1 Core Concepts

There are a number of **dimensions to the course** that I should keep in mind at all times:

1. Whether the laws enacted by the Commonwealth Parliament fit within the powers the constitution provides for (s 51)
2. Federalism: Consider the division of powers between the Commonwealth and the states. This mostly surfaces as an inconsistency between state and commonwealth laws.
3. Separation of powers: The legislature cannot act like a court. For example: Bill of Attainder
4. Dimension of rights: If a Commonwealth Law breaches a right found elsewhere in the constitution, that law will be invalid. E.g. the implied right to political communication
5. Though written in 1901, it gives expression to centuries of western tradition and philosophy

Bedrock Constitutional Principles

1. No matter who you are in the country, high or low, you are subject to the law equally
2. Through constitutionalism and the rule of law, the law is that you are dealt with according to the criteria of the law - no influence of race or personal preference etc.
3. The law and the government exist for the individual, not the other way around. The government is the servant of the citizen (there to help the individual). The human person can never be treated as a means to an end, humans are the end.

The Australian Constitution

- Within the Westminster tradition of Constitutions, with its most immediate influence the British Constitution. However, the US constitution (with its central government with limited powers and residue to the states) was helpful.
- The immediate conflict between US and British principles is through the separation of powers vs parliamentary supremacy argument
- The Australian colonies joined together to establish the Commonwealth (one nation) for the purposes of defence and commercial advantage (think: Free Trade Zone).
- It solidifies the concept of the Crown and Presidential government
- The Commonwealth Parliament has the power to make s 51 laws (must be for the 'peace, order and good government of the Constitution). This is a plenary power, a full power 'subject to this constitution'
- Early on, the HC developed two doctrines of preserved state powers which were rejected

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ('Engineers case') [1920] HCA	
Holding	• Rejected doctrine of reserved state powers; and doctrine of immunity of instrumentalities (laws of the Commonwealth could not apply to state government entities or state government statutory authorities) • RSP: The HC said to read the words in s 51 as if they were statutory terms, and let the power lie where it falls. Do not try to protect the states. • IOI: Only relevant question is whether the law is within power, if so it can apply to the states, including the government.

There are two additional forms of constitutional interpretation:

1. Textualism (focus on the words – interpret it as if it were a statute). If are clear, apply the words. Else, look at content and structure of the constitution.
2. Originalism (what did the framers of the constitution mean by particular terms). Find this meaning and apply them in that way.

	Cole v Whitfield
Holding	• Court broke from strict textualism view of the law and considered extrinsic materials. I.e. looked beyond the 'text and structure' of the constitution.

	Commonwealth v Bank of NSW (the 'Bank Nationalisation Case') (1949)
Holding	• Following this case (until 1998), the HC observed a form of originalism (thinking to what the framers intended) to give contemporary meaning (interpret clause in present context). That is, interpret according to <u>contemporary values</u>

How to read s 51:

- The more broadly read, the more the Commonwealth gets power against the states (or even us) Note: anytime you interpret a principle, always look at the underlying power structures being changed.
- Constitutionalism attempts to break power up; to prevent its concentration in order to preserve the values discussed above. Why? Absolute power corrupts absolutely. Note that excessive defragmentation has the opposite result.
- Therefore when interpreting words, engage in an exercise of controlling power. The constitution is an attempt to manifest the higher principles; the need to disperse power.
- States can legislate on s 51 powers if not inconsistent (power to make law) cf invalid (no power)
- Purposive powers (purpose attached) vs non-purposive powers. Most s 51 powers are about subject matter (no purpose attached). If a power is interpreted as purposive, laws passed pursuant to them must have purpose too.
- When characterising purposive powers, find THE purpose the Cth provides. Non-purposive powers do not require characterising purposes of the statute.

