

TOPIC 3 – CHARACTERISATION

OVERVIEW

- The process of determining whether a law is with respect to a subject matter listed in the *Australian Constitution* is called **characterisation**.
- The HC has the power to review and invalidate Cth or state laws that offend the *Constitution*.

Establishing characterisation

Main principle

- **The Australian Constitution vests power in the Parliament to validly legislate ‘with respect to’ a subject matter listed in the Constitution (ss 51 and 52, *Toohey J Redinjin*)**
 - Other provisions include ss 71, 73, 76, 77 and 122.
 - NB. It is generally a challenge with a provision in the Act and not in its entirety.
- In determining whether a law is with respect to a head of legislative power, *Grain Pool WA v Cth* (2000) [492] noted a five-step approach.

The test

- 1) Is the subject matter one which is respect to s 51? Find a power in s 51.

- **Powers within a subject matter**
 - Most heads of power are subject matter powers. Commonwealth heads of power do not describe a purpose, but describe an activity.
 - Trade and commerce in s 51(i): the subject matter being the activities of interstate and overseas trade and commerce
 - Corporations power in s 51 (xx): the subject matter being the legal persons of trading, financial and foreign corporations
 - Races power in s 51 (xxvi)
 - Marriage power in s 51 (xxi): juristic classification of marriage
 - A recognised category of legislation (taxation, bankruptcy)
 - Object (e.g. lighthouses, fisheries, currency).
 - NB. The purpose of an Act does not impact upon its validity: *Grainpool*
 - UNLESS... the impugned legislation falls within the incidental range of a non-purposive head of power. In this case, the “proportionality test” can be used.
 - The HCs role is to assess the constitutionality of a law, not to pass judgment on the desirability or otherwise of its purpose or motivation.

- **Purposive powers**

- Some Cth heads of power are '**purposive**' because they describe a specific purpose. Here, the "proportionality test" must be used.
 - Examples:
 - s 51(vi), the defence power (to defend the cth)
 - s 51(xxix), external affairs power (enables the Cth to enact international treaties and conventions into domestic law)

- **Dual characterisation?**

- If there is a law that is in respect to two subject matters, one of which is found in s 51 and the other is not, the law will still be valid: *Fairfax v FCT*, Kitto J
- Example: legislation that protects the environment does not fall within a head of power. But Parliament can use the corporations power (financial and trading companies) to regulate those companies in a way that promotes the protection of the environment.

2) The law must have a 'sufficient connection' with a head of power (*Toohey J Redinjin*). 'Sufficient' in this context means 'real but not tenuous' and is a question of degree (*Fairfax*) by considering the legal right/obligations which the Act creates or seeks to regulate.

- **Jumbunna states to provide the words with "generality" (a broad reading).**

- O Connor J in **Jumbunna** 1908 noted that '**Courts should lean towards the broader interpretation** unless the context or Constitution indicates a narrower interpretation will best carry out the subject matter's purpose'. This was endorsed in *R v Coldham*.
 - However, *Engineers* held that the words of the Constitution should be given its natural and literal meaning, unencumbered by any notion or concept that does not appear expressly in the text.

- **Problems using the Jumbunna approach**

- The HC may not 'lean to the broader interpretation' of the Commonwealth's legislative powers because, by its nature, it favours the Commonwealth in federal disputes.
 - The application of this approach has been an important justification for rejecting narrower interpretations of federal heads of legislative power such as the corporations power in s 51 (xx) and the external affairs power in s 51 (xxix).
- The *Jumbunna* principle cannot be used if the words of a provision are clearly confined. It can only be used where the power is capable of two alternative meanings.

- **A contemporary approach: changing circumstances?**

- In *Grain Pool*, Kirby J emphasised the importance of applying the contemporary meaning of constitutional language (known as the "ambulatory" approach)
- The radius of a power is to be determined by reference to contemporary circumstances at the time of the decision: Kirby J in *Grain Pool*, Windeyer J in *Ex Parte Professional Engineers Association*; *Jumbunna*

