CONSTITUTIONAL INTERPRETATION

Federalism: Division of legislative power

- The Constitution establishes a federal system of national government (Cth) and regional governments (colonies, which became the states)
- Model: framers *followed* the U. S. model (specific powers given to the Cth, residual/general power left to the States). *Rejected* the Canadian model as too centralist (2 specific lists of powers)
- **Cth parliament has limited LPs**: its law-making powers must be found within the Con.
    - **Concurrent/non-exclusive powers** are specified in the 39 placita of **s. 51**
    - **Specific/exclusive powers** (only exercisable by Cth parl., depriving states of any power to enact valid laws in this area) are specified in **s. 52**
- **Powers left unassigned are left to be exercised by the States** (**s. 107** – general/residual powers 'continue' unless power is exclusively vested in the Cth)
- The general arrangement is one of **concurrent powers**. Even in area where Cth has clear grant of law-making power, State parl. will normally have power in that area too
- The possibility of conflict between State and Cth laws is acknowledged in **s. 109**: in a case of conflict, Cth law shall prevail.

Foundations of Commonwealth-State relations

The Australian Constitution is an agreement between the 6 pre-existing colonies on the Australian continent who were, in practice, independent and self-governing entities, although subject to the overriding imperial authority of the U. K.

A clear majority of the framers of the Constitution *intended* to create a federal system of govt: a Cth parl. with important, but limited powers + States continuing as self-governing entities with most of the powers they possessed prior to Federation (subject to the Con. and certain specific powers withdrawn which were considered best left to a central govt., e.g. issues of defence, trade: **ss. 51, 106, 107**).

Creating a federal Cth requires a division of powers between the new political entity (Cth) and exiting political entities (colonies renamed as states)

- **s. 51**: specific list of Cth powers, but concurrent/non-exclusive. States can also legislate in the same areas
- **s. 52**: exclusive powers of the Cth Parl. States cannot legislate in these areas; if they do, law is automatically invalid (exception to concurrent powers)
- **s. 90**: only Cth can legislate re imposition of customs and excise duties
- **s. 106**: Generally, preserves the constitutions of colonies when they become States
- **s. 107**: powers not specifically and solely assigned to the Cth Parl remain with the States
- **s. 109**: Cth laws override State laws in the event of inconsistencies

Pre-*Engineers*

- Early HCA consisted of 3 judges who had been heavily involved in the movement to federation and drafting of the Con., and the choices and compromises which went into it.
- Generally took a narrow view of Ctj power and attempted to preserve state power.
- Basic historical reality: original HCA sought to interpret Con. in a way that created a *federal* govt. with limited powers, preserving to a great extent previous self-governing powers of the colonies so as not to let the new federal govt. intrude too far into those powers.
- Interpreted the Con. in light of their understanding of the political context of the agreement: the movement to federation. They had a vision of a *balanced* federalism, rather than a very strong central govt., and interpreted and approached the Con. accordingly

Doctrine of implied immunity of instrumentalities

"When a State attempts to give its legislative or executive authority an operation which, if valid, would **fetter, control, or interfere** with, the free exercise of the legislative or executive power of the Cth, the attempt, unless expressly authorised by the Con, is to that extent **invalid and inoperative**". This is based on the notion that the Cth is a "**sovereign power**" (and **a "right to sovereignty subject to extrinsic control is a contradiction"**): ***D'Emden v Pedder*** **(Griffith CJ)**

- No longer valid, swept away by ***Engineers***
- HCA originally held States and Cth cannot make laws binding one another, as federalism = each level of govt is sovereign and not subject to one another's control
- Doctrine: State and Cth immune from one another's laws, not because it was in the Con, but because it was thought to be **necessarily implied in federalism**
- The very nature of the Con provides the sovereignty of each within its own sphere which should be absolute (***Municipal Rates Case*****, O'Connor J**)
- Doctrine also applies to insulate State agencies from Cth laws (***Railways Servants Case***)
- Doctrine extends only to **government functions**, not trading functions (***Engine-Drivers Case***)
- Where the Cth has **exclusive** power, doctrine cannot apply (***Steel Rails Case*****, Barton J**)

Reserved state powers doctrine

Con impliedly reserves to states their traditional areas of law-making power and hence grants of law-making power should be narrowly construed so as not to encroach on traditional State powers (***R v Barger***)

- Overthrown by ***Engineers***
- When interpreting a grant of power, reference must be had to other separate express grants of power, as well as the powers reserved to the state (***R v Barger***)

Aroney, 2008

- **Criticism:**
  - Doctrine lacks any **real foundation** in the text of the Con. Recipe for uncertainty, subjectivity
  - Reverses proper order of inquiry required by **s. 107,** to first question the identifying powers reserved to States and *then* identifying powers conferred upon the Cth.
  - The doctrine is a recipe for **uncertainty and subjectivity**. The lack of clear guidance in the Constitution means that recourse will be had to **extra-constitutional notions**.
- **Support** (best enunciated by Griffith Court):
  - Foundation is in the political origins, underlying ideas, structural features and the intended purpose of the Con.
    - Con received political legitimacy from a federating compact negotiated between States
    - Colonies were **equal contracting parties** possessing self-governing powers, insisted these powers would continue.
    - Cth therefore a creature of Con, its powers were strictly defined and limited.