Powers vs prohibitions: s 51 is a power. The constitution also has prohibitions (e.g. can't have bill of attainder, can't breach separation of powers). Always ask two questions:

1. Is the law within power?
2. Does it breach a prohibition somewhere else in the constitution?

Characterisation vs Interpretation

<u>Interpretation:</u> Interpreting the constitution (reading and interpreting it).
<u>Characterisation:</u> Determining the subject matter of the law

How to apply characterisation to see if a statute comes within power?

- Kitto J (Fairfax Case) says when characterising, look to the nature and character of legislation. The question is always one of subject matter, determined by reference to the <u>rights, duties, powers and privileges which it changes, regulates or abolishes.</u>

	Fairfax Case
Facts	• Amendment to income tax act to give superannuation funds tax exemptions if they invested into government bonds (valid under s 51(ii)). • What are the rights, duties, powers and privileges which it changes, regulates or abolishes?
Holding	• It is encouraging investment, not operating on tax. However, since this is a non-purposive power, it doesn't matter what the purpose of the statute is as long as it operates in respect of taxation. • Court rejected dominant characterisation. Validity is satisfied if one of the characterisations is within the subject matter. • Current principle: dual or multiple characterisations

When interpreting constitutional provisions: Grainpool

- Examine the constitutional text and construe it with all the generality with which the words used admit (take a generous spirit).
- Don't be formalistic in your interpretation: consider BOTH the legal operation AND the practical effect.

The HCA is extremely reluctant to strike down an act of parliament, because it is the expression of the will of the people. As such it has developed methods of constitutional interpretation to save it: reading down and severance.

Reading Down: If the statute you're characterising is slightly ambiguous (multiple meanings) give it the meaning which brings it within power. If reading down doesn't work, try severance.

- Read down in a way consistent with the rest of the statute (cannot be ridiculous interpretation)
- Not in a way that is strictly against the intention of parliament

Severance: Invalidate only those parts of the statute which are invalid (not the entire thing) and keep the rest of the statute alive.

- You can sever a single word or a paragraph as long as what you sever is not going against the real intention of parliament.
- If there is a provision you wish to sever and you take it out of the section, you also have to sever any provision dependent on it. At this point - judgement call if you have to sever half the statute is that going against what parliament intended?
- Certain provisions will be so pivotal to the rest of the statute that the entire statute stands or falls.
- Test: are there dependent sections? If no, then is the intention of parliament that this section is critical? If I sever that section will the whole statute fall?
- S15A Acts Interpretation Act (1901): Only Cth statutes

2 External Affairs Power, s. 51(xxix)

"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 … external affairs"

- When interpreting External Affairs, the underlying theme – too broad an interpretation may allow the Cth to legislate on anything which would undermine the distribution of powers.
- The critical question is what is the requisite international or external affair element that enables the valid use of the external affairs power to make law.
- In 1901, very limited breadth due to Australia as a dominium of the British Empire. After the Colonial Laws Validity Act, Australia was no longer bound by non-repugnancy. Australia became independent most likely at 1986 and at this time the 'external affairs' power had to take into account Australia as a complete independent nation with no restrictions from imperial presence
- Power is central to Australia's ability to implement its international obligations and the power has the potential to allow the Cth to legislate beyond subject matters to which s 51 limits it
- The main issues which arise:
    1. What is the requisite international or external affairs element to enable the power to invoked?
    2. To what extent can this power be used to extend Cth power beyond other limitations in the Constitution?
- The transformation theory is applied in international law in both Australia/England, where the international legal order and the national legal systems are separate (requires separate act)

Relationship between International Law and the Constitution

- Both Britain and Australia adopt transformation policy, where the international legal system and the national (or municipal) system are separate.
- International Law and International Treaties do not bind us as citizens, but they do bind Australia as a nation. They will only bind us as citizens when parliament by a **deliberate and separate act of law** incorporate international law into domestic law: Chow Hung Ching v R [1948]
- Ratification is via the executive using prerogative power (s 61). This section contains common law powers of the Crown which were powers left in the hands of the Crown after parliament establishing supremacy (1688). The rationale for maintaining this is **expediency**.

