

CONSTITUTIONAL LAW EXAM NOTES

Commonwealth Acts:

- Constitutional interpretation of Commonwealth power pp 10 – 11
- Characterisation of Commonwealth power pp 12 – 15

Head of power (all Commonwealth Acts must have a head of power):

- External affairs s 51(xxix) pp 16 – 22
- Corporations s 51(xx) pp 23 – 26
- Grants s 96 pp 27 – 29
- Spending powers ss 81 and 83 p 30

Relationship with State laws:

- Intergovernmental immunities: State immunity from Commonwealth laws pp 36 – 40
Commonwealth immunity from State laws pp 41 – 42
- S 109 inconsistencies pp 43 – 45

Limits:

- Separation of powers pp 46 – 52
- Implied freedom of political communication pp 57 – 62

Commonwealth law but no Act:

- Executive powers s 61 pp 31 – 35

State Acts:

- Origin of State legislative power pp 5 – 6

Relationship with Commonwealth laws:

- Intergovernmental immunities: State immunity from Commonwealth laws pp 36 – 40
Commonwealth immunity from State laws pp 41 – 42
- S 109 inconsistencies pp 43 – 45

Limits:

- Restrictive procedures pp 7 – 9
- Separation of powers (*Kable*) pp 46 – 47, 53 – 56
- Implied freedom of political communication pp 57 – 62

Restrictive Procedure Process:

1. Identify the RP:
 - Ordinarily a restrictive procedure will not be valid and binding because they purport to undermine principles of parliamentary sovereignty (must retain sovereignty of later parliament) and State plenary power (**s 2(1) Australia Act, Union Steamship v the King**)
 - However, a restrictive procedure provision may be valid if it seeks to govern the constitution, powers or procedure of the States parliament (**s 6 Australia Act**)
2. Is the RP in the first law doubly entrenched? **AG (NSW) v Trethowan**:
 - The provision of the act which contains the restrictive procedure is itself covered by the requirement to be changed by way of that procedure (in order to change the RP, must use the RP on the provision containing the RP)
Stops a later Parliament from simply repealing the RP and then repealing the law that the RP covers via a standard process
 - The RP must be mandatory ('if you want to change any section of this act, you must...')

NO: the RP can be repealed by using the standing legislative procedure and the RP will not be binding

YES: RP may be binding – continue

3. Is it truly a manner and form provision? (give arguments for both sides, continue in the affirmative)
A provision will be a complete abdication of parliament's power and not a true manner and form provision if the section could never realistically be changed (overly onerous)
 - Invalid: referendum with a 99% majority or referendum required to be held within 10 days
 - Valid: referendum with a normal majority (consistent with parliamentary sovereignty and State plenary power)

NO: it is a complete abdication of parliament's power – not valid as a RP, laws can be enacted without conforming to the RP

YES: it is a true manner and form provision - continue

AG (NSW) v Trethowan: RP (referendum) was valid and binding

AG (WA) v Marquet: An absolute majority was binding

West Lakes v SA: Not valid for an extra-parliamentary, private, non-representative body to give permission or veto legislation (abdication of parliamentary sovereignty)
King CJ in obiter: a special majority of 2/3 is an attempt to deprive Parliament of powers and is not valid (validity of special majority depends on the percentage and subject matter)

Always analogue to these cases, and continue in the alternative even if found invalid

4. Does **s 6 Australia Act** apply? (precursor is **s 5 CLVA**)
 - a) First law must contain a manner and form provision (a RP – not a CPP of Parliament law)
 - b) Subsequent law must be about the CPP of ParliamentWhere an Act doesn't deal with the CPP of P, it is valid through normal procedure even if in disregard of RP (**AG (WA) v Marquet**)

Australia Act 1986 (Cth)

S 6: Notwithstanding sections 2 and 3 (2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

Constitution of Parliament: (the composition of parliament)

- Abolishing or adding a house
- Composition of the houses (who and how elected eg that members be directly elected by the people)
- Changing electorate boundaries or affecting electoral process
- The features that give the parliament and its houses a representative character

AG (WA) v Marquet: The constitution of Parliament extends to features which give it, and its houses, a representative character

Taylor v AG (Qld): Parliament may even change its structure, so long as it remains representative

Procedures and powers of Parliament: Dixon J in **AG (NSW) v Trethowan**:

