

## TOPIC A PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

**Section 51:** the Heads of Power gives power to the Cth Parliament to make laws with respect to subject matters

- These are concurrent powers: States can still legislate in these areas, but in the event of an inconsistency, the Cth law prevails (s 109) 109
  - Moreover, Cth has these powers whilst States have the residue

## METHODS OF CONSTITUTIONAL INTERPRETATION

Engineers (1920)

**Dominant interpretational approach:** strict legalism, textualism, and reference to context only when there is any degree of ambiguity

- read it naturally in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law and the statute which precedes it.
  - Focus attention on the actual words used, understood in their ordinary or natural meaning

### Doctrines rejected:

- **Doctrine of reserved state powers:** that constitutional provisions must be interpreted in a way that does not take away the powers of the state
- **Doctrine of implied immunity of government instrumentalities:** that constitutional provisions must be interpreted in a way such that no Cth (state) laws can bind state (Cth) governments and their public servants

Examine the full import of the powers conferred on Parliament without recourse to such doctrines, or other extraneous considerations (e.g., reference to views of the framers/philosophies or political considerations not permitted) /

Whilst there is no required interpretational approach, the dominant approach is still legalism and textualism (focusing attention on the actual words used, understood in their ordinary or natural meaning)

- However, from 1988 onwards, the court will revert to a degree of originalism if what the Constitution is trying to achieve is not clear 1988
  - Originalism: determining the meaning of the Constitution's words by looking to their meaning in 1900 and to discussions amongst the framers of the Constitution 1900

## PRECISE TECHNIQUES OF CONSTITUTIONAL INTERPRETATION

In examining the constitutional validity of an Act, two fundamental steps must be taken:

### CHARACTERISATION & INTERPRETATION

#### *(1) Interpret the relevant constitutional provisions*

**Process:** define the relevant **head of power**: what is the core meaning, and what matters incidental to that core can also be regulated?

- To do so, give heed to the **Engineers principles** and the principle that the constitutional text is to be construed with all the generality which the words used admit (**Grain Pool of Western Australia v Cth**)
- Consider whether the head of power is a **purposive or non-purposive power**
  - **Purposive:** the relevant law must not only relate to the subject matter, but **must also be exercised pursuant to the specific purpose provided for in the head of power**
    - E.g., s 51(vi) **defence power**: law must not only regulate armed forces but be for the purpose of defending the Cth and maintaining the Constitution and its laws
  - **Non-purposive:** powers that simply state a subject matter: an activity (e.g., trade and commerce, external affairs, taxation, immigration) or a type of person (aliens, corporations) or an object (lighthouses, fisheries, currency)

- E.g., taxation power: as long as the Statute is with respect to taxation, it can be for whatever purpose the Parliament wants

**(2) Characterise the Act in order to determine whether the impugned legislation falls within the scope of the subject matter**

- Characterise the Act to determine its subject matter (and purpose, if the power is purposive)
  - e.g., the Act deals with transportation of commercial goods between states
  - determined by reference to: the rights, duties, powers and privileges which the law changes, regulates or abolishes: Fairfax
- Examine the practical as well as legal operation of the law to determine if there is a **sufficient connection to the head of power** (as interpreted) : Grainpool
  - **principle of dual characterisation applies** (Fairfax): if at least one of the possible (and plausible) characterisations of the statute brings it within power, then the Statute will be within power/valid/
    - The fact that only some elements in the description of law fall within one or more heads of power won't be fatal to the law's validity, so long as the remaining elements are not of such significance that the law cannot fairly be described as one with respect to one or more heads of power: *Fontana Films*
- **PLUS, if the law is purposive:** determine whether the law satisfies the purpose of the head of power determine its subject matter

**THEN ASK:** even if the impugned legislation is authorised by a head of power, does the law breach the constitution in some other way?

- Does it breach any express or implied constitutional prohibitions?

