

LAWS5101:

Constitutional Law

Question 1: 24 minutes (*10 marks*)

Question 2: 48 minutes (*20 marks*)

Question 3: 48 minutes (*20 marks*)

Total: 120 minutes (*50 marks*)

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A. INTERPRETATION AND CHARACTERISATION

(1) INTERPRETATION: What is the scope of the HOP?

- In the early years of the Australian Commonwealth the 'reserved State powers' doctrine dictated that the grants of law-making power given to the Commonwealth should be narrowly interpreted (e.g. *R v Barger*)
- However, this doctrine was 'exploded' in the *Engineers Case*
 - Isaacs J in *Engineers Case*: 'The Constitution must be read 'naturally and in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, then *luceat ipsa per se*' (i.e. it shines from within)
- The current approach to constitutional interpretation is dominated by 'legalism'
 - 'Legalism is widely accepted as the orthodox methodology for constitutional adjudication in Australia ... At its core is insistence that courts resolve questions before them by reference to standards drawn from a body of existing law and not on standards that are "subjective or personal" to a judge'
- Note the relevance of the *Jumbunna* principle:
 - 'Where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should... always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose'

(2) CHARACTERISATION: Does the law fit within the constitutional HOP?

- The HOPs in s 51 and 52 are divided into 'subject matter' powers and 'purpose' powers
- Different test of characterisation is applied depending on how the HOP is categorised
 - Subject matter powers – 'sufficient connection' test
 - Purpose powers – 'proportionality' test

	Subject matter power	Purpose power
Definition	Powers that describe things like an activity, a type of person, a recognised category of legislation or an object	Powers that involve the notion of purpose
Test	Sufficient connection test	Proportionality test
Difficulty of the test	Sufficient connection is less demanding for the Commonwealth – only need the connection not to be tenuous or vague	Proportionality is more difficult for the Commonwealth – need to look closely at what the legislation is doing (i.e. means and ends)
Examples	<ul style="list-style-type: none"> • s51(1) – trade and commerce power • s51(2) – taxation power • s51(20) – corporations power 	<ul style="list-style-type: none"> • s51(6) – defence power • s51(24) – external affairs power

Most authoritative approach: *Grainpool*

1. Constitutional text must be construed 'with all the generality which the words used admit' (*Aus. Nat. Airways*)
2. The character of the law must be determined by reference to the rights, powers, liabilities, duties and privileges which the law creates
3. Examine the practical and legal operation of the law to see determine if sufficient connection test is satisfied
4. Dual characterisation: If the law is a law w.r.t. two subject matters (one under s51, one not), the law will still be valid notwithstanding the fact that there's no independent connection between the two subject matters (*Re F*)
5. It is irrelevant to consider the justice and wisdom of the law, or whether it is necessary or desirable, because this is a matter of legislative choice

Single vs. dual characterisation

- **Current test = dual characterisation:** laws may possess dual or multiple characters and only one of these need to be 'with respect to' a head of power (e.g. *Fairfax*, *Murphyores*)
- **Old test = single characterisation:** look for the 'pith and substance' of the law (*Re Barger*)
 - Problematic approach to characterisation because laws could have more than one character – e
 - However phrase this went out of fashion in the *Bank Nationalisation* case

Interaction between heads of power

- General rule: one head of power may not fetter the scope of another head of power
 - Example: Cth cannot pass legislation w.r.t. Intrastate trade and commerce under s51(1) however it is possible to use another head of power (e.g. corporations or taxation) to legislate the activity in question
 - Head of powers are given a broad and general meaning, they are NOT read down in light of each other
- Exception: this rule does not apply where the head of power subject to an express reservation
 - Example: s51(13) 'banking, other than State banking' (*Bourke*)

Fairfax v Federal Commissioner of Taxation (1965)

- Section 11 of the *Income Tax & Social Services Contribution Assessment Act 1961* (Cth) inserted an amendment that could be used to induce trustees of superannuation funds to invest in Cth bonds by: (1) exempting the funds from income tax if they did and; (2) subjecting them to a special rate of tax if they did not
- Issue: Was s11 validly enacted under the s51(2) taxation head of power?
- Held: this section was valid – dual characterisation approach applied
- Kitto J: In substance, this is a law about encouraging a certain type of behaviour (e.g. buying government bonds) rather than tax – however this does not matter provided that one of these characters relates to a HOP
 - The dual characterisation approach is very empowering to the Cth – they can use the taxation HOP for all sorts of purposes, not just that they are using it to for the purposes of raising revenue

Murphyores Incorporated Pty Ltd v Commonwealth (1976)

- Section 112 of the *Customs Act 1901* (Cth) gave power to make regulations prohibiting exports
- Regulation (3) provided that the approval of the Minister was required for certain exports
- MI Pty Ltd was a group of companies wanting to mine on Fraser Island
- They were told that no decision on their application would be made until an inquiry was undertaken under s11 of the *Environment Protection (Impact of Proposals) Act 1974* (Cth)
- MI adopted a single characterisation, *Barger* argument: the law should be characterised as environmental, rather than trade and commerce – i.e. there is no environment HOP so the law would be rendered invalid
- Held: this argument failed, legislation was valid – dual characterisation approach applied
- Mason J: all that was necessary to determine was that this legislation was relevant to trade and commerce – it was because it is a prohibition w.r.t. imports and exports
- It is not relevant that the purpose of the legislation was environmental protection because (1) you can characterise legislation in multiple ways and; (2) motives are not relevant – it is not the judiciary's role to second guess what the legislature are trying to achieve

Re Dingjan; Ex Parte Wagner (1995)

- McHugh J: if a connection exists between the law and the HOP, the law will be 'with respect to' that head of power unless the connection is 'so insubstantial, tenuous or distant' (Dixon J in *Melbourne Corporation*)
 - Sufficient connection test is not particularly demanding
 - The law is constitutionally valid provided you: (1) interpret the HOP, (2) characterise the law, (3) the law operates w.r.t. the HOP; and (4) there is no 'insubstantial, tenuous or distant' connection between the two

(3) CONSEQUENCES OF INVALIDITY

- If all or part of the statute is invalid, the relevant provisions are void *ab initio* – i.e. from the beginning
- If part of the statute is invalid, this provision may be 'severed' from the statute provided the remaining provisions can continue to operate without this provision
- Alternatively, the statute may be 'read down' – i.e. if the statute has more than one meaning (one is valid, one is invalid), the court can 'read down' the statute by selecting the meaning that is constitutional (*Public Service Association of SA*)