- Procedures: Parliament's internal procedures, parliamentary conduct (eg question time), parliamentary provision
- Powers: Parliament's law making capacity (eg a law that restricts or expands parliament's law making power)
Not every law that expressly or impliedly amends a manner and form provision regards the powers of parliament
Laws concerning the appointment and dismissal of judges might be bound by manner and form provision because it confers extra power on the Parliament

NO: RP isn't binding

YES: RP is valid and must be complied with

5. Has the process of law making complied with the restrictive procedure? Is the subsequent Act valid?
Always be sure to determine whether the process undertaken by the Parliament actually complies with the prescribed procedure

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| Taylor v AG (Qld) |
| <ul style="list-style-type: none"> Long history of deadlock between the houses of Qld parliament, new Act introduced as a way of breaking the deadlock Council passed an Act with an alternative (not restrictive) procedure, whereby a bill rejected twice by the UH could be put to a referendum, and if approved it could receive assent (regardless of the Council's failure to pass the Act) The government then tried to use that procedure to abolish the Council Council argued the Act couldn't apply to such a fundamental matter as the bicameral nature of the parliament |
| <ul style="list-style-type: none"> The Act was authorised to amend the constitution and have the affect of abolishing the Council Qld parliament had the power to pass the Act under s 5 CLVA (the law didn't concern the CPP of Parliament) Constitution means composition, form or nature of the houses of legislature Barton J: cannot eliminate the representative nature of the legislature, but can abolish one house Isaacs J: the representative nature of the legislature needs to be preserved, but Parliament may even change its structure so long as it remains representative The power to impose the referendum requirement and to abolish the Council is part of the power to make laws for the 'peace order and good government' of a state |

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| AG (NSW) v Trethowan |
| <ul style="list-style-type: none"> Government wanted to pass an Act to get rid of the majority opposition in the LC without a referendum Per the Vic Constitution, "the LC shall not be abolished except in the manner provided in this section (a referendum), and that provision was doubly entrenched "the provisions of this section shall extend to any bill for the repeal or amendment of the section LC passed the bill because they thought it would go to referendum, government bypassed the referendum and went straight to Governor for assent LC argued that parliament has full power to amend its constitution, but is subject to RP's within the constitution |
| <ul style="list-style-type: none"> State Parliaments do have the power to enact binding RP's which bind its successors The RP was valid and binding, wasn't too onerous (referendum is possible to pass) If a manner and form provision hasn't been doubly entrenched, a parliament is free to legislate to remove the entrenchment provision and amend the earlier protected provision by standard Parliamentary procedure The language must be mandatory, otherwise the Parliament may forego the provision Minority judgment found it impermissible, too onerous, an abdication of legislative power Source of this power came from s 5 CLVA (precursor to s 6 of <i>Australia Act</i>); every parliament has the power to change laws so long as they comply with the manner and form set out in certain acts |

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| West Lakes v SA |
| <ul style="list-style-type: none"> An Act purported to install floodlights on the football oval in a West Lakes residential area S 16(4) <i>West Lakes Development Act</i>: certain alterations to the agreement couldn't be made without consent in writing of West Lakes (couldn't be unilaterally changed by state legislature) <i>West Lakes Development Act</i> was ratified by the developer and the minister West Lakes sought an injunction against the floodlighting legislation arguing it was inconsistent with s 16(4) |
| <p>SASC held:</p> <ul style="list-style-type: none"> The later (floodlighting) Act was valid The RP in the West Lakes Act was an abdication of Parliament's law making power and didn't bind the Parliament King CJ: not valid for an extra-parliamentary, private, non-representative body to give permission or veto legislation as it is an abdication of parliamentary sovereignty King CJ in obiter: a special majority of 2/3 is an attempt to deprive Parliament of powers and is not valid (validity of special majority depends on the percentage required and the subject matter – more important = more onerous) The law was not a truly manner and form provision, rather a renunciation of the power to legislate on that topic A referendum requirement can be distinguished as the people are a representative body – Parliament represents the people, so it is not an abdication of power for Parliament to refer certain legislative questions to the people |