**Murphyores v Cth (1976):** purposive/non-purposive powers distinction/

**FACTS:**

- Regulation passed pursuant to the Customs Act (Cth):
  - The export of minerals without the written approval of the Cth Minerals minister was prohibited
  - Power was used here by the Cth for what appeared to be environmental purposes, i.e., purposes which appear to be extraneous to trade and commerce
- Minister denied consent on the basis of environmental concerns
- The plaintiffs argued that the prohibition was invalid since the trade and commerce power was being exercised for an environmental protection purpose

**PRINCIPLES:**

- **The trade and commerce power is not a purposive power** and it is thus irrelevant that the law is administered using criteria with little or no apparent relevance to trade or commerce
- It is enough that the law deals with this permitted topic and it does not cease to deal with that topic because factors extraneous to the topic may be taken into account in the relaxation of the prohibition imposed

**Fairfax v Federal Commissioner of Taxation (1965):** rejection of dominant characterisation approach and acceptance of dual/multiple characterisation approach/

**FACTS:**

- The Parliament amended the Income Tax Act to exempt income earned by super funds from income tax if a specified portion of funds were invested in government bonds
- The aim of the legislation was to provide an incentive to invest in government bonds
- It was argued that the statute was not with respect to taxation, but must be characterised as providing incentives for investment in certain asset classes and was thus invalid

- At that time the court adopted a dominant characterisation approach: **in order to see if the statute is in power, you had to determine its dominant characterisation**

**ISSUE:** Are such provisions within the taxation power?

**PRINCIPLES:** Rejected the dominant characterisation approach, adopting the dual/multiple characterisation approach: **if one of the statutes characterisations brings it within power, then it is within power/**

**HELD:**

Applying the dual characterisation approach, the court held that even though taxation/revenue raising was not the dominant characterisation of the statute, it could nonetheless be characterised like this in a minor way and thus the statute was within power/

- What appears to be a taxing measure does not cease to be one with respect to tax merely because it deters taxation. We look at any changes to tax liability
- Head of power was taxation, and since the subject matter changed obligations regarding tax, it fell within that head of power

### **READING DOWN & SEVERANCE**

If the law is *prima facie* unconstitutional:

- Can the statute be validly read down
- If the statute is still invalid, can the Court sever the offending section?

### **s 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.**

- **Application:** *Industrial Relations Case*
  - (1) To particular clause, provisos and qualifications, separately expressed
  - (2) In relation to general words or expressions
- **Consequence:** s 15A has introduced a rule of construction whereby **unless an intention affirmatively appears (from the text, context, content or subject matter of the provisions) to the contrary, a statutes are to be taken as independent of one another and not interdependent:** *Airlines Case 15A*
- **Limitations:** *Industrial Relations Case*
  - (1) The operation of the remaining parts of the law must remain unchanged
  - (2) Cannot be applied to a law expressed in general terms if it appears that the law was intended to operate fully and completely according to its terms, or not at all

### **READING DOWN**

- Saving impugned legislation by interpreting it in a way which is within power

### **Requirements**

- The law must be ambiguous
- The law permits two or three meanings

Where one meaning is constitutionally valid, this will be selected

### **Limitations:**

- If the read down interpretation no longer means what Parliament intended it to mean
- If the expression is undistributed i.e., when a regulation encompasses another thing, you cannot read from it a division or limitation

### **SEVERANCE**

- Cutting away invalid parts of an Act so that the rest can be enforced
- Most appropriate where the invalidated portions are relatively few and specific: Industrial Relations Case

**Limitations:** severance will not be possible if:

- (1) The rest of the Act cannot operate without the part that you wish to sever;
- (2) The Act does not make sense without the severed provision;
- (3) The remainder of the Act imputes a new meaning on the statute so as to undermine the true meaning of the Act (the remaining Act is clearly contrary to the intention of Parliament)
  - Severance cannot substantially alter the appearance of the law, presenting a law that looks quite different from that which was made by the Parliament (Kirby J in Word Choices Case)

[s 51\(i\): the trade & commerce power](#)

## TRADE & COMMERCE POWER

- (1) Is the law with respect to the express power? (NB: non-purposive)
- (2) Is the law with respect to the incidental power? (NB: non-purposive)
- (3) Is the law invalid for some other reason?
- (4) Can the law be read down or severed?

