

CONSTITUTIONAL LAW SUMMARY

NOTES

PRELIMINARY CONSIDERATIONS – INTERPRETATION

If it seems there is an issue of CONSTITUTIONAL INTERPRETATION → *Engineers or Kartinyeri*:
'CHARACTERIZATION' process to determine validity of Cth laws:

- STATUTORY INTERPRETATION to determine legal effect of statute
- CONSTITUTIONAL INTERPRETATION to determine the scope of/limits upon the power identified as the source of authority to make the law (key narrative associated with constitutional interpretation was the extension of Commonwealth power)

Engineers set tone for constitutional interpretation used by HCA

- The terms of the Constitution must be interpreted according to ordinary rules of statutory construction.
- Primary or golden rule being that the terms of the Constitution must be given their natural meaning.
- Enumerated heads of power to be read broadly.
- Any limitation or restriction on the use of a head of power must come from the terms of the Constitution itself.

Can be matters implied from text of constitution → can be both explicit and implied limitations and restrictions but must emanate from constitution rather than political ideas about how it should be interpreted.

→ ALWAYS LOOK TO *Engineers* WHEN DISCUSSING:

- Abuse of Commonwealth power and centralisation of power
- Constitutional interpretation and meaning of terms – PLAIN & NATURAL MEANING
- Federalism
- Context and changing circumstances (see also variety of views in *R v Burgess*)

NOTE encompasses Ministers, GG, conferral on a public servant, statutory authorities or non-statutory authorities → EXECUTIVE POWER.

PROBLEM 1 → No. of questions:	PLAN/KEY ISSUES:
MARKS:	
WORDS:	
TIME:	
PROBLEM 2 → No. of questions:	PLAN/KEY ISSUES:
MARKS:	
WORDS:	
TIME:	

PROBLEM 3 → No. of questions:	PLAN/KEY ISSUES:
MARKS:	
WORDS:	
TIME:	

LEGISLATIVE POWER

Is there legislation?

- If NO → issue is NON-STATUTORY EXECUTIVE power (can the executive spend money/enter into contracts in the absence of explicit statutory authorisation?)
- If YES → STATE or CTH? Prima facie INCONSISTENCY? Does CTH apply to states?

CTH LAW	<ol style="list-style-type: none"> 1. Is there a valid head of power? <ol style="list-style-type: none"> a. in order to be constitutionally valid, Commonwealth legislation must be enacted pursuant to an enumerated head of power under ss 51 or 52 of the Constitution. This legislation will be validly enacted provided it is within the scope of the [EA/CORP/DEFENCE] power conferred by [SECTION] of the Constitution (made 'with respect to') b. VALIDITY may depend on whether validly provides for a GRANT OF MONEY to the states by the commonwealth under section 96 (here go to grants power) or whether infringes another limitation. 2. CHARACTERISATION of the law → for the purposes of ascertaining its validity requires consideration of the <u>operation and effect</u> of the law: seen in jurisprudence, concentration on terms and operation but also its practical effect, how does it work in actual operation? (<i>Kartinyeri</i> per Brennan CJ & McHugh J). Consider: <ol style="list-style-type: none"> a. Does the law fall within the subject matter of the Head of Power? (matter of definition of that subject matter) b. Is the law one "with respect to" that subject matter? (usually involves the "appropriate and adapted" test – is appropriate and adapted to subject matter of enumerated head of power). c. Discuss any relevant limitations <p>Done by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes. Legislative powers under s 51 are <u>plenary powers</u> – power to make laws under subject matter includes power to unmake that law (reading broadly as the ordinary meaning of the text would allow for).</p>
STATE LAW	Are there any constitutional restrictions? (inconsistency, state power to impose excises, separation of powers, implied freedom, voting rights)

Consider whether challenging the law or the power of the Cth legislature to pass the law? under what head of power?

- For VALIDITY questions always go first to HEAD OF POWER.
- Validity of the law or power of the Cth legislature: challenge to LEGISLATIVE POWER
- If NO law (or validity law not being challenged) → go to EXECUTIVE or JUDICIAL POWER.

NOTE: if NO LEGISLATION → **incidental power** not relevant because it is a legislative head of power (only used in cases where they passed legislation to try and facilitate their scheme).

- Consider argument generally about whether X does not fall within the scope of the head of power (factual analysis)

<p>EXTERNAL AFFAIRS</p> <p>51(xxix)</p>	<p>NOTE → <i>Tasmanian Dams</i> broadened view of Commonwealth's legislative competence to implement treaties under the external affairs power in s. 51(29) – majority founded their argument on canons of constitutional interpretation deriving from the decision in the <i>Engineers Case</i>.</p> <p>EA POWER RULE: under the EA power the Cth parliament may enact laws pursuant to treaties provided that the treaty is bona fide, not too aspirational (<i>IR Act Case</i>). Furthermore, in order to be valid, the legislation must be reasonably capable of being considered appropriate and adapted to implementing the treaty (<i>Tas Dams</i>; <i>IR Act Case</i>)</p> <p>Is there a TREATY? (written agreement between two or more states).</p> <p>(1) EA power can be used for treaty implementation:</p> <p>Subject matter of treaty is irrelevant (can be a domestic issue) (<i>R v Burgess</i>; <i>Tas Dams</i>)</p> <ol style="list-style-type: none"> 1. Capable of implementation? (interpretation) <ol style="list-style-type: none"> a. Bona fide? Evidence that AU has not simply entered for purpose of attracting power? (<i>IR Act</i> approving majority in <i>Tasmanian Dams</i>) → cannot be merely a device to attract domestic legislative power (<i>Tasmanian Dams</i>, Deane J) <ol style="list-style-type: none"> i. Does not require an obligation on the state (<i>IR Act Case</i>) b. Aspirational? (<i>Industrial Relations</i> – a need for specificity. NOTE obiter but of 5 majority judges) <ol style="list-style-type: none"> i. “The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states” (at 486) ii. A broad objective with little precise content and permitting widely divergent policies will not meet this standard (<i>IR</i>) iii. Accepted that international agreements are less precise, so standard <i>not as high</i> as DOMESTIC legislative interpretation, a lower threshold (<i>IR</i> citing Deane J in <i>Tasmanian Dams</i>) iv. “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.” (at 487) v. Purposive approach → “Where a treaty relating to the domestic subject matter is relied on to enliven the legislative power conferred by s 51(xxix) the validity of the law depends on <u>whether its purpose or object is to implement the treaty</u>.” (at 487) - this would be shown by level of conformity (adopted from Deane J in <i>Tasmanian Dams</i>) 2. Is the law a valid implementation of the treaty? (characterisation) – reasonably capable of being appropriate and adapted. <ol style="list-style-type: none"> a. CONFORMITY: law needs to carry into effect the particular provisions of a treaty it sought to execute (<i>Tasmanian Dams</i> Deane J and Mason J) b. PROPORTIONALITY: <i>IRA</i> adopting DEANE J in <i>Tasmanian Dams</i>: <ol style="list-style-type: none"> i. Must be APPROPRIATE and ADAPTED to achieving the designated purpose purposes → “reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it” (<i>Tas Dams</i>; <i>IR Act Case</i>) ii. Cf. if legislation imposes prohibitions on activities which do not necessarily have anything to do with purpose of the treaty compared to if discretion of GG (<i>Tasmanian Dams</i> Deane J) iii. Partial implementation? (<i>IR</i> – deals with conformity requirement) → can legislative to partly carry out treaty into effect provided law has character of implementing treaty and is not substantially inconsistent with it (<i>IR Act Case</i>) <ol style="list-style-type: none"> i. Benefits/recommendations vs. obligations (as opposed to mere mentions?) <p>(2) For international relations: subject matter of external affairs covers relationships with governments and persons in other countries (<i>R v Sharkey</i>)</p> <ul style="list-style-type: none"> • <i>Tasmanian Dams</i>: shift towards the view that subject matter of treaty indicates that this is a matter of international concern • MASON J: <ul style="list-style-type: none"> ◦ “[T]he treaty itself is a matter of external affairs as is its implementation by domestic legislation.”
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	<p>◦ “The existence of international character or international concern is established by entry by Australia into the convention or treaty.”</p> <ul style="list-style-type: none"> • ‘External relations with other nation states and with international organisations’ (Kirby in XYZ) • Law fosters (or inhibits) relations between AU or political entities, bodies or persons with AU and other nation states, entities, groups or person external to AU (Murphy J in <i>Tasmanian Dams</i>) <p>(3) Geographic externality (as can be seen in <i>Horta</i>, <i>Polyukhovich</i> and XYZ). Mere geographic externality is sufficient (XYZ, Gummow, Hayne, Crennan JJ; <i>Horta</i>) → ‘place, person, matter or thing lies outside the geographical limits of the country’ (<i>Polyukhovich</i>)</p> <ul style="list-style-type: none"> • An AU connexion or nexus is required → dissenters in <i>Polyukhovich</i>, joint judgment in <i>Horta</i>, uncertain in XYZ (unnecessary to decide) • Not restricted by: unnecessary for there to be a treaty but if there is, law does not have to discharge obligations under the treaty to give it effect, and does not have to comply with international law (<i>Horta</i>). <p>(4) Matters of international concern?</p> <ul style="list-style-type: none"> • Justice Stephen in <i>Koowarta</i>, Murphy J in <i>Tasmanian Dams</i> → but has not commanded an overwhelming majority in HCA (could use in context when state uses a <i>Melb Corp</i> type argument). • Recognised by Gibbs CJ in dissent in <i>Tas Dams</i>: look at (a) extent to which other nations regard it as proper subject for international concern and (b) whether it will affect AU’s relations with other countries. • Only likely to arise when at issue whether a treaty or question of whether a law conforms with treaty but to a larger matter of international concern (broader scope). • Rejected by Mason J in <i>Tas Dams</i> because decision of what is of international concern is an essentially political decision and violates separation of powers.
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