

Cth - Table of Contents

Executive - 9

Characterisation - 26

External Affairs Power - 31

Corporations Power - 49

Grants Power - 66

Appropriations and Expenditure Powers - 75

State Immunity from Cth Laws - 90

Separation of Judicial Powers - 106

Implied Freedom of Political Communication - 138

Implied Right to Vote - 169

Freedom of Interstate Trade and Commerce [s 92] - 176

Inconsistency [s 109] - 201

Corporations Power

- Introduction

- Under s 51(20) of the *Constitution*, Commonwealth parliament has power to legislate with respect to constitutional corporations
- Initially, the corporations power was given a very narrow interpretation in *Huddart Parker* given the operation of the reserve powers doctrine
- However, the court overruled *Huddart Parker* and the narrow interpretation given to the head of power in *Concrete Pieces* thus expanding the scope of s 51(20)
- [party not wanting legislation to be valid] will argue that [legislation] has not been validly enacted under a head of power
- However, Cth will argue that [legislation] has been validly enacted under s 51(20) since the law regulates a foreign, trading or financial corporation

- Incorporation process [if relevant]

- The incorporation process does **not** fall within the scope of the corporations power since s 51(20) provides that the Cth has the power to regulate constitutional corporations '**formed within the Commonwealth**' meaning the power only applies to corporations which have been formed (*Incorporation case*)
- This process is now regulated by the *Corporations Act 2001* (Cth)

- Constitutional corporation

- For [legislation] to be a valid enactment under the corporations power, the corporation must be a constitutional corporation that is, either a foreign, trading or financial corporation

- Legislation which purports to regulate all corporations will not be a valid enactment under s 51(20) (*Concrete Pipes*)
- [A corporation refers to an artificial entity invested with legal personality under Australian law (Gageler J in *Queensland Rail* case)]
 - Thus, [corporation] would be classified as a corporation however for it to be regulated by Cth Parliament under s 51(20) it must be classified as either a foreign, trading or financial corporation
- **NB: If multiple corporations on the facts, classify each one individually**
- **Might be told that body is a trading/financial corporation [if so, mention that it is stated on the facts]**
- **Trading corporation**
 - Cth will argue that [corporation] is a trading corporation thus capable of being regulated under s 51(20)
 - To determine whether [corporation] is a trading corporation, the court will apply the “current activities” test articulated by Barwick CJ, Mason, Jacobs and Murphy JJ in *Adamson’s* case and affirmed in *Tas Dams*)
 - The test involves considering whether a substantial or significant proportion of the corporation’s activities constitute trade
 - * The court held in *Adamson’s* case that **‘trading’ includes any activity that produces revenue**
 - **Include football clubs or leagues which exist for profit** (*Adamson’s* case) - football clubs in *Adamson* were held to be trading corporations since there were a number of sources of revenue [gate takings, revenue from interstate games they arranged, TV rights, advertising income, promotions, renting out premises, catering, programs]

- A **non-for-profit** may still be a '**trading corporation**' provided trading constitutes a substantial proportion of its activities since **focus is on producing revenue rather than profit** (*Adamson's case*)

* In *Qld Rail*, the Authority did not make profit however the court held this did not preclude a classification as a trading corporation

* Whether trade constitutes a substantial or significant proportion of the corporation's activities is a **question of fact and degree** (Mason J in *Adamson's case*)

* **Look beyond the predominant activity of corporation** (majority in *Adamson's case*)

* **Relatedness between two entities does not preclude a classification of a corporation as a trading corporation** (*Qld Rail*)

- However, [party wanting law to be invalid] will counter the Cth's argument contending that the trade activities are **so slight and insubstantial and merely incidental/ancillary to a more significant activity** namely [X] with the result that the "current activities" test is not satisfied (Mason J in *Adamson's case*)
- Furthermore, [party wanting law to be invalid] will argue that **[corporation] is not a trading corporation since [legislation/document] states that [corporation] is not a corporation**
- The court would likely conclude given the satisfaction of the "current activities test", [corporation] is a trading corporation meaning it is capable of being regulated under the corporations power

