Constitutional Law Notes

<table>
<thead>
<tr>
<th>Power (Authority for Law)</th>
<th>Limit</th>
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<tbody>
<tr>
<td><strong>Commonwealth</strong></td>
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<tr>
<td>• External Affairs</td>
<td>Separation of powers (Boilermakers)</td>
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<tr>
<td>• Corporations Power</td>
<td>Intergovernmental Immunities</td>
</tr>
<tr>
<td>• Grants</td>
<td>Implied Rights</td>
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<tr>
<td>• S 81 &amp; s 83 Appropriation</td>
<td>– Right to vote</td>
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<td>– Freedom of Political Communication</td>
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<td></td>
<td>Express Rights</td>
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<td></td>
<td>– Freedom of interstate trade (s. 92)</td>
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<td><strong>State</strong></td>
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<td>• Plenary Powers</td>
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<td>• Extraterritorial powers</td>
<td>Manner &amp; Form</td>
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<td>Intergovernmental immunities (Henderson/IGI)</td>
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<td>– Inconsistency</td>
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A. Commonwealth Powers
   1. s 51 (xxix 29) External Affairs Power
   2. s 51 (xx 20) Corporations Power
   3. s 96 Grants Power
   4. s 81 & 83 Appropriation and Expenditure

B. State Legislative Powers

C. Manner and Form

D. Separation of Powers
   1. Cth Separation of Judicial Powers
   2. State Separation of Judicial Powers

E. Implied Intergovernmental Immunities
   1. Commonwealth immunity
   2. State Immunity

F. Implied Political Freedoms (Cth & State)
   1. Freedom of Political Communication
   2. Voting Rights

G. Freedom of Interstate Trade and Commerce (s 92)

H. Inconsistencies (s 109)
Is the law valid?

1. Was there power to pass the law?

<table>
<thead>
<tr>
<th>Power</th>
<th>Power to pass law – State?</th>
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<tbody>
<tr>
<td>Was there power to pass law in the first place – Cth?</td>
<td></td>
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<tr>
<td>Corps</td>
<td>Plenary (s.16 Vic Constitution)</td>
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<tr>
<td>External Affairs</td>
<td></td>
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<tr>
<td>s 96 – Pass laws to give money to states</td>
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<td>s 81 &amp; 83 Appropriation and Expenditure</td>
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2. Are there any limitations on the power?

<table>
<thead>
<tr>
<th>Limitations</th>
<th>Commonwealth Powers</th>
<th>State Powers</th>
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</thead>
<tbody>
<tr>
<td>Intergovernmental immunities</td>
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<tr>
<td>Boiler makers</td>
<td></td>
<td>Kable</td>
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<tr>
<td>Political communication</td>
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<td>Political communication</td>
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<tr>
<td>Freedom of interstate trade</td>
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<td>Freedom of interstate trade</td>
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<tr>
<td>Rules about spending money</td>
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<td>Inconsistent legislation</td>
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</tbody>
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Issue Spotting

<table>
<thead>
<tr>
<th>Issue</th>
<th>Power/Topic</th>
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<tbody>
<tr>
<td>‘Corporations’</td>
<td>Corps Power</td>
</tr>
<tr>
<td>‘Shareholders’</td>
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<tr>
<td>Treaty / International protocol</td>
<td></td>
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<tr>
<td>‘Grants Act’ / Giving Financial Assistance to States /</td>
<td></td>
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<tr>
<td>Giving Money to States</td>
<td>Grants Power</td>
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<tr>
<td>‘Funds’ ‘Appropriates’ ‘Provide funding’</td>
<td>81 &amp; 83</td>
</tr>
<tr>
<td>Victorian Act</td>
<td>Plenary Power (s 16 Vic Const)</td>
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<tr>
<td>Judge</td>
<td>Separation Judicial Power</td>
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<tr>
<td>State Government instrumentality / the crown in right of /</td>
<td>Intergovernmental immunities</td>
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<tr>
<td>the Cth is responsible for</td>
<td></td>
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<tr>
<td>Rights</td>
<td></td>
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<tr>
<td>Trading / Commercial Language / Sales Transaction across</td>
<td>Section 92 (Freedom Interstate Trade)</td>
</tr>
<tr>
<td>state borders</td>
<td></td>
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<tr>
<td>Parliament trying to pass restrictive procedure</td>
<td>Manner &amp; Form</td>
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<tr>
<td>Cth law &amp; State Law in same question</td>
<td>Inconsistency</td>
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Characterisation

- For a Commonwealth law to be valid, it must be a law with respect to a subject matter the Commonwealth has law-making power over.

Doctrine of Reserve State powers (R v Barger)

- Upheld Doctrine of Reserve state powers.
- Court held that in interpreting the scope of Cth powers, the court should be influenced by an assumption that certain subject matters of legislation were reserved for the State parliaments’ exclusive power.
- Character of a commonwealth act should be dependent on the character of the legislation rather than its form.
- Purpose of the Act was to regulate employment conditions, rather than raising money by imposing a tax.
- Decision also indicated that Cth laws were incapable of dual characterisation.
- Overturned in the Engineers Case 1920.

