Case
Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129

Repudiation of doctrine of implied immunities – limitations on power found in the Constitution itself

Facts:

- Industrial dispute arose between the Amalgamated Society of Engineers and 843 employers in Australia.
- The Engineers' Union lodged a claim for an award thereby seeking to have Cth industrial laws applied to a State employer

Importance:

- **Takeaway from Engineers' Case**
  (1) repudiation of doctrine of implied immunities
  (2) articulated a constitutional method: limitations on power are found in the Constitution itself.

  - Doctrine of intergovernmental immunities overruled in *Engineers Case*
  - Rejected the idea of two levels of government: they can't legislate over each other
  - Even then, majority Justices noted possible qualifications to the general rule: left open question whether common law can exercise prerogative power, and that there might be some limits around power taxation. Still suggested there might be some limits to Cth's power to legislate over states
  - Today, clear that 2 doctrines have grown that in some way replaced the old doctrine of immunity of instrumentalities, limiting Cth power to affect the states, and another doctrine which provides some immunity to the Commonwealth.
  - Doctrine limiting Cth's power to affect states, important case: *Melbourne Corporation* provided a bank shall not conduct rules for a state is invalid. Law prohibited banking on behalf of the states. 3 different approaches in reasoning of majority justices (only two set out here):
    - **Dixon J**: Commonwealth could not impose a special burden on the states. Could not single out either a particular state, or discriminate against the states as a whole. i.e. law that only states could not conduct banking was a discriminatory law that was invalid.
    - **Starke**: Cth law can't substantially interfere with States exercising their own constitutional power. i.e. banking law interfered with states' activities.
    - These two conceptions of the law were for long advanced together. That is the position adopted by the court. See Mason J in Queensland electricity case.

Thomas v Mowbray (2007) 233 CLR 307, 411- 444

→ Re: anti-terror legislation. Constitutional challenge is directed at an 'Interim Control Order' (on a person claimed to be a terrorist defined by the Act) in this case issued by a federal magistrate – plaintiff submits that the legislation is not based on any valid head of legislative power → involves a significant deprivation of liberty. **s 51(vi)** is one of multiple Constitutional provisions relied on as the source of the authority.
→ 'defence' is broadened in response to threat of terrorism, not just 'war'.

→ Look at how the challenged legislation is **constructed** – how is this different? How do the limitations ie) internal / external from ACP case fare?

Hayne J:

S 51(vi) is not to be read as a legislative power whose content is defined by one or more kinds of response to external threat…. Naval and military defence does point to kinds of threat with which the power is concerned… it by no means follows that the only permitted subject matter of legislation made in reliance on the defence power is the provision for naval and military responses to such threats… the view that the power was confined in that way was rejected in *Farey v Burvett.*

→ analogy between terrorism and war

> The line between war and peace may once have been clear and defined by the declared state of relations between nations… that line is now frequently blurred… Terrorist tactics can be used by very small numbers of personnel but with large consequences… **Both war and terrorism are each in the pursuit of international political aims by the actual threatened application of concerted force.**

It should be accepted that the defence power is concerned centrally with defence of the Australian bodies politic… concerned centrally with defence against the imposition of political objectives on those polities by *external force*. **It matters not whether that force is sought to be applied by other nation states or by groups that do not constitute a state.**

Takeaway points:

- The division between external and internal threats is unhelpful – **national threats and emergencies do not have to come from other *nation states* to enliven the defence power.**
- The present case does not involve a wholly 'internal' threat – Hayne J finds it is neither "necessary or appropriate for the Court to examine the issues which might arise were it said that the defence power may be engaged to legislate with respect to such a threat"
- **→ Plaintiff's submission that actual or threatened aggression from a foreign nation is essential to the proper application of the defence power is rejected**.
  → … The differences between fully domestic/ international terrorism and how they affect the operation of s 51(vi) has not yet been resolved…
- **Internal / external distinction = rejected…** (see other judges' opinions)
  → broad approach to 'national emergency and threat of war' – it need not be a threat from other nation states, an external threat seems to be sufficient to enliven the power.
- Plaintiff's submission that defence involves the defence of the Commonwealth and states as a body politic, as opposed to citizens and property, is dismissed – arbitrary distinction and rejected as unhelpful. **The defence of the body politic includes defence of citizens and property within the Commonwealth.**

Kirby J (dissenting)):

Interpretation:

- Indefinite detention at the will of the executive is alien to Australia's constitutional arrangements (p1248)
- Cites the *Communist Party Case* (Dixon J at 205, McTiernan J at 222, Williams J at 263)– we also should reject executive assertions of self defining and self fulfilling powers (should worry about expansion of executive power) (p1249)
- The constitution and statutes should be interpreted in light of international law and the common law presumption in favour of personal liberty
- Indefinite detention would be contrary to the strong presumption in favour of liberty (p1249)
- Majority view has "*grave implications*" for the liberty of individuals which the court should not endorse
- Indefinite detention incompatible with rule of law

International law:

- *Note*: difficulty of international law arguments
- Kirby addresses this difficulty by trying to make adoption of international materials as more palatable
- International law should offer interpretive guidance but not to be binding
- Argues that US SC uses international law
- Points to cases where the court has taken into account international law (attractive proposition – other mature constitutional courts have been able to handle intl law as a form of interpretive guidance)
- *Note:* not as cut and dry as Kirby makes out
- *Lawrence v Texas:* clear that some members of the court do use international law (Kennedy J) but on the whole there is a significant degree of skepticism among the other members of the court, many of who believe it is anathema to use intl law

Punitive or non-punitive?