Before deciding whether a law is empowered by s51(xxix), Murphy J in Tasmanian Dam said to consider (NB that this list is not necessarily correct but some of these are relevant. Murphy took broad interpretation):

Point	Within power?
If the law implements an international law	Uncertain. If international obligation on Australia being implemented, no reason that's different to implementing a treaty
If the law implements any treaty, or convention (general/multilateral or particular)	
If the law implements a recommendation/request of the UN or subsidiary organisation (WHO/UNE?SCO)	• Yes. To be certain as long as you can connect to a treaty. • If no treaty, due to ambigious endorsement of E+M in *Industrial Relations*, can only apply to the facts of that case
If the law fosters (or inhibits) relations between Australia (political entities/bodies/persons within Aust) and other nation states (entities, groups or persons external to Aust)	Sharkey principle

If the law deals in circumstances or things outside Australia (prohibiting smoking in Paris)	
If the law deals with circumstances or things inside Australia of international concern	Sharkey type principle

2.1 Geographical Externality

- E.g. extradition laws or laws regarding the judicial notice taken of foreign judgements of foreign evidence
- Note that Brennan J in Koowarta v Bjelke-Petersen (1982) endorsed an extension of the *Sharkey* principle to include relations with 'international persons' such as the UN and other international government organisations

Extensions to other countries, not merely other Dominions of the Crown

	R v Sharkey (1949)
Facts	• A sedition law against exciting 'disaffection against government or Constitution of any of the King's dominions'. Sharkey was a communist and challenged.
Holding	The law was valid under the external affairs power
Reasoning	• Latham CJ: 'Relations of the Cth with all countries outside Australia…are matters which fall directly within the subject of external affairs'. Preservation of friendly relations with other dominions 'is an important part of the management of the external affairs of the Cth'. • Beyond geographic externality, you don't need to be overseas to be charged. • Zines: the law does not need to concern only friendly relations with other countries. It is sufficient if the law concerns ties with another nation. • Brennan J: Extended principle to include international persons (e.g. UN)

Australian laws can have an effect overseas

	NSW v Commonwealth (the Seas and Submerged Lands Case) (1975)
Holding	• Barwick CJ: Anything which in its nature is external to Australia • Mason: Matters or things geographically situated outside Australia

	Polyukhovich v Commonwealth (the War Crimes Act Case) (1991)
Facts	• Validity of s 9 War Crimes Act (1945) which was amended to punish Australian citizens who may have committed 'war crimes' during WW2. It also added crimes
Holding	Legislation was valid
Reasoning	Mason, Deane, Dawson and McHugh JJ: • Since the Cth has plenary extraterritorial power, there is no requirement for a 'nexus' or connection to Australia Brennan J (minority): • Interpreted power narrowly such that Cth had power over matters of genuine concern to Australia. Legislation was invalid due to insufficient nexus to Aust. • There must be nexus, even if not substantial. • 'Affairs' in the Constitution should be read as 'external affairs' of Aust Toohey J (minority): • Agreed with Brennan that there must be connection to Australia. A matter which the parliament recognises as touching or concerning Aust in some way. • Here sufficient connection due to Australia's involvement in WW2.

- *The majority view has prevailed (no nexus requirement) as per Industrial Relations Case*

	Horta v Commonwealth (1994)
Facts	• Constitutional challenge to the validity of legislation passes pursuant to a bilateral treaty between Aust and Indonesia over exploration of resources in Timor Gap

	• The treaty was in 1989 that P's argued was void in International law and could not be implemented under s 51 (xxix) as no requisite nexus
Holding	Law was valid
Reasoning	• Court avoided treaty issue. Based judgement on seabed being geographically external to Australia making it sufficient to bring law into power • Minority view from Polyukhovich was rejected. • Current principle: The <u>geographical externality principle is enough to enable a law pursuant to the external affairs power</u>

Some disquiet in the next case (one off?)