Separation of Judicial Powers

Federal Level

- Introduction
- [party wanting law invalid] will contend that that [Cth legislation] is invalid for breaching the doctrine of separation of judicial power (SoJP)
- At the federal level, there is a strong separation of judicial power which is implied from the text and structure of the Constitution
- Two key principles have emerged regarding SoJP at the federal level which are implied from the text of structure of the Constitution:
 - Principle 1 - only Chapter III courts may exercise judicial power (*Wheat Case*)
 - Principle 2 - Chapter III courts may only exercise judicial power (*Boilermakers*)
- [party wanting law invalid] will argue that [Cth legislation] is invalid since operates to vest judicial power in a non-Chapter III court therefore breaching Principle 1 (*Wheat Case; Waterside Workers; Brandy*); OR
- [party wanting law invalid] will argue that [Cth legislation] is invalid since operates to vest non- judicial power in a Chapter III court therefore breaching Principle 1 (*Boilermakers' case; Wakim*)
- Judicial or non-judicial power
- To ascertain whether Principle [1/2] has been breached, the power vested in [non-Chapter III court/Chapter III court] must be classified as either judicial or non-judicial
- Griffith CJ in *Huddart Parker* defined 'judicial power' as the power which every sovereign must have to decide controversies in a binding and authoritative manner'

- However, Griffith CJ's statement in *Huddart Parker* does not operate as a comprehensive or conclusive definition of 'judicial power' since judicial power is a 'chameleon principle of innominate functions' (Kirby J in *Albarran* case)
- Rather, whether the power is judicial or non-judicial must be ascertained by having regard to and weighing up indicia

- **Incontrovertible judicial functions**
- There are certain powers that the law has identified as being 'incontrovertibly and exclusively judicial in nature'
 - Determining the common law (*Mabo* per Brennan J; *Farah Constructions*)
 - * *It is the role of the High Court to develop and authoritatively determine the common law and the High Court sets precedents for all other courts in the system*
 - Determining criminal guilt, civil wrong or contract
 - * The punishment of crime, trial of actions for breach of contract or for a civil wrong are exclusively judicial powers
 - * **Judgement and punishment of criminal guilt is essentially and exclusively judicial in character (*Chu Kheng Lim*)**
 - Cth prevented from making laws that vest the determination of criminal guilt in the Executive (*Chu Kheng Lim*)
 - ✦ Involuntary detention of a citizen is 'penal and punitive' and 'exists only as an incident of the exclusively judicial function of adjuring and punishing criminal guilt'
 - * A court determining criminal guilt beyond reasonable doubt based on admissible evidence **[judicial]**
 - * Administrative processes that may involve a finding of guilt for other purposes(*ACMA v Today*)

- In ACMA v Today, the court held in determining whether a broadcaster had committed an offence, is '**not adjudging and punishing criminal guilt**' [non-judicial]

* **Legislative detriment cannot be equated with legislative punishment'** (*Duncan v NSW*)

- In Duncan v NSW, Licensees deprived of licenses does not mean they were punished via the exercise of judicial power consequent on the finding of criminal guilt [non-judicial]

- Interpreting the constitution

* Interpreting the constitution and deciding whether legislative/executive action is within the power bestowed by the Constitution are judicial functions

- Judicial review of administrative action

* It is the role of the judiciary to decide whether administrative decision makers have acted within their legal authority

* Cth/State laws cannot exclude judicial review by ouster clauses due to s 75(v) Constitution (for HCA) and for state supreme courts, since judicial review is a defining characteristic of the court

- Statutory construction

* Courts have a duty to interpret the law and authoritatively state what the law means thus statutory interpretation is a judicial function

- Since [body] is [outline category above], this would mean that it is exercising judicial power OR
- Even though [body] is not exercising one of the incontrovertible and exclusive judicial functions, it cannot necessarily be concluded that the [body] is exercising non-judicial power

<p>Duncan v NSW</p>	<ul style="list-style-type: none"> - Mining Amendment Act (NSW) amended the Mining Act (NSW) by inserting Schedule 6A <ul style="list-style-type: none"> • Under Schedule 6A, three mining licenses were cancelled and no compensation was to be paid to licensees • A corruption inquiry found that the three licenses were issued on the basis of serious corruption and the Act purported to cancel the licenses without compensation to restore public confidence; promote integrity and place the State in the same position as if the licenses had not been granted - Issue: Did the cancelling of the licenses amount to an exercise of judicial by the NSW Parliament? 	<ul style="list-style-type: none"> - The court held that the NSW Amendment Act did not adopt or fasten upon any specific findings of the corruption commission with respect to the corruption of individuals nor did the amendments actually impose any legal burden on the individuals - HCA held that NSW Parliament has informed itself by reference to the ICAC report - not limited its consideration or linked its conclusions to any one or more specific findings in the reports - Parliament came to its own satisfaction [formed one view that the administrative processes by which the licenses were issued was tainted by corruption] - HCA found that it was the NSW Parliament's own determination that it was actually in the interests of the public that the product of the tainted processes (licenses) be canceled - <u>this did not amount to a finding of criminal guilt</u> <ul style="list-style-type: none"> • HCA held that the fact that they were deprived of their assets 'does not mean they were punished via the exercise of judicial power consequent on the finding of criminal guilt' • 'Legislative detriment cannot be equated with legislative punishment'
<p>Brandy v HREOC</p>	<ul style="list-style-type: none"> - HREOC [Human Rights and Equal Opportunity Commission] had to register its determinations with the FCA and upon such registration, the determinations were to be enforced as if they were decisions of the Federal Court - Issue as to whether HREOC was exercising judicial power? 	<ul style="list-style-type: none"> - Court held that the fact that HREOC had to register its decisions with the FCA meant that the determination of HREOC, a commission was enforceable since: <ul style="list-style-type: none"> • Registration of determination is compulsory • The automatic result of registration is to make the Commission's determination binding upon the parties as an enforceable order of the FCA - The fact that HREOC's decisions were enforceable means that it was exercising judicial power but HREOC is not a Chapter III court thus this was an invalid vestment of judicial power to a non-Chapter III Court

