

IFRAC

- Issue (use as a subheading)
- Facts (in Con law these can include clauses within legislation as well as material facts)
- Rule(s) (cite the relevant section of the constitution, caselaw (might be conflicting judicial opinion) and legal doctrine)
- Application (of rule(s) to facts)
- Conclusion (explain the most 'probable' or 'likely' outcome)

Structuring:

- Underlined or highlighted subheadings (using a relevant issue as the subheading for each new section of answer);
- Underlined or highlighted section numbers when referring to sections of the Constitution
- Underlined or highlighted case names when referring to common law.

CHARACTERISATION

Characterisation is the process of determining whether a Commonwealth law comes within the scope of the legislative powers conferred upon the Commonwealth Parliament by the Constitution: *Richardson v Forestry Commission (Lemonthyme and Southern Forests Case)* (1988). The question is whether the law relates to the subject matter or purpose of these head of power. This questions can be divided into two septette questions: (1) What is the scope of the power; and (2) Is the law in truth a law with respect to the subject matter of the power. The primary question whether a law is one with respect to a legislative power granted to the Commonwealth by the Constitution is answered by ascertaining its substantive or direct legal operation, that is, by determining the rights, duties, obligations, powers and privileges which it creates: *Fairfax*. Dual characterisation of a legislation is fine (*Fairfax v Federal Commissioner of taxation*). The HCA has divided most heads of power as either a subject matter power or purpose power. Commissioner of Taxation (Cth)

Subject Matter Power

For heads of power declared as subject matter powers, it must be demonstrated that there is a sufficient connection between the law and a head of power (*Lansell v Lansell* (1964); *Nationalisation of the Banks Case* and *Murphyores* (1976): TEST - If it's a subject matter power, does the Cth Act have a sufficient connection to the subject matter? ; Kitto J in *Fairfax* "Is it in real substance a law upon, "with respect to", one or more of the enumerated subjects")).

However, this requirement does not mean that the connection must be close. Rather, it means only that the connection must not be so insubstantial, tenuous or distant that it cannot be regarded as a law with respect to the relevant head of power: *Melbourne City Council v Commonwealth (State Banking Case)*. The courts will examine the purpose of the power to see if there is connexion with the law (*ANA v Cth*). The High Court may also consider the practical effect or operation of a law: *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983)

1. What five steps did the Court follow in *Grain Pool of WA v Cth* when characterising a subject matter power?

- The five steps followed were:

- First the constitutional text is to be construed with all the generality which the words used admit.
- Secondly, the character of the law in question must be determined by reference to the rights, powers and liabilities, duties and privilege it creates
- Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power
- Fourthly, doesn't matter if there are dual characteristics
- Finally if a sufficient connection does exist...

- The ulterior motive of the legislature, or the purpose or the indirect consequences which it seeks to achieve, either economic or social, are irrelevant: *South Australia v Commonwealth (First Uniform Tax Case)*

Purposive Power

For heads of power described as purpose powers, the courts have applied a proportionality test to determine whether the law in question is reasonably appropriate and adapted to the purpose of the power (see *Tasmanian Dam Case*; *Polyukovich v Cth*). Where a grant of Commonwealth legislative power involves the notion of purpose or object, or an incidental power, special considerations apply to the characterisation process. The defence power (Constitution, s 51(vi)) and the 'implementation of a treaty' aspect of the external affairs power (s 51(xxix)) are both defined by the Constitution in terms of purpose rather than subject matter. When characterising a law to determine whether it is one with respect to a purposive legislative power, the Court looks not only to its direct legal operation but also to its purposes or object: *Richardson v Forestry Commission (Lemonthyme and Southern Forests Case)* (1988)

IMPLIED INCIDENTAL POWER

The Subject Matter is extended in scope by the Cth express incidental power under s51(39), which allows the Court to legislate on matters incidental to any head of power.

In addition, the courts have recognised an implied incidental power held by each power in s51, which allows the Parliament to legislate on matters which although not mention, would render the purpose of the power ineffective (*D'Emden v Pedder*).

The difference between the express and implied incidental power is that the implied incidental power from *D'Emden v Pedder* (1904) is used to interpret the head of power and the express incidental power (s. 51 (xxxix)) is used to interpret an executive exercise of power under the head of power.