[s 51 Australian Constitution](#)

The Parliament shall, subject to this Constitution, have power to make law for the peace, order, and good government of the Commonwealth with respect to:

- (i) trade and commerce with other countries, and among the States

### THE EXPRESS POWER

The subject matter that the law deals with must be:

- (1) With respect to trade or commerce; and
- (2) Occurring:
  - (i) with other countries; and/or
  - (ii) among the States

Once the legislative power over the matter is established, it becomes irrelevant how, or upon what grounds, or for what motives it is exercised: [Huddart Parker](#)

- **s 51(i) a non-purposive power**, thus [X purpose of Parliament in enacting provision Y] is irrelevant 51(i) [X Y] : [Murphyores](#)

### Interpretation

- The term trade and commerce is to be understood in the same way as ordinary commercial people would understand it
- The words trade and commerce are to be interpreted broadly and flexibly, and are to be adopted to changing circumstances : [ANA v Cth](#)
- **The commerce power is defined by reference to subject matter, not purpose:** [Murphyores](#)

### General principles

- Profit is not necessary: [Bank of NSW v Cth](#) (Dixon J)
- Governments themselves can participate in trade and commerce: [ANA v Cth](#)

### Subject matters included in the power

- Transportation: [Airlines Case of 1945](#)
  - Incl. all the commercial arrangements of which transportation is the direct and necessary result: [W & A McArthur](#)
- Purchase or sale of commodities: [W & A McArthur](#)

- Movement of persons and things: [W & A McArthur](#)
  - All the commercial dealings and all the accessory methods in fact adopted by Australians to initiate, continue and effectuate the movement of persons and things from State to State
  - The supply of gas; the transmission of electric current: [Bank of NSW v Cth](#) (Dixon)
- Transporting merchandise over the frontier: [W & A McArthur](#)
- Creation of government owned transport services: [ANA v Cth](#)
- Intangibles: [Bank of NSW v Cth](#) (Dixon J)
- Communication: [Bank of NSW v Cth](#) (Dixon J)
  - The telegraph, the telephone, the wireless, broadcasting, television, visual signals
- Enactment of pricing regulations: [W & A McArthur](#)
- Power to select and identify people who may engage in, and goods that may be the subject of, trade and commerce: [ANA v Cth](#)
- Transportation, traffic, movement, transfer, interchange: [Bank of NSW v Cth](#) (Dixon J)
- The importation and exportation of goods: [Murphyores](#)

**Australian National Airways Pty Ltd v Commonwealth (1945):** rejection of view that transport was merely an instrument of trade, not trade itself

**FACTS:**

The Cth government enacted the Australian National Airlines Act 1945 (Cth) 1945

- This established the ANA Commission to operate government-owned airlines for domestic travel in Australia
- s 19(1) empowered the ANA Commission to transport, for reward, passengers and goods by air 19(1) :
  - between any place in a State and any place in another State, or between territories; and
  - between any place in any Territory and any place in Australia outside that territory
- Part IV effectively established a monopoly for that government airline

**ISSUE:**

Major issue: was the Act within power?

Sub-issues:

- (a) Could the government itself engage in trade and commerce?
- (b) Is transport part of trade and commerce?
- (c) Can the law create a government monopoly (s 92 issue)?
  - Argued that the monopoly breaches [s 92 Constitution](#), that trade and commerce amongst the States shall be absolutely free 92

**HELD:**

[s 19\(1\)](#) was valid, but Part IV was invalid. Part IV could not be read down as it was clearly establishing a monopoly. It was thus severed. After severance, the rest of the Act was valid 19(1) IV

- (a) Yes: the mere fact that Parliament has the power to regulate something does not prohibit it itself from engaging in it
- (b) Trade and commerce include the transportation of goods and persons when undertaken for reward (whatever may be the reason or purpose for which the goods or persons are in transit i.e. does not need to be for trade/commerce). It also includes the actual movement of persons or goods even without profit/
- (c) No. Establishing a monopoly is within the trade and commerce power, since a power to regulate includes the power to prohibit. However, whilst the law was within power, it breached another constitutional provision (s 92) 92

## **THE INCIDENTAL POWER**

**Principle:** where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention [i.e., implied], every power and every control the denial of which would render the grant itself ineffective'[]: **DEmden v Peder**

- Included in the power is the power to make laws governing or affecting many matters that are incidental or ancillary to the subject matter directly in power
- **Result:** where the legislative provision falls within the incidental power, it is just as valid as if it were found to be directly within a head of power