	XYZ v Commonwealth [2006] HCA 25
Facts	• Offence for Australian citizen while resident outside Australia to engage in sex with a minor. Rationale was to prevent perverse tourism overseas.
Holding	The law was valid
Reasoning	• Confirmed geographical externality principle since it was conduct outside Aust by an Australian citizen. <u>Callinan and Heydon JJ (dissent):</u> • Dissented on GE principle and held provision invalid and doctrine ineffected. <u>Kirby J:</u> • Said GE needed further elaboration before it could be a settled doctrine • Legislation valid on Sharkey principle (Australia's relations with other nations and international orgs = affects relations positively)

2.2 Implementation of treaties/conventions

- Constitutional issues arise because the treaties/conventions to which Australia is a party are not limited only to treaties whose subject matter comes within the heads of power of s 51.
- To what extent can Cth laws validly regulate subject matters, which would otherwise be beyond Commonwealth legislative competence, relying on the justification of the implementation of a treaty to provide the requisite element to bring them into power?
- Consider:
    1. Interpretation issue: how is the connection defined between a treaty and external affair?
    2. Conformity issue: assuming the treaty can be implemented, does the legislation in fact conform sufficiently to the treaty in order for it to be regarded as implementing the treaty?
    3. Is it only that a treaty obligation can be implemented? If not, what other types of international arrangements can be used as a source of Cth power to legislate?

	R v Burgess, ex parte Henry (1936)
Facts	• To what extent can the Air Navigation Act (Cth) and regulations made pursuant be held to be within the external affairs power? (There was an international treaty which was a convention for the regulation of aerial navigation)
Holding	• Regulations were invalid because they did not carry out/give effect to the convention. Had the regulations been consistent/give effect to the treaty, the laws would be valid • Bench was split on doctrinal dispute which underlies remaining cases
Reasoning	<u>Latham CJ, McTiernan and Evatt JJ (expansive view; for central power):</u> • The Cth has full power under External Affairs to incorporate all its treaty obligations into Australian law. • <u>Evatt and McTiernan JJ</u> go further: the principle is applicable not just to treaties but to draft treaties or informal agreements (recommendations, etc) • <u>Limitation:</u> The treaty had to be *bona fide*. Therefore all you need to do is to show an international treaty/draft instrument/informal instrument and this will be sufficient to invoke the power (no requirement to show subject matter is international in concern) <u>Dixon, Starke JJ (restrictive view):</u>

	• In addition to a treaty, the subject matter you're trying to implement into law must indisputably be international in character. • E.g. Racial Discrimination International Convention – are race relations undeniably international in character or sufficient int. significance or purely domestic affairs?

	Koowarta v Bjelke-Petersen (1982)
Facts	• The Aboriginal Land Commission sought to acquire lease of a large property from Koowarta. QLD Minister for Lands refused since it was a settled QLD policy not to view favourably the acquisition of large parcels of land. • The Commission wanted to invalidate state law due to inconsistency with Racial Discrimination Act (Cth). QLD Government relied on Dixon + Starke JJ to argue the Cth law invalid due to requirement for both subject matter and international significance and that Race Relations are purely domestic subject.
Holding	The Majority (4:3) held that provisions of the Racial Discrimination Act were valid
Reasoning	• Broadest view (Mason, Murphy and Brennan JJ): Treaty is enough; no need for international significance (not full Evatt + McTiernan) o [Cth did have competence to legislate in order to implement the treaty into Australian domestic law *whether or not* the subject matter was of sufficient international significance as long as it was a bona fide treaty (i.e. the treaty itself provided the requisite element of international significance)] o [Negative effects on ability of Australia to implement its international obligations unless the broader view were taken] • Narrowest view (Gibbs, Wilson and Aitken JJ adopting Starke and Dixon view): Subject matter of the treaty must be of international insignificance (failed here) o [Treaty could only be implemented when *the subject matter which was being implemented was itself an external affair;* that is, it concerned extraterritorial matters or relations with other states and not purely domestic matters such as race. The mere existence was not enough to create the requisite external affair o [Gibbs concerned with maintaining the 'federal balance'. Is this reserved state powers thinking?] • Middle ground (Stephen J): Agrees with Narrow view in that a matter of international significance is required, however he found race relations satisfied this. o [Adopted a more liberal interpretation of the narrow view, holding that race relations were not purely domestic issues, that they were indeed a matter of sufficient international significance such as to enable the implementation of a treaty] The ratio is with Stephen J since he was in the majority for both. • Interpreted the Dixon and Starke view (International Concern or subject matter of International Significance) liberally, and took into account world affairs. Therefore, race was certainly a matter of international concern.

