

# LAW2011 – FEDERAL CONSTITUTIONAL LAW

## Problem Questions:

- Most cases in Fed Con are HCA decisions,
- But, HCA is not bound by its own decisions,
- Thus, the decision may not hold in the future,
- Need to be aware of minority judgments

*You believe this is the position (x HCA decisions on this matter), but, strong dissents which have not gone away (must be aware of these dissenting trends), how strong is the precedent?*

## TOPIC 1 – INTRODUCTION

### A. GENERALLY

**S51 Constitution:** The Parliament shall, **subject** to this **Constitution**, have **power to make laws** for the **peace, order, and good government** of the Cth with respect to...

- *List of subject matters in respect of which Cth parliament can make laws*
  - The subject matters are not exclusive
  - They are *concurrent* powers with States (have plenary legislative power)
  - Except for the powers which the Constitution exclusively vests in the Cth
- Any law purportedly made by Cth parliament which is not within one of the subject matters, is unconstitutional (law is invalid if declared by courts to be unconstitutional)
- Any court (but usually HCA) can declare a law to be unconstitutional
- *A law only becomes unconstitutional if the court declares it as unconstitutional*
  - If no person challenges an unconstitutional law, the law remains

### Basic Principles

- Constitution empowers Cth to pass laws with respect to 'heads of power'.
- These laws are effective across the whole of Australia.
- The States retain what is known as *plenary power*, meaning that they can legislate with respect to any matter other than those matters over which the Commonwealth has exclusive power.
- Most Cth powers are concurrent – they can be exercised by States as well.
- In such a situation, the Cth laws prevail over State laws when inconsistent s 109.
- The Cth has some exclusive powers – s 90. If a State tries to pass a law in such a field, it is invalid.
- States have their own Constitutions – recognised under s 106.
- Cth can make grants to the States to convince them to pass laws in which it does not have the power to do itself.
- The States may hand over or refer specific powers to the Commonwealth – s51 (xxxvii).

### B. PROCESS

#### Two-Tier Test to Determine the Constitutional Validity of An Act:

##### I. Power

<i>[1] Interpretation (of cons provision)</i>	Court gives a definition/meaning to the words of the head of power
<i>[2] Characterisation (of the statute)</i>	<i>Whether the act falls within the scope of the subject matter</i> <ul style="list-style-type: none"><li>• Characterise the act to determine the subject matter</li><li>• Does the subject matter characterised of the statute come within the previously interpreted words of s 51?</li><li>• If characterisation produces a subject matter which is outside subject matter of a head of power →unconstitutional, invalid</li></ul>

Determine whether the law falls within a head of power;

1. *Ascertain the nature of the law in question*
  - a. Rights, duties, powers, privileges it changes/regulates/abolishes (what it does)
2. *Determine the scope of the relevant head of legislative power in the constitution and whether the law in question falls within that head of power:*
  - a. Whether the law relates to the subject matter/purpose of the head of power in a way that allows it to be described as a law with respect to that power

- b. *Subject matter power* → sufficient connection with the head of power?
  - c. *Purposive power* → law capable of being seen as reasonably appropriate and adapted to achieve that purpose?
3. *Whether the law breaches an express/implied prohibition in the constitution*

## II. Prohibition

- Even if the law comes within a head of power in s 51, is there a prohibition in the constitution which would prohibit the law in another way
- ('Subject to this constitution' in s 51)?

## C. INTERPRETATION

Interpretation: Giving a definition to the relevant head of power (when interpreting, refer to *Engineers, Grain Pool*).

Previously:

- HCA adopted an attitude to s 51 that limited Cth parliament,
- Favoured state governments (act as autonomous entities),
- Limited Cth parliament to national matters
- **HCA used 2 doctrines of interpretation**
  - *Doctrine of the immunity of instrumentalities*
    - No Cth laws could bind state governments,
    - But, Cth laws could bind the people of the states
  - *Doctrine of reserved state powers*
  - Interpret the head of power (s 51) in a way that does not take away from the states the legislative power that traditionally belonged to them

### ***Grain Pool of WA v Cth***

- ***Constitutional texts to be construed with all the generality of which the words will permit***
- The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges it creates
- There is sufficient connection between the law and the head of power

### ***Engineers v Adelaide Steamship (Engineers Case)*** (Knox CJ, Isaacs, Rich, Starke JJ)

Facts:

- Claim lodged by a trade union of engineers in Cth court
- Sought declaration re industrial award concerning 800 employers
- In WA, the employers included 3 government employers
  - Argued the doctrine of immunity of instrumentalities,
  - We are state government employers/agencies,
  - Under Cth law, conciliation, arbitration court cannot apply to us
- Isaacs J → had previously argued against the doctrine of immunity of instrumentalities and doctrine of reserved state powers
  - UK statute, apply normal techniques of statutory interpretation
  - Should not think about federalism and other political principles,
  - Should interpret the words as words, as we do as a court,
  - Should remove both the implied doctrines and,
  - Apply strict textualism, legalism to the constitutionalist text

**Issue:** Whether a Cth law made under conciliation and arbitration power in s 51 could authorise the making of an award binding those 3 governmental employers in WA

**Held:** HCA **rejected doctrines of immunity of instrumentalities + reserved state powers**

- WA government employers were subject to Cth Act,
- It was in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one state, no exception being expressed as to industrial disputes in which states are concerned

**General Principle:**

- Apply principle of **strict textualism, legalism** when **interpreting the constitution**
- States are subject to a Cth law under s 51 if such legislation on its true construction applies to them
- Ordinary principles of construction applied so as to discover in the actual terms of the instrument their **expressed/necessarily implied meaning**
- Not decide on Cth power by looking over your shoulder as to what effect the decision will have on state power (constitution will take care of that), so, HCA must give to the words their **full and fair meaning** (Barwick)

- **No other considerations** (federalism, preserving state powers)

**Effect:**

- It took from HCA the notion/limiting principle,
- HCA now favours strong Cth powers (supremacy of Cth over states is enforced through s 109 Constitution - When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.)
- Now, the abolition of both doctrines means that if supported by a head of power in s 51, Cth can implement legislation that affects the states
- Clearly, Cth does not restrain itself and give the power back (power shift)

D. CHARACTERISATION

- Characterisation involves determining whether the impugned legislation falls within the scope of the subject matter.
- To characterise this, look at the rights, duties, powers and privileges that the law changes, regulates or abolishes: **Fairfax v Federal Commissioner of Taxation**
- Dual or multiple characterisations: as long as one possible characterisation fits within a s 51 head of power, then that is enough: **Fairfax v Federal Commissioner of Taxation**

**Fairfax v Federal Commissioner of Taxation (1965)**

Facts:

- Concerned the validity of the Income Tax and Social Services Contribution Assessment Act 1916 s 11 ("s 11") which effectively exempted the income earned by superannuation funds from income tax, provided the funds were invested in Commonwealth securities
- The appellant [Fairfax] says s11 concerned investment, not taxation thereby making the enactment of the Provision invalid
- The commissioner claimed that s 11 is a law with respect to taxation, therefore valid.

Held: s 11 was valid under s51(ii) [tax power]

- Dual characterisation (can characterise the statute in a number of ways)
  - 1. Law changes duty to pay tax that if I invest in government bonds, I am exempted from paying part of my tax (law valid as within taxation power)
  - 2. Law changes privilege as to where I invest, as it provides incentives for investment in government bonds (dominant characterisation is investment in government bonds but this is not a relevant head of power)

Even though the dominant characterisation was the incentives characterisation, the law could be characterised as a law with respect to taxation, as the duty to pay tax was being affected/regulated

Kitto J:

- Affirmed the principle that **once it appears that a federal law has an actual and immediate operation with in a field assigned to the Commonwealth, it is enough to make it prima facie valid**
- That an enacted law has a legislative purpose outside of the prescribed power is not sufficient to invalidate a law
- The legislative policy may be obvious: to incentivise investment in Commonwealth securities, but s 11 does not expressly prescribe or forbid it

Barwick CJ:

- Noted that it is possible that a law relating changing a tax liability may be found to not be a law with respect to taxation, but there was nothing in the facts of the current case to suggest otherwise

Principle:

*I. Interpretation (interpret tax, what does tax mean?)*

- A tax is a compulsory exaction of money by a public authority for public services, enforceable by law, not a fee for services

*II. Characterisation*

- Must determine the **subject matter** of the statute which is determined by reference to the **rights, duties, powers and privileges** which the impugned **law changes/regulates/abolishes** (Kitto J)
- Dominant characterisation principle:
  - If a law is capable of two/more characterisations, the court must determine which is the dominant characterization

- Which is the characterisation that gets to the core of the statute?
- Pre-Fairfax: It is only the dominant characterisation that can be used to test whether the law comes within the power/is valid or not
- Fairfax rejected dominant characterisation principle
  - Can have **dual characterisation** and,
  - If **one** of the **possible characterisations found the law to be with respect to a head of power**, then that was enough and the law is **valid**

III. *Any other prohibitions in constitution that would make this law invalid? No*

**Grain Pool of WA v Cth** (Confirmed Fairfax principle)

*Process of determining whether a federal law is a law with respect to a head of Cth power*

1. Examine the rights, duties created by the law (nature of the law) (characterisation)
2. What is the connotation and denotation of words and phrases used to describe the power? What is the scope of the power? What is its core meaning and what matters incidental to that core can also be regulated (interpretation)?
3. What is the strength of the law's connection to the head of power?

Does the law have a **sufficient connection with s 51 head of power** (characterising statute)?

- Consider the **practical** + the **legal operation** of the impugned **law**

**Purposive vs Non-Purposive Powers** (Engineers Case)

- Purposive: Purposive powers must be exercised pursuant to a specific purpose stated in the Constitution, in addition to being with respect to the stated subject matter
  - It is not enough that the relevant law relates to the subject matter, it must also be for a constitutional purpose [e.g. s 51(vi) defence power]
- Non-purposive: the fact the law relates to the subject matter is enough – most heads of powers are non-purposive
  - An activity (**trade and commerce**), or
  - A type of person (aliens, corporations), or
  - A recognised category of legislation (taxation, bankruptcy), or
  - An object (lighthouses, fisheries, currency)

**Murpheyores Inc v Commonwealth (1976)**

Facts:

- M (private firm) held mining lease from Qld (intrastate as state license)
- M to export minerals mined, but needed permission under *Customs Act* from Cth Minister (act regulating trade and commerce as it is exporting),
- Minister would only give permission after considering outcome of an environmental enquiry on island
- M challenged this, stating the Minister does not have authority to take into account environmental factors when granting permission to export
- Environmental purposes stated, but the real impact is on mining (would people mine if they knew they could not export?)

Held: The legislation was valid under the trade and commerce power

- The power falls within the subject matter, as it is regulating a right to export, which is the transportation of goods overseas (part of trade and commerce)
- The trade and commerce power was a non-purposive power; therefore, it is enough that the law deals with the permitted topic and the legislation was held valid
- Furthermore, an act that deals with a topic under a non-purposive power does not cease to deal with that topic merely because factors extraneous to the topic may be taken into account

Principle:

- Non-purposive power (Huddard v Cth)
  - Purpose is irrelevant, provided the law is within the subject matter
  - Once the power over the matter is established, it becomes irrelevant how/upon what grounds/for what motives the power is exercised
  - Legislative motive is irrelevant when charactering non-purposive powers
- Purposive power
  - If the constitution states the law must be for a particular purpose,

- The law will be invalid if it is for an improper purpose,
- Even if it is within the power's subject matter

#### E. READING DOWN/SEVERANCE

- **If a law is prima facie unconstitutional, then a law is read down and severed to the extent that it will not exceed its constitutional power**
  - *HCA is very reluctant to declare a state is invalid*: Reluctance explained by the principle that the statute is an expression of the will of the Australian people expressed through its elected representatives through parliament
- 1. **Reading Down**: Can the statute be characterised in a number of ways?
  - a. Interpret the statute in the way that makes it constitutional
  - b. If the statute can be read in another way which is slightly different but can get the statute into power, then, the court will read the statute in this way
- 2. **Severance**: A part (few words, phrase) of the statute is constitutionally invalid, this does not mean that the entire statute becomes invalid. Court will sever the constitutionally invalid part.

**Acts Interpretation Act 1901 (Cth) s 15A**: Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

## TOPIC 2 – TRADE AND COMMERCE

### A. DEFINITION

#### **Constitution s 51 (i):**

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- (i) trade and commerce with other countries, and among the States.
  - Includes international and interstate trade and commerce
  - Excludes purely intra-state trade
  - Cannot breach any other part of the constitution

#### **What is Trade and Commerce?**

##### **Commonwealth v Bank of NSW** – Classic Statement

Dixon J:

- Covers intangibles, as well as the movement of goods and services
- Gas and electricity may be considered an extension of the movement of physical goods
- It covers communication because there is no reason to exclude visual signals: TV, radio, telegraph, telephone
- Covers transportation, traffic, movement, transfer, interchange, because these words embrace what the dominant conception of what the commerce clause requires
- To confine the subject matter to physical things and persons would be out of touch with all modern developments

Also note s 92 limitations on trade within the Commonwealth

##### **W & A McArthur v Qld** - Accepted (still influential) Principle

'Trade, commerce, intercourse'

- Not terms of art (give words their natural meaning not a legal definition)
- They are expressions of fact
- Terms of common knowledge, as well known to laymen as to lawyers,
- Better understood in detail by traders, commercial men than by judges

Trade and commerce between different countries

- Has never been confined to the mere act of transportation over the border
- Trade and commerce includes all the commercial arrangements of which transportation is a direct and necessary result
  - Includes the mutual communings, negotiations, verbal and by correspondence, bargain,