**Test:** Nationwide News (Mason J)

- The provision is **appropriate and adapted** to effectuate the exercise of the trade and commerce power intrastate trade and commerce

### ***Scenario A: Intrastate trade and commerce***

**General rule:** section 51(i) does not permit the regulation of intrastate trade, the HCA rigorously maintaining the distinction between inter-state and intra-state trade however artificial [the distinction] may appear and whatever interdependence may be discovered between the branches 51(i) HCA []: Burgess

- Commingling theory has no application in Australia
- NB: if the impugned provision contains an undistributed expression, this cannot be read down to exclude the intrastate element, thus rendering the impugned provision invalid

**Exception:** where it is necessary for the Cth to regulate intra-state trade and commerce in order to effectuate their regulation of interstate trade and commerce: **Airlines (1965)** (Barwick CJ)

- **Limitation:** incidental power can only be used to protect interstate trade and commerce from physical interference. It cannot be used to secure the economic efficiency of interstate trade and commerce:  
**Western Australian Airlines Case**
  - However, this may only apply to transport cases: see Redfern
  - Moreover, it may not deny arguments of economic necessity: Latham CJ in Burgess

## **Regulation of transport**

### **R v Burgess; Ex parte Henry (1936)**

- (i) Assertion of the constitutional distinction drawn between intra-State and inter-state T&C T&C ;
- (ii) **Rejection of the US commingling theory** i.e., that where inter-state and intra-state trade and commerce are so intermingled that it is practically essential to control all of them as one subject matter
  - However, query what would happen if it were established by evidence that the intermingling of foreign and inter-State trade and commerce with intra-state trade and commerce was such that it was impossible for the Parliament to regulate the former without also directly regulating the latter: Latham CJ
  - However, rejection does not deny that there may be occasions when parts of intra-State aviation will be seen to occupy so direct and proximate a relationship to inter-State aviation that the agents and instruments of the former will be drawn into the ambit of the federal power, for otherwise the particular Cth regulation would be entirely frustrated and nullified Cth : Evatt and McTiernan JJ
- (iii) **Confirmation that an undistributed expression could not be read down: when a regulation encompasses another thing, you cannot read from it a division or limitation**

### **FACTS:**

- Unlicensed pilot prosecuted for flying within NSW in contravention of Reg. 6 Air Navigation Regulations (Cth)
  - Regulations prohibited an unlicensed person from flying an aircraft within the limits of the Cth

- Pilot argued that the regulations were because they made no distinction between intra and inter-state flights
- Cth argued that in order to deal effectively with the subject of aircraft flying between States or internationally, the Parliament must also have the power to deal with aircraft flying only intrastate but which use, as a matter of absolute necessity, the same air, and as a matter of practical necessity, the same aerodromes. Cth .

**ISSUE:** Was the regulation valid within the incidental power?

**HELD:**

The regulation fell beyond the Cths power under s 51(i), since it purported to apply across the board to all forms of transport without limiting itself to inter-state and overseas transport 51(i)

- The Commonwealth argued that the commingling in air routes and airports of aircraft proceeding intrastate with those traveling interstate, enabled it to control all aircraft. The Court rejected the commingling argument, preferring to maintain a distinction between interstate and intrastate trade. Mr Henry could not be prevented by the Commonwealth from stunt-flying around Sydney Harbour under the commerce power. **The Constitution clearly distinguished between intrastate and interstate commerce, and confined the Commonwealth to the latter.**
- The division between interstate and intra-state trade and commerce was confirmed despite its artificiality and despite whatever interdependence may be discovered between the two divisions (Dixon J)
- The offending phrase **within the limits of the Commonwealth could not be read down to just interstate** as it was **an undistributed expression** i.e., it did not distinguish interstate from intrastate travel

#### **Airlines of NSW Pty Ltd v NSW (No 2) (1965)**

- Although the Commonwealth has the power to regulate interstate air navigation under s 51(i) of the Constitution, **it can only regulate intrastate air navigation under the implied incidental power attached to that head of power.** 51(i)
- Express rejected the adoption of the broader, more liberal US substantial effect test, as there appear to be no limits to it
  - Distinction must be observed however much inter-dependence may now exist between the two divisions of trade and commