

CONSTI EXAM NOTES LAW2111

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OVERVIEW

Commonwealth Law/ Act

- Head of power/ characterisation
 - > External Affairs HoP -s51(29) (incl treaties, extra territoriality, relations with other countries, international concern)
 - > Corporations HoP s51 (20)
 - > Financial powers
 - Grants to the States s96
 - Appropriation and expenditure (ss 81, 83)
- Implied Limits/ Prohibitions
 - > Separation of powers- Cth level
 - > Limits on Cth's ability to bind States
 - > IGI- (Intergovernmental immunities) State immunities from Cth law
 - > Implied Freedom of Political Communication
 - > Implied freedom to vote
- Express Limits
 - > s 81 spending power (appropriation and expenditure)
- **Cth but no Act: Executive power or spending power s 81**

State Law

Refers to a law concerning Parliament's own legislative authority

- **McCawley** - Law proposing a change in judicial tenure affects Parliament's powers

c) **Procedures**

Refers to rules and procedures relating to Parliament's own internal conduct

- The role of the speaker, the no. of times a Bill needs to be read, internal procedures, regulating standing orders of Parliament

STEP 7: Conclusion

- If Second Law does not relate to the CPP of Parliament, it is not bound by the MAF requirement and hence the second law will be valid
- If the second law does relate to the CPP of Parliament, it is bound by the MAF requirement and its failure to follow the RP makes the second law invalid
 - Of "no force or effect" as it is not made in a M&F as required by Parliament's RP.

Sources of Cth Law making power

TOPIC 4: General Principles of Characterisation

STEP 1: INTRODUCTION: General principles

- Cth legislative power is enumerated rather than plenary hence must fall under a HoP in order to be validly enacted
 - **S 51(24)** External Affairs
 - **S 51(20)** Corporations power
 - **S 96** Grants Power
- On the facts, Cth is seeking to enact a [LAW] using a [HoP]
- The subject matter of the law needs to be identified and there must be a direct relationship between subject matter and legislation.
- Dual Characterization of a Cth law is permissible provided that one of the characterizations is within a HoP (**Fairfax per Kitto**)
 - Doesn't matter if one of the laws touches or affects a topic under which Cth has no power to legislate (**Murphyores per Mason J**)

STEP 2: IF RELEVANT DOCTRINE OF STATE POWERS

- a) One party may argue that the law is invalid because Cth is attempting to impede on state power
 - **per R v Barger** Court held that in interpreting the scope of Cth powers, the court should be influenced by an assumption that certain subject matters of legislation were reserved for the State Parliaments' exclusive power as
 - e.g. Labour-making powers
- b) Other party will argue that this was overturned in **Engineers case**
 - Heads of power of the Constitution are to be interpreted in accordance with their natural meaning.
 - Therefore, intentions of the founders do not need to be read into the constitution, unless such implication follows necessarily or logically from the text.

NEXUS REQUIREMENT- Link between the legislating parliament and the matter being regulated

- Even if there is the standard is low
 - **Polyukhovich v Cth** (Toohey J minority judgement) - A nexus requirement should exist, but this is satisfied by virtue of Australia being involved in WW2 (hence, Aus has the power to criminalise acts committed during WW2).
 - **XYZ v Cth** - There is no requirement for a nexus between the Cth and the challenged law. It is sufficient if the matter is external to Australia.
 - **Polyukhovich v Cth** (Gaudron J minority judgement) - Very decision of the Clth to legislate on a matter is conclusive evidence of a nexus
- Unlikely that a nexus requirement exists as the “word external is precise and unqualified” **ILO; majority Poly**

[Plaintiff] may argue that merely relating [Law] to a matter external to Australia is insufficient pointing towards the dissenting judgments of Callinan and Heydon JJ in **XYZ** (found that a nexus between the Cth and the law was required) and Brennan and Toohey JJ in **Polyukhovich** (found that a genuine connection between the Cth and the law was required).

