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Section 1

What is Characterisation of laws?

The process by which the High Court determines whether a statute can be said to be a law 'with respect to' one of the matters upon which the Commonwealth/State has power to make laws.

Principals of Characterisation

1. Write the question

Write down: Is this a valid law with respect to (list the head of power e.g. defence)?

2. Is it a Cth law or State law?

Write down the answer

3. Characterisation of Laws.

From the Grain Pool Case:

- a) When the validity of legislation is in question the task is to consider whether it “answers the description, and to disregard the purpose or object”
- b) Determine the character of the legislation in relation to the rights, powers, liabilities, duties and privileges which it creates

4. Interpretation of the Head of Power

a. Connotation and denotation

- The essential meaning of the Constitution must remain the same although over time the words will be applied to situations which were not envisaged at 1900 (from *Street v Queensland Bar Association*)

b. Scope of the Constitutional Power:

- *Engineer’s Case*: Give the words of the Constitution their natural and ordinary meaning
- *Jumbunna Principle*: Lean toward a broader interpretation of the words of the Constitution UNLESS there is something in the context or the rest of the Constitution which indicates that a narrower interpretation will best carry out its objects or purposes
- *Grain Pool Case*: Examine the practical and legal operation of the legislation to determine if there is a sufficient connection between the legislation and the head of power (e.g. defence)

5. What type of power is it?

It will either be a subject matter power or a purposive power.

a. Subject matter power:

- A subject matter power is a power in which the subject matter is listed e.g. the corporations’ power in s 51 (xx) is a subject matter power as the subject is the legal persons of trading, financial and foreign corporations. Most powers are subject matter powers. Subject matter powers are either a core or incidental area.

- Core Power:

A core area power operates directly on the subject matter of the power

- Incidental Power:

An incidental power operates despite the subject matter but requires the following questions to be asked:

- i. Is there a sufficient connection or relevance between the subject and the law?
- ii. Is the power necessary in order for the main purpose of the law to come into effect?

If the answers to the above questions is yes, then it is an incidental power.

b. Purposive Power

- A purposive power is about the purpose of the legislation. Both the defence power in s 51 (vi) and the treaty implementation component of the external