Table of Contents

CHAPTER I: AUS CONSTITUTIONAL LAW CONCEPTS

Parliament has the constitutional power to "make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament" [A V Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed, 1885; 10th ed, MacMillan, 1964), p 40]. The powers of all Australian legislatures are, however, constrained by the *CC*.

RULE OF LAW

Society is governed according to declared laws, rather than by arbitrary exercises of power.

"At its core is the conviction that law provides the most secure means of protecting each citizen from the arbitrary will of every other. By being constrained to govern by means of general laws, the rules of society cannot single out particular citizens for special treatment. The law is to constitute a bulwark (safeguard) between governors and governed, shielding the individual from hostile discrimination on the part of those with political power" [T R S Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 *Cambridge Law Journal* 111 at 112–113].

Lord Bingham stated, "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" [T Bingham, *The Rule of Law* (Penguin, London, 2011), p 8].

In 'The Rule of Law' (2007) 66(1) *The Cambridge Law Journal* 67, 69–81, Lord Bingham elucidated the ROL into eight sub-rules:

1. "The law must be accessible … intelligible, clear, and predictable";
2. Liability should be resolved by applying the law, not by discretion;
3. The laws should be of equal application to all;
4. The legal system must adequately protect the fundamental human rights;
5. The system must provide ways for parties to *bona fide* legal disputes, who are unable to resolve the disputes themselves;
6. "Ministers and public officers … must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers";
7. The legal procedures must be fair; and
8. The State must comply with its international legal obligations.

Gleeson CJ: "Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly" [*Plaintiff S157/2002 v Cth* (2003) 211 CLR 476 at 492; citing *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70 per Brennan J].

CONSTITUTIONAL CONVENTIONS

Conventions are customs or practices that are habitually followed by governments, who are under a moral or political obligation to continue following them. Their breach does not, however, attract any legal sanction.

The bare words of the *CC* vest the Queen's representative (G-G) with enormous power. He may dissolve the lower house of Parliament "as he thinks fit" [*CC* s 5], may disallow legislation by refusing his assent [s 58], and may sack individual Ministers and even the entire government [s 64]. It is only a convention that the G-G acts on the advice of the government of the day. This convention has only been broken once at the federal level, and then only arguably, in 1975 when G-G Kerr sacked the Whitlam Government.

The proper functioning of government has always necessitated the conferral of discretionary power on various persons within the government. Conventions generally govern the exercise of these legally conferred discretions. Conventions allow for some flexibility to permit gradual, evolutionary shifts in power.

RESPONSIBLE GOVERNMENT

Under the doctrine of RG, the Executive is responsible to the Legislature. By convention, the Crown (represented by the G-G) acts on the advice of its Ministers. Those Ministers in turn, incl. the PM, may only remain in gov whilst retaining the confidence of the House.

In practice, this means that the gov will only stay in power while their party commands a majority in the House of Reps. If they should lose that majority, the gov is required by convention to resign. If no other gov can be formed by commanding a new lower house majority, an election must be called by the G-G.

The doctrine of RG links the Executive to the Australian people. The Executive is responsible to the Lower House, which is itself responsible to the electorate via the doctrine of representative government. RG is one way of ensuring parliamentary supremacy over the Executive. However, it may be that the Legislature is effectively dominated by the Executive.

PARLIAMENTARY CONTROL OF SUPPLY

The Whitlam Gov's budget failed to pass through a Senate controlled by the Opposition. One view is that the Senate breached convention by its unprecedented failure to pass a supply bill. The alternative view is that the Whitlam Gov breached convention by failing to resign when it could not guarantee supply. The G-G "resolved" the crisis by sacking the Whitlam Gov and forcing a double dissolution.

SOP

The SOP doctrine prevents the concentration of too much power in, and consequent abuse of power by, a single arm of gov. SOP ensures that the three arms of gov operate as checks and balances upon each other so that no one gov'l arm unduly harms the interests of the governed.

The distinction between the Executive and the Legislature has become increasingly blurred. Cth Ministers are concurrently members of both gov'l arms, as required by the *CC* s 64.

FEDERALISM

Australia is a federal state so constitutional power is shared between two levels of gov. There are 7 autonomous govs (Federal gov and the 6 states). Though there can be inconsistencies between federal and state law, Federal law prevails to the extent of any inconsistency [s 109].

The territorial govs remain under the thumb of the Federal Parliament, which could legally abolish them, and can override any territorial legislation [s 122]. Since the enactment of the *Territories Self-Government Legislation Amendment Act* 2011 (Cth), laws passed by the territorial parliaments can no longer be overturned by the Federal Executive, but the Federal Parliament retains the power to do so.

