

Topic 3: Characterisation: Subject Matter Powers

Revision of previous class

The main question is: whether a law is constitutional valid or not?

---If it is Cth law, is it supported by a **head of power**? : We should characterize the law and find whether it was supported by a head of power? Is there anything in the constitution grants the cth power to make such law?

---Once we find the law is supported by a head of power, we should ask: does the law breach **any limitation or prohibition** on the exercise of that power. The limitation or prohibition could either be **express or implied**

In order to determine *whether a law is a law with respect to the subject matter of head of power*, we have to know how to **characterize that law**, and we have to know how to **interpret the head of power**

Brief Summary:

- The “**settled rule of construction**” consist of some common law rules and rules set out in the *Acts Interpretation Act 1901 (Cth) (as amended)*: **Engineer case**
- **Characterisation**: to determine the subject of a law, look at “the actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileged”: **in order to characterize a law, we look at the actual operation of the law in question with respect to its legal effects** in creating, changing, regulating or abolishing rights, duties, powers or privileged (latham cj)
- “**Dual characterization**” is permitted: a law can be characterized in more than one subject. Note, some of these subjects may outside the scope of cth power
NB: most of the times we characterize cth laws, this is because the constitution grants numerate power to cth regarding making laws, and leave the residual to states.

However, some times we also need to characterize state laws, this is because s 51 head of power are concurrent powers, while s 52 is the exclusive power to cth. We need to characterize state law because we need to see whether the state law is on the subject matter exclusive to cth.

When we characterizing state laws, if it is otherwise valid (not the law on the subject matter exclusive to cth), we should then ask: is it consistent with Cth law?? Does it breach the prohibition or limitation implied or expressed on the exercise of legislative power?

- When considering the question of “**subject mater of the law with respect to**”, the court is not concerned with motive or policy objective of the law
- Heads of power are not “**read down**” against each other:
- **After characterizing the constitutional power /heads of power, we should do the constitutional interpretation.** Constitutional interpretation can be approached in a number of ways. The HCA is not always systematic. The usual approach is: case by case
---Connotation-denotation distinction is used: **When courts try to interpret constitutional powers/heads of powers, the court should be aware that their meaning is not fixed. The central idea of these heads of power is unchanging, but the scope of that power can be attached to will grow, expand and develop.**

Characterisation “Subject Matter” Powers

- Consider the “heads of power” in s 51: some refer to **subjects**; some to **purposes**. The characterization tests are different.
NB: s 51 is not the only source of heads of power for Cth, there are few others.
- Being a subject power doesn’t mean that the scope of the power never changes.
- In order to determine whether a law is on the subject power, **we look for the connection between the law and the power. Test for subject powers is sufficient connection.**
- *Ex parte Wagner (1995)*: So long as connexion is not too “insubstantial, tenuous or distance”.
- *Burton v. Honan (1952)*---a law may be invalid because it purports to be a particular subject matter, **the connection with head of power is too far away** (there is too little in the law to actually make it characterized as a law with respect to that subject matter of that subject power)
- *Grain Pool of Western Australia v. Cth (2000)*: procedure for characterization with respect to subject matter powers: (1) construe text with all generality which the words that are used admit; (2) determine character of law by reference to rights, power, liabilities, duties, privileges. (3) practical and legal operation must also be examined (**political operation of the law as well as the legal operation of the law in its practical effect should be taken into account**). (4) one subject matter is sufficient, even if no connection between two subject matters. (5) justice, wisdom or desirability of law is irrelevant.

Characterisation of the subject power “marriage”

- *S 51(21) Constitution*: Cth can pass laws with respect to marriage
- What makes a law sufficiently connected to “marriage”. *R v. Lambert; Ex parte Plummer (1980)*; the connexion between the operation of the law and the relationship of marriage may be **so tenuous** that such a law cannot be said to be a law with respect to marriage.
- *Gazzo v. Comptroller of Stamps (Vic) (1981)*: law exempting maintenance payments from state duties or charges was not a law with respect to marriage
NB: this case concerns with a family law act, this particular act says: when divorce happens, if there is a transfer of property as a result of family court ruling, the property being transferred should be exempt from duties and charges. The question was, whether this particular law was a law with respect to marriage? Was it a law with respect to taxation? Or was it a law with respect to divorce (s 51(22))? The court says, in order for it to be characterized as a law with respect to marriage, the **connection between the law and marriage must be very close, the court finally says the law is not with respect to marriage because the connection was too tenuous.**
- In *Marriage of Cormick (1984)*; *Re F*; *Ex parte F (1986)*: laws deeming an ex-nuptial child or grandchild ordinarily member of household to be a “child of a marriage” were not laws with respect to marriage
NB: again, the court says the connection was too tenuous.

- But, the court seems to change their mind a bit. In *Fisher v. Fisher (1986)*: it is a mistake to insist on close connexion between law and subject of power (also see Mason and Deane JJ—dissent in *Re F; Ex parte F*)

Whether the test for inconsistency between the territory law and Cth law is the same as the test for inconsistency between the state law and Cth law?

---we don't have to worry too much. Basically, the court considers it is the same.

Cth v. ACT [2013]: same-sex marriage case

[Facts]:

- The ACT passed a “Marriage Equality” Act in 2013
- The central issue was: was this Act inconsistent with the Cth *Marriage Act*

[Held]

- The only issue the court can decide is a legal issue.
- **Before we know if 2 laws are inconsistent**, we need to characterize those laws. We also need to know if the Cth has power to pass such a law: what is the scope of Cth power?
- Does the Cth's marriage power (s 51(21)) extend to same-sex marriage? **The answer would be Yes. We know the Cth has power to pass laws with respect to marriage (defined between man and woman), but did the cth has power to pass laws with respect to same-sex marriage?**

The court says yes---The cth could pass law with respect to same-sex marriage.

If cth could not pass laws with respect to same-sex marriage, then there would be no inconsistency with territory law which recognize the same-sex marriage, because these 2 laws would not be on the same subject matter.

The connotative meaning of “marriage” is “status” (the connotation of “marriage” is, at the time when constitution was adopted, the core meaning of “marriage” was “status” (a law that recognize a particular personal status from which certain rights and duties flow))

- Does the Cth *Marriage Act* permit same-sex marriage? **No.**
- The HC held the ACT law is invalid
- **PS: before you consider “inconsistency” issue, the first question you need to ask is: is the cth valid? Is the state law valid? Are they on the same subject matter? This is very important in your exam.**

Summary: with respect to subject matter power, the question we should ask is: **how closely connected** between the law and head of power (**this is the test for “subject matter power”**).

Characterization “Purposive” Powers

- Some (few) powers describe a *purpose* rather than a subject:
---s 51(6) defence power: “defence” is a purpose, not a subject; ie. you can point something and say that is “lighthouse”, you can point something and say that is “marriage”. But you cannot point something and say that is “defence”.
 As “defence” is a purpose not subject, so you cannot say how closely connected the law to defence, and you cannot say this is a law looks like defence

You cannot characterize a law with respect to defence simply by looking at what the subject matter of the law is, instead, you should look at its purpose. ---s 51(29): this is the purposive power. **External affairs power**---this section gives effect to treaty obligation

- **Test for purposive power** is whether the law is *appropriate and adapted or proportionate to the purpose*.

NB: lets say the parliament has passed a law which says university students are not allowed to join any organization that are critical to government, this is because criticism of government gives encouragement to terrorists and terrorists will impair the defence of Australia. therefore, in order to achieve national defence, we must make sure university students would not give any encouragement to terrorists.

In determining whether this law is valid or not, we should ask how proportion is the law to the purpose of defence? How appropriate and adapted is the law to the purpose of defence?

You will see this case in topic 4, the court held this law is not appropriate and adapted to the purpose of defence, and it is not proportionate to the purpose of defence

- **The test is not concerned with the *motive or intention* of the legislatures.** Although the court says sometimes **it is hard to separate** that (ie. intention or motive) in case of purposive powers, but the **primary focus is on what the law does with respect to advancing the purpose of the power**
Stenhouse v. Coleman (1944) Dixon J: defence power is described in terms of purpose, but this “peculiarity has caused no departure from the practice that excludes from investigation the actual extrinsic motives and intentions of legislative authorities.
- **The distinction between purposive power and subject power could be very artificial.** This is because every heads of powers include a “purpose”. Although there are purposes in the subject power, the purpose power is still different from subject powers. With respect to purpose powers, the purpose and the powers are co-extensive. The purpose power authorize parliament to pass laws with respect to particular purpose (ie, they authorize cth to pursue a particular purpose), while subject power authorize parliament to pass laws with respect to particular subjects although it may achieve some purposes at the same time.

Proportionality test

- The test of whether a law is reasonably capable of being seen as appropriate and adapted to achieve a particular purpose, which is sometimes also described as a **proportionality test**, is applied with respect to the **purposive powers** (such as the defence power) and with respect to **constitutional limitations on power** (such as s 92 and the implied freedom of political communication)
NB: proportionality test applies to 3 things:
---**purpose powers:** is the law appropriate and adapted to the purpose?
---**certain prohibition or limitations on the exercise of power: s 92**
---**incidental power:**

Incidental Power

Incidental power---implied

- **NB: For example**, under s 51(9) Constitution, cth has power with respect to **quarantine**, lets say the Cth parliament passes a law with respect to quarantine which requires all cattle in Australia to be sold, this would avoid mad cow disease because there will be no cows. **This is a law with respect to cows, and it is not a law with respect to quarantine. But the cth could say, this is the incidental power because it allows us to give effect to the main head of power (s 51(9)). If we are not allowed to make laws with respect to cattle, then the quarantine power would be rendered ineffective. But another question would be, is this law appropriate, or proportionate or adapted?**

(ps: taking one step back, you can have a law which is not on the subject of power but is necessary to support the exercise of main grant of power)

Another example, under s 51(1) constitution, the cth has power to make laws with respect to **trade and commerce** with other countries. **So the cth got power to pass laws governing exports. Incidental to the trade and commerce power, cth also has power to regulate the quality of production (ie, the quality of the goods that are about to export).** The question is, whether the cth has power to pass certain regulations governing the quality of the meat prior to the export of that meat. The HC in this case upheld the regulations and say: **if the cth cannot regulate and control the quality of the meat that produced for export, then trade and commerce power cannot be fully given effect.**

- ***Grannall v. Marrickville Margarine Pty Ltd (1955)***: every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is 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.
- ***Burton v. Honan (1952)***: **Implied incidental power includes all matters that are reasonably necessary for the fulfillment of the legislative power over the subject matter**: this permits regulations, including the creation of offences and penalties to enforce Cth laws. **ie. The cth can pass laws for lighthouse (s 51(7)), but they can also, incidentally to these laws, create penalties for people who trespass the lighthouses.**

Incidental power---express

- s 51(39) 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 matters **incidental to the execution of any power vested by this Constitution in the parliament** or either House thereof, or in the government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

NB: this section also refers to executive power as well as judicial power

Incidental power---Proportionality Test

- **The cth cannot just randomly pick up a thing and say this is incidental to the exercise of main head of power. This is because the constitution is**

actually about limiting powers, and the high court is there as the watch dogs

- **Proportionality Test:** “reasonable proportionality”; “proportionality”; “sufficiency of connection”; “appropriate and adapted”
- ***Davis v. The Cth (1988)*:** “*the regime of protection*”---regulations purporting to trademark the expression “200 years”---“was **grossly disproportionate** to the need to protect the commemoration of the Bicentenary”.
- ***Burton v. Honan (1952)*:** offences and penalties for offences are supported by the incidental power: **the means “necessary for the reasonable fulfillment” of the main power.** “reasonable” refers to **degree of connection, not wisdom of law.**

Reading Down

- This is **different** from “read down” as we learnt previously.
- **So far as it is reasonably possible to do so, legislation should be construed as being within power (ie. HC will not try to invalidate laws)**
- Where an Act is so general as to apply to matters beyond power, the court will **construe it in a more limited sense** and will confine its meaning (unless contrary intention is clear in Act)
NB: the general principle of statutory interpretation is: if it is possible to read down the meaning of the law, so its narrower application is constitutional valid even though the broader interpretation is invalid, then the HC will read down the law.
- Eg. ***Wilson v. Minister for Aboriginal and Torres Strait Island Affairs (1996 HC)*:** in this case, “person” was read down, so as not include “federal judges”.
- **However**, if reading down the legislation would amount to a **re-wording** of the intention of the legislature, the court will **not “read down a law”** (***Pidoto v. Victoria 1943***).

Severance

- An unconstitutional section of an Act may be *severed* from the rest of the Act (thus, saving the Act). But, these questions must be asked.
- In severance possible as matter of language: would there need to be a **substitution** rather than excision of words? If yes, no severance
- Would the result be to **change a legal effect**? If yes, no severance
- Is the remainder of statutory text, or part of it, so interdependent with the severed words that to remove them would **change the whole effect of the law**? If yes, no severance
- Would severance be in accordance with the apparent intention of the legislature, as revealed in the terms of the whole Act? **If intention is that the statute should stand or fall as a whole**, severance is not possible
- ***Work choice case (2006)*:** if the invalidated portions are relatively **few and specific**, surgery (ie. severance) will be available and appropriate. However, where the resulting invalidation is **substantial and would strike down key provisions** of a comprehensive and integrated legislative measures, severance will be inappropriate. “Judicial surgery” should not involve the court’s performing a legislative task (**ie. HC cannot go and amending legislation, this is not judicial role**).