

Commonwealth Constitution Notes

WEEKS 1- 6

1. Is the Commonwealth law constitutionally valid?

- Does the law have a sufficient connection with a Commonwealth legislative head of power?
- Possible heads of power:
 - Corporations power (s51xx)
 - External affairs power (s51xxix)
 - Races power (s51xxvi)
 - Taxation power (s51ii)
 - Appropriations and spending power
 - Nationhood power
- General principles
 - Dual characterisation – if a law can be characterised with respect to a subject matter within power, it does not matter that it can also be characterised as a law with respect to a subject matter outside of power.
 - E.g. In *Tasmanian Dam*, the law was actually enacted for environmental protection, but because it can be characterised as regulating corporations, it was valid.
 - Incidental area of power – The core of head of power carries an incidental area necessary to effectuate the core e.g. penalty provision (fine for the breach of the core provision)
 - E.g. the penalty provision, a fine for the breach of the core provision. If the core regulation is within power, the penalty will be supported by the incidental area.
 - The Constitutional text is to be construed with all the generality that the words used admit, unless there is something in the context or in the rest of the Constitution that indicates otherwise – *Jumbana*
 - Note: *Engineers* has limited this qualification
 - Note: *Grainpool* principles might be helpful

Is a State Law Constitutionally valid?

1. Does the law fall within the general grant of legislative power under the State Constitution? (see APL, not CCL) – general principle is that the States have plenary power
2. Does the law infringe an express/implied limitation on state legislative power?
3. **Is the law inoperative under s 109 because of inconsistency with a valid Cth law?**

Constitutional Interpretation Principles

Pre 1920s – ‘in the infancy of the cth’ - Griffith CJ, Barton & O’Connor JJ

Tas v Cth (1904) – **The ordinary principles of statutory interpretation apply to the interpretation of the Constitution.**

Jumbunna (1908)

The Constitutional text is to be construed with all the generality that the words used admit, unless there is something in the context or in the rest of the Constitution that indicates otherwise.

- Generally, a broad interpretation is used to enhance Commonwealth power, but it can still be narrowed using the text or context of the Constitution.
- Rationale: Interpreting a Constitution, not a regular Act, that is meant to endure

In *Jumbana*, the early three judges imagined a few limitations from the text and context to limit heads of power:

- So, narrow reading of federal powers. Applying the qualification in *Jumbunna*, federal context provided otherwise.

Intergovernmental immunities (aka implied immunities, instrumentalities, doctrine of mutual non-interference)

- IMPLIED limitation that the Commonwealth laws could not bind the States, and the State laws could not bind the Commonwealth – governmental entities are immune from each other's laws
- Commonwealth and States as separate political entities were sovereign – Commonwealth laws could not apply to State government and their agencies, and vice versa.
- Rationale: federalism – limiting Commonwealth power from affecting the State

Reserve Powers

- Commonwealth is limited to the express powers it was given in the Constitution, and anything not stipulated is retained by the States.
- Narrow interpretation of Commonwealth power – Protecting reserve powers so Commonwealth will not be able to intrude into areas traditionally regulated by the States
- Based on a broad reading of s 107 which said to operate to save traditional areas of the State
 - Section 107: 'Every power of the Parliament of a Colony ... shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth ...'.
- Driven by distinction in S51i – since the text only expressly allowed overseas and interstate trade and commerce, intrastate trade and commerce must be preserved for the States

In 1906, Isaacs J and Higgins J entered the court, with a different vision of the interaction of Cth-State and their powers. The qualification becomes less applied afterwards, especially after *Engineers*, so that there needs to be something very clear in the text or rest of the constitution to suggest a narrow reading.

Grain Pool of Western Australia v Commonwealth

- 'the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates'.
- 'the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power'.
- 'if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice'.
 - As long as you can identify a character of the law has sufficient connection with the head of power, the merits (whether or not it should have been adopted, whether it operates unfairly) is a matter for the parliament and legislative process as they are democratically responsible for this political choice.

Techniques of statutory construction that courts apply to save the constitutional validity of legislation

- (1) **Reading down** – if there is a provision that can be read in at least a couple of different ways – one that will lead to constitutional invalidity, but one that will not – the court will read it in a way so that it remains valid.

(2) **Severance** – if there are multiple provisions, sections, subsections or paragraphs in a statute, where some are valid and others are not, the court will try to sever the invalid ones to retain the valid ones.

- This will only happen if severing is possible without disrupting the legislative schemes. If all the provisions tie together so that they can't be disentangled from one another, the court will have to say the whole thing is invalid.

Corporations Power – s 51xx

'foreign corporations, and trading or financial corporations formed within the limits of the Cth'

Does the statutory provision apply to the corporation at present?

- Statutory interpretation
- usually defined in the statute to mean a s 51(xx) corporation, so then we ask, what is a s51(xx) constitutional corporation?

When is an entity a constitutional corporation under s 51(xx)?

A constitutional corporation is a 'foreign' or 'trading' or 'financial' corporation formed within the limits of the Commonwealth

- 'formed within the limits of the Commonwealth' – geographically created in Australia (note: 'formed' meaning Commonwealth trying to incorporate?)

Even if the law is valid with a sufficient connection to the corporations power, it may still not apply to the body that you have been asked to advise if it does not fit within the definition.

- Making sure that a body is not a constitutional corporation is one of the only ways the States can avoid Commonwealth regulation and control

foreign corporations: *Work Choices Case* (2006) 229 CLR 1, 74 [55] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ):

'Plainly a foreign corporation is a corporation formed outside the limits of the Commonwealth' = A foreign corporation is a body incorporated outside the Commonwealth

'trading or financial' corporations

How does the court work out what a trading or financial corporation is?

- current activities test: *Adamson*
 - two versions:
 - high threshold – trade must be the corporation's predominant or characteristic activity
 - **low threshold – trade must be a sufficiently significant proportion of the corporation's overall activities; or be substantial; or not insubstantial (this version is endorsed)**
- *Work Choices Case* (2006) 229 CLR 1 – no impact on the relevant approaches and tests
- Isaacs J in *Huddart, Parker* took a narrow view of what corporations fell within s 51(xx): excluded 'domestic corporations ... constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes'. This view has not been accepted. Each of those bodies could be a trading corporation if it satisfies the applicable test.
- Note indications that the High Court might be prepared to reconsider its approach (either the high/threshold or the current activities/purposive approach)