The Cth and States have a number of concurrent powers under the *CC* s 51. The States retained exclusive authority over the residual powers, those which are not expressly or impliedly conferred on the Cth.

FROM COLONISATION TO FEDERATION

From Dictatorship to Responsible Government

Prior to 1823, NSW (then being the only colony) was ruled by the Governor as a form of military dictatorship. After that date, the powers of the Governor were slowly diminished, or delegated, until each colony developed a system of RG with a bicameral parliament incl. a popularly elected lower house. NSW adopted a system of RG in 1855. The *Australian Constitutions Act (No 2)* 1850 (Imp) authorised the colonial parliaments to draft constitutions for their respective colonies. These initial constitutions were the direct ancestors of today's state constitutions.

Limits of the Powers of Colonial Parliaments

The colonies could not pass any law, which was repugnant to a law of the UK Imperial Parliament. The actual meaning of this rule was clarified in the *Colonial Laws Validity Act* 1865 (Imp). S 2 of the Act confirmed that laws enacted by colonial legislatures were void if repugnant to the provisions of UK legislation extending to that colony.

A final restriction on colonial power was the reserve power of the English Monarch to disallow a colonial law, even after the relevant Governor had given his assent. This rule is carried on into the *CC* s 59, which still permits the Queen to disallow any Cth law within one year of the G-G's assent. However, by convention, she does not exercise this power.

The Advent of the *CC*

The Imperial Parliament, the only legislature with the legal power to form the Australian federation, passed the *Commonwealth of Australian Constitution Act* in 1900, which came into force on 1 Jan 1901, this being the date when the Cth of Aus was officially "born" ☺.

When Federal and State Powers Coincide [*CC* s 57]

There is the potential for deadlock in the legislative process. A hostile senate could block a gov's entire legislative program. The *CC* s 57 provides a process for resolving deadlocks. It provides for an alternative legislative procedure, which allows laws to be passed without formal senate approval. This procedure is complex and involves a number of steps.

In the *Territorial Senators Case*, Murphy J argued that s 57 was non-justiciable, as it raised "political" issues to be resolved by the G-G in Council, rather than the courts (at 293–294). Jacobs J concurred, feeling that any defect in the procedure could be resolved by the people voting at the requisite general election (at 275–276).

Chapter IV: Finance & Trade

SS 81 and 83 provide for parliamentary control over executive money-raising and expenditure. SS 88 and 92 are designed to harmonise customs and excise policies throughout the nation, and create a free trade area within Australia. S 96 provides for the provision of financial aid by the Cth to any State. SS 105 and 105A provide that the Cth may make arrangements to take over State debts and raise loans.

Chapter V: Transformation of Colonies into States

S 107 confirms the retention of residual legislative powers by the States.

FROM FEDERATION TO THE AUSTRALIA ACTS

Upon federation, the Australian colonies remained subordinated to the Westminster Parliament under the *Colonial Laws Validity Act* 1865 (Imp) s 2, and the same applied to the new Cth entity.

Statute of Westminster

The first major emancipating step was the passage of the *Statute of Westminster* 1931 (Imp). This did not apply to Australian until it was specifically adopted by the Cth Parliament through the passage of the *Statute of Westminster Adoption Act* 1942 (Cth).

S 2(1) declared that the *Colonial Laws Validity Act* would not apply to any law of the Cth after the date of its adoption. S 2(2) confirmed that no law of a dominion would be held to be invalid for the reason of repugnance to any law of the UK. S 2(2) also gave the Cth the power to repeal or amend any UK Act, which had previously applied to it.

S 4 removed the power of the UK Parliament to extend legislation to the Cth except in one circumstance, where the Cth passed an Act requesting and consenting to the enactment thereof. Thus, as of 3 Sep 1939, the Cth was legally free from the Parliament of the UK.

The Australia Acts

The States remained legally subservient to the UK until 1986. In 1986, the Cth Parliament passed the *Australia Act* 1986 (Cth). The relevant constitutional head of power was s 51(xxxviii). Under the Act, s 1 terminated the power of the UK Parliament to legislate for any of the States. Thus, as of 1986, no law of the UK could extend to the States.

S 2(2) confirmed the plenary power of the States found in their own Constitutions. S 3(1) terminated the *Colonial Laws Validity Act*, insofar as it applied to the States, so that no state law could be void for being repugnant to UK law.

UK Parliament subsequently enacted the *Australia Act* 1986 (UK), containing virtually identical provision to that of the Australian version. There were significant doubts WRT the validity of the *Australia Act* 1986 (Cth) at the time of its enactment. S 51(xxxviii) has never been interpreted, so its scope was uncertain.

S 11 of the Act effectively abolished all appeals from Australia to the Privy Council.

CONSTITUTIONAL INTERPRETATION

An interpretative technique is to interpret the words contextually. This technique was described by Gibbs J in the *Territorial Senators Case* (at 246): "We must construe the Constitution as a whole … It may be necessary, for this purpose, to restrict the literal meaning of one section to render its provisions harmonious with those of another part of the Constitution".

Precedents

In the absence of Australian precedents, and even in their presence, judges sometimes look to comparable overseas precedents for guidance. In the *Territorial Senators Case*, both the majority and minority relied, to some extent, on comparisons with the jurisdiction of the US.

Policy Arguments

Policy decision regarding the social or economic outcomes of a decision are traditionally the domain of the Legislature and the Executive, rather than the Judiciary. However, occasionally policy will compel a judge to choose one meaning over another, due to the dire consequences of the latter meaning. The *Territorial Senators* decisions were explicitly influenced by arguments based on "policy", or the "bad" ramifications of adopting the alternative position.

The minority chose a meaning designed to avoid an unquestionably bad circumstance. The majority chose the more orthodox approach of "trusting" the Parliament not to bring about that bad circumstance.

Implication

In the *Engineers' Case*, the Court ruled that judges should primarily interpret the *CC* according to the express words therein. Implied meanings could only be construed where such a meaning was *necessarily* or *logically* implied from the text of the *CC*. Otherwise judges should not overlay the *CC* with implications, which they feel *should* be there.

International Law

Kirby J: "Where there is an ambiguity in the meaning of the Constitution, as there is here, it should be resolved in favour of upholding such fundaments and universal rights. The Australian Constitution should not be interpreted so as to condone an unnecessary withdrawal of the protection of such rights. At least it should not be so interpreted unless the text is intractable and the deprivation of such rights is completely clear [*Newcrest Mining (WA) v Cth* (1997) 190 CLR 513 at 657–661].

At common law, judges are required to resolve ambiguities in statutory interpretation in favour of compliance with Australia's international obligations [*Polites v Cth* (1945) 70 CLR 60 at 68–9, 77, 80–1]. In *Newcrest Mining*, Kirby J extended that rule to apply to constitutional interpretation. He repeated this view in numerous cases [*Kartinyeri v Cth* (1998) 195 CLR 337 at 417–418; *Thomas v Mowbray* (2007) 233 CLR 307 at 440–441].

Influence of International Law

Mason CJ, Brennan, Gaudron, and McHugh JJ: "The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language" [*Coco v R* (1994)].

CHAPTER II: CHARACTERISATION OF CTH LAWS

Most heads of Cth law making power are found in s 51, though misc. powers may be found elsewhere in the *CC*, such as in ss 52, 81 and 96.

RESERVED POWERS DOCTRINE

In the first two decades after federation, HCA took a very narrow approach to the characterisation of Cth laws. It adopted the view that certain legislative areas were "reserved" for the States. If a Cth law impinged on an area of reserved power, it was found to be invalid.

R v Barger (1908) 6 CLR 41

This case concerned the validity of the *Excise Tariff Act* 1906 (Cth), which imposed a tax on the manufacturers of agricultural implements. S 2 exempted from the tax those goods "manufactured by any person … under conditions which were declared by Parliament to be fair and reasonable, or which were in accordance with a federal industrial award". The Cth argued that its law was a valid exercise of power under s 51(ii), which gives the Cth power "WRT … taxation'.

A majority of Griffith CJ, Barton and O'Connor JJ found that the law could not be characterised as falling within s 51(ii). They stated [at 69]: "Regulation of the conditions of labour is a matter relating to the internal affairs of the States, and is therefore reserved to the States and denied to the Cth, except so far as it can be brought within one of the thirty-nine powers enumerated in s 51.

… We are thus led to the conclusion that the power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament"

The decision indicated that Cth laws were incapable of "dual characterisation": they could not be about more than one subject matter. The *Excise Tariffs Act* was, objectively, about both, taxation and labour conditions. The majority decided [at 77] that the proper characterisation of the law was as one WRT "conditions of manufacture of agricultural implements", an area beyond the scope of Cth power. This was an ulterior motive of enacting the impugned statute.

The majority decision indicated that the "thing being taxed" had to fall outside the State's reserved powers, in order to fall within Cth power. *Barger* imposed substantial limits on the Cth's taxation power under s 51(ii) by quarantining certain activities from its scope.

Isaacs J (dissenting) stated that a tax always taxes something, goods, services, dogs, and that it is impossible to legislate merely on tax without another characterisation, i.e. the thing being taxed – in this case, manufacture of agricultural products. A tax law would never be passed if the Cth could not legislate on the "thing" being taxed, as it would fall out of the scope of the Cth – However, the States' reserved powers doctrine was overturned in the *Engineers' case*.