

LAW 2501

AUSTRALIAN CONSTITUTIONAL LAW

Exam Notes 2018

Constitutional Change

- Can only occur by a referendum initiated by parliament under s 128 of the Constitution.
- Low success rate – 44 attempts and only 8 succeeded

Constitutional Validity

- States have plenary power
 - *Constitution Act 1934 (SA)* s 5
 - Commonwealth Constitution ss 106-107
- Commonwealth legislative power
 - *Australian Constitution* ss 51-52 head of power
 - S 51(xxxvi) states can refer power to the Commonwealth

Characterisation Overview

1. Interpret head of power
 - Prefer broad interpretation
Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309
 2. Look at the legislation
 - Determine the character of the law by the rights, powers, liabilities, duties and privileges it creates
 - Consider the practical as well as legal effect of the law
Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479, 492
 3. Compare the two
 - Subject matter power: test of sufficient connection
 - Purpose and proportionality irrelevant
Herald and Weekly Times Ltd v Commonwealth (1966) 115 CLR 418
 - Purposive power: test of proportionality
- Only one character of the law needs to be within power (exc. Tax)
Actors and Announcers Equity Association v Fontana Films (1982) 150 CLR 169
 - Different sections may be supported by different heads of power

Reading Down and Severance

- Severance – particular sections or words may be severed to bring the law within power
- Reading down – to preserve valid applications of the law (interpret in a narrower field of operation)
- Tools used to give effect to parliament's intentions – cannot change the law if it becomes something that parliament did not intend
- Can only be done if 'the operation of the remaining parts of the law remains unchanged'
Pidoto v Victoria (1943) 166 CLR 87
- Courts cannot 'reconstruct out of the ruins of one invalid law of particular application, a number of valid laws of particular application'
Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 468
- Courts can undertake amputation and excision, but not plastic surgery
New South Wales v Commonwealth (Work Choices Case) (2006) 231 ALR 1

Corporations Power: s 51(xx)

PROCESS POLYGON #1

- Is the law supported by s 51(xx)?
 - Is the law within the scope of the power? – *Work Choices Case*
 - What is the character of the law?
 - Is there a sufficient connection
- Assuming the law is valid; does the law apply to a particular corporation?
 - Is the corporation a foreign, trading or financial corporation within the meaning of s 51(xx)?
 - Substantial activities tests

What is a corporation?

- Distinct legal person
- Capable of having legal rights and obligations
- Usually created by the process of incorporation or via statute
- “When regard is had to the Act, Queensland Rail is properly to be regarded as a “corporation”; it is an artificial legal entity created by law with its own legal personality and having perpetual succession”
Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Queensland Rail (2016) 256 CLR 171

What is the scope of the power?

- “I have no doubt that the power conferred by s 51(xx) of the Constitution extends to the **regulation of the activities, functions, relationships and the business of a corporation** described in that subsection, the **creation of rights, and privileges belonging to such a corporation**, the **imposition of obligations** on it and, in respect of those matters, to the **regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities**, functions, relationships or business.”
New South Wales v Commonwealth (Work Choices Case) (2006) 229 CLR 1
Adopting the position of Gaudron J in *Re Pacific Coal Pty Limited; Ex parte: Construction, Forestry, Mining and Energy Union* [2000] HCA 34
- Can only legislate ‘with respect’ to said ‘activities’ though; cannot extend to employees beyond their connection with the constitutional corporation
- Power conferred also extends to any subject that affects the corporation, including laws that protect s 51(xx) corporations from the conduct of non-corporations
Re Dingjan; Ex parte Wagner (1995) 183 CLR 323

Examples of laws ‘with respect to’ constitutional corporations

- A law regulating restrictive trade practices between corporations
Strickland v Rocla Concrete Pipes Ltd (Concrete Pipes Case) (1971) 124 CLR 468
- A law prohibiting corporations, for the purposes of their trading activities, from carrying out excavation works, building, damaging buildings, damaging trees, making roads, or using explosives on certain land
Commonwealth v Tasmania (Tasmanian Dams Case) (1983) 158 CLR 1
- Comprehensive Regulation of corporations’ workplace regulations
Work Choices Case (2006) 229 CLR 1