- O'Connor in *Jumbunna* said: The constitution is intended to apply to the varying conditions which the development of our community must involve
 - *Ex Parte*, Windeyer J: 'we must not restrict its terms to the things denoted in 1900'.
 - In *Grain Pool*, the court rejected the argument that the words 'patents of innovations' in s 51(xviii) of the Constitution should be interpreted by reference to the meaning the word had in 1900. The HC adopted an 'ambulatory' approach to the interpretation of that provision, recognising that the words in s 51(xviii) even at 1900 had a dynamic meaning capable to changing circumstances.
- BUT... historical material should not be ignored
 - The court does not ignore the historical accounts of the development of the Constitution when they are engaged in the process of interpretation. The search for meaning typically starts with historical analysis, and then concludes when the judges of the court determine the contemporary meaning of the language informed by that analysis. *Cole v Whitfield*
 - *Engineers case* (Knox, Isaacs, Rich and Starke JJ): the Constitution should be read 'naturally in the light of the circumstances it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it'
 - NB. Judges may differ as to the *kind* of federal system the *Constitution* summoned into existence.
- 3) To determine whether a law has a "sufficient connection", it must have an 'express' or 'implied' incidental head of power. This may be answered 'by reference to the nature of the rights, duties, powers and privileges which [the law] changes, regulates or abolishes' (*Leah v Cth*).
- Is there an express incidental power?
 - A law that operates directly on the subject matter of the power and clearly identifies the legal or practical character of the law operating.
 - Is there an implied incidental power?
 - 'With respect to' gives the Cth an 'implied incidental component' for each subject matter.
 - Section 51(xxxix) confers on the Commonwealth the power to pass laws that are reasonably appropriate or necessary to give effect to the main head of power on 'matters incidental to its execution': Dixon J in *Grannell v Marrickville Margarine*
 - Examples:
 - Trade and commerce regulations: A law that regulates trade and commerce globally falls within s 51(i). For a law to be effective, criminal sanctions are required to prohibit and punish the export or import of certain illegal goods. Those sanctions are incidental aspects.
 - Marriage: Parliament may legislate with respect to marriage pursuant to s 51(xxi), but the *Marriage Act* 1961 makes bigamy an offence.¹

¹ The Act states that lawful marriage is the union of a man and a woman to the exclusion of all others. Bigamy may be considered appropriate to protect the legal institution of marriage and specifically "the exclusion of all others" aspect.

4) Apply the 'proportionality' test (means/ends test) (must do so if purposive head of power).

- The proportionality test involves a value judgment into the law's reasonableness and appropriateness (this is matter of personal judgment): *Thomas v Mowbray*
- It requires the court to consider whether 'the law goes further than necessary to achieve that purpose or whether there is a less restrictive means for achieving the same end (Hanks).²
 - Are the legal/practical effects of the law "proportionate" to what the law is trying to achieve?
 - For example, a provision that provides a very high tax on cigarette manufacturers:
 - Legal effect: cigarette manufactures pay a tax of (X) on production
 - Practical effects: Deterrence, forces prices of cigarettes up
 - If the purpose is to deter smokers, is increasing tax proportionate (fair)?
 - Is the law restricting a constitutional right (express or implied)? *Thomas v Mowbray*
 - For example, a right of implied political communication

5) Conclusion

- Matters that fall within a subject matter ('activity'):
 - If there is a sufficient connection between the law and a head of power, the law is valid
- Matters that fall within a 'purposive' head of power:
 - If there is a sufficient connection between the law and a head of power, and the legal/practical effects is proportionate to achieve its purpose, the law is valid.

Comm. legislative powers are not to be read down by reference to other powers

- From the *Engineers Case*, it has held that a commonwealth legislative power is not to be read down by reference to the scope or delimitation of other powers.
 - In the *Engineers Case*, there was nothing in s 51 (xxxv) or in any other express provision in the Constitution that indicated that the Cth could not regulate states in their capacity as employees.
- There have been two cases which held that a head of power in s 51 should not be read down.
 - In *Strickland v Rocla Concrete Pipes 1971*, it was held that the corporations power in s 51(xx) should not be limited by the perceived distinction in s 51(i) between intrastate and interstate trade. Strickland considered that *there was no warrant for it to confine to the scope of s 51 (xx)*
 - In *NSW v Cth (Work Choices case) 2006*, the court held that the mere presence of s 51 (xxxv) which contemplates that the cth can regulate interstate industrial disputes by way of conciliation and arbitration did not preclude the Cth from regulating industrial relations implicating a 'trading corporation' under s 51 (xx).

² In other words, whether a law is a reasonably appropriate and adapted measure to achieve an object or end that is within power.

Exceptions

- The position would be different if other federal power contains a 'positive prohibition or restriction', that is, to have a general application across powers: *Work Choices case*
 - For example, the cth has legislative power over banking other than 'state banking': s 51 (xiii). It also has legislative power over 'financial institutions': s 51 (xx). Assuming that companies can be characterised as both banks and financial institutions, the cth could not use its power over financial corporations to regulate state banks (*Bourke State Bank of NSW 1990*). Using s 51 (xx) in this way would breach the express limitation on power in s 51 (xxiii).
- Other examples noted in the Work Choices cases
 - Taxation (s 51(ii)) – 'but so as not to discriminate between States or parts of States'
 - Bounties (s 51(iii)) – 'but so that such bounties shall be uniform throughout the Cth'
 - Insurance (s 51(xiv)) – 'other than State insurance'
 - Medical and Dental services (s 51(xxiiiA)) – 'but not so as to authorise any form of civil conscription'.