- Following this case, Murphy J replaced Stephens
- Dixon + Starke view is winning – tempered with the humanity of Stephens J (but treaty is still not enough).
    - Gibbs CJ is concerned with the way external powers is headed (concern that interpreting no requirement for international significance broadly would undermine the division of powers). NB: Not reserved state rights, rather, trying to maintain the federal balance
    - Mason J disagreed: if you allow states rights, the ramification of fragmenting the decision making process by assuming Cth cannot implement international obligations (relies on Engineers argument to *let power lie where it falls* and criticises the minority for reserved states rights thinking.
- In *Koowarta*, Dixon + Starke view prevailed. Cf USA where the right for civil rights requires federal national legislation because of their North-South division.

Evatt, McTiernan JJ	Dixon + Starke JJ
• Draft treaties/informal international agreements would be sufficient to get you into power • Therefore, wouldn't need a treaty obligation, a recommendation would be sufficient	• A treaty is required, but also the subject matter you're trying to implement must be of international significance (two tier test)

NB: Change in bench: Mason, Murphy, Deane = Evatt, McTiernan; Brennan = unknown; Wilson, Dixon, Dawson = Dixon, Starke

	Commonwealth v Tasmania (Tasmanian Dam case) (1983)
Facts	• Hawke Government wanted to preserve Franklin River and prevent Tasmanian Government from hydroelectric Dam. They relief on International Treaty for the Protection of World Cultural and Natural Heritage and enacted a Cth Act identifying areas for protection and take action to protect. • Section 9 (what can't be done to property to be protected); s 6 (how property is protected) state that GG can proclaim certain property to be protected and from then on, cannot damage, destroy building, construct road, etc (s 9) • Section 6(2) states that 'a proclamation may be made in relation to identified property that is in a state and… the protection or conservation of property by Australia is a matter of international obligation whether by convention/otherwise
Holding	Section 6(2)(b) was valid and authorised under External Affairs power
Reasoning	Section 6(2)(b): • <u>Evatt + Mctiernan JJ</u>: If a treaty, that would be ok • <u>Dixon + Starke JJ:</u> Is it a matter of international significance or purely domestic? <u>Test: A treaty is enough, but you need a treaty obligation. No suggestion that mere recommendations are enough.</u> • Stephens J requirement of 'a matter of international concern literally interpreted' does not apply. • Mason J: political test and therefore is a matter of international significance • Deane J (undiluted McTiernan view) <u>Minority:</u> • Only Mason, Murphy and Deane JJ said that an actual obligation isn't needed • Brennan J did not decide on obligation • If obligation is required, and treaty isn't *compelling* you to do certain things (only recommending), law invalid

Can a treaty be implemented pursuant to the external affairs power in relation to any subject matter?

- The majority said that the mere implementation of a treaty appeared to be enough for it contained *in itself* the requisite international significance.
- The minority were willing to go as far as Koowarta (due to precedent): that the treaty can be implemented, if the additional requirement is met that its *subject matter*, which is sought to be implemented into Australian law is a matter of <u>international significance</u>

Need there be a treaty obligation alone?

- No clear majority position since Brennan J did not decide. Minority judges insisted on an obligation

What limitations are there to the implementation of the treaty [what is the nature of the 'conformity principle']