Week ONE

Overarching questions to keep in mind during the course:

- How does the Australian Constitution divide up power between the Commonwealth and the States?
  - Is this division of power effective?
  - Do the states really have any constitutional power left?
- Does the Australian Constitution adequately protect rights?
- Should we have a constitutionally entrenched right to freedom of speech?

The Scope of State Legislative Power

- States have general legislative power to pass laws for the peace, welfare (order) & good government of the State
- **This is subject to:**
  - Express limitations in the Commonwealth Constitution on State legislative power
  - Implied limits in the Commonwealth Constitution on State legislative power
  - Any inconsistent Commonwealth legislation (see **s.109**) – *which implies that we have a system characterised by Commonwealth legislative supremacy*
  - Limits on extraterritoriality
  - Capacity of State legislature to prevent legislation from being amended or repealed (manner & form)

State Constitutions

- State constitutions are not 'supreme' in the same sense as the Commonwealth Constitution.
- State constitutions were traditionally compared to **'Dog Acts'** because of the ease with which they may be repealed or amended – such a discussion was considered by the court in **McCawley v The King** (1920)

- **NOTE** - It is usually **easy to change a State Constitution** – recently the NSW *CONSTITUTION ACT* was changed so that *SECTION 2* included *'Recognition of Aboriginal people'*

- **HOWEVER –** there exists some capacity to *prevent legislation being amended or repealed* –some sections controls the **'manner and form'** of any changes

Peace, Welfare & Good Government

- All State Constitutions contain words denoting the plenary legislative power of the State Parliament
- Derived from the nature of imperial legislative power and the doctrine of parliamentary supremacy

- **Union Steamship Co v King** (1988) - 'boilermakers deafness' case – cannot argue law isn't for the PWGG of that state – said 'PWGG' and its equivalents are **not words of limitation**

- **BLF v Minister for Industrial Relations** (1986) – State can alter legislation even if there's pending litigation – isn't unconstitutional

- **Durham Holdings v NSW** (2001) –held *There is no 'deeply-rooted (common law) right' to compensation when your property is acquired by a State* – this case **confirmed position in Union Steamships, that there exists parliamentary supremacy**

Express and implied limitations on State's PWGG power

- **S.114** *CC* – limits States raising forces or taxing Cth property
- **Lange v ABC** (1997) –State cannot limit freedom to discuss political and governmental affairs in a way that is compatible with the system of representative government contemplated by the CC
- **Note –s.7** and **s.24** of the CC says representatives will be 'chosen' by the people of the Commonwealth – the H.C said that this word 'chosen' implies discussion, so there exists freedom to discuss governmental affairs
- **Kable v DPP** (1996) - A State cannot single a person out and subject them to punishment without trial - that would be contrary to implications arising from Ch III of the CC

Peace, Welfare & Good Government

- *If these words are not words of limitation what protection do citizens have against 'extreme laws'?*
  - Democratic nature of parliamentary institutions (which doesn't really help minority groups)
  - The power of judges to construe legislation that impacts negatively on common law (which doesn't really assist where a legislature is restricting the civil liberties of a minority)

Extraterritoriality - Presumption that legislation is only intended to operate in the enacting State's territory

- **The States have extraterritorial legislative power** (Confirmed by **s.2(1)** *Australia Acts* - the legislative powers of the State Parliaments include full power to make laws for the POGG of that State that have extra-territorial operation)
- **But there must be a connection with the State**:
  - **Pearce v Florenca** – lobster fishing way off the coast of the WA – Court held lobster fishing was connected to the WA so their laws would apply – court said *Any real connection 'even a remote or general' connection, will suffice*

Week TWO - An introduction to Australian federalism

The Commonwealth and the States

- Senate had begun to vote on party lines, rather than necessarily in accordance with the interests of the State lines:
  - *'responsibility for maintaining an appropriate federal balance was left in the hands of the political process. But this plan came undone soon after federation when Senate began to vote on party, rather than State, lines - the States lost their chief political protection, enabling the Cth to focus primarily on the 'national' interest'*

- **S.51 of the CC sets out enumerated powers - the States are said to have residual powers**
- Under the Griffith H.C, two doctrines where developed as essentially Griffith wanted there to be a balance of power between the states and the Cth – these were the **doctrines of implied intergovernmental immunity** and the **State reserved powers doctrine** – they were intended to result in a narrow interpretation of Cth legislative powers

'Implied Immunity' Doctrine

- necessary implication from the federal character of the Constitution, that the Cth and the States were sovereign in the separate areas described by their respective Constitutions – meaning Cth immune from the operation of the legislation of the States, and *vice versa*.

Cases on Point:

- **D'Emden v Pedder** - HC held that Tasmania could not oblige a Cth public servant to pay a State tax on his salary as Cth was said to be immune from operation of State legislation
- **The Railway Servants case –** confirmed implied immunity doctrine not limited to taxation – HC held Cth legislation regulating the rights of employers and employees would interfere with the State's control of those railways so it didn't apply
- **Baxter v Commissioner of Taxation (NSW)** - applied the doctrine in a case involving a NSW tax on a Commonwealth customs official, even though the Privy Council had rejected the doctrine in Webb v Outrim

State 'reserved' powers doctrine

- An implication drawn from the Constitution - the Cth could not exercise its legislative power in a way that interfered with the residual or 'reserved' powers of the States.

- **The Union Label case** - court held by majority that provisions of federal trade marks legislation were *ultra vires* the Commonwealth because such a regulation concerned the control of the reserved 'internal trade and commerce' to the States.

- **The Engineers' case**
- After changes to the composition of the bench and the retirement of Griffith CJ, a majority of the High Court (with Knox as CJ) **rejected the doctrine of reserved powers and the doctrine of implied immunity**

- FACTS - The **Society of Engineers were essentially asking the Cth to apply a federal law to a state** – this raised issues which concerned the doctrines enacted by the Griffith H.C
- The HC was asked to determine an important question: whether the federal parliament had the power to make laws under **s.51(xxxv)** which bound the State Government instrumentalities in their capacity as employers -
- Section 51(xxxv) contained no language that indicated that the Commonwealth could not regulate States in their capacity as employers. This was contrasted with s.51(xiii) or (xiv), which contemplated express restrictions on the Cth over some topics (e.g. State banking and State insurance).
- PRINIPLE - Where no express restriction was made, none should be implied; *expressio unius est exclusio alterius*. **The words of the Constitution should be given their 'natural and ordinary' meaning**
- The *Engineers'* case authorised the expansive construction of federal powers, and correspondingly, opened the door to increased federal regulation of the States. The majority was alive to this concern, but it was Isaacs J opinion that the senate should protect each state – it was parliaments role to determine federalism and not the High Courts

A political decision or a legal decision?

- The authoritative exposition of the meaning of the Constitution *necessarily* involves policy considerations, because 'the Constitution is a political instrument*':* **Melbourne Corporation v Commonwealth**
- The political consequences of judicial decision-making can give rise to a perception that the High Court makes political decisions, or legal decisions motivated by political views, rather than legal decisions.

Fiscal Federalism

- Cth has the power to levy customs and excise duties – to develop a national common market: see **s.86** and **90**.
- **s.96** gives Cth power to grant financial assistance 'to any State on such terms and conditions as Parliament thinks fit'

The *Uniform Tax* cases

- Expansive construction of the Commonwealth's taxation and grants powers since the **Engineers' case** has resulted in Cth dominance in revenue raising, and consequently, fiscal dominance through appropriations and grants: **The First and Second Uniform Tax cases**

The *First Uniform Tax* case

- The fiscal imbalance between the Commonwealth and the States started with the *Uniform Tax* cases, a Federal legislative scheme with the object of securing to the Commonwealth the power to levy income tax as WWII had begun & Cth needed money, which was challenged in **the First Uniform Tax case** (1942)
- First law - imposed an unprecedented rate of income tax that made it politically impossible for States to levy a concurrent income tax.
- Second law - made grants to the States replacing the revenue they had previously generated from income tax.
- Third law - forbade taxpayers from paying State tax until they had first paid federal tax.
- Fourth law - transferred the entire apparatus of State income tax administration to the Commonwealth for the same period
- The laws were challenged on a number of grounds.
- **The High Court upheld the laws by majority**.
- **In summary, the majority of the judges upheld each of the four laws, some under s.51(ii) and some under s.51(vi)**
- The result of this case - Cth now controls the states with all the extra money it has through **s.96** of the CC

The *Second Uniform Tax* case (1957)

- A post **Melbourne Corporation** challenge to the Uniform Tax scheme failed **- The Second Uniform Tax case**(1957)
- The whole court upheld the (second) grants act as a valid exercise of **s.96** of the Constitution. A majority, Dixon CJ, McTiernan, Kitto and Taylor JJ struck down the law giving the Commonwealth priority in the payment of income taxes on the basis that such a provision was not incidental to **s.51(ii)**
- Dixon CJ, McTiernan and Kitto JJ disapproved the *First Uniform Tax* case on this point — Dixon CJ (with whom Kitto J agreed) held that the measures could not be incidental to a *Federal* power of taxation.
- McTiernan J held that the provision could no longer be supported by the defence power.
- Taylor J distinguished the *First Uniform Tax* case because that provision might have been justified as a temporary measure designed to deal with a special situation (WWII), but could no longer be justified
- The States propped up their dwindling revenue through increased reliance on money generated from 'business franchise licence fees'

Ha v New South Wales

- States were charging license fees upon bottle shops, petrol stations, tobacconists etc which in essence where duties of excise as they were taxes upon goods and therefore contrary **s.90** CC
- This decision provided a political justification for the introduction of a consumption tax to buttress State revenue (the 'GST').
- This has further entrenched Federal power over the States.
- **Reality of fiscal federalism in Australia – Cth collects the lion's share of the revenue, and then exerts fiscal leverage over the States to affect its policies by placing 'terms and conditions' on Commonwealth grants of financial assistance.**

Fiscal Federalism

- *Peter Hanks* observed that the "Cth now uses the grants power to support, on a massive scale, state finances. That level of support naturally gives to the Commonwealth very substantial power to influence, even to direct, state spending programs."

The Demise of the States?

- Almost no one, would have guessed that virtually all of the *important* division of powers cases would eventually go the Cth's way and that States would become enfeebled, emasculated creatures
- The doctrine of State reserved powers and the doctrine of implied intergovernmental immunities had been rejected. However the *Engineers'* case did not destroy States rights completely.

