

Interpretation & Characterization

RULE: 'The basic test for validity is whether a sufficient connection has been shown between the law in question and the subject matter of the head of power'; *Leask v Commonwealth*

Consider two questions:

- Interpretation: constitutional meaning?
- Characterization: what legal rights and duties does it create, modify or abrogate?

STEP ONE: Interpretation: What is the meaning of the words?

The High Court on Interpretation:

- Callinan J in *Workchoices*: 'little sustained unanimity on the part of 46 Justices who have constituted this Court.

Pre-engineers: Reserve Powers Doctrine rejected

- Based on *s 116 CTH Con.*
- *Bargers Case (1908)* power of taxation must be considered with reference to the powers reserved to that states.

Engineers Case (1920) natural language

- The Constitution should be interpreted according to the 'ordinary' principles of statutory interpretation: the language of the Con.
- Is to be read in its natural and ordinary sense. (literal approach)
- There is no nothing in the constitution that says there are powers reserved to the State.

Jumbunna Coal Mine NL (1908): natural language is broad as possible

- The court should 'always lean to the broader interpretation' (this approach favors the CTH in federal disputes)
- Exception: 'unless there is something in context or in the Constitution to indicate a narrower interpretation.' *Incorporation case 1990*

Context of the words

- What was said in the convention Debates (see *Cole v Whitfield*)
- The common law at the time (see *Engineers*)

Important of **text and structure**

1. *Grain Pool*: Constitutional text is to be construed with all the generality which the words used permit. (natural and broad meaning).
- *McGinty v Western Australia (1996)*: look at the terms or structure of the constitution.

- *Workchoices*: their reject [of the plaintiff's argument] is favored by a consideration of the text and structure of the Constitution – Majority

HoP not to be interpreted in light of each other *Workchoices 2006*

- You can't take an implication from one section to interpret another section.
- The powers are entirely independent powers.

Meaning not tied to 1900:

- *Grain Pool*: The High Court adopts an 'ambulatory' approach to the interpretation of s 51(xviii) 'patents of inventions', recognizing that the words (even in 1900) had a dynamic meaning. Kirby K emphasized the importance of applying the contemporary meaning of constitutional language.
- *Ex parte Professional Engineers' Association (1959)*: 'we must not restrict the denotation of its terms to the things they denoted in 1900.'
- Example: The phrase 'industrial disputes' should be given its 'popular' meaning: *R v Coldham (1983)*
- Example: The High Court has interpreted S 51(v) 'postal, telegraphic, telephonic and other like services' wide enough to apply to radio and television: *R v Brislan (1935)*

STEP TWO: Characterization: Is the law supported by a head of power?

- Characterisation requires lawmakers to show that legislation is made '**with respect**' to one or more of the 'heads of power' in ss 51 and 52.
- Look at the rights, powers, liabilities, duties and privileges it create: *Grain Pool (2000)*
- The character of a law will be central to determining whether a law has contravened a constitutional limitation or whether a state law is inconsistent with a CTH law for the purpose of s 109.

STEP ONE: What head of power is the law supported by?

What rights and duties are affected by the law? *Fairfax v Commissioner of Taxation*

Dual Characterisation?:

- Law can be characterized under more than one HoP: *Murphyores v Cth*
- It is irrelevant that the law may also be characterized as a law with respect to a subject matter outside CTH power: *Fairfax v Federal Commissioner of Taxation (1965)*

STEP TWO: Nexus between the legislation and the head of power

- Characterisation requires a '**sufficient connection**' with the constitutional head of power; *Cunliffe v Cth*.
- The connection must be substantial: Toohey J *Re Dingjan; Ex parte Wagner (1995)*
- Motive and policy behind law irrelevant: *Fairfax*
- Look at the direct effect of the law: *Murphyores Pty Ltd v CTH*

Incidental Powers

- The High Court has also confirmed that each head of power in **s51** authorises the exercise of **implied incidental power**. *Grannal v Marrckville Margarine*
- The **s51(xxxix)** express incidental power has been held to permit the Cth to make laws incidental to the execution of any power vested by the Constitution.