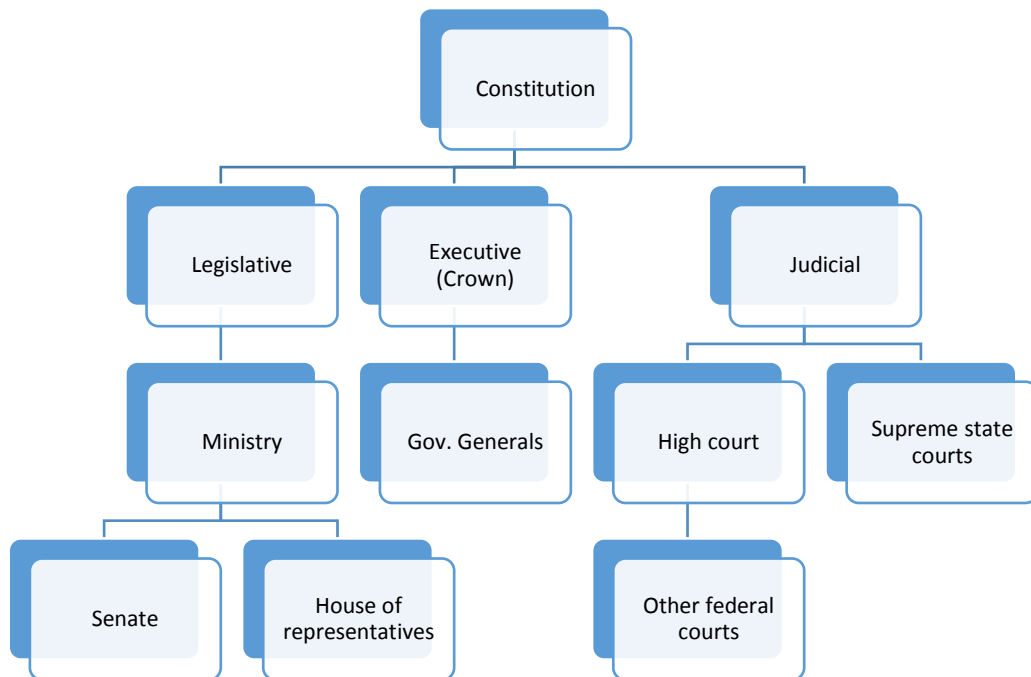


CONSTITUTIONAL LAW

Legislative (Legislature)	Executive (Federal gov)	Judicial (Judiciary)
<ul style="list-style-type: none">• Make the law• Prospective• Acts binding on everyone	<ul style="list-style-type: none">• Enforce law• Administer government	<ul style="list-style-type: none">• Adjudicate the constitution and laws made• Retrospective• HCA publish reasons for judgment - precedent for lower courts, binding on parties.



Constitutional interpretation and characterisation

S51 – Confers specific powers on Parliament. Is law authorised by a particular head of s51 legislative power? Is it within a core grant of legislative power, or made pursuant to the execution of an incidental power?

Subject matter powers (trade and commerce):

- Characterised via sufficient connection test: Is there a sufficient connection between the law and the head of power?
- As long as law can be characterised as being a law with respect to a subject matter which is within the power, it does not matter that it might also be characterised as bearing upon some other subject matter not within it.
- When characterizing law, court is not overtly concerned with the policy the law embodies, but whether it can be fairly described as a law 'with respect to' a specified subject matter. The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges, which it creates. **(Fairfax)**
- The practical as well as the legal operation of the law must be examined to determine if there is a sufficient connexion between the law and the head of power. The connection

cannot be so tenuous that the provisions cannot sensibly be supported by section 51(i) of the Constitution. (*Re Dingjan; Ex parte Wagner.*)

- Non-purposive powers require you to examine a law's operation and effect (**Leask**)
- If a subject to which a law relates falls within an enumerated power the law is valid, even if that is not the main subject of the law (**Murphyores**)

Purposive powers (defence, nationhood):

- Must look at law's purpose for validity (i.e. whether the law is intended to achieve that purpose) (**Leask**)
- However, also need to ask whether it is appropriate or adapted or proportionate to the purpose intended.
- The proper use of proportionality test has yet to be settled. The general consensus that proportionality may be relevant in determining whether a law infringes an express or implied limitation on legislative power, and may be relevant to characterisation by reference to subject matter powers, except perhaps where reliance on incidental power is dependent on legislative purpose (**Leask**)
- This analysis is used to ensure that the Commonwealth Parliament does not implement measures that lack the necessary connection back to the power. Proportionality is used to ensure that the Commonwealth head of power is not used to drastically expand and intrude on the residue powers of the States.

Are there "reserved powers" reserved to states into which Commonwealth cannot intrude, i.e.