Aspects of Commonwealth/State relations

- **The doctrine of 'enumerated powers'** – need to identify the power/s the Cth might invoke to support the law - **Attorney-General (Cth) v Colonial Sugar Co Ltd** (1913)
- **'Concurrent' powers**
  - **Pirrie v McFarlane (1925**) – principle of this case was that state laws will operate in fields left vacant by the Cth

***Melbourne Corporation* Doctrine**

- In 1947, Cth wanted to nationalise the banks and enacted legislation to this effect - *Banking Act 1945* (Cth), which provided in part that banks shall not conduct any banking business for a state
- Legislation was challenged on a number of grounds, one of which was that it was 'discriminatory' in the sense that it was 'aimed at' the States and State authorities, and that neither the Commonwealth nor the States are competent to aim its legislation at the other so as to tend to weaken or destroy the functions of the other.
- A majority of the court (Latham CJ, Rich, Starke and Dixon J; McTiernan J dissenting) accepted this argument

- The High Court recognised an implication arising from the federal structure of government contemplated by the Constitution that the Commonwealth may not impose special burdens or disabilities on a State or States or destroy or curtail the continued existence of the States or their capacity to function as governments.
- Latham CJ referred to the *Engineers'* case and said that this case didn't say that *the States are inferior to and subjects of the Cth.*
- The **Melbourne Corporation** principle as formulated by Starke J was applied in **QEC v The Commonwealth** (1985).

QEC v Commonwealth

- The federal government enacted the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth).
- The court struck the law down on the basis that it singled out the QEC and discriminated against them in their activities as an agent of the Queensland Government

- **Gibbs CJ said, at 205-7**:
- *"The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities'*: **Melbourne Corporation v The Commonwealth** *(1947).*
- *There are two distinct rules –*

1. *A general law, made within an enumerated power of the Commonwealth, will be invalid if it would prevent a State from continuing to exist and function as such*
2. *'A Cth law will also be invalid if it discriminates against the States in the sense that it imposes some special burden or disability on them….*

- The **Melbourne Corporation** principle was reformulated in **Re Australian Education Union; Ex parte Victoria** (1995)
- Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ formulated the Melbourne Corporation principle in the following terms:
- *'The limitation (recognised in the Melbourne Corporation case) consists of two elements: (1) the prohibition against discrimination which involves the placing on the States of special burdens or disabilities ("the limitation against discrimination") and (2) the prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments'*: at 231

Victoria v Commonwealth

In **Victoria v Commonwealth** (1996) - Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ struck down a federal award which infringed the second limb of the prohibition, as it had been reformulated in **Re Australian Education Union** (1995)

- It was held that the award in *Victoria* prevented a State from exercising its 'right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss … on redundancy grounds' and, in the case of those employed at the higher levels of government, the terms and conditions on which those persons shall be engaged'.

Austin v The Commonwealth

The **Melbourne Corporation** doctrine was also applied in **Austin v The Commonwealth** (2003)

- A NSW Supreme Court Judge challenged federal legislation that identified State judges as one of a number of groups of people who should pay federal taxation on their superannuation entitlements.
- Austin argued that this federal law affected the financial security and thus the independence of State judicial officers, a matter for the States within the ambit of the *Melbourne Corporation* doctrine.
- Gaudron, Gummow and Hayne JJ, with whom Kirby J agreed, said: ***[124]*** *The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as "special burden" and "curtailment" of "capacity" of the States "to function as governments". These* ***criteria are to be applied by consideration not only of the form but also "the substance and actual operation" of the federal law*** – so important to consider both the form and substance of the law

Concurrent powers and Exclusive powers

- The federal legislative supremacy established by the *Engineers'* case does not mean that the States cannot enter federal fields, only that their laws may be overridden by virtue of the operation of **s.109** in the event of a clash.

Cth Exclusive Powers

- **Sections: 52, 90** (customs & excise duties), **114** (defense power), **115** (States cannot coin money)
- **Some powers that are for all intents & purposes exclusive**
  - e.g. 51(iv), 51(xxxi), (xxxix)

Concurrent Powers

- Section 51 - The Cth's concurrent powers do not automatically "reserve" any topics of legislation to the Commonwealth
- So, States may legislate in any field left vacant by the Commonwealth **Pirrie v McFarlane** (1925) - State law would only be inoperative if it was invalid to the extent of its inconsistency with a federal law by operation of s 109.

Week THREE - The Territories

- **S.122 -** The **Parliament may make laws for the government of any territory** surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow representation of such territory in either House of the Parliament to the extent/on terms which it thinks fit.

The Territories

- The traditional view was that **s.122** was plenary
- In **Buchanan v The Commonwealth** - Barton ACJ - *'s.122, by itself, contains all the necessary power to legislate for a territory"*

Reasons for view that s.122 was plenary:

- **One** has been that **s.122** is cast in general and unqualified terms - **Spratt v Hermes** "*Section 122 is a complete power to make laws for the peace, order and good government of the territory – it is as large and universal a power of legislation as can be granted.*
- **Two**, **s.122** is not, like the sub-sections of **s.51**, expressed to be 'subject to the Constitution'. It must therefore trump **s.51**, and, in particular, any limitations described in that section (such as **s.51(xxxi)**).
- See **Teori Tau v The Commonwealth** (1969) - The grant of legislative power by **s.122** is plenary - it is not limited or qualified by **s.51(xxxi)** or any other paragraph of that section
- **Note** - this creates policy issues as is it implying people who live in territories are lesser people
- **Newcrest Mining (WA) Limited v Commonwealth** (1997) – McHugh argued Cth doesn't have to pay just terms if acquires land in a territory as s.122 not subject to s.51
- However **Wurridjal v Commonwealth** (2009) overruled **Teori Tau v The Commonwealth**. 'Northern Territory Intervention' - Provision was made for fleases in favour of the Cth over land which was otherwise subject to native title
- When the issue of compensation arose, **Majority of court clearly overruled *Teori Tau***
- Gummow and Hayne JJ also pointed out that subsequent decisions of the court such as **NAALAS v Bradley** have indicated a further 'retreat from the "disjunction"' theory of the relationship between s.122 and the rest of the Constitution

- In more recent cases, the HC has adopted an approach that considers the relationship between s.122 and other provisions of the Constitution on a section-by-section basis, with the consequence that some provisions will be restrict s. 122, and others will not.
- This approach was endorsed in **Capital Duplicators Pty Ltd v ACT** (1971) – H.C held that territories can't levy an excise duty – so s.90 qualifies ambit of s.122 – no longer plenary

Does Ch III apply in the Territories?

- **R v Bernasconi** (1915) - B charged of indictable offence in Papua under Australian legislation - B argued entitled to trial by jury under s.80 CC – **court held territories are not part of the Cth – Chapter 3 of CC doesn't apply to territories**

Does s.72 apply in the territories?

- Are Territory courts created by the parliament 'federal courts' for the purposes of **s.72** of the Constitution?
- The question arose in **Spratt v Hermes** (1965) – magistrate in ACT had tenure of 10 years – s.72 says need to have tenure for life to remain independent - **The Court held unanimously that s.122 was not restricted by s.72.**

Capital TV & Appliances Ltd v Falconer (1971)

- Court applied Spratt v Hermes unanimously held that the Supreme Court of the ACT was created pursuant to **s.122** of the Constitution

and was not a 'federal court' or a 'court exercising federal jurisdiction' within the meaning of **s.73**
- Consequently, in the absence of a statutory appeal, the High Court had no jurisdiction to hear the appellant's appeal.
- Gaudron J upheld **Spratt v Hermes** and though not with any enthusiasm, indicating that if the question had not been the subject of previous authority Her Honour would have decided that **s.72** does apply in the Territories.

Ex parte Eastman (1999)
- The murder trial was presided over by an 'acting judge' of the court; a judge appointed for a short period.
- Eastman argued that **Spratt v Hermes** was wrongly decided, should be re-opened and overruled. The **court rejected this argument by majority** (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ; Kirby J dissenting).
- The majority wasn't enthusiastic about upholding Spratt v Hermes - suggests that perhaps **s.72** will apply to the territories in the near future

NAALAS v Bradley (2004)
- There is an anomalous situation that federal courts exercising federal jurisdiction pursuant to laws enacted by the Cth Parliament do have s.72 tenure, but Territory judges appointed under laws that are ultimately authorised by the Cth Parliament exercising federal jurisdiction would not.
- This arguably undermines Ch III.
- FACTS - Bradley was appointed by the NT to Chief Magistrate until retirement age, but with a remuneration package that only lasted two years.
- Argued by NAALAS that the two year pay deal that took effect upon his appointment created a relationship of looming dependence on the NT executive.
- NAALAS argued that despite the High Court's decisions on s.72 of the Constitution and its inapplicability in the Territories, the separation of judicial power effected by Ch III of the Constitution required that judicial officers exercising federal judicial power (as the Chief Magistrate might under s.68 of the Judiciary Act) needed to be, and be seen to be, independent of the executive government.
- **This gave rise to an implication that Territory judges must enjoy an irreducible minimum amount of judicial independence, which had not been provided to Bradley.**
- **The Full Federal Court rejected this challenge by majority, holding Bradley's appointment valid.**
- The High Court unanimously dismissed the NAALAS appeal.
- However the plurality (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) upheld a number of the integers of the NAALAS argument:
- *'Counsel for the Legal Aid Service put an argument in three steps. The first is that a court of the Territory may exercise the judicial power of the Commonwealth pursuant to investment by laws made by the Parliament ... It should be accepted ...*
- *'... The second step in the Legal Aid Service's argument is that it is implicit in the terms of Ch III of the Constitution, and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Commonwealth be and appear to be an independent and impartial tribunal. That proposition ... also should be accepted.*
- *The difficulty arises with the third step. This requires discernment of the relevant minimum characteristic of an independent and impartial tribunal exercising the jurisdiction of the courts over which the Chief Magistrate presides ...*
- *'... No exhaustive statement of what constitutes that minimum in all cases is possible. However, the Legal Aid Service refers in particular to the statement by McHugh J in Kable at 98, per Toohey J; at 108, per Gaudron J; at 133-134, that the boundary of legislative power, in the present case that of the Territory:*
- *'is crossed when the vesting of those functions or duties might lead ordinary reasonable members of the public to conclude that the [Territory] court as an institution was not free of government influence in administering the judicial functions invested in the court.'*
- *'Much then turns upon the permitted minimum criteria for the appearance of impartiality…'*

- The conclusion in the *NAALAS* case that an implication arising from Ch III of the Constitution applies in the Territories indicates that the 'sweeping generalisation' made by Griffith CJ in **Bernasconi** that 'the power conferred by s.122 is not restricted by Chap III of the Constitution' is unlikely to be upheld in future.

Other Guarantees
- The constitutional guarantee of freedom of interstate trade, commerce and intercourse among the States in s.92 has been given territorial application in both the NT and the ACT

Freedom of Speech
- In **Lange v ABC** - the HC stated that a law of a Territory legislature may not infringe the implied freedom of political communication – so the implied freedom of speech does apply to the territories
- This would, presumably, extend to any other freedoms that spring from that source, such as the implied freedom of association for political purposes.

Week FOUR – Trade and Commerce

Section 51(i)
- The Parliament shall, subject to this Constitution, have power to make laws for the POGG of the Cth with respect to:
  (i) Trade and commerce with other countries and among the states (note that it doesn't include intra-state trade)

'shall'
- The word 'shall' is *mandatory*, not *declaratory*.

'power to make laws'
- The power to make laws includes a power to unmake laws.
  - **Kartinyeri v Commonwealth** (1998) –6 out of 7 HC judges said Cth can repeal laws, so the HIBA that repealed elements of the Heritage Protection Act was valid

'peace, order and good government'
- Denotes parliamentary sovereignty over the listed topics.
- A Commonwealth law cannot be challenged on the basis that it is not for the POGG of the Cth as this power has been interpreted as plenary

'with respect to'
- This phrase means that the Cth has legislative power not only in respect of the topics listed in s.51, but power to regulate rights, duties, obligations, privileges, immunities etc. **that are 'incidental to' or 'related to' or 'sufficiently connected' to the listed topics.**
- This is typically referred to as the 'implied incidental power'.

O'Sullivan v Noarlunga Meats
- **s.51(i)** allowed Cth to set meat freezing temperatures in a (purely intrastate) meat-packing business – held that there was a sufficient connection between firms activities and trade with other countries as nearly all meat was produced for export

Note: s.51(i) is eclipsed by s.51(xx) (corporations power)
Strickland v Rocla Concrete Pipes Ltd (1971)
- The Commonwealth can regulate the intra-State trading activities of trading corporations.
- This enables the Cth to regulate activities that have sometimes been regarded as beyond **s.51(i)** – i.e. intra-State activities like mining, manufacturing and production.

Not a *direct* power over intra-State trade
- **S.51(1)** does not appear to enable the Federal Parliament to regulate purely intra-State trade and commerce in a *direct* way. However this limitation is more apparent than real, and can be circumvented in a number of ways.

The Cth can use less obviously 'commercial' powers to effect commercial policies

- For example, the Cth could use the external affairs power to seize international trading operations of terrorists.
- The Commonwealth could regulate foreign investment by individuals using the aliens power (s 51(xix)).
- The Commonwealth can incorporate businesses in the Territories (s.122).

The implied incidental power

- Finally, the Commonwealth can utilise the notion of the **implied incidental power** to regulate things and activities within a State so long as they are *sufficiently connected* to inter-State or overseas trade or commerce.

'Trade' and 'commerce'

- 'Trade' and 'commerce' - concepts common to **s.51(i)** & **92**
- **James v The Commonwealth** (1936) - principle that words in different parts of a statute should, as a general rule, be interpreted in the same way, is sometimes referred to as the principle of harmonious interpretation.

Give the words their popular meaning

- **W & A McArthur Ltd v Qld** (1920) - 'The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively... trade and commerce': at 546–547 per Knox CJ, Isaacs and Starke JJ.

Commonwealth trading enterprises

- **Australian National Airways Pty Ltd v The Commonwealth** - ANA argued that trade and commerce doesn't include transport for reward, and also argued that it only applies to regulate trade that is already established – HC rejected these 2 arguments
- So authority for the principle that transport for reward is a type of trade and commerce and s.51(i) can be used to regulate Cth trading enterprises

- **Bank of New South Wales v Commonwealth** (1948) Provides a broader definition of trade and commerce:
- It covers intangibles as well as the movement of goods or persons. The supply of gas and the transmission of electric current may be considered only an obvious extension of the movement of physical goods. But it covers communication. The telegraph, the telephone, the wireless may be the means employed. It includes broadcasting and, no doubt, it will take in television.Transportation, traffic, movement, transfer, interchange, communication, are words which perhaps together embrace an idea which is dominant in the conception of what the commerce clause requires. But to confine the subject matter to physical things and persons would be quite out of keeping with all modern developments - at 381–382.

Matters incidental to the regulation of inter-State or overseas trade and commerce - **Granall v Marrickville Margarine Pty Ltd**

- It was discussed by the judges in this case that manufacture, production or importation might be an essential preliminary condition to trade and commerce but this does not make manufacture, production or importation trade and commerce amongst the states (at 71-72)

'with other countries'

- **Murphyores Inc Pty Ltd v The Commonwealth** (1976) – Cth cancelled M's export license to stop them mining
- This case is authority to say that prohibitions in legislation are allowed

- **R v Burgess; Ex parte Henry** (1936) – principle – Cth has no *direct* power to regulate **intrastate trade and commerce**
- The Commonwealth simply cannot exercise power over the intrastate activity solely on the ground of 'intermingling', 'practicality' or 'necessity'.

- **Airlines of NSW Pty Ltd v NSW (No 2)** (1965)
- A majority of the Court rejected the argument that intrastate matters could be regulated on the basis that they 'commingled' with interstate matters at 77.
- A majority of the Court held that the licensing system was valid on the basis that s.51(i) was wide enough to enable the making of laws to ensure the safety, efficiency and regularity of **interstate and overseas** air navigation: see e.g. Barwick CJ at 92–3.
- The entire Court rejected the regulation purporting to give the Cth power to authorise intrastate air transport operations as it could not be demonstrated that the regulation was supported by s.51(i).
- Can **s.51(i)** extend to enable regulation that might affect *both* interstate and intrastate trading activity? This question was considered in **Redfern v Dunlop Rubber Aus Pty Ltd** (1964)

- **Redfern v Dunlop Rubber Australia Pty Ltd** (1964) – Cth enacted legislation to prevent a restrictive trade agreement concerning the sale of rubber materials
- While Taylor J said that the power could not authorise regulation of a purely intrastate arrangement, even if this had an economic effect on interstate: at 217
- Commonwealth power over trade and commerce can only extend to such intra-State trade and commerce as is *inseparably connected* with inter-State trade and commerce

Economic connection between intrastate trade and interstate trade

- **Minister for Justice (WA) v Australian National Airlines Commission** (1976) – concerned an aircraft journey that went to Perth, Port Headland, then Darwin (this is intrastate and then into a territory) –H.C held that intrastate things can be regulated if a sufficient connection, **but you cannot justify this connection based upon an economic benefit**

- **Pape v Commissioner of Taxation** (2009) – Was the Cth 'economic stimulus package' a valid regulation of **s.51(i)**?
- French CJ, along with Gummow, Crennan and Bell JJ, declined to consider the argument, upholding the legislation as a valid exercise of **s.61**, together with **s.51(xxxix)** of the Constitution
- Hayne, Kiefel and Heydon JJ dissented – said that the argument that people may use the money in inter-state trade and commerce is too tenuous
- The Minority made their decision in line with **Airlines of NSW Pty Ltd v New South Wales [No 2]** (1965) and held s.51(i) of the Constitution compels a distinction between trade and commerce with other countries, and among the States, on the one hand, and other forms of trade and commerce, on the other.

The implied incidental power

- ***Attached to every express grant of power in the Constitution is an implied grant of power wide enough to make the express grant effective***
- In the context of the trade and commerce power, the implied incidental power has enabled the Federal Parliament to regulate activities preparatory to trade occurring wholly within a State - **O'Sullivan v Noarlunga Meat Ltd (No 1)**
- In Australia, the incidental power, which would be implied in the absence of s.51(xxxix) at any rate (**D'Emden v Pedder**) extends to enable the regulation of 'things which may reasonably and properly be done' for the effective execution of an express power: **British Medical Association v The Commonwealth** (1949).

- **O'Sullivan v Noarlunga Meat Ltd (No 1) -** Cth purported to set meat freezing temperatures in a (purely intrastate) meat-packing business
- Fullagar J described the implied incidental power as 'a most welcome aid and assistance' in interpreting the scope of s.51(i), and said that s.51(i), with its implied incidental power, extended to:
- matters include not only grade and quality of goods but packing, get-up, description, labelling, handling, and anything at all that may reasonably be considered likely to affect an export market by developing it or impairing it ... It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine.. But I think it safe to say that the power of the Commonwealth extended to the supervision and control of all acts

or processes which can be identified as being done or carried out for export.
- Justice Fullagar's opinion that the Commonwealth might enter 'the factory, the field or the mine' is not readily reconciled with the proposition that 'trade and commerce' does not include manufacturing, production or mining.
- CONCLUSION - the Commonwealth can prescribe standards for their treatment *if* the carcasses are destined for export trade.

- The implied incidental power has enabled s.51(i) to extend to the regulation of employment relations between stevedoring companies and waterside workers: **R v Foster; Ex parte Eastern and Australian Steamship Co Ltd** (1959)
- It has also authorised the imposition of penalties in respect of prohibited imports, and seizure and forfeiture of such goods: **Burton v Honan** (1952).

Characterisation
- There must be a *sufficient connection* between the matter, thing or activity to be regulated (including intrastate matters) and interstate or overseas trade before s.51(i) can be invoked to support a Federal law: **O'Sullivan v Noarlunga Meat Ltd** (1954)

Policy of law irrelevant to characterisation – Fairfax v FCT
- **Murphyores Inc Pty Ltd v The Commonwealth** (1976):
- This case can also be used as an authority to say that a legislative provision that constitutes a prohibition is valid

Purpose and policy distinguished
- The Court will disregard the policy of a law when it determines its validity under a head of power, but it can have regard to its purpose, to determine whether it is sufficiently connected to an end within power, or as noted above, incidental to the power – i.e. the Cth enacted federal regulation to regulate the treatment of meat destined for export for the purpose of enhancing export trade (as in **O'Sullivan v Noarlunga Meat Ltd** (1954))

Week FIVE – Corporations Power

- **Section 51(xx)** of the Constitution provides:
- 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:
(xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth
(It doesn't apply to corporations generally – it specifies the types of corporations to which it applies)

'Trading'
- The word 'trading' can be interpreted in its current and popular sense, and is not restricted to the meaning it had in 1900 - **Adamson's case** (1979)

'**Trading' and 'trade'**
- Trading refers to the activity of engaging in trade – some judges have argued that this means that the Cth can only regulate corporations that actually trade and not shelf companies, however this is just a minority view.
- See definition of trade provided above in **W & A McArthur Ltd v Queensland** and **Bank of NSW v Commonwealth**

'Financial'
- **Re Ku-Ring-Gai Co-Operative Building Society (No 2)** (1978) – a building society argued that it was not for profit, that it only operated for the benefit of its members – court held that the building society was a financial corporation however as it is in the business of buying and selling money

'Financial'
- Like the expression "trading corporation", the words "financial corporation" are not a term of art; nor do they have a special or settled legal meaning - **State Superannuation Board v Trade Practices Commission** (1982) – HC said SSB buy and sell money therefore they engage in financial activities, therefore they are a financial corporation

What are '*foreign* corporations'?
- Corporations incorporated outside Australia.
- **New South Wales v The Commonwealth** (the Incorporation Case)

- **The character of a corporation may be determined by reference to its actual or intended activities**

Intended activities or 'purposes' (Earlier View)
- The earlier view was that a corporation was defined by reference to its **purposes**, rather than its activities.
- **The St George County Council case** (1974) – SGCC supplied electricity to residents but they also made electrical appliances – HC held SGCC was not a trading corporation but a municipal corporation – majority focused on purpose of SGCC

A test of intended activities applies to 'shelf' companies
- **Fencott v Muller** (1983) – Cth can regulate companies that may trade in the future

Current Activities Test – Quickenden v O'Connor – University was held to be a trading corporation – 18 per cent of revenue came from trading activities – this was held to be a significant proportion

Substantial or significant activities
- **Adamson's case** (1979) – can consider the substantial or significant activities of a company to determine if a trading corporation

These substantial or significant activities need not form a predominant part of the corporation's activities - see **Quickenden v O'Connor** or **E v Australian Red Cross Society** (where the majority of its activities pertained to charity)

The Cth does not have a general power to incorporate trading or financial corporations
- **Huddart, Parker & Co Pty Ltd v Moorehead** (1909) – HC held that s.51(xx) only applies to corporations already in existence

New South Wales v The Commonwealth (the Incorporation case) (1990) - Counsel argued that it was artificial that States can incorporate companies but the Cth can't, argued that **Huddart, Parker & Co Pty Ltd v Moorehead** was decided when the state reserved powers doctrine applied but court upheld view in **Huddart, Parker & Co Pty Ltd**

BUT this doesn't mean that the Cth cannot incorporate companies as a matter incidental to other heads of power - Barwick CJ in **Strickland v Rocla Concrete Pipes Ltd** at 488

The scope of s.51(xx)
- **Huddart, Parker & Co Pty Ltd v Moorehead** (1909)
- Isaacs J drew a distinction between the external activities of trading corporations, which he said were regulable, and the internal activities of corporations, which he said were not.
- However, the majority in the **Work Choices case** (2006) held that this distinction could not be maintained when regard was had to the language of s.51(xx)

- **S.51(xx) is a power to regulate the trading or financial activities of trading or financial corporations - Strickland v Rocla Concrete Pipes Ltd** (1971) – Cth can regulate **intrastate** trading activities of trading corporations – s.51(xx) isn't limited geographically

- **Work Choices case –** Howard government was trying to introduce a national system for industrial relations supported by the corporations power - States argued that s.51(xx) couldn't be used to support the legislation as s.51(xxxv) of the CC already deals specifically with industrial disputes
- The court took a broader view of the scope of s.51(xx)

- Court held laws 'prescribing the industrial rights and obligations of s.51(xx) corporations and their employees and the means by which they are to conduct their industrial relations' are laws with respect to constitutional corporations
- **This case is authority to say that Cth can regulate the employees of a s.51(xx) corporation, the activities and functions of this corporation etc.**

- **R v The Judges of the Australian Industrial Court** (1977) – s.51(xx) can be used to regulate the directors of companies and their activities

- **A power to regulate the activities of persons who harm the interests of s.51(xx) corporations - Actors and Announcers Equity Association v Fontana Films Pty Ltd** (1982) – AAEA tried to get FF to comply with their demands by engaging in a secondary boycott – HC was able to regulate a union as scope of s.51(xx) includes a power to regulate people who can harm the corporation

  Note – there has been no majority decision in the H.C that confirms that the Cth can 'regulate any activity of a trading/financial corporation'

- **A power to regulate *any* activities of a s.51(xx) corporation?**
- **Commonwealth v Tasmania (Tasmanian Dam case)** (1983) – a minority (Mason, Murphy and Deane) said that Cth can regulate any activity of a corporation (i.e. that s.51(xx) confers a plenary power) as argued that negative implications shouldn't be read into the constitution – however majority didn't articulate this view
- **Majority held that s.51(xx) is wide enough to regulate activities preparatory to the trade of a trading corporation**

So what are the limits of s.51(xx)?
- **Work Choices Case** (2006)
- "laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations" are laws with respect to constitutional corporations.

Characterisation
- **Re Dingjan; Ex parte Wagner** (1995) –could the Cth regulate an unfair dismissal that occurred by a contractor of a corporation in relation to one of their sub-contractors
- Majority said that the sub contractor relationship is not sufficiently connected to the corporation and therefore cannot be regulated (but the Cth can regulate a non corporation that is dealing with a corporation, but cannot regulate the relationship between this non corporation and other non corporations)

Week SIX – External Affairs

- The external affairs power and Australian federalism
  - As the range of topics that can be regulated under section 51(xxix) has expanded and the Cth has come into conflict with the States, who have at times expressed a different vision of Australian federalism than the vision of federal legislative supremacy enunciated in the **Engineers case**
  - NOTE - The Cth arguably has fiscal supremacy as well as legislative supremacy and the States believe that the Cth's power is over-reaching

- Chief Justice Gibbs' comments from **Tasmanian Dams case**:
- Gibbs voiced the concern that the Minister of foreign affairs could enter international treaties that would then enable the Cth to deal with matters that the States would have previously dealt with and the Cth would therefore be enlarging its legislative powers

Geographic externality
- Persons, places, matters or things external to Australia
- **NSW& Ors v The Commonwealth (the Seas and Submerged Lands case)** (1975) – 3 judges in this case upheld the legislation using the external affairs power, arguing s.51(xxix) applies to persons, place matters or things external to Aus
- **Polyhukhovich v The Commonwealth (the War Crimes case)** (1991) - *War Crimes Amendment Act* case. Majority held that 'external affairs' is wide enough to extend to places, persons, matters or things physically external to Australia.
- This case is also authority to say that the Cth can enact retrospective criminal legislation
- **R v Kidman** (1915) – authority to say that Cth can legislate with prospective and retrospective effect

- **Horta v Commonwealth** (1994) – concerned East Timor gap and a bi-lateral treaty between Cth and East Timor, HC said the East Timor gap was external to Aus & therefore Cth could regulate it
- HC unanimously upheld the majority view in **Polyhukovich** and minority view in **Seas and Submerged Lands case**

- **The Queen v Hughes** (2000) – Brennan raised the issue that there needs to be a sufficient connection between thing external to Aus and Australia and Toohey said thing external to Aus needs to touch and concern Aus **but these were just minority views**
- **XYZ v The Commonwealth** (2006) – paedophile charged under Aus legislation that said engaging in sexual activities with children overseas is illegal, majority upheld legislation under s.51(29) and **majority confirmed that you don't need a sufficient connection or doesn't need to touch and concern Aus**

Australia's international relations and obligations
- **R v Sharkey** (1949) – S was a communist and was charged with inciting hatred against a sovereign under Crimes Act – court upheld section saying a valid exercise of external affairs power
- **Kirmani v Captain Cook Cruises Pty Ltd (No 1)** (1985) – can repeal Imperial legislation operating in the Australian States
- **Barton v The Commonwealth** - The power to arrange for extradition of fugitives from foreign countries to Australia, even in the absence of a treaty with those nations
- The power to regulate Australian waters (**Ruddock v Vadarlis**)
- The power to declare war and peace (**Farey v Burvett***)*

Note the supplementary executive power to conduct external affairs, including:
- Treaties are entered into by the Governor-General on the advice of the Federal Executive Council - **Barton v Commonwealth** (1974)

Treaties are not 'self-executing'
- **Walker v Baird** [1892] - the treaties need to be implemented into domestic Australian law through legislation

Implementation of international obligations *throughout Australia*
- The external affairs power can authorise the implementation of international obligations within the States - **Cth v Tasmania** (1983) and also in the Territories - **Newcrest Mining (WA) Limited v The Commonwealth** (1997)

- **The identification of international obligations is a question of fact for the Court to decide** (**Queensland v Commonwealth (the Daintree Rainforest case)** (1989) - HC determines whether an international treaty applies or not so the HC confirms what are international obligations are

Sources of international obligations
- international treaties or convenions
- the recommendations of international organisations
- matters of international concern
- the general principles of international law or customary international law

No limit as to subject matter
- **R v Burgess; Ex parte Henry** (1936) - Evatt and McTiernan JJ confirmed that anything can be the subject of an international obligation

The different ways in which international law influences Australian law

- Treaty implementation by domestic law pursuant to the external affairs power
- Where Australia is a party to a treaty the text of that treaty may assist in the interpretation of ambiguous domestic law or in the exercise of statutory discretion: **Chu Kheng Lim v Minister for Immigration**
- More specifically, it is said to be a principle of Australian statutory interpretation that statutes are to be interpreted and applied in conformity and not in conflict with established principles of international law: **Teoh v Minister for Immigration and Ethnic Affairs** (1995)

Domestic law must conform to the treaty

- **R v Burgess; Ex parte Henry** (1936) – Cth enacted legislation purportedly implementing an international Convention to which Australia was a party.
- Henry challenged regulation's validity on a number of grounds, including the ground that there were substantial differences between the Convention obligations and the domestic regulations.
- Held federal regulations implementing international obligations to be 'sufficiently stamped with the purpose of carrying out the terms of the Convention:'
- "*Meticulous adherence to the terms of the treaty is not required, so long as the purpose of the treaty is effected"*

- **R v Poole; Ex parte Henry (No 2) -** Henry's joyflights were revisited - A majority of the Court (Rich, Starke, Evatt and McTiernan JJ; Latham CJ dissenting) upheld the domestic regulations on the basis that they were an appropriate means of implementing the Convention
- Starke J said that 'it was not necessary to demonstrate 'meticulous adherence to each provision' in the Convention: at 648.

- **Tas Dams** – court said that Cth can implement a treaty into domestic law providing that the treaty is **1)** bonafide and **2)** the domestic laws conforms to the spirit of the treaty

- **Victoria v Commonwealth** (1996) - As far as the test of conformity was concerned, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said:
- TEST - ***To be a law with respect to 'external affairs', the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty***
- The Cth passed legislation purporting to regulate industrial relations in Victoria

- NOTE – Ultimately the federal provisions were 'read down' on the basis that they infringed the Melbourne Corporation Principle

What are the limits on the external affairs power?

- Section 51(xxix) is 'subject to' the Constitution and its express and implied constitutional limitations
- **Victoria v Commonwealth** (1996) - The scope of the external affairs power is not restricted by **s.51(i)** – i.e. the Cth can regulate intrastate things with external affairs power
- **Airlines of New South Wales v NSW (No 2) (Airlines (No 2))** (1965) - If the Commonwealth exercises its external affairs power to implement treaty obligations which are void or unlawful under international law, will this invalidate the domestic legislation? PROBABLY NOT - SEE HORTA BELOW

- **Horta v The Commonwealth** - said in a unanimous judgment:
- *even if the Treaty were void or unlawful under international law, the Act … would not thereby be deprived of their character as laws with respect to "External affairs" for the purposes of s 51(xxix). Neither s 51(xxix) itself nor any other provision of the Constitution confines the legislative power with respect to "External affairs" to the enactment of laws which are consistent with, or which relate to treaties or matters which are consistent with, the requirements of international law*

The Commonwealth may not cite an international obligation as a 'sham or circuitous device to attract legislative power'

- There is obiter that suggest that the Commonwealth may not enter into an international treaty merely as a device to attract jurisdiction to itself which it would not otherwise have: **Koowarta v Bjelke-Petersen** (1982); **Commonwealth v Tasmania** (1983). Been suggested that any international treaty to which Aus is a party must be bona fide: **R v Burgess; Ex parte Henry** (1936).

Week SEVEN – The Races Power & Acquisition of Property on Just Terms

- ss.8 & 9 of the *RDA* (Cth) can be supported by the external affairs power (s.51xxix) but not the races power (s.51xxvi)

- **Koowarata v Bjelke-Petersen** – K refused aboriginal land rights,, issue was whether sections of RDA implemented in federal legislation were valid, held s.51(xxvi) couldn't be used to uphold the RDA as it isn't a law that applies to all races, it only applies to 'any race' - a logical conclusion otherwise the Cth could use s.51(xxvi) to regulate anyone

The 1967 Referendum – 92% of Australians elected to change s.51(xxvi) so that aboriginals affairs would no longer be a state matter

- **Kruger v Commonwealth** (1997) – constitutional challenge to the aboriginal ordinance that took place, K brought an action to claim compensation and ultimately succeeded, **however court unanimously confirmed that CC is not designed to protect the civil rights of aboriginals**

- **Kartinyeri v Commonwealth** (1998) -Hindmarsh Island Bridge case - 5 out of 6 judges said Cth can repeal laws
- K argued that the races power should be construed so that laws can only be passed for the benefit of the aborigines, Cth argued this would be reading in extra things to the CC – **Kirby agreed with K – took historical approach and not a literal approach**
- **5 out of 6 judges held that a textual interpretation of s.51(xxvi) reveals laws can be passed for the benefit or disadvantage of a race** and that it is up to parliament to decided whether a decision is for the benefit of the aborigines or not

Acquisition of property on just terms

Section 51(xxxi)

- The Parliament shall, subject to this Constitution, have power to make laws for the POGG of the Commonwealth with respect to:
- **(xxxi)** the **acquisition** of **property** on **just terms** from any State or person ... **which the Parliament has power to make laws**
  - This is both a power and a contingent guarantee. The condition "on just terms" was included to prevent arbitrary exercises of the power at the expense of a State or a subject - **Grace Bros Pty Ltd v The Commonwealth** (1946)

- Not a limit on the States - **Pye v Renshaw** - States can acquire your property & aren't obligated to pay just terms comp. – you have no constitutional remedy, your remedy would be merely political

- Furthermore, there is no 'deeply rooted CL right' to receive just compensation for property acquired under State legislation - **Durham Holdings Pty Ltd v NSW** (2000)

- But the Cth can't fund the States to circumvent **s.51(xxxi)**
- I.e. - A federal grant supported by s.96 for the purpose of enabling the State to acquire property would be subject to the s.51(xxxi) requirement of just terms - **Pye v Renshaw** (1951)

- Section 51(xxxi) applies in the territories - **Wurridjal v Commonwealth** (2009) – it applies to 'states or persons' and persons can refer to someone within a territory

- Cth cannot use a head of power under s.51 to acquire property without be subjected to the just terms requirement in s 51(xxxi) - **Attorney-General (Cth) v Schmidt** (1961)

Before the just terms guarantee applies, the person challenging Cth legislation under s.51(xxxi) must demonstrate the following elements:

'acquisition'
- Requires compulsion, Refers to a 'taking'
- There is no acquisition if there has been an agreement

- An 'acquisition' within s.51(xxxi) is not effected when property rights are *merely affected by* a Cth law: **Tasmanian Dam case –** Cth depriving Tas from dealing with the land as they wished wasn't an acquisition - it merely affected Tas's property rights

- *The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property* - **Health Insurance Commission v Peverill** (1994) – radiologist was deprived from being able to claim back money from the Cth, HC held deprivation alone doesn't amount to an acquisition
- For there to be an "acquisition of property", there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property - **Newcrest Mining (WA) Ltd v Cth** (1997) – the Cth actually took land which they could then sell on so it did amount to an acquisition

Acquisition by agents
- It is not necessary for the Cth or its agent to acquire the property in question for an acquisition to take place under s .51(xxxi). The property may be acquired by someone else for the purposes of the Cth - **McClintock v Commonwealth**

A forfeiture is not an acquisition (Neither are taxes, penalties)
- **Re DPP; Ex parte Lawler**

'property' - HC takes a broad approach to 'property':
- **Bank of NSW v Commonwealth** (1948) –NSW argued the acquisition of the directorship power was equal to a property right - Majority agreed - property has a broad meaning
- **Clunies-Ross v Commonwealth** (1984) – majority explicitly stated that "the court will take a broad approach to the meaning of the phrase property in s.51(xxxi)

'Property'
- The language used in s.51(xxxi) is perfectly general … It extends to *any* acquisition of *any* interest in *any* property
- **Minister of State for the Army v Dalziel** (1944) per Rich J.
- Property includes "real and personal property, incorporeal hereditaments such as rents and services, rights of way, profits and choses in action" per Starke J,

- **Bank of NSW v Cth** (1948) Dixon J said s.51(xxxi):
- extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth of any subject of property.

'Just terms'
- if it appeared from the terms of the enactment that the legislature had considered that a particular form or measure of compensation was just, the court would give great weight to the conclusion of the legislature - **Andrews v Howell** (1941) – **this case confirmed that it is conceivable that the impartial tribunal could be constituted by a Minister**

NOTE – owner of the property must have an opportunity to be heard in respect of the acquisition - **Johnston Fear & Kingham v Commonwealth**

'just terms'
- The law must be so unreasonable as to terms that it cannot find justification in the minds of reasonable men - **Minister of State for the Army v Dalziel** (1944) (this case dates from war time when acquisition of property was necessary)

- Just because you do not receive the market value as compensation, this doesn't mean that it isn't just terms - **Nelungaloo Proprietary Limited v The Cth**

Special property requires special treatment
- **Johnston Fear & Kingham v Commonwealth** (1943) – rare and expensive printer was acquired, this should be taken into consideration with reference to the compensation and there was a stronger case that the owner should receive market value
- **Wurridjal v Commonwealth** (2009) – Kirby said a special degree of care may be needed in making assessment of just terms in cases involving aboriginal property – he went on to say that property interests for aboriginals may be essential to their character, identity, culture and spirituality

The measure of justice must be determined by an impartial tribunal - Nelungaloo Pty Ltd v Commonwealth (1948) per Dixon J

- The determinations of this tribunal must be amenable to judicial review – **Australian Apple and Pear Marketing Board v Tanking**

…in respect of which the Parliament has power to make laws
- Every law supported by s.51(xxxi) must also be supported by at least one additional legislative power - **P J Magennis Pty Ltd v Commonwealth** (1949)
- **i.e.** need to be able to invoke another head of power from s.51 to effect the acquisition of property as a whole

Week NINE – The Executive Power

- **Section 61** - The executive power of the Cth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Cth.
- **(Essentially enables executive to execute and maintain the CC)**

- **Section 51(xxxix)**
- 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:
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

What about the Governor-General as the Queen's representative?
- Ordinarily, the Governor- General will act on the advice of the Federal Executive Council
- In general, the GG has more of a ceremonial role these days
- **Note** - there are some powers where the GG appears to have an independent discretion: **(ss.5, 28, 57, 62** & **64**, **69**).

  Note – **s.63** – says that a reference to the GG refers to the GG acting with the advice of the Federal Executive Council – this section is also the only section to contain an interpretive rule which is strange
- The **doctrine of 'responsible government'** is that the executive acts on the advice of the legislature

What does the executive power include?
- First, the extent of the common law or 'prerogative' powers inherited by the Executive from the Imperial Crown at Federation.

- Secondly, the development of the executive power — in particular, the extent to which the power may be expanding by reference to a developing concept of 'nationhood'.

General preliminary points
- Common law executive powers may be removed by constitutionally valid legislation: **Commonwealth v Cigamatic Pty Ltd** (1962)

- The constitutional authority for laws that condition common law executive powers comes from the combination of **s.61** and **51(xxxix)** of the Constitution - **Victoria v Cth** (1996)

International affairs
- *Power to enter treaties*: **R v Burgess; Ex parte Henry** – GG is able to enter treaties on behalf of Aus like minister of foreign affairs
- *Diplomatic matters generally*: The conduct of foreign affairs generally, including entry into and execution of treaty obligations, and diplomatic matters, is part of the prerogative (or executive) power of the Crown - **Koowarta v Bjelke-Petersen** (1982)
- *Extradition*: The executive power with respect to international affairs enables the Commonwealth to request the extradition of fugitives where there is no extradition treaty in place with the relevant country - **Barton v Commonwealth** (1974)
- *Power to declare war or peace*: **Farey v Burvett** (1916)

Defence
- *Control of the armed forces* - **Marks v Cth** (1964)
- *Exclusive power over land used for defence purposes* - **Essendon Corporation v Criterion Theatres Ltd & Ors** (1947)
- *Emergency power to expropriate property for the purposes of defence and Cth don't have to pay just terms compensation under s.51(xxxi) if necessary to defend Aus* - **Johnston Fear and Kingham v Cth** (1943)
- *Price regulation* - **Farey v Burvett** (1916) – Cth can regulate intrastate food prices even though beyond scope of s.51(i) if necessary for defence of the Cth
    - *War creates its own necessities, proportioned to the circumstances, and not measurable in advance*

'Nationhood'
- Protecting the nation – the executive power may be used to authorise legislation imposing criminal sanctions for seditious or subversive conduct.

- **Burns v Ransley** (1949) - Provisions of the *Crimes Act* 1914 (Cth) made it a criminal offence to incite hatred of the Sovereign, the Government of the UK or the Government of Australia so as to endanger the Commonwealth – Burns was convicted under these provisions
- Court held that while the parliament 'has no power to pass a law to suppress or punish political criticism … excitement to disaffection against a Government goes beyond political criticism'
- Held that **s.61** in conjunction with **s.51(xxxix)** gives the Cth power to regulate the incitement of disinfection against a government

- **R v Sharkey** (1949) – S liable like Burns - The provisions were challenged on similar grounds to *Burns'* and upheld, indicating Cth has a power to protect the nation from subversion
- **Dixon J** articulated the view that the government has an implied power to protect itself from subversion and he went further to discuss that the Cth could criminalise conduct that will impede the government in the course of its activities

Australian Communist Party v The Commonwealth (1951)
- Legislation passed to dissolve the Communist Party, but there was no right to judicial review - Majority struck down the legislation on the basis that it could not be supported by **s.51(xxxix)** and **61** of the Constitution read together, or under an implied power to protect the nation.
- **Dixon Said**: *As appears from* **Burns** *and* **Sharkey**, *I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words in s 51(xxxix) with those of other constitutional powers*: at 187–188
- **This is considered controversial obiter as it has now become ratio in subsequent cases. Dixon talks about an implied power which conflicts with the doctrine of enumerated powers**
- **Dixon was engaging in judicial law making in his decision which is controversial as we have a referendum and this is the only mechanism by which things can be altered**

- **Australian Assistance Plan case** - Cth bypassed **s.96** and gave money straight to local governments - Cth argued that an implied power to protect a nation is also one to advance a nation and that the AA Plan would advance the nation. Mason J, echoing the language of Dixon J in **Australian Communist Party case**, said:
- … *there is to be deduced from the existence & character of the Cth as a national government and from the presence of ss.51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation*: at 397.
- **Mason articulated an implied power**

- **Davis v The Commonwealth** (1988) - court struck down provisions of the Act that gave the Australian Bicentenary Authority the exclusive power to use symbols – SEE BELOW
- **Mason CJ, Deane and Gaudron JJ** said - *the framework of regulation … was an extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power:* at 100
- In effect, these judges were contemplating a freedom to discuss governmental matters
- **Brennan J** explored the nature and extent of the implied power - *If the executive power of the Commonwealth extends to the protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered. There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood — a flag, or anthem, for example — or the benefit of many national initiatives in science, literature and the arts.* : at 110–111.
- *The executive power does not extend to whatever activity or enterprise the Executive Government deems to be in the national interest. But s.61 does confer on the Executive Government power "to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation", to repeat what Mason J said in the AAP case … In my respectful opinion, that is an appropriate formulation…*
- **Wilson and Dawson J** – these judges doubted the opinion of an implied power – *If the specifically enumerated powers are taken to include s.51(39) then we consider that in the ultimate analysis the Cth Parliament does not possess any legislative power which could not be assigned to a particular provision or combination of provisions* at 103-4
- **Toohey J** - I am presently not persuaded that any implied power arising only from the creation of the Commonwealth as a body politic extends beyond steps necessary to protect the existence of the government.

- **Pape v The Commissioner of Taxation** (2009) – Tax Bonus Act case
- French CJ, Gummow, Kiefel and Bell JJ upheld the legislation as a valid exercise of **s.61**, together with **s.51(xxxix)**
- Hayne and Crennan JJ, and Heydon J in a separate judgment, dissented. This 4:3 majority reveals that the wide scope of the executive power discussed in **Davis v The Commonwealth** may be narrowing

- **French CJ** upheld the legislation as a valid exercise of s.61on the grounds that it was a necessary response to a national emergency as a result of the GFC – at [8]
- **Gummow, Crennan and Bell JJ** said (at 232 to 243):
- *The Executive Government is the arm of government capable of and empowered to respond to a crisis be it war, natural disaster or a financial crisis.*
- *This case may be resolved without going beyond the notions of national emergency and the fiscal means of promptly responding to that situation.*
- **Hayne and Kiefel JJ** said (at [352]) that: 'Reference to notions as protean and imprecise as "crisis" and "emergency" (or "adverse

effects of circumstances affecting the national economy") to indicate the boundary of an aspect of executive power carries with it difficulties and dangers that raise fundamental questions about the relationship between the judicial and other branches of government'.
- *By "enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power merely because these programmes can be conveniently formulated and administered by the national government", effect a radical transformation in what has hitherto been thought to be the constitutional structure of the nation.*
- These judges essentially expressed the view that if the Cth doesn't have an enumerated power to deal with the matter then the Cth should have got the States to refer their powers in relation to this matter to the Cth
- **Heydon J** (dissenting)
- *Section 61 limited by legislative competence of Commonwealth.* Relied on Gibbs J comment that: *Those words limit the power of the Executive and, in my opinion, make it clear that the Executive cannot act in respect of a matter which falls entirely outside the legislative competence of the Commonwealth."*

Week TEN – Judicial power of the Commonwealth

Keep in mind - how does the separation of judicial power and its vesting in Ch III courts limit legislative power, and in doing so, preserve rights and liberties in the Commonwealth?

Sources of the separation of judicial power
- The separation of powers doctrine can be traced to a number of sources including the English CL, the Act of Settlement of 1770; the writings of Montesquieu and the judgments of the US Supreme Court, in particular, **Marbury v Madison** (1803) – confirmed it is up to the courts to decide what the applicable law is when a dispute arises

Locally
- SOP is reflected in the *chapter divisions* of the CC: the Parliament (Ch I), the Executive (Ch II) and the Judicature (Ch III).

Section 71 of the Constitution
The judicial power of the Cth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The HC shall consist of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes.

Note section 75
s.75(iii) and **(v)** ensure that actions for judicial review against the Cth and States for breach of the law are available to the citizen, and cannot be removed by Parliament - **Plaintiff No 167 v The Commonwealth** – HC has original jurisdiction to hear your case against the government

'Checks and balances'
The separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed: **Wilson v Minister for Aboriginal and Torres Strait Islander Affairs** (1996)

Direct consequences of the SOP
- ***1st***, only Chapter III Courts can exercise Chapter III power: **The Wheat case** – majority held that the Inter-State Commission, set up under Ch V of the Constitution, was not a Federal Court within Ch III of the Constitution and therefore it could not exercise the judicial power of the Commonwealth
- ***2nd***, Chapter III courts can only exercise Chapter III power, and powers that are incidental to judicial power: **The Boilermakers case – s.51(xxxv)** - Cth created the Conciliation and Arbitration Court, which could make legal decisions and also deal with industrial disputes and give out industrial awards, which are like regulation - majority held this Court couldn't exercise both of these powers as one of them wasn't part of the judicial power or auxiliary or incidental thereto

Exceptions to the rule...
Courts martial are not Ch III courts
Re Tracey; Ex parte Ryan (1989) – dissentients argued that they could be Chapter III courts that exercise powers incidental to Chapter III powers such as under **s.69** or **s.51(vi)** – problem with this approach is that **s.51(vi)** is subject to the CC and therefore Chapter III but **s.69** is not, meaning that two different conclusions can be reached on the facts,

Power to commit for contempt
R v Richards; Ex parte Fitzpatrick & Browne (1954) – F and B were committed for contempt by parliament, not the court – this is permissible with reference to **s.49** of the Constitution

Section 72
Judges' appointment, tenure, and remuneration -The Justices of the High Court and of the other courts created by the Parliament- (i) Shall be appointed by the Governor-General in Council: (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity: iii) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.
The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years.

Judicial tenure
Judicial tenure is based on a lengthy tradition dating to 1700, when the Imperial *Act of Settlement* removed the power of the king to remove the commission of judges at pleasure, and replaced it with a power of removal by Parliament in essentially the same terms as **s.72(ii)**

Purpose of tenure
Judicial tenure reinforces judicial independence, which enables judges to make impartial decisions, 'insulating the judiciary from political pressure'- **Harris v Caladine** (1991)

Austin v Commonwealth
Secure judicial remuneration serves to encourage persons learned in the law..."to quit the lucrative pursuits of private business, for the duties of that important station". It also … assists the attraction to office of persons without independent wealth and those who have practised in less well paid areas. Further, it helps "to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty'".

Other judicial tenures case (many concerning territories)
- **NAALAS v Bradley** (2004)
- **Waterside Workers' Federation of Australia v JW Alexander Ltd** (1918) – a justice of the HC was acting as president of the Cth Court of Conciliation and Arbitration – it was argued this judge didn't have judicial tenure as his position in this Cth court was for a finite time period, but court held that this justice enjoys life tenure on the HC and this is sufficient for him to have judicial tenure
- **Spratt v Hermes** (1965)
- **Ex parte Eastman** (1999)
- **Austin v The Commonwealth** (2003) 214 CLR 185

NAALAS v Bradley
It is implicit in the terms of Ch III of the Constitution and necessary for the preservation of that structure, that a court capable of exercising the judicial power of the Cth be and appear to be an independent and impartial tribunal – **at 163**

What is meant by this term 'Matters'? - it appears in **s.75, s.76** and **77**
- Meaning of the word 'matters' was considered in **Re Judiciary and Navigation Acts** (1921) - defined matter to mean 'a claim of right in litigation between parties' not just 'abstract questions of law'
- Quote - it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law.
- NOTE - However, in a number of States the Attorney-General or equivalent chief law officer *does* enjoy the power to refer questions

of law to a superior Court for determination. Oddly enough, while the High Court itself may not give advisory opinions referred to it by the federal executive, the High Court may take appeals from advisory opinions delivered by State Supreme Courts pursuant to **s.73** - **Mellifont v Attorney-General (Q)** (1991)

What is judicial power?

An historical approach to judicial power
In doubtful cases, however, we employ a historical criterion. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided by the historical criterion - **R v Davison** (1954) - Kitto J concluded that the power to make a sequestration order was an 'established branch of judicial activity' at 1900. It was essentially a judicial procedure involving a curial proceeding, the exclusion of legally inadmissible evidence and the application of legal principles

Things change...
The utility of an historical approach to the meaning of 'judicial power' was also considered in **R v Quinn** (1977)

R v Quinn:
- *First*, Jacobs J indicates that central to any consideration of the meaning of judicial power in Australia is the recognition of the doctrinal underpinnings of the system: the rule of law, an independent judiciary and the separation of judicial power. The basic rights that are available in Australia depend on these things.
- *Second*, the purpose of the judiciary has traditionally been to determine the availability of 'the basic rights' by the exercise of judicial review. The courts have also traditionally had a number of other roles, including the power to govern a criminal trial and the power to determine legal rights (Jacobs J uses the example of a power to make legally binding decisions relating to a bankruptcy).
- *Third*, not *every* power which historical analysis might indicate is 'judicial' will be regarded as such today. Having said that, the power to make an enforceable determination of legal rights is exclusive to the courts and could not be vested in a non-judicial tribunal.

Powers that were historically exclusive to courts, and remain so
- **The power of judicial review** (**Australian Communist Party v The Commonwealth** (1951)
- **The power to adjudicate on existing legal rights and liabilities between persons is exclusive to courts - Waterside Workers' Federation of Australia v J W Alexander Ltd (1918)**
- **The power to determine criminal guilt** is an exclusive power of courts - **Chu Kheng Lim v Minister for Immigration** (1992) that cannot be excluded from courts - **Polyhukovich v The Commonwealth** (1991)

There are some things judges will not do...
The separation of judicial power guarantees that **Ch III courts will not take instructions from the legislature** *regarding the manner in which their jurisdiction will be exercised*, or the result of a case: **Chu Kheng Lim v Minister for Immigration** (1992)

A Ch III court has a duty to act and to be seen to be acting impartially: **R v Watson; Ex parte Armstrong** (1976) - In **Chu Kheng Lim v Minister for Immigration** (1992) at 27, Brennan, Deane and Dawson JJ said that the Parliament could not require or authorise courts exercising judicial power of the Cth "to exercise judicial power in a manner which is inconsistent with the essential character of a Court or with the nature of judicial power."

Ch III courts enjoy particular implied or inherent powers that are incidental to judicial activity
- The **power to determine what practice and procedure should be adopted in exercising its jurisdiction** - **Nicholas v The Queen** (1998)
- The power to **refuse to exercise its jurisdiction where to do so would be contrary to law or would involve the court in sanctioning fraud or oppression, or would permit parties to participate in an abuse of process** - **Pasini v United Mexican States** [2002]
- **The power to compel appearance of persons** (**Waterside Workers' Federation of Australia v J W Alexander Ltd** (1918)
- **Ch III courts have an inherent power to commit for *contempt of court*** - for example, in **Re Colina; Ex parte Torney** (1999)

Judicial remedies
- As previously noted, **the power to order judicial remedies** is entrenched by **s.75(v)** and also by **s.75(iii)**

Judicial power and civil liberty

If there is no Bill of Rights, do any implied rights exist as a consequence of the separation of judicial power and the requirement that judges act in accordance with judicial process?

R v Quinn; Ex parte Consolidated Foods Corporation (1977) - Jacobs J said: we live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive ... an independent judiciary is the bulwark of freedom.

Chu Kheng Lim v Minister for Immigration –
Mandatory detention of asylum seekers was held to be constitutionally valid and sufficiently connected with power to regulate aliens (s.51(19))
- **Brennan, Deane and Dawson** said - the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt. Every citizen is "ruled by law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else" at 27
- There are **some qualifications** however – an involuntary detention under arrest and detention in custody is not punitive or Involuntary detention in cases of mental illness or infectious disease can also legitimately be seen as non-punitive in character & not necessarily involving the exercise of judicial power.
- **Gaudron J** – I am not presently persuaded that legislation authorizing detention in circumstances involving no breach of the criminal law and travelling beyond presently accepted categories is necessarily and inevitably offensive to Ch III - at 55 (**perhaps she was contemplating involuntary detention of terrorists**?)

- In **Kable v Director of Public Prosecutions** *(NSW)* (1996) – 4 out of 6 judges struck down the NSW Community Protection Act which was enacted to effect the preventive "detention" of Kable in prison –
- **Implication** - A State cannot single a person out and subject them to punishment without trial - that would be contrary to implications arising from Ch III of the CC
- The statements made by the majority in this case were both diverse and wide and could be interpreted in a number of ways. The legislation in this case precluded the decision from judicial review, required that judges consider certain evidence that normally wouldn't be considered and it lowered the standard of proof from the criminal threshold to the civil law threshold.
- **Gaudron J** - acknowledged to an extent that the legislature were telling the judiciary what to do to a degree and this breached the separation of judicial power – however the majority articulated no clear statement in relation to this point

- **Fardon v Attorney-General (Queensland)** (2004) – decided 8 years after Kable but very different result – factually the case could be distinguished in certain respects in relation to Kable as it allowed for judicial review and higher the standard of proof – the Dangerous Prisoners Act interfered less with the separation of judicial power in this case
- **Callinan and Heydon JJ –** concluded that Act was designed to achieve a legitimate non-punitive purpose and therefore different from Kable – at 656
- **Kirby J –** dissented – said legislation was punitive in nature
- **McHugh and Gummow –** both these judges sat on Kable and they deoparted from what they said in Kable without really explaining why – both of judges focus on distinguishing Kable on the specific

facts, whereas in principle the cases are quite similar as they both relate to preventative detention of a person – it has been postulated that perhaps the court were willing to leave open grounds for preventative detention, contemplating that it may come in useful in relation to detaining suspected and actual terrorists in light of the fact that September 11 took place between Kable and Fardon

Week ELEVEN – Rights and Freedoms

Express and implied rights and freedoms (also referred to as express and implied constitutional guarantees)
- Section 51(xxxi)
- Section 80
- Section 92
- Section 116
- The implied freedom of political communication

No Bill of Rights
- The Australian Constitution, with few exceptions and in contrast with its American model, does not seek to establish personal liberty by placing restrictions upon the exercise of governmental power. **Those who framed the Constitution accepted the view that individual rights were on the whole best left to the protection of the common law and the supremacy of the Parliament**. Thus the Constitution deals, almost without exception, with the structure and relationship of government rather than individual rights... The framers preferred to place their faith in the democratic process for the protection of individual rights.

- **Kruger v The Commonwealth** (1997) – concerned aboriginal ordinance, court observed that even though it there was a high risk that it would cause children mental suffering, the existence of that risk did not deny the legislative power to make the laws which permitted the implementation of that policy.

Trial by jury
- **S.80** - The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

Section 80 does not apply to the States or Territories
- The trial on indictment of any offence against any law *of the Commonwealth* shall be by jury
- **Byrnes v The Queen** (1999) - majority said that a State can provide for a trial other than by jury
- **R v Bernasconi** (1915) – older case, majority held territories were not part of the Cth and therefore **s.80** didn't apply to territories
- **NOTE –** In light of **NAALAS v Bradley**, it is arguable that **s.80** will apply in the territories in the future (as court came close to finding that s.72 applies in the territories)
- **NOTE –** Interestingly, the territories cannot legislate without the powers of the Cth (they do not have constitutions like the States) – they derive their legislative power from **s.122** – so essentially the Cth is authorising a territory to breach **s.80** (but this argument has yet to be determined in court)

Section 80 does not extend to Courts martial - Re Tyler & Ors; Ex parte Foley (1994) – not considered Chapter III courts

What are proceedings 'on indictment'?
- Proceedings 'on indictment' involve the formal setting out of charges before a grand jury
- However **s.80** is *not* a general guarantee of trial by jury in cases involving 'serious offences'- **Kingswell v The Queen** (1985)

A literal approach
- **s.80** merely says: "The trial ... shall be by jury" - that is to say, *if there be an indictment, there must be a jury; but there is nothing to compel procedure by indictment* - at 139–140.
- **R v Archdall and Roskruge; Ex parte Carrigan and Browne** (1928) – court confirmed that **s.80** guarantees that if there is a trial on indictment, then it must be a trial by jury

- **Cheng v The Queen** – McHugh observed at 292 that 'the words of s.80 were deliberately and carefully chosen to give the parliament the capacity to avoid trial by jury when it wished to do so'

The right to trial by jury cannot be waived by the accused
- **Brown v The Queen** (1986) – the words 'a trial on indictment ... shall be by jury' illustrates that the right to a jury is compulsory and cannot be waived

The content of the right — an historical and ambulatory approach to 'trial by jury'
- **Cheatle v The Queen** (1993) – C's were charged on indictment with tax fraud under Cth law - State laws allowed majority verdicts
- C's argued majority verdict inconsistent with the trial by jury contemplated under s.80
- Court first took a historical approach and said
  - the clear weight of judicial authority supported the unanimity requirement
- SA's submissions were that juries back then had to be 12 men, over a certain age, white and had to own property – so racist and sexist – argued court cannot determine what should be disregarded and what should be retained as this was judicial activism
- **H.C held that need to determine what should be retained as essential from the historical meaning and that the requirement of unanimity was essential – so the HCessentially adopted an ambulatory approach to interpretation**

Brownlee v The Queen
- There is no constitutional requirement that a jury be composed of twelve persons – what we know from this case is that a jury must consist of at least 6 jurors - **Brownlee v The Queen** [2001]

Section 116 of the Constitution
- The Cth shall not make any law **for** establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Cth.

Does not apply to the States
- Although **s.116** appears, incongruously, in a chapter entitled 'The States', it is said to have no application to the States - **The DOGS case** (1981)

Does it apply to the Territories? (substantial obiter suggests it does)
- At 143, Dixon CJ, with whom Webb, Kitto and Taylor JJ agreed, said in obiter that there was no reason 'why s.116 should not apply to laws made under s.122' - **Lamshed v Lake** (1958)
- This view was approved by Toohey, Gaudron and Gummow JJ in **Kruger v The Commonwealth** (1996)
- **NOTE –** In **Wurridjal v Commonwealth** (2009) the court also rejected the principle that **s.122** isn't subject to express and implied restrictions in the constitution

What is a 'religion'?
- **The Scientology case** (1983) – HC had to consider whether Scientology was a religion as Victorian legislation provided for tax exemptions for religious organisations
- **Mason ACJ and Brennan J** said that:
- *the criteria of religion are twofold: **first**, belief in a supernatural Being, Thing or Principle; and **second**, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws outside the area of any immunity, privilege or right conferred on grounds of religion.*
- **Wilson and Dawson JJ**
- One of the more important indicia of "a religion" is the belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has a "religion". Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having

supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they **constitute an identifiable group or identifiable groups**. A fifth, and perhaps more controversial, indicium is that the adherents **themselves see the collection of ideas and/or practices as constituting a religion**: at 173–4.

- **Murphy J**
- Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible, such as the sun and the stars, or a physical invisible God or spirit, or an abstract God or entity, is religious. For example, if a few followers of astrology were to found an institution based on the belief that their destinies were influenced or controlled by the stars, and that astrologers can, by reading the stars, divine these destinies, and if it claimed to be religious, it would be a religious institution. Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious. The Aboriginal religion of Australia and other countries must be included. The list is not exhaustive; the categories of religion are not closed: at 151.
- **Murphy J took a broader approach than others to religion**

The 'establishment clause'

- **The DOGS case** (1981) - Cth gave financial assistance to the States subject to conditions, including, in this instance, that a portion of the monies be given to non-government schools – which are typically operated by religious groups.
- Argued that the grants Acts were laws 'establishing' religion in that they provided financial support to these religions,
- The majority held...
    - The establishment clause referred to laws 'intended and designed to set up the religion as an institution of the Commonwealth' (per **Barwick CJ** at 583); to laws with 'the purpose and effect of setting up any religion as a state church' (**Gibbs J**, with whom **Aickin J** agreed, at 604); to laws which effected 'the authoritative establishment or recognition by the state of a religion or church as a national institution' (**Mason J** at 616); or which provided 'statutory recognition of a religion as a national institution': **Wilson J** at 653.
    - **Murphy J** (the dissentient) argued that some of the money however would be spent of religious things and therefore did assist to establish a religion

The free exercise of any religion

- To require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of section 116 - **Krygger v Williams** (1912) at 369 - a passivist wouldn't subscribe to the war effort and the court held that this has nothing to do religion so the passivist couldn't seek to rely upon **s.116**

NOTE – The H.C have taken the approach of interpreting the term 'for' in **s.116** to mean 'directed towards' – if they had interpreted this term to mean 'affecting' then this would have broadened the scope of **s.116** but to date, no one has been able to run a successful **s.116** argument

- **Adelaide Company of Jehovah's Witnesses v The Commonwealth** (1943) – during WWII – national security regulations contained restrictions on passivists meeting in groups (they couldn't meet in groups of more than 4 people)
- Jehovah's wanted to meet as a group for religious purposes, they argued restrictions breached s.116 – HC held that they didn't and said that s.116 is a freedom that needs to be balanced against protection of the Australian society
- Latham CJ (with whom McTiernan J agreed):
    - *it must be conceded that the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society*: at 131–2, 157.

Week TWELVE – General Notes & Freedom of Speech

The Engineers Case said that words should be given their 'natural and ordinary meaning' – this principle suggest that if the words of the CC are to be changed or altered it should be done through a referendum
The HC in this case contrasted sections such as s.51(xiii) with s.51(xiii) and argued that the drafters did not include express restrictions in s .51(xxxv) as they did in s.51(xiii) and therefore none should be implied – what this suggests is that all constitutional implications are necessarily contrary to the principle articulated in the Engineers case

Melbourne Corporation Doctrine - implication from the federal structure of government contemplated by the CC & it qualifies federalism

In the Australian Communist Party Case, Justice Dixon went deeper and wider than the words of the CC in order to arrive at the implied nationhood power – a clear example of a constitutional implication.

Opponents to interpretation of the CC may argue that there are inherent indeterminacies in allowing 7 very intelligent HC judges to develop constitutional implications
The implied freedom of speech to discuss political and governmental affairs

Mason CJ, Deane and Gaudron JJ said in **Davis v The Cth** that the Cth regulation of particular symbols and trademarks associated with the biccentary was *[An] extraordinary intrusion into freedom of expression [and] is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power:* **at 100**

s.7 and **s.24** of the CC contemplate that federal representatives (in the House of Reps and the senate) will be 'directly chosen by the people'

The first reported decision of the HC in which a majority recognised an implied freedom of speech was **Nationwide News Pty Ltd v Wills** (1992). Brennan, Deane, Toohey and Gaudron JJ based their reasoning on the proposition that the system of representative government prescribed by the Constitution gave rise to an implication that it is necessary to enable the discussion of political and governmental affairs: at 47–49, 71–73 and 94.
In essence the judges argued that the wording 'directly chosen by the people' gives rise to an implied freedom of speech to discuss political and governmental affairs.

In **Australian Capital Television Pty Ltd v Commonwealth** (1992) - six judges recognised the existence of an implied freedom of speech but differed as to its nature and content

The implication was drawn in different ways and the Justices differed as to its content, giving rise to some uncertainty regarding the scope of the freedom. Its outer limits were explored in **Theophanous v Herald & Weekly Times Ltd** (1994) and **Stephens v West Australian Newspapers Ltd** (1994)

Interestingly Justice Dawson dissented in these cases and held that there was no such thing as an implied freedom of speech to discuss governmental and political matters but Justice Dawson changed his view in later cases (**Langer v Cth**) - presumably as he was tired of always being a dissentient and went with the wanted to adopt the same view as the majority of the court?

In **Theophanous v Herald & Weekly Times Ltd** (1994) the majority posited the existence of this broader implied freedom on the basis that the Constitution is based on principles of *representative democracy* and this might give rise to any implications which were 'necessary' to sustain a representative democracy. **Theophanous** and **Stephen**s seemed to presage High Court activism in the development of implied constitutional rights. However, the correctness **of Theophanous** and **Stephens,** and in particular, the reasoning upon which those decisions was based, was doubted in **Lange v Australian Broadcasting Corporation** (1997). In particular, in more recent decisions the HC has confirmed that Representative government, not representative democracy, is likely a basis for the implication of freedoms from governmental power

In **McGinty v WA** (1996) - The development of implications from a doctrine of representative democracy said to underlie the Constitution was stridently opposed by **McHugh J**, who said:

- I regard the reasoning in **Nationwide News**, **Australian Capital Television**, **Theophanous** and **Stephens** in so far as it invokes an implied principle of representative democracy as fundamentally wrong and as an alteration of the Constitution without the authority of the people under s 128 of the Constitution.

In **Langer v Commonwealth** (1996) - A majority of the Court, Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ (Dawson J dissenting) held that the provision did not infringe the implied freedom of communication because Langer remained free to criticise the system — but in doing so he was not allowed to encourage people to disregard the system.

The divergence of opinion among the justices of the HC regarding the nature and scope of the implied freedom of speech was removed in **Lange v ABC** (1997)
The HC reached a unanimous verdict and developed a test for this implied freedom of speech. It was a two stage test, but it has been modified in later cases.

Levy v Victoria (1997) – first case to apply test established **in Lange v ABC** - Every member of the Court held that the regulations were reasonably necessary to protect the safety of the public and participants and the restriction on the type of protests this entailed was reasonably capable of being seen as appropriate and adapted to this end. Consequently, Levy's challenge to the regulations was rejected. In passing, every member of the Court also stated or assumed that nonverbal activity could fall within the implied freedom of communication.

However the consenus reached in **Lange v ABC** was short-lived. This became evident in **Coleman v Power** (2004) where judges again took divergent opinions to the **The majority**(McHugh, Gummow and Hayne and Kirby JJ (at 51, 77-8 and 82 respectively)) **held that the applicable test is as follows:**

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? **Second**, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people.

Some of this majority applied this newly formulated test and struct down the legislation but others applied the test and upheld the legilsation. Gleeson CJ, Callinan and Heydon JJ dissented.

APLA Ltd v Legal Service Commissioner (NSW) (2005) – concerned regulation that restricted the capacity of lawyers to advertise legal services that referred to personal injury - Argued that the implied freedom to discuss political and governmental affairs extends to communications in relation to legal rights and remedies against governments for constitutional reasons beyond communications relating to electoral choice: at 325-7. It was argued that regulation also lead to a breach of the rule of law as it was argued that the rule of law principle requires that subjects of the law know or be able to ascertain what their rights and duties are: at 326. The resolution of such issues is a matter for the judicial branch of government, and, accordingly, the efficacy of judicial institutions requires freedom to communicate with them and about them: at 326.

The application was rejected by majority of 5:2. The common ground in the majority judgments was that the plaintiffs had failed to demonstrate that advertising legal services should be constitutionally protected communication. Gleeson CJ and Heydon J, in their joint judgment (at 349-350) and Gummow, Hayne and Callinan JJ, in their separate concurring judgments, emphasised the distinction between the provision of professional legal services – which they regarded as being necessary for the effective exercise of judicial power and the maintenance of the rule of law – and the advertisement of those services to people who are not their clients: which they said was *not* necessary to the maintenance of the rule of law.

Other implied freedoms that may arisefrom the system of representative and responsible government prescribed by the Constitution:

The people of Australia may have **an implied right of access to the seat of government**: **Crandall v Nevada** (1867) [US Case]; **Cunliffe v The Commonwealth** (1994) at 328 per Brennan CJ.
They may enjoy a **freedom of association and travel associated with the election of Federal representatives and associated activities**: **Kruger v The Commonwealth** (1997) at 114–21 per Gaudron J, at 142 per McHugh J. As Gaudron J noted in *Kruger*:

> just as communication would be impossible if "each person was an island", so too it is substantially impeded if citizens are held in enclaves, no matter how large the enclave or congenial its composition. Freedom of political communication depends on human contact and entails at least a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement: at 115.

In **Mulholland v Australian Electoral Commission** (2004) Gummow and Hayne JJ said at 234 (with Heydon J agreeing at 306):

A freedom of association to some degree may be a corollary of the freedom of communication formulated in **Lange v Australian Broadcasting Corporation** and considered in subsequent cases.
Callinan J rejected the argument: at 297. McHugh J (at 225) and Kirby J (at 277) supported the recognition of the freedom, but held that it had not been breached on the facts of the case. Gleeson CJ did not deal separately with the freedom of association claim. McHugh J said:
[113] Mr Mulholland contends that ss.7 and 24 of the Constitution contain **an implied freedom of association or participation in relation to federal elections**, which includes an associated freedom of political privacy. He contends that these freedoms are derived either directly from the text and structure of ss.7 and 24 or as a corollary of the implied freedom of political communication. Mr Mulholland contends that the challenged provisions concerned with the "500 rule" and the enforcement of that rule would breach the implied right of freedom of association and the related freedom of political privacy by identifying the members of the DLP.
[114] In ACTV, I said that the Constitution contains "rights of participation, association and communication" in relation to federal elections but that these rights extend only in so far as they are "identifiable in ss.7 and 24" of the Constitution. In **Kruger v The Commonwealth**, Toohey and Gaudron JJ and I each recognised an implied **constitutional** freedom of association. Toohey J regarded the freedom of association as "an essential ingredient of political communication". Gaudron J said that freedom of association was an aspect of the freedom of political communication that is protected to the extent "necessary for the maintenance of the system of government for which the Constitution provides". I said that the Constitution recognises a freedom of association at least for the purposes of the constitutionally prescribed system of government and the referendum procedure.
[115] However, disclosure to the Commission of the names of the members of political parties − either as part of the party's initial application for registration or in answer to a statutory request of the Commission − does not breach the implied freedom of association. Disclosure of the names of members is simply a condition of entitlement to registration and continued registration as a political party for the purposes of the Act. It is up to the political party which seeks to obtain or maintain registration to decide whether or not to disclose the names of its members. If, for privacy reasons, it does not wish to do so, the party is not entitled to the benefits of registration. A political party is not compelled to disclose to the Commission the names and addresses of its members. Accordingly, disclosure of the names of the members of a political party which seeks to obtain or maintain registration under the Act is not a breach of the constitutionally implied freedom of association (references omitted).

Kirby J also accepted the existence of an implied freedom of political association at 277-8

Principles of constitutional interpretation

'Legalism' (close adherence to legal reasoning) – Dixon CJ said - *There is no safe guide to judicial decisions in great conflicts other than strict and complete legalism*

- In **West v Commissioner of Taxation (NSW)** - Dixon J said:
  Since the **Engineers' Case** a notion seems to have gained currency that in interpreting the Constitution no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied. I do not think that the judgment of the majority of the court in the **Engineers' Case** meant to propound such a doctrine

Examples of constitutional implication

- The implied freedom to discuss political and governmental affairs (**Lange v ABC**)
- The implied autonomy and integrity of the States (**Melbourne Corporation v The Commonwealth**)
- Implications arising from the separation of judicial power (i.e. That only a court can imprison you, and then only upon a finding of criminal guilt) (**Chu Kheng Lim v Minister for Immigration**)

The historical context and current standards — connotation and denotation of constitutional language

- **Originalist approach -** ascertain the meaning of the language of the Constitution at the time of Federation
- However, while the High Court has recognised that this is a useful *starting* point, it is *not the finishing point*.
- **'ambulatory' approach** - consider both the connotation of the words (their 'original' or 'essential' meaning, which is 'fixed') and their denotation (the meaning of the words today) (**Cheatle v The Queen** (1993) –Mr and Mrs C had been charged with Cth tax fraud – issue of whether **s.80** refers to unanimous verdicts of the jury or a majority verdict was permissible – H.C said when construing words of the CC, they are to be given their ordinary and natural meaning – they also said if there is a contrast between the original meaning and the present day meaning, they said retain what is essential – in this case the court concluded that the 'unanimous judgement' meaning must be retained but the sexist and racist connotations shouldn't be retained