- Did not have to address this issue but did so anyway
- "*A power of detention can turn to punishment in a comparatively short time… Punishment under the constitution is the responsibility of the judiciary, not of the other branches of government (Lim)"*
- **Punishment because of the time extension**
- The existence and predominance of the judicial power necessarily implies constitutional limitations on the use of the heads of legislative power in Ch I and Ch II of the Constitution in providing for unlimited detention without the authority of the judiciary. This is because detention can turn into punishment, and punishment is the responsibility of the judiciary under the Constitution (p1254)

Importance

- Rejection of the reasonableness requirement (Hayne J in *Al-Kateb)* as opposed to *Lim,* where it is considered as an element. As long as the law is pursuant to a valid head of power, that is enough.
    - Use this statement with caution. Say it had at least been suggested that reasonableness is no longer a requirement.

Seminar 16: State Courts and the Separation of Powers

- These cases show the *nationalisation and unification of the judiciary*
- **The High Court is unifying the judiciary, and the first step was *Kable***
    - State courts are not entirely subject to Ch III but *to some extent they are*.
        - If a power is so far away from judicial power, then they won't be able to exercise it, even though there is no SoP in States
- We are slowly seeing unification of Australian courts, *whilst previously there was a clear separation between state and federal courts* (*Kable, Tatani, Wainohu*)
- The federal rule that judges can't act as persona designata if the role is so far away from the judiciary, this applies to states as well in *Kable*
    - In *Kable*, legislative conferral of state power to a court in NSW

- After ***Kable*****,** the test becomes a question of ***public confidence***
    - What are institutions in which the public could reasonably have confidence?
    - This criterion of public confidence for constitutional validity was widely criticised post-*Kable*
- In response to the public confidence criticisms post-*Kable*, **French CJ declared in *Totani* the need to ask about the defining characteristics of the Court.**
    - According to the Constitution, there shall be State courts, which bear certain characteristics.
    - There is an assumption in the Constitution that State Courts must be competent to exercise federal jurisdiction (French CJ)
    - Courts invested with federal jurisdictions must have the defining characteristics of Courts.

→ See other more recent, unsuccessful attempts to invoke Kable doctrine (circumstances were distinguishable). Ie) ***Knight*** **[2017]** HCA 29 vs. cases which have *successfully* applied it ie) **Totani [2010]**

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51[80]

Facts:

- **s 5 of the *Community Protection Act 1994* (NSW)** *gave the Supreme Court of NSW the power to issue a detention order specifically targeted at Gregory Wayne Kable* (s 3) for 6 months on application from the Director of Public Prosecutions (DPP - executive*) if satisfied on reasonable grounds that:*

    (a) The person is more likely than not to commit a serious act of violence, (one that has a real likelihood of causing death or serious injury to the other person or that involves sexual assault)

    (b) That it is appropriate, for the protection of a particular person or persons or the community generally, that the person be held in custody

(4) More than one application could be applied for (could potentially authorize indefinite

[80] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

- Means: court found the price was too high therefore was not necessary or appropriate and adapted
- The end was to reduce littering

Means must be appropriate for the end the law seeks to achieve:

- In *Tasmanian Dams*, the court upheld the validity of legislative provisions if they are appropriate and adapted to the implementation of the provisions of the treaty. But the means which the law adopts must not be disproportionate to the object to be achieved. (473)
  - A similar approach can be taken in this case.

- The court will look at the measures taken but not scrutinise them so closely so as to fulfil the role of the legislature. The test is very context flexible, the court can take into account the exigencies of each test.
  - Issues with the test is that it may be too vague, doesn't precisely state *when* the court should scrutinise

Application:

- **The objectives were valid but the legislation was still found to be in breach of s 92 as the discriminatory burdens placed on interstate trade were not justified.**
- SA could have achieved the same end of having more non-refillable bottles returned through **a lower deposit** (examples in other states / comparative measures with lesser burden)
- **Magnitude of the discrepancy**
  - Discrepancy between 15 cents prescribed for non-refillable bottles and 4 cents for refillable bottles went "beyond what is necessary" as it was a gross disparity (474)
- The law through differential treatment of non-refillable and refillable bottles was unlikely to conserve the state's energy resources "other than to a trifling extent"
- In reality, to conserve SA's resources it would be better to have non-refillable bottles manufactured outside of SA (477)

- S.A could have achieved its aims of non-littering with a lower deposit requirement, therefore although the law pursued a legitimate end, it was not reasonably appropriate and adapted to that end. The exception in *Cole v Whitfield* could therefore not be relied on.

Decision:

- The law was unanimously held to be invalid – the state did have an interest in preventing littering, but this law was not necessary and appropriate and adapted to that end.

Importance:

- Example of factual discrimination
- Purpose exception: the court recognized that sometimes discriminatory burdens on interstate trade may be legitimate and not violate s 92
- BUT ONLY WHERE the purpose is to secure a legitimate non-protectionist objective
- Any discriminatory burdens on interstate trade **must be incidental to and not disproportionate** in achieving the legitimate objective
- If non-discriminatory measures are available to achieve the same legitimate purpose, this will suggest the law is protectionist