Engineers ***Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ('Engineers Case')*** **(1920)**

Context

- By 1920, Barton, Griffith, and O'Connor JJ left the Court, replaced with other lawyers and judges, rather than politicians involved in the framing of the Con. The majority, therefore, is now made up of nationalists and centralists such as Isaacs and Higgins JJ.
  - This new majority hands down ***Engineers*** which **directly swept away 'implied immunities' doctrine and by implication from its reasoning, 'reserved state powers' doctrine.**
- Due to the new majority, Con. now viewed as a **legal instrument** rather than **a political document** (***Engineers*** reflects a shift in composition of the HCA to favour Isaac J's view)

Significance

- **Determined settled rules of construction of the Con.:**
  - "The one clear line of judicial inquiry as to the meaning of the Constitution must be to **read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it**, and then *lucet ipsa per se* [the answer will illuminate itself] …" [152]
  - Where the text is ambiguous, recourse must be had to the context and scheme of the Act [148]
- **How to interpret Cth LP**
  - "It is a fundamental and fatal error to read s. 107 as reserving any power from the Cth that falls fairly within the explicit terms of an express grant in s. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated." [154]
    - Key rejection of reserved state powers thinking
  - Read s. 51, give the words their natural/reasonable meaning, and do not place limitations on that power unless expressly in the text, *then what is left to the states is there after you have done that process of interpreting s. 51*
  - Each grant of power to the Cth. Parl. is plenary, limitation on this power must be indicated in Con.
- **Use of U. S. Supreme Court decisions**
  - Early HC freely and heavily used the U. S. decisions. This is rejected by majority: U. S. authority and the interpretation of the U. S. Constitution is not relevant (lasting impact).
  - For proper construction, "it is essential to bear in mind two cardinal features of our political system which … radically distinguish it from the American Constitution … **One is the common sovereignty of all parts of the British Empire; the other is the principle of responsible government**." [146]
- Court cannot rely on political necessity to justify its decisions

Legacy

1. Expanded Cth industrial power in respect of C&A: state employees could be subject to that regime generally.
2. Marked the beginning of HC's consistent trajectory of giving **an expansive interpretation of Cth LP generally**. HC interpretation has taken the nature of federation far beyond what framers intended (to create a central government of limited powers, with states to retain much of their pre-federation power).
3. **Lasting impact on the Court's reluctance to draw implications**.
   - Eventually overcame that reluctance in a few areas e.g. in relation to IFPC
   - While *Engineers* strongly rejects reserved state powers/implied immunities implications and there is a rhetorical emphasis against implications, the door is not shut entirely on implications.
4. **Federalism as an interpretive principle**
   - Federalism played a key role in the early HCA in how the document was interpreted. *Engineers* adopted a limited approach and stated that if powers are abused, that is a matter for the electorate (not the court's role).
   - Note: Dixon, through a series of dissents, convinced Court to adopt implications and apply a *version* of the implied immunities doctrine: signifies a retreat from this approach (although the general rule is that federalism has a limited role to play in interpreting Cth LP).

Approval

- **Windeyer J**
  - Explains WWI fundamentally changed society, Australians more used to a national government. Even though the HC uses this as an interpretation, Windeyer says this does not mean courts have "transgressed lawful boundaries".
  - Windeyer's perspective has been cited with approval by a number of HC judges, surprising because its explanation doesn't sit very well with what the HC is doing with respect to CI
- **Stephen Gageler, p. 260**
  - A full-blown defence of *Engineers*, the decision was 'not a statement of legal principle', but rather 'an encapsulation of the political and economic development of Australia as a nation' (however supported the decision as it was consistent with his own view of constitutional interpretation)

    - Tells us where we have come from and helps understand where we might be going; Aus Con a mechanism for enfranchising the people and must accommodate itself to factual circumstances of our national development
    - Rearticulates responsible government and the idea that Australia is made up of a unified people, whereas the U. S. tries to divide power. Argues the founders did not mean to divide and constrain the govt, but rather, empower the people (people who comprise the state and the Cth are the same people, not warring sovereigns (which is how the HC described it in ***D'Emden v Pedder***)
- **Sir Anthony Mason, p. 259**
    - Defended *Engineers* as an "instance of evolutionary or progressive interpretation"