Intergovernmental immunities (Engineers)

Facts:
- An industrial claim was lodged in the Commonwealth Arbitration Court by an engineers trade union against 843 employers
- This included three WA government employers
- Under the reserved powers doctrine, the Court could not have exercised jurisdiction under a Commonwealth Act so as to affect the labour relations between a State and its employees

Holding

- Commonwealth heads of power are to be interpreted in accordance with the natural meaning of the words therein and therefore can bind State instrumentalities
- A literal approach must be taken to the interpretation of the Constitution looking at the ordinary and natural meaning of the words Perceived desirable outcomes or political necessities should not be considered

Characterisation rule: (Kitto J in Fairfax)

- It is a question as to the true nature and character of the legislation: is it in its real substance a law upon, with respect to, one or more of the enumerated heads of power?’
- ‘The nature and character needs to be considered
- ‘The question is always one of subject matter, to be determined be reference solely to the operation, which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes’

Proportionality Test

What is proportionality?
- There should be a reasonable relationship or balance between an end and the means used to achieve that end
- In characterisation terms, it relates to the reasonableness and appropriateness of the law. (ie fairness)
- Is the law sufficiently proportionate to the aim that is within the power?

Communist Party Case

- Law to ban communist party was disproportionate to the supposed threat to national security posed.
- Not enough evidence
- Parliament cannot base legislative validity on its own declaration that there is a nexus between HoP and actions:
  - “Stream cannot rise higher than its source” Fullghar J

Incidental scope = when a law cannot be characterised as being ‘with respect to’ the heart of a topic, may fall within incidental scope
A1. External Affairs (s 51 (xxix 29))

“The Parliament shall, subject to this constitution, have power to make laws with respect to ... external affairs”

Starting point:
- The Cth has enumerated HoPs and the ______(law) may arguably fall under the external affairs power (EAP) (s 51(xxix).
- The Cth will argue that ______(law)
  1. Is extraterritorial;
  2. Affects relations with other countries;
  3. Is a law implementing international law or treaty;
  4. Is a law on matters of “international concern”
- High Court has adopted a broad approach to external affairs (Korwata)

Only go through what is applicable

Extraterritorial Power

Starting point:
- The Cth has power to legislate WRT matters beyond Australia’s borders (s51(29))
- The Cth parliament’s extraterritorial power was confirmed by s 3 of the Statute of Westminster, which was adopted in 1941 (retrospectively operating from 1 September 1939). In Polyukhovich and XYZ the Court confirmed that under s 51(xxix) this power was unlimited and a nexus is not required.

Test:
- “Mere externality test” is satisfied if a place, person, matter or thing lies outside geographical limits of the country, then it is external to it and falls within the meaning of the phrase ‘external affairs’ (Polyukhovich and confirmed in ILO)

Tangibility:
  - Can be tangible or intangible
  - Even criminalising a person’s conduct where only the motivation relates to a geographic externality will be supported
  - “The combination of the external aspect of the offender’s mental state and the conduct undertaken to support or promote an offence against s6(1)(a) provides a sufficient connection between the head of power and the practical operation of the law”

Polyukhovich

Facts: Leg criminalised certain acts committed outside Australia. Whether Australia legislation can retrospectively criminalise war atrocities committed in Europe in WW2. Nationality of perpetrator and victim irrelevant
Held: No nexus between Cth and conduct required

XYZ

Facts: Whether legislation which prosecutes Australian citizens for sex crimes on children which occurred outside Australia can be prosecuted
Held: Plenary extraterritorial power granted, thus Cth can legislate for any offence committed overseas. Minority: Callinan and Heydon JJ, rejected the ‘mere externality’ test, pointing to weaknesses in textural analysis. Gives narrower meaning to “EA”, only to mean foreign relations.
Relations with other countries/international legal persons

Starting point:

- The Cth will argue that ______(the law) affects relations with other countries (Sharkey) and/or international legal persons (Koowarta; XYZ per Kirby J).

What can the powers do?

- Laws for maintaining relations with foreign powers (foreign fighter laws; inciting overthrow of foreign governments; terrorist acts
- Included Powers:
  - The preservation of friendly relations with other Dominions (R v Sharkey)
    - Stopping sedition against other countries (incite rebellion against government)
  - Legislation directed at terrorism directed at foreign states and the public thereof (Thomas v Mowbray)

Sharkey
Facts: Sharkey challenged s24A(1)(c) of Crimes Act (Cth). Created an offence of sedition, which prohibited “the excitement of disaffection” against the governments of the UK and its dominions. Sharkey argued no HoP.
Held: Valid under s.51(29) because “the perseverance of friendly relations with other dominions is an important part of the management of the external affairs of the Commonwealth” (Latham)

Implementation of Treaties/International Laws

- s.61 of Constitution empowers Cth with prerogative power to ratify treaties (Teoh) and bind Australia in international law
- Prior to Tas Dams there was a divergence of views on whether subject matter was important (see Dams minority and Koowarta per Stephens J). However, the prevailing view now is that the Cth can implement treaties regardless of subject matter under s. 51(xxix) (Dams; Richardson) subject to four limitations.
- Cth can also implement recommendations, though they are not treaties (ILO) → LOOK OUT FOR AN ADVISORY BODY
  - Note: Treaty Status= charters, conventions, covenants, pacts & protocols.