For a Commonwealth law to come within the scope of the incidental reach of a power there must be a relevant and sufficient connection with the subject matter of that power. In determining whether such a connection exists, the courts have regard to the purpose of the legislative provision and the reasonableness of the connection between the law and the subject matter of the power: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Mason CJ at 27-28. Even if the purpose of a law is to achieve an end within a substantive power, it will not fall within the scope of what is incidental to that power unless it is considered by the court to be reasonably proportionate or reasonably and appropriately adapted to the pursuit of that end: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, Mason CJ at 30-31; *Davis v Commonwealth* (1988) 166 CLR 79, Mason CJ, Deane and Gaudron JJ at 100. In determining whether the requirement of reasonable proportionality is satisfied, the court will ascertain whether, and to what extent, the law goes beyond what is 'reasonably necessary' or 'conceivably desirable' for the achievement of the legislative object sought to be obtained. In doing so, the court will ascertain whether the law causes adverse consequences unrelated to the achievement of that object and, in particular, whether those adverse consequences result in the infringement of fundamental values traditionally protected by the law, such as freedom of expression.

Scope of Power

- Where the Commonwealth Parliament possesses power to make a law in relation to an activity, it may prohibit that activity absolutely or permit it conditionally. In *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, regulations made by a Commonwealth minister prohibited the export of specified minerals from Australia without ministerial approval. In deciding whether to approve export of the minerals, the Commonwealth Minister proposed to take into account a report investigating the environmental aspects of their mining. The High Court held that, as the Commonwealth was permitted by the Constitution, s 51(i), to absolutely prohibit the export of the minerals, a law which relaxed the prohibition was necessarily one within the Commonwealth's legislative power. The Minister could, therefore, consider an environmental report for the purpose of deciding whether to relax the prohibition, even though the report considered matters extraneous to the subject of the grant of power pursuant to which the Commonwealth imposed the prohibition.
- Conditions or criteria laid down by the Parliament which authorise an otherwise prohibited activity need have no relevance to the subject matter of the Commonwealth's

legislative power pursuant to which the prohibition was imposed. In *Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, Kitto J said:

- *A law which qualifies an existing statutory power to relax a prohibition is necessarily a law with respect to the subject of the prohibition. Even if the qualification gives it the additional character of a law upon some other topic — even, indeed, if that other topic be not a subject of federal legislative power — it is still a law with respect to the subject of the prohibition, and is valid if that subject be within federal power.*
- A law upon a subject matter within Commonwealth legislative power does not cease to be valid because it either touches or affects a subject outside Commonwealth legislative power or because it can also be characterised as a law upon a subject outside Commonwealth legislative power.
- A Commonwealth law need not relate exclusively to an enumerated grant of legislative power: *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, Stephen J at 192.
- Where a Commonwealth law bears several characters, it is fruitless to attempt to characterise it as relating to one subject to the exclusion of all others *Actors & Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, Stephen J at 192; *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, Murphy J at 180.
- Provided that the law can fairly be characterised as one with respect to a Commonwealth grant of legislative power, it is irrelevant that it may also be characterised as one with respect to a power exercised by the States, even where the obvious or primary character of the law falls outside the Commonwealth's legislative powers.

Solving a problem question in Constitutional Law

1. Identify the head(s) of power that could reasonably be invoked to support a Commonwealth law
2. How has the power(s) been interpreted by the High Court?
3. What is the scope of the grant of power? What limits have been applied by the High Court in its interpretation?
4. Is the power non-purposive or purposive, or is it a power incidental to the execution of the grant of power (ie implied incidental power). This is important because it will determine the test of characterisation to be applied.
5. Characterising the law

a. Subject Matter Powers

- i. Test to be applied:
Is it a law 'with respect to' to head of power – look to the rights, duties, obligations and privileges which it changes, regulates or abolishes
- ii. Sufficient connection test: - If it's a subject matter power, does the Cth Act have a sufficient connection to the subject matter? (Kitto J in *Fairfax* "Is it in real substance a law upon, "with respect to", one or more of the enumerated subjects")

b. Purposive Powers

- i. Test to be applied:
A law made in exercise of a purposive constitutional power will be valid if it is reasonably capable of being regarded as appropriate and adapted to the object which gives the law its character as a law with respect to the relevant head of power. It is a question of proportionality.

c. Implied Incidental Powers (it must satisfy both tests):

- i. Sufficient connexion: There must be a relevant and sufficient connection with the subject matter of that power (i.e. to be within the scope of the incidental power) In determining whether it exists (i.e. the connexion) the courts will have regard to the purpose of the legislative provision and the reasonableness of the connection between the law and the subject matter of the power (*Nationwide News*)
- ii. Proportionality Test: If no sufficient connection (in general test) but by invoking the implied incidental power it can be brought into the subject matter, we must ask whether the law is "appropriate and adapted" to its purpose (FAIRLY DISCRETIONARY) (***D'Emden v Pedder (1904)***): *R v Burgess (1936)*.

6. Once the law can be characterised as being within power, you need to consider any constitutional limitations on the Commonwealth's exercise of power. There are both express limitations (eg. s 51(xxxi), s 92) and implied limitations (eg implied freedom of communication, Melbourne Corporation doctrine)