Criticism

- **RTE Latham, 'The Law and the Commonwealth'**
    - Majority judgment was self-contradictory.
    - Con to be interpreted by its words alone, yet the HCA, in reaching that proposition, took notice of responsible government, a matter far more extrinsic to strict law, and far less admissible by the English rules of statutory construction themselves, than the close verbal correspondence with the US Con upon which early HCA had relied on
    - Weakened federalism and centralising power in the Cth, promoted parliamentary sovereignty to the detriment of constitutionalism.
    - Fundamental criticism: that the real ground for the decision was the view held by the majority that Con had been intended to create a nation.
- **Jeffrey Goldsworthy, p. 259**
    - Arguable the decision is inconsistent with HC's emphasis on the need to respect the limits of "text and structure" in C.I.

Victoria v The Commonwealth ('Payroll Tax Case') – Reaction to Engineers

- ***Engineers*** is the distant echoes and muffled undertones of centralism vs State rights: position of Cth has waxed and States has waned; this is because in 1920 the HCA viewed Aus as one country where national laws might meet national needs (**Windeyer J**)

The *Jumbunna* interpretive principle

Jumbunna Coal Mine NL v Victorian Coal Miners' Association

- When there is uncertainty as to whether an expression used in the Con. is intended as narrow or broad, Court should always **favour the broader interpretation**, unless there is something in the **context or text** to indicate the narrow interpretation will best carry out its **object and purpose** (**O'Connor J**)
- Restricts power of Cth

Literalism, legalism, and judicial choice

Literalism

2 key features:

1. Strong emphasis on text: "strictly textual", depending on the "plain meaning of the words" (**Heydon, p. 172**)
2. Not legitimate to look at considerations, material, factors sitting outside the text (strict version: look at *only* the section you are interpreting, less strict: look at the *whole* of the text)

Attractive because:

- Appearance of simplicity, objectivity, legitimacy, no import of ideas or politics

Objected to because:

- Problematic, how do you resolve ambiguity? No resources to resolve disputed cases (and cases get to the HCA because they are difficult to resolve)
- **No literalists on the HCA today**

Legalism

Key features

- Rhetorical emphasis: relies on legal principle and reasoning, does not have regard to politics or justice.
- Often considered the orthodox, mainstream position which best describes HCA approach to CI (with a healthy dash of orginalism)
- Legal disputes and problems of interpretation can/should be resolved by regard to accepted authoritative legal materials, considerations, and reasoning and wholly within the domain of law, by technical legal skill and accepted legal methods (*Engineers* represents a triumph of legalism)

Attractive because:

- Does not insist that interpretive or justificatory reasoning be limited to any one source, but only that all its sources be located within a self-contained autonomous of law.
- In many ways an empty vessel. While the general rule is that you cannot use your personal values/policy, what exactly is allowed is open.
- **Sir Owen Dixon (p. 170):** "There is no other safeguard to judicial decisions in great conflicts than **a strict and complete legalism**"
- **Barwick**: "The function of the court is to give to the words their full and fair meaning", "The words of the Con set out the limits of Cth power"

Criticised because:

- Law, legal reasoning, and legal technique, cannot ultimately resolve all interpretive problems, therefore, something *else* must be required
- **Gaegler, 2009 (p. 180)**
  - "Strict and complete legalism … is devoid of any fixed or definite meaning"
  - "Legalism can tell us how. Legalism cannot tell us why."
- **Blackshield, 1981 (p. 173)**
  - The basic criticism of legalism (that there must be something else going on) can be regarded as the realist critique. It cannot be just *law* resolving these cases.
  - A challenge to legalists: we don't think the HC is merely applying accepted legal technique and technical analysis, there other other values and purposes at play that the Court is not articulating
  - Roscoe Pound, a leading example of American realism.
    - A range of elements are at play: precepts, standards, conceptions, principles. All of those are part of the law, but they are just an "authoritative starting point".
    - Principles cannot fully resolve a problem like rules sometimes can
    - Interpretive choice: "Very often these authoritative starting points compete. There is often a choice of such a starting point."
    - Legalism doesn't fully acknowledge the degree of interpretive choice
    - "at the level of generality and impressionism involved when we try to diagnose 'the ideal element in law', it is impossible to disentangle the ideas embedded *within* the authoritative legal materials from those extra-systemic ideals which each judge brings with him to those materials."
    - There is an impossible-to-discern mix of the law and the values each judge brings
    - Realists say you have to go outside the law
- **Mason, 1986 (p. 177)**
  - "It is impossible to interpret any instrument, let alone the Con, divorced from values."
  - "To the extent that they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. The ever present danger is that "strict and complete legalism" will be a cloak for undisclosed and unidentified policy values."
  - You are not being transparent if you say you are a legalist and following a legalist approach: you are not disclosing all of the reasons
- **Julius Stone (p. 177)**