State Constitutions

Characterisation for the states:

- There is no equivalent listing for State powers.
- To work out what powers States may exercise:
 - Between 1902 – 1920, the HC interpreted s 51 powers narrowly so that States could have "more room" to legislate as States can generally pass laws on subject matters that are not expressly vested in the Cth Parliament subject to s 109.
 - This is no longer the case. In the *Engineers* case (1920), the HC decided to give an ordinary and natural meaning with respect to a head of power. *Engineers* extinguished the reserved powers and implied immunities doctrine which expanded the legislative powers of the Commonwealth (at the expense of the States). (see also *Jumbunna*).

Case summaries

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)³

Summary

- This case marked the beginning of the gradual expansion of Cth legislative power.

Principles

- In interpreting subject matters, give them their ordinary and natural meaning. Don't start with the presumption that the scope should be narrowed.

Facts

- The *Engineers* case turns on whether a Commonwealth law is supported by or can be sourced to a subject matter of a Commonwealth head of power.
- The question was whether Commonwealth heads of power should be given a narrow construction thereby *reserving* or protecting the scope of the legislative powers of the States.
- Two doctrines were challenged: implied immunities and reserved powers. These had a restrictive effect on the scope of federal constitutional powers.
 - **The doctrine of implied intergovernmental immunity (implied prohibition)**
 - Said to be a necessary implication from the federal nature of the Aus Gov, that the cth and the states were sovereign in the separate areas described by their respective constitutions, and were therefore able to exercise their legislative power immune from the operation of the legislation of the other
 - **Doctrine of state reserved powers**
 - Said to be an implication necessarily drawn from the Constitution. It was that the Cth could not exercise its legislative power in a way that interfered with the residual or 'reserved' powers of the states falling outside the list of enumerated powers.
 - b/w 1903 & 1920, this maintained State legislative power through the HC interpreting the legislative power of the Cth more narrowly.
- Together, these two doctrines served to protect the financial, legal and political independence of the states.

Held

The two doctrines: implied immunities and reserved powers

- The HC rejected these. A majority held that the constitution should be interpreted by 'ordinary' principles of statutory interpretation, rather than to be consistent with any doctrines said to be 'implied' by the constitution relating to the relationship between the cth and the states.
- **The majority gave the words of the Constitution a clear, literal reading, unencumbered by any notion or concept that does not appear *expressly in the text*.**
 - By giving the Commonwealth heads of power a natural reading, free from the influence of the reserved powers doctrine, it significantly broadened the scope of legislative power.

³ Hanks casebook [3.2.20]–[3.2.28]

- Knox, Isaacs, Rich and Starke JJ said that 'ordinary principles of construction are applied to discover the actual terms of the instrument their expressed or necessarily implied meaning'

Future application

- The Engineers case was an implicit example of how social and other non-legal factors operating in the wider community can feed into the constitutional process
- The characterisation process is no longer constrained by the reserved powers doctrine.
 - Since the Engineers case, a number of judges/scholars have noted the expansion of the power of the cth and the diminished power of the states.

Thomas v Mowbray (2007) 233 CLR 307⁴

Facts of this case

- The case concerned the constitutional validity of an 'interim control (preventative detention) order' of the Federal Magistrates' Court under *federal* legislation.⁵
 - In late August 2006 an Australian Federal Police Officer applied to the Federal Magistrates' Court
 - The order was imposed upon a Victorian man Jack Thomas (a.k.a. 'Jihad Jack').
- The application for the order was on the basis that:
 - (1) Thomas had received training from a 'listed terrorist organisation', namely Al Qaeda (which Thomas had admitted to) (s 104.4(1)(c)(ii)) and
 - (2) that the control order in the terms sought was 'reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act' (s 104.4(1)(d) of the *Criminal Code*).
 - (3) Both (i) and (ii) were necessary preconditions for the making of the control order with respect to Thomas.
- The application was substantially granted by the Federal Magistrate Mowbray.
- The order placed Thomas on a curfew and severely constrained his freedom to communicate and travel, akin to the conditions that obtain to a bail order.

Held

- Gummow and Crennan JJ rejected the plaintiff's defence power argument. **Gummow and Crennan JJ said that 'the power is purposive in nature'**
- HC recognised that the Legislation was with respect to the defence power.
 - HC said that we make an assessment whether the measures in the act are reasonably proportionate to furthering the purpose of the defence power.
- Said that the intereme control orders prevent the likelihood of terrorism in Australia and was provides a proportionate measure to furthering the defence of the commonwealth.

⁴ <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html> paragraphs [1]–[3] and [132]–[148] from the judgments of Gleeson CJ and Gummow and Crennan JJ. 1:40 in the lecture.

⁵ pursuant to s 104.4 of the *Criminal Code* (Cth), as amended by the *Anti-Terrorism Act (No 2) 2005* (Cth).