State - Table of Contents

State Constitutions - 9

Manner and Form Provisions - 14

Executive - 32

Cth Immunity from State Laws - 49

Separation of Judicial Powers - 60

Implied Freedom of Political Communication - 94

Implied Right to Vote - 125

Freedom of Interstate Trade and Commerce [s 92] - 132

Inconsistency [s 109] - 157

Manner and Form Provisions

- Summary

<u>Manner and Form Provision [L1]</u>	<u>Law respecting the CPP of Parliament [L2]</u>	<u>Action</u>
Invalid manner and form provision	Law does not pertain to CPP of Parliament	Ignore the L1 procedure - s 6 AA does not apply
Invalid manner and form provision	Law pertains to CPP of Parliament	Ignore the L1 procedure - s 6 AA does not apply
Valid manner and form provision	Law does not pertain to CPP of Parliament	Ignore the L1 procedure - s 6 AA does not apply
Valid manner and form provision	Law pertains to CPP of Parliament	L1 procedure must be followed when enacting L2 [s 6 AA applies which requires both a valid manner and form provision and a law concerning the CPP of Parliament]

1. Introduction

- i. Overall, there are no substantive limits on the residual plenary power of state legislatures (*Union Steamship; s 2(1) Australia Act*)
 - ▶ 'peace order and good government' are not words of limitation but rather indicate the plenary nature of Parliament's legislative power (*Union Steamship Co*)
 - ▶ There is a slight limitation on the ability for State Parliaments to legislate extraterritorially - there must be a 'nexus' between the subject matter and the State however this requirement is liberally interpreted (*Union Steamship Co*)

- ii. However, State Parliaments have the ability to impose procedural limits on legislative power with the result that a later parliament are required to follow special procedures when passing laws which pertain to the the 'constitution, powers or procedures' of Parliament
- iii. Thus, the ability for procedural fetters to be imposed on Parliament's legislative power undermines parliamentary sovereignty
- iv. **The constitutional basis empower Parliament to impose procedural restrictions is s 6 Australia Act 1986 (Cth) [previously s 5 Colonial Laws Validity Act] (Marquet)**
 - v. s 6 AA provides that for a restrictive procedure to bind Parliament, the manner and form provision must be valid and for the law to be subject to the restrictive procedure must pertain to the constitution, powers or procedures of Parliament
 - vi. Thus, to ascertain whether the amendment/enactment of [L2] is subject to the restrictive procedure outlined in [relevant provision], it needs to be ascertained whether the restrictive procedure is valid and whether the Act to which it purports to apply to pertains to the 'constitution, powers or procedures' of Parliament

2. Restrictive Procedure Law [L1]

- i. [relevant provision] imposes a restrictive procedure namely, [outline procedure]
- ii. For s 6 AA to apply and for the manner and form provision to have a binding effect and impose a procedural fetter on Parliament's legislative power, the manner and form provision must be valid which will be the case if the following requirements are satisfied:

► **(1) Bind Parliament**

- The manner and form provision must pertain to processes that Parliament must follow that is, the provision must bind Parliament (as opposed to the executive or judiciary)
- This element would be satisfied here since the procedure that is stipulated in [relevant provision] is imposed on Parliament