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| AG (WA) v Marquet |
| <ul style="list-style-type: none"> A bill to <i>amend</i> s 13 of the EDA shouldn't be presented to the governor unless it had been passed by absolute majorities of the LC and LA Parliament passed a bill to repeal the old act, and another to enact a new principal of electoral distribution in Australia for a more equal number of people in each electorate (concerned the constitution of parliament) Neither bill was passed by absolute majority Council for the state argued that a repeal didn't constitute an amendment (RP was carelessly drafted) |
| <ul style="list-style-type: none"> S 13 is binding under s 6 <i>Australia Act</i> as it affects the constitution of Parliament, therefore must be complied with If a law proposed for enactment, in breach of a RP, is not one regarding the CPP of parliament, the RP can be ignored The constitution of the Parliament extends to features which give it, and its houses, a representative character Dismissed the idea that there can be any source for a manner and form provision other than the <i>Australia Act</i> Manner and form provision doesn't have to be in the Victorian Constitution 'Amend' per s 13 includes a repeal – otherwise would defeat the purpose of the provision |

Characterisation of Commonwealth Power:

Remember that if the section is invalid, the invalidity extends to just that section and not the whole Act

Identify the subject matter:

On facts, the Commonwealth is seeking to enact [law concerning] under [head of power]

Dual characterisation:

Fairfax v FCT: dual characterisation is possible as long as the law can be characterised as falling within a head of power, even if at the same time it can be characterised as a subject matter that is not a head of power (Kitto J) (rejected *Barger*)

Murphyores v Cth: confirmed dual characterisation, doesn't matter if law also concerns a topic not within a head of power (Mason J)

But note Callinan J dissent in **Workchoices** (criticised **Fairfax** and **Murphyores** dual characterisation approach):

"It has been said more than once than an enactment may be concerned with more than one subject... When the Commonwealth comes to this Court to contend validity of legislation on either of those bases it asks the Court to do what the legislature is itself unwilling or unable to do; to strip mine the Constitution to try to discover in it, or extend for the Commonwealth come (any one will do) supportive head of power, express or implied"

Is the power purposive or non-purposive?

1. Purposive heads of power (rare)

Describe a specific purpose, which must be aimed at regulating and controlling the subject matter

- **S 51(vi)**: the defence power – a law enacted under this section must be reasonably adapted for the purpose of the armed defence of the nation against enemies

| Australian Communist Party v Commonwealth |
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| <ul style="list-style-type: none">• <i>Communist Party Dissolution Act</i> purported to dissolve the ACP and appoint a receiver of ACP's property• Also made provision for any group or body not registered as in industrial organisation which was affiliated with the ACP to be declared an unlawful association where GG satisfied that the group's continued existence was prejudicial to the defence and security of Commonwealth• Act preamble asserted the Party was committed to the use of violence to overthrow the system of government in Australia and to disrupt industries vital to the nation's defence by means of strikes and stoppages of work• Party and several unions sought a declaration that the Act was beyond the scope of the Commonwealth's power in s 51(vi) or from the interplay of ss 51(xxxix) and 61 |
| <ul style="list-style-type: none">• It could not be characterised as a valid law under the defence power (was ultra vires)• The law was disproportionate to the purpose of the defence power, which did not extend to authorise the law• There was insufficient evidence to classify combat of communism as a subject matter within the defence power• The preamble couldn't operate to extend the application of constitutional power• SS 51(xxxix) and 61 didn't authorise the Act as the Act did not prohibit specific acts or conduct, but dealt directly with persons |

- **S 51(xxxix)**: the incidental power – there must be purpose for the government to regulate areas which are not part of its express legislative authority
- **S 51(xxix)**: the external affairs power

Test: proportionality test (for both core and incidental powers)

- Legislation within a purposive power is characterised by reference to the purpose or object of the legislative power, not by its actual operation or effect
- There should be a reasonable relationship or balance between an end and the means used to achieve that end; the law should be regarded as reasonably appropriate and adapted to the fulfilment of the end of the power

| Leask v Commonwealth |
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| A law will be valid under a purposive power if it is sufficiently proportionate (Dawson J) To determine the validity of a law said to be supported by a purposive power, a court must ask; 1. What it is a law for the specified purpose 2. Whether the law goes further than is necessary to achieve that purpose (ie whether it is appropriate and adapted) |

| Australian Communist Party v Commonwealth |
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| <ul style="list-style-type: none">• The law was disproportionate to the objective of defending the nation (distinguished between times of war vs peace), so was therefore invalid• In measuring disproportionality, regard may be had to surrounding circumstances that render harsh laws legitimate |

2. Non-purposive heads of power (most powers)
Do not describe a purpose, but describe something else such as:
- **S 51(i)** trade or commerce – an activity
 - **S 51(xx)** corporations – a type of person
 - **S 51(ii)** taxation – a recognised category of legislation
 - An object eg lighthouse, fisheries, marriage, divorce

