

**LAW399 – Constitutional Law study notes**

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*The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers case) (1920) 28 CLR 129*

A claim was lodged by the Amalgamated Society of Engineers against the Adelaide Steamship Company in the Commonwealth Court of Conciliation and Arbitration for an award relating to 844 employers across Australia.

The question was whether a Commonwealth law made under 'the conciliation and arbitration' power in s 51 (xxxv) regarding industrial disputes could authorise the making of an award binding the three employers.

Knox CJ, Isaacs, Rich and Starke JJ at 154:<sup>22</sup>

Section 51(xxxv) is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned; but subject to any special provision to the contrary elsewhere in the Constitution.

Higgins J held at 161-162:<sup>23</sup>

The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament; and that intention has to be found by an examination of the language used in the statute as a whole.

There is no limitation to the power in the words of the placitum; and unless the limitation can be found elsewhere in the Constitution, it does not exist at all.

### Consequences of invalidity

When a court pronounces governmental action, legislation or decision to be invalid, the act or decision is treated as *void ab initio*. Despite this strict rule, there are numerous qualifications which exist as an exception to the rule:

In *New South Wales v Kable (Kable No 2)* [2013] HCA 26, the case concerned a challenge by one Mr Kable to the validity of a period of detention he had endured in 1995. Kable had been detained for a further six months after the expiry of his sentence for a crime pursuant to a judicial order made by Levine J under the *Community Protection Act 1994* (NSW).

Later in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, the High Court found that Act to be invalid.

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<sup>22</sup> *The Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers case)* (1920) 28 CLR 129, 154 (Knox CJ, Isaacs, Rich and Starke JJ).

<sup>23</sup> *Ibid*, 161-162 (Higgins J).

## 1. Proportionality

'Proportionality' refers to that there should be a relationship between an end and the means used to achieve that end.<sup>34</sup>

In *Leask v Commonwealth*,<sup>35</sup> Dawson J held at 605-606:

... it is my view that the relevant test of the validity of a law made under one of the substantive heads of power in s 51 of the Constitution is that of sufficiency of connection with its subject matter ... The terms 'appropriate and adapted' and reasonable proportionality' are best avoided when enunciating a test to determine whether a law exceeds a non-purposive head of power under s 51 of the Constitution.

The situation may be different where the purpose of a law is a crucial determinant of validity, as it is where a power is conferred in purposive terms ... To determine the validity of a law said to be supported by a purposive power, a court must ask whether it is a law for the specified purpose, and the court may have to inquire into whether the law goes further than is necessary to achieve that purpose. This is an exercise of proportionality.

**\*\*Dawson J rejected the use of proportionality as an aid to characterisation in relation to subject matter powers such as s 51(i), however he did recognise that it may be a legitimate aid to characterisation in relation to purpose powers such as the defence power in s 51(vi)\*\***

The majority in *McCloy v New South Wales*<sup>36</sup> held that proportionality analysis applies to 'incidental powers, which must serve the purposes of the substantive powers to which they are incidental'.

## 2. Reading Down and Severance

Section 15A *Acts Interpretation Act 1901* (Cth):

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

In *Victoria v Commonwealth (Industrial Relations Case)*,<sup>37</sup> the majority of the High Court held at 502:

Section 15A of the *Interpretation Act* (Cth) may fall for application in two distinct situations.

It may fall for application in relation to 'particular clauses, provisos and qualifications, separately expressed, which are beyond the legislative power' [*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 577]. It may also fall for application in relation to general words or expressions.

It is well settled that s 15A cannot be applied to effect a partial validation of a provision which extends beyond power unless 'the operation of the remaining parts of the law remains unchanged' [*Pidoto v Victoria* (1943) 68 CLR 87, 108]. Nor can it be applied to a law expressed in general terms if it

<sup>34</sup> J Kirk, 'Constitutional Guarantees, Characterisation, and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 2.

<sup>35</sup> (1996) 187 CLR 579, 605-606 (Dawson J).

<sup>36</sup> (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ).

<sup>37</sup> (1996) 187 CLR 416, 502 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).