► **(2) Mandatory or Directory**

- The manner and form provision must be mandatory not merely directory
- Hence, the provision must not give choice/grant discretion to Parliament regarding whether to follow the restrictive procedure or not
- 'shall' or 'must' suggests it is mandatory for Parliament to follow the restrictive procedure
- Whereas, 'may' suggests Parliament can exercise its discretion regarding whether or not to follow the procedure hence will not satisfy this requirement (*Clayton v Heffron*)
- It is stated in [relevant provision] that Parliament [must/may do X] in order to enact the legislation thus it would (not) be mandatory in nature suggesting this requirement is (not) satisfied

► **(3) Double entrenchment**

- For the restrictive procedure stipulated in [X] to apply to [L2], the manner and form provision must be doubly entrenched

- Double entrenchment means that the restrictive procedure provision itself must also be subject to the restrictive procedure that is, the provision must be self referential
 - For example:
 - * *'The provisions of this section shall extend to any Bill for the repeal or amendment **of this section**'*
 - * *'No Bill to amend or repeal **any provision** in this Act may be presented for Royal Assent unless it is approved at referendum'*
 - * *'No Bill to alter the composition of the Parliament, **nor this section**, may be presented unless the second reading based with the approval of an absolute majority in each of the Houses of Parliament'*
 - * *'Any Bill to **amend this Act** must be passed by an **absolute majority** of both houses of State Parliament' - s 13 Electoral Distribution Act 1947 (WA) [Marquet]*
 - [Without double entrenchment, an ordinary Act of Parliament is able to repeal the restrictive procedure provision meaning there would not be any special procedure that Parliament is required to follow to enact laws which the manner and form provision intended to apply to]
 - [relevant provision] states [evidence of double entrenchment] suggesting that the manner and form provision is itself subject to the restrictive procedure contained therein thus this requirement would be satisfied
- **It is likely that the court would conclude that the four aforementioned requirements are met**

- ▶ **However, in order for the manner and form provision to be valid, the restrictive procedure imposed needs to be considered**

Covering the field test

- Even if [state law] would not be rendered inoperative under the simultaneous obedience or conferral of rights tests, it may be found invalid under the indirect cover the field test
- Where the Cth has expressly or impliedly evinced an intention to cover the field and the state law attempts to encroach on the same field, the State law is inconsistent merely by reason of its existence (*Clyde Engineering*)
- The court will adopt the three step test articulated by Isaacs J in *Clyde Engineering* to ascertain whether [state law] is invalid on the basis of it encroaching on the field the the Cth purports to cover exclusively
- **Applies to Territory Laws**
 - Although s 109 pertains to State laws that are inconsistent with Cth laws, under s 28 of the *ACT (Self Government) Act 1988* (Cth), ACT laws are inoperative to the extent of any inconsistent with Cth law
 - **Court in *Cth v ACT* held that cover the field test is part of the analysis under s 28**
 - * In *Cth v ACT*, ACT law allowed same sex marriage; Cth laws had defined marriage to exclude same sex marriage; the court held that the Cth evinced an intention to cover the field pertaining to the definition of marriage thus the ACT law was inoperative [due to the operation of s 28 of the *ACT (Self Government) Act 1988*]

- (1) Characterise the field
- First, the court must ascertain the field of operation or subject matter that [Cth law] is regulating - whether the field is characterised in a broad or narrow manner will influence whether s 109 operates to invalidate [state law] on the basis of an inconsistency
- [party wanting state law invalid] will argue for a broad characterisation of the field since inconsistency with [Cth law] would more likely be found
 - Thus, [party wanting state law invalid] would state that [Cth legislation] covers the field of [outline field]
- Conversely, [party wanting state law valid] will argue for a narrow characterisation of the field since it would be less likely that an inconsistency with [Cth law] would be found
 - Thus, [party wanting state law valid] would state that [Cth legislation] covers the field of [outline field]
- It is important to note that the High Court had been inconsistent with how they interpret the field since such a task is inherently subjective (*Ansett*) and does not offer 'objective criteria for analysis' (Joseph and Castan)
 - Thus, both the broad and narrow characterisation of 'the field' would likely be accepted by the court
- However, on balance, the court would be more favoured by the [broad/narrow] interpretation since [outline reason]
 - **Broad view:**
 - * *Ansett* (minority) = field of Cth law was 'dismissal of airline pilots' [**Vic Act excluded**]
 - * *O'Sullivan* (majority) = field of Cth laws were 'regulation of slaughtering for export'

- **Narrow view:**

- * Ansett (majority) = field of Cth law was '*procedure* for dismissal of pilots' [**Vic Act not excluded**]

- * Airlines of NSW - purposes of the licensing schemes held to be dissimilar
[State Act was about transport, competition and suitability of the application; Cth law was about safety, regularity and efficiency]