Core (express) scope:

Direct effect test:

Does the proposition deal with a subject matter that 'directly affects' the subject matter of a head of power, or is conducive to it? (Professor Zines)

Remember to take in to account dual characterisation

Fairfax v Federal Commissioner for Taxation: direct effect (on head of power) test; not the intended consequences or purpose
The characterisation of a law will be determined by the nature of the obligation, right or privilege that the law actually regulates, changes or abolishes, rather than its intended purpose or consequences

Murphyores v Cth: confirmed direct effect (on the head of power) test – what the law does, rather than its intention/purpose
Irrelevant if considerations leading up to a decision made under the law are outside the head of power

Workchoices: confirmed the direct effect test

Do not use proportionality test:

Plaintiff S156 v Minister for Immigration and Border Protection: proportionality is not relevant for the core scope of a non-purposive power

Leask v Commonwealth

- Dawson J: To introduce the concept of proportionality is to introduce a concept which is alien to the principles which this court has hitherto applied in determining the validity of laws passed by the Cth Parliament
- If the purported head of power is non-purposive, the validity of the law will be determined by reference to its operation and not by reference to proportionality
- HCA conceded that proportionality could *have relevance* to the characterisation of non-purposive powers
- No judge said proportionality was the *determinative factor* in characterisation of non-purposive powers

Incidental (ancillary) scope:

- Every legislative power carries with it the authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter
- **S 51(xxxix)** expressly gives the Commonwealth power to legislate upon matters incidental to the execution of any power vested by the Constitution, but the HCA has confirmed this incidental powers power extends to all heads of power
- Any piece of legislation may be constitutionally valid even if it only comes within an incidental power of a head of power

Sufficient connection test:

There must be a sufficient connection with the subject matter of the power and it must be reasonably necessary for the Commonwealth parliament to legislate over this area with respect to the core head of power

Grannal v Marrackville Margarine: Commonwealth has authority to legislate in relation to acts, matters and things necessary to effectuate the head of power's main purpose

Plaintiff S156 v Minister for Immigration and Border Protection

Proportionality test may also be relevant, but not decisive:

- There should be a reasonable relationship or balance between an end and the means used to achieve that end; the law should be regarded as reasonably appropriate and adapted to the fulfilment of the end of the power
- A law may be so disproportionate to the legitimate attainment of the subject matter of the head of power, so as to take it outside of the head of power

Some judicial support in *Leask* for the idea the proportionality may be relevant in characterising the incidental aspect of non-purposive powers:

Leask v Commonwealth

- Gaudron J: "Proportionality is one of several considerations that may be taken into account when determining whether the subject matter of a law is relevantly connected with a particular subject or with a constitutional head of power"
- However, proportionality is nothing more than a guide to sufficiency of connection

Fairfax v Federal Commissioner of Taxation

- *Income Tax and Social Services Contribution Act* was amended to provide that the income of a superannuation fund would not be exempted from income tax, unless the Commission was satisfied that 30% of the fund's assets were invested in public securities
 - Fairfax was a trustee of a fund assessed as liable for income tax on the basis that it didn't comply with the investment conditions
 - Fairfax appealed on the basis that the amendment was a law with respect to the investment activities (of superannuation funds), and not a proper exercise of the s 51(ii) power
- This law was valid as it was in substance and form a law with respect to taxation, with no obligation for superannuation funds to invest in public securities (even though it was encouraged)
 - The characterisation of a law will be determined by the nature of the obligation, right or privilege that the law regulates, changes or abolishes, rather than its intended purpose or consequences
 - Approach to characterisation focused solely on the direct effect of the law, rather than its consequences or purpose
 - Policy and purpose behind the law are irrelevant considerations when the HCA is characterising a law
 - Dual or multiple characterisation where one character doesn't fall within a head of power, is permissible provided that one of its characters is within a commonwealth head of power (rejected Barger's case re sole characterisation test – expands power of Commonwealth Parliament)
 - Kitto J's test for characterisation: can the law properly be described as a law with respect to a head or heads of power? Is the law sufficiently connected or incidental to the power invoked to support it?
 - A tax doesn't cease to be valid merely because it regulates, discourages or indefinitely deters the activities taxed