STEP 5: MATTERS OF INTERNATIONAL CONCERN (possible branch)

- a) Is there potential for the Cth to implement legislation on matters of international concern?
 - Cth may argue that [Law] enlivens **s 51 (29)** as it gives effect to a matter of international concern (**Koowarta** per Stephen J)
 - P may argue that there has been no majority acceptance of this doctrine and that ILO’s expansion of the treaty implementation limb to include non-treaty documents (ie. declarations) has rendered the international concern limb uncertain, however the HCA has considered it (albeit never determinatively) recently
- b) **XYZ v Commonwealth** - Heydon & Callinan JJ (dissent): ‘immense difficulties’ facing any court wishing to apply the international concern doctrine
 - measuring the extent of international concern to determine the boundaries of commonwealth legislative power
 - However, they did not conclusively deny the existence of the doctrine
- c) As **per XYZ** Law is not clear, no guarantee that on a stand-alone basis it will be valid

TOPIC 7: The Corporations Power Section 51 (xx)

STEP 1: INTRODUCTION

Look at the subsection and whether or not it is too broad (needs to be read down??) AND whether the person in the problem falls within the ready down section or is outside it?

[Plaintiff] may argue [law] is invalid for want of an enumerated HoP. Cth will argue that [law] is a law regarding corporations and as such **enlivens s 51(xx)**

Per **s 51(xx)**, Parliament has the power to make laws with respect to foreign corporations, and trading/financial corporations formed within the limits of the Cth. For this HoP to be valid the corporation must be a Constitutional Corp (CC). (Non-purposive)

Case	Illustrative facts
Austin – impedes on “ability to function”	<ul style="list-style-type: none"> • State judges were affected by a superannuation scheme • Held: that as judges were retiring earlier, this impaired the state’s ability to retain and appoint judges and hence to function
Clarke - impedes on “ability to function”	<ul style="list-style-type: none"> • Law reduced remuneration of SA parliamentarians (higher echelon employees) • interfered with right to set terms and conditions of higher level employees hence invalid
Native Title Case - Does not impede on “ability to function”	<ul style="list-style-type: none"> • having to pay compensation to indigenous inhabitants does not impede effective governmental functions • this does not directly affect any of the three branches of state government • the only real effect is to limit its financial capacity to acquire land and resources

STEP 4: CONCLUSION

If the law is discriminatory, it is prohibited because *it is classified as a law that impairs the States’ ability to function as a govt* , If a law impairs the state’s ability to function as a government it is invalid.

Cth vs State Power

TOPIC 9: Inconsistency

STEP 1: INTRODUCTION

- **S 109** → ‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’

[X] will argue that [State law] is inconsistent with [Cth law] and should be therefore be rendered inoperative to the extent of the inconsistency under s 109 of the Cth Consti.

- a) Need a valid Cth Act for **S 109** purposes
 - Includes industrial awards (**McLean**), Federal agreements (**Ansett**), NOT administrative orders (**Airlines of NSW**)
- b) Tests that may be applied:
 - 1) Simultaneous obedience
 - 2) Conferral of rights

Marriage equality case	<ul style="list-style-type: none"> ▪ Cth act was a comprehensive and exhaustive list of the state of marriage ▪ Comprehensiveness showed that there was an intention to cover the field i.e. expressly limited marriage to opposite sex persons ▪ Marriage equality was invalid
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2. Subject matter of the legislation

- If the Cth law is regulating an area that **requires uniformity**, this indicates an intention to cover the field
- Matters requiring uniformity include:
 - Currency
 - Fulfilment of treaty obligations
 - Quarantining
 - Employment preferences for discharged military personnel
 - Protection of Cth property from destruction
 - Copyrights & trademarks
 - Prevention of collisions at sea

Case	Illustrative facts
Viskauskas v Nilana	<ul style="list-style-type: none"> ▪ Cth legislation involved the implementation of an anti-discrimination treaty, which indicated that the Cth intended to have a uniform regime.

3. Unfortunately, neither indicator is decisive

STEP 4: CONCLUSION

The consequences are **S 109** directs that it will be invalid to the EXTENT of the inconsistency

- b) Only inconsistent provisions will be invalid
- c) Severe those provisions out of state law that are invalid
- d) However, if you severe that part (it was a key part), and the law does not make sense, the whole of the state law will be void

The Executive

TOPIC 10: Sources of Executive power

Red Flag: any action the executive has taken....