"implied immunities"? No – Commonwealth legislative power in s51 is full- Powers are interpreted broadly and generously according to their natural meaning. However, every power exercised must be referable to the constitution. (**Engineers case, Leask**)

- Constitution is to be read as statute.
- Duty of High court to expand constitution according to rules of statutory construction.

The Commonwealth's powers are interpreted without reference to the impact that they will have on the States' legislative powers.

Commonwealth and states:

s51 is subject to this Constitution which provides for the existence of States.

Melbourne corporation case -Established the 'implied federal principle'. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers.

States do not restrict the Commonwealth from exercising powers to their fullest (*Engineers*), but this is subject to the provisions of the Constitution itself which expressly provide for the continued existence of the States. A law may be invalid if it is aimed at States and imposes a special burden or disability on the exercise of powers and fulfilment of functions of certain States.

Tasmanian Dams Case-

- A commonwealth law may not discriminate against a State
- A commonwealth law may not inhibit or impair a States continued existence of capacity to function as a government.

Austin - The principle is infringed if a law imposes a special burden on a state which has the effect of substantially curtailing its capacity to function as a separate government.

NB the intergovernmental immunities doctrine protects only the institutions of the State governments and not their powers.

financial dominance of the Commonwealth over the States and the Commonwealth's ability to use s 96 grants to the States to make them implement Commonwealth policies

Clarke v Commissioner of Taxation (2009)

French CJ highlighted factors to consider in applying the implied limitation:

Application of implied limitation requires multifactorial assessment with factors relevant to include:

1. Whether law in question singles out one or more of states and imposes special burden/disability on them which is not imposed on persons generally
2. Whether operation of a law of general application imposes a particular burden or disability on the states
3. Effect of law upon capacity of states to exercise constitutional powers
4. Effect of law upon exercise of their functions by the states
5. Nature of capacity or functions affected
6. Subject matter of the law affecting the state or states and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application

None of these factors, considered separately will necessarily be determinative of the application of the limitation.

- i.e. law which singles out the states/state will be of considerable significance to be weighed together with the effects of such a law on their capacities and functions
- law of general application may be more difficult to demonstrate in its impact upon the states, that it transgresses the limitation

Trade & Commerce s51 (i)

- Federal parliament: power over interstate and foreign trade and commerce
- State parliaments: residual power to legislate with respect to intrastate trade activity

Parliament cannot attempt to hinder private competition or create a monopoly violating s92 of the Constitution (**Australian National Airways case**)

Power with respect to trade and commerce with other countries includes the power to regulate products to be exported. The powers extend to supervision and control of all acts which can be identified as needed for export. (**O'Sullivan v Noarlunga Meat**)

Is the law in substance with respect to interstate and foreign trade? Does the law protect / foster / encourage interstate and foreign trade and commerce, even if also relevant to intrastate trade and commerce? (**Second airlines case**)

- Commonwealth can legislate on incidental matters (s51(xxxix)) but this power is restricted by the court's sensitivity to Commonwealth encroachment into the domain of intrastate trade. (**Wragg**).
- There is no incidental power to legislate for intrastate trade and commerce. This power cannot undermine state parliament's residual power to legislate for intra-state trade and commerce (**ANAC case**)
- Precisely drafted provisions are more likely to be valid (**See Burgess; Second airlines case**)

s92 – "Free" trade among states.

- Purpose of section to create free trade area throughout the commonwealth.
- Law offends s92 if it imposes:
 - discriminatory burdens of a protectionist kind or
 - if its effect is discriminatory against interstate trade and commerce in that protectionist sense or its effect is discriminatory and the discrimination is upon protectionist grounds (**Cole v Whitfield**)
- The words "absolutely free" refer to freedom in the economic sense.
- Court looks upon law for its substantial operation or effect- are there actual economic effects? Law may not in effect advantage local traders or put interstate competitors at a disadvantage.
- Hard to apply Cole v Whitfield to Commonwealth law. However, discrimination of sort identified in Cole v Whitfield will not be unacceptable simply because a Commonwealth law does not apply uniformly to all trade and commerce of the relevant type.
- The Court looked to the purpose of the Tasmanian laws and found that their objectives were of a conservational nature. As the laws applied to all crayfish, they were not of a protectionist nature and hence not in breach of Section 92.
 - If a state law applies to all trade and commerce, interstate and intra-state alike, it is less likely to be protectionist than if there is discrimination appearing on the face of the law.
 - Where the law in effect discriminates in favour of intra-state trade it will offend s92 if the discrimination is of a protectionist nature.
 - A law which has as its real object the prescription of a standard for a product or service or norm of commercial conduct will not ordinarily be grounded in protectionism and will not be prohibited by s92.