Murphyores v Commonwealth

- Minerals were found in Fraser Island which are used in paints (rutile), nuclear reactors and gemstones (zircon)
 - M held leases under the Mining Act which allowed the mining and exporting of zircon and rutile from Fraser Island
 - Commonwealth regulated that the export of zircon and rutile is prohibited without written approval from Minister
 - Ministers was concerned about impact of mining on the island and withheld the licence for environmental reasons
 - M said these reasons were impermissible to withhold a licence
 - Was this a law about trade and commerce s5 1(i), or about the environment (no head of power)?
- The law and Minister's decision was a valid exercise of the trade and commerce power, regardless of its motive
 - The direct legal effect of the legislation was to prevent exports without ministerial approval
 - The Minister's consideration of the environmental matters didn't affect the validity of the Regulations
 - As long as one of the effects falls within a head of power, the law is valid
 - Look at what the law is doing (direct effect), rather than what its purpose is (expands Commonwealth power)
 - Policy and purpose behind the law are irrelevant considerations when the HCA is characterising a law
 - A law can confer unfettered discretion on an authorised person or body so long as the law itself can be directly characterised under a head of power
 - Mason J: a law which absolutely or conditionally prohibits export of goods is a law that operates on trade and commerce with other countries
 - Murphy J: it is no objection to the validity of a law otherwise within power that it touches or affects a topic on which the commonwealth has no power to legislate (confirming dual characterisation)

Leask v Commonwealth

- Commonwealth created a strict liability offence of appearing to arrange transactions into smaller transactions, so as to avoid a reporting duty
 - Leask had been committed for trial of such offences and sought a declaration that it was not a valid law of the Commonwealth under the currency power (s 51(xii))
- The Act was valid within s 51(xii) because it regulated the extent to which currency could be used to transfer wealth, therefore there was a sufficient connection between the Act and the head of power
 - The fact that the Act was harsh, disproportionate or ill-adapted to obtain the legislative purpose was irrelevant
 - Brennan and Dawson JJ: if the purported head of power is non-purposive, the validity of the law will be determined by reference to its operation (sufficient connection), and not by reference to proportionality
 - Proportionality of legislation isn't a general tool for constitutional interpretation, it is only one of several matters to be considered when purpose is an issue
 - But a purposive law will be struck down if it cannot be regarded as reasonably appropriate and adapted to the fulfilment of the end of the power
 - The HCA use the proportionality test (disproportion may indicate a lack of sufficient connection) and may examine the purpose, and thus the appropriateness of the law to established constitutional validity of purposive powers
 - Exception to the *Fairfax* and *Murphyores* assertion that policy and purpose behind the law are irrelevant considerations when the HCA is characterising a law

Plaintiff S156 v Minister for Immigration and Border Protection

- In 2013, Rudd proclaimed any asylum seeker who arrives in Australia by boat will have no chance of settling in Australia as refugees
 - S 198AD *Migration Act*: unlawful non citizens who are also unauthorised maritime arrivals ('UMA's) were to be taken to regional processing countries asap
 - S 198AB *Migration Act*: allows Minister by legislation to designate a country as a regional processing country if in the national interest
 - 4 days later P, a member of a minority group, entered Australian migration zone at Xmas Island
 - P was deemed to be an unauthorised maritime arrival and was detained in PNG, couldn't apply for a protection visa
 - P commenced proceedings in the original jurisdiction of the High Court, challenging the validity of ss 198AB and 198AD of the Act on the ground that neither provision is supported by any head of power in s 51 of the Constitution
 - P conceded that the power conferred by s 51(xix) extends to legislation to exclude or deport aliens (UMA's)
 - P argued proportionality may inform whether a sufficient connection with a head of power exists in the first place
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- SS 198AB and 198AD are laws with respect to a class of aliens and are valid within s 51(xix)
 - The relevant test for whether a law falls within a head of power is whether there is a sufficient connection between the law and the power
 - Must first characterise the law by determining its legal operation and effect
 - Then ask whether the provisions of the law in question are laws with respect to (are relevant or have a sufficient connection to) the subject of the enumerated head of power concerned
 - It is enough for a federal law to have immediate operation within a subject of legislative power assigned to the Commonwealth
 - There was nothing to support P's argument that there were relevant considerations which the Minister was obliged to, but did not, take into account in making the decision
 - The character of the provisions and their connection to a head of power are determined by reference to their terms, operation and effect, not administrative arrangements which are made independently of them