STEP 1: INTRODUCTION

Pirrie v McFarlane	<ul style="list-style-type: none"> McFarlane (Cth air force personnel) was liable for driving on Vic roads without a licence
A v Heydon	<ul style="list-style-type: none"> ASIS agents were liable for offences committed during a botched training exercise at a Victorian hotel.

STEP 5: CONCLUSION

WHERE IGI IS BREACHED: Overall, it appears that [Vic Law] affects the C&F of the Cth and hence is invalid in its effect on the Cth.

WHERE IGI IS NOT BREACHED: Overall, it appears that [Vic Law] affects the exercise of the C&F of the Cth and hence is valid and binds the Cth.

Separation of Judicial power

TOPIC 11A: Federal Separation of Powers

STEP 1: INTRODUCTION

[Plaintiff] may argue that [Cth law] is invalid for breaching the implied doctrine of SOJP. There is no strict SOP in Australia but implied from The Chapter headings and emphatic delegations in **ss 1, 61** and **71** the Constitution dividing power between the Parliament, Executive and Judiciary suggests that the framers of the Australian Constitution intended to adopt a SOP (Dixon J in **Dignar**)

- **Justification:** So that the judiciary is independent of political pressure, safeguard the right to a fair trial, checks the concentration of power, so ultimately there is a true guarantee of a democracy.
- The two key principles are:
 - I. Only Ch III courts may exercise federal judicial power **Wheat**
 - II. Ch III courts CANNOT exercise non-judicial power **Boilermakers.**

STEP 2: IS IT JP OR NON JP (OR A MIXTURE OF BOTH) THAT IS BEING EXERCISED?

In order to determine whether JP or non-JP look to the indicators of JP, however, no single one is decisive.

[Cth] will argue that the following indicators exist hence JP is being exercised:

(1) Binding and conclusive decisions

- a. If the body can make decisions that are 'binding and conclusive' this is a strong indicator of JP
- b. Look at the kind of appeal/ review available from the decision if it is a complete rehearing this points away from JP
 - i. Court- original decision is still binding and conclusive but the case may be appealed on a point of law

- P: as per **Grollo** the secrecy of the ex parte application weakens the public view of independence of and public confidence in the judiciary

As per Wilson

1. **Is the non-judicial function so closely connected with the functions of the legislature or the executive?**
 - P: as per **Wilson** preparing a report for the Minister was too closely connected to the Exec as the judge amounted to a quasi-policy advisor.
 - **Consequence:** If no such close connection is evident, there is no constitutional incompatibility.
 - If there is such a close connection, Ask:
2. **Must function be performed dependent of the advice of the Executive and/or Legislature?**
 - **Consequence:** If not independent, incompatibility arises.
 - P: as per **Wilson** it was insufficient that judges may perform the required function independently
 - If the function is to be performed independently, Ask:
3. **Does function involve a discretion to be exercised on political grounds? or ask whether a judicial manner of performance is required?**
 - P: as per **Wilson** the report related to indigenous land (hot political topic) hence in making the report Matthews J could take political considerations into account = this was found to be incompatible with her impartial nature
 - If the answer to these Qns is no, the function is not incompatible with a judge's judicial role.

STEP 6: CONSEQUENCES

If Principle 1 has been breached and the delegation exception does not apply there has been a breach of the SOJP and hence [body] should not be allowed to exercise JP.

If Principle 2 has been breached i.e. the [body] is exercising [JP/ non JP] and persona designation exception does not apply (i.e. incompatibility) the [body] is not a CH III court and hence breach of SOP.

TOPIC 11B: State Separation of Powers

STEP 1: INTRODUCTIONS

[Plaintiff] will argue that the [State Law] is invalid for breaching the SOJP doctrine.

[State] government will argue that they enjoy residual plenary power (**S 16** Vic Consti, **S 2(1)** AA and **Union Steamships**) nothing in the Constitution implies such SOP. No SoJP in the State Constitution, so no entrenched provisions to protect judicial independence. Per **Kable**, State Parliaments can invest non-judicial bodies with JP and can confer NJP on courts (as long as it is not incompatible).