Four requirements for laws under this:

1. **Treaty must be a bona fide i.e. not a sham treaty (Burgess)**
   - Must have bona fide interest in entering into the treaty beyond trying to expand its own power (i.e. not a power grab) (Koowarta)
     - Ask “can this be seen as a power/land/money grab by the Cth?”
   - **Mention:** “However, this constraint has been described as ‘at best, a frail shield’ (Koowarta per Gibbs CJ) and thus a weak limitation.”

2. **Obligation requirement:** Treaty must oblige Australia to do something
   - **Language:** Must look to the language of the treaty itself and determine whether the words are obligatory in nature (‘must’, ‘shall’, ‘undertakes’) or are merely aspirational/ a mere recommendation.
     - **Compare to contracts:** Although Treaties are not contracts, the burden it places on parties can still be obligatory (Dams). Treaties have a level of vagueness to be reasonably applicable in a range of circumstances
     - If non-obligation, ask if it is reasonably necessary to fulfill a treaty obligation (incidental power)
     - The requirement for an obligation is unclear (Dams; Richardson) & since ILO is not as important as the specificity limitation

*Broad v narrow interpretation of whether issue of treaty is of “international concern”:*
The thin majority in the Tasmanian Dams in favour of the Koowarta broad interpretation of the scope of s 51(29) was converted into unanimous acceptance in Richardson v Forestry Commission (1988).

Thus the debate between the narrow and broad views in Koowarta has been rendered moot.

The Cth can implement the obligations of ANY treaty it enters into, regardless of the treaty's subject matter.

Koowarta

Facts: Wiks peoples wanted to buy native lands from American businessman who owned the large station. Bielke Petersen didn't want sale to go through, directed Qld Minister to block it. Wiks brought claim under Racial Discrimination Act, argued Hawke Govt. didn't have power to pass it.

Held: Extended the Sharkey principle to cover laws relating to 'international persons' which includes international NGOs and government collectives such as the UN (and its specialised agencies), the EU or other intergovernmental organisations. Act valid because it gives effect to UN treaty.

Broad: Cth can implement ANY treaty obligation. Narrow view: Cth can only implement if relates to an 'external affair', relations with other nations. Middle: can only implement with matters of international concern.

Tasmanian Dams Case (EAP)

Facts: Tasmanian Govt. wanted to build hydro-electric dam in Franklin River, opposed by environmental groups and Federal government. Hawke govt. recommended Franklin River become UNESCO World Heritage site, then implemented UNESCO treaty (Convention for the Protection of the World Cultural and Natural Heritage (1972)) with World Heritage Properties Conservation Act 1983. Articles said:

- Article 4: duty of each State to protect such property...
- Article 5: ...shall endeavour...to adopt polices and measures...to ID, protect, conserve ...

Tas government argued that Cth had no HoP to implement the treaty.

Held: Cth legitimately prevented the construction of dam through implementation of Treaty. Minority: held Stephen J’s view from Koowarta, where treaties could only be implemented if they were a matter of international concern.

3. Specificity: A treaty must prescribe a sufficiently specific way of implementing treaty provisions for signatory states (ILO case). There must be some direction in the treaty on how to achieve the aims of the treaty. (Very important)
   - How to work out if a treaty is specific enough? (Pape)
     - Look at language of the treaty
     - Look at the amount of discretion given to signatory states:
       - Greater discretion = less specificity
       - How many ways are there to implement the obligation?
     - Is there international consensus?
     - Must prescire regime, processes etc.
   - Direction of general course of action is sufficient, as opposed to mere aspirations (Pape)

Pape v Commissioner of Taxation

Facts: Pape challenged the cash bonus given to Aussies during GFC. Cth tried to argue that the G20 Int Declaration was an identifiable international commitment which they had to comply and could implement into domestic legislation using s51xxix

Held: Cth failed because recommendations were not specific enough in how they should be implemented. Was for each country to charter own course, thus not specific enough.

4. Conformity: The Cth’s implementing legislation must conform to the requirements of the treaty.
   - The law has to be reasonably capable of being seen as appropriate and adapted to fulfilling/implementing the obligations (ILO Case)
   - NB: Partial implementation is okay, as long as not contradicting the treaty overall. Not for courts to determine how best to implementing a treaty. (Tas Dams)
• Compare aims of the treaty with what the Cth is doing: "**appropriate** and **adapted** way of achieving the aims of the treaty"

• Basically adapting the Treaty for Australian law, making it appropriate and consistent with our laws.

→ **Go through each section of the Act**, not the Act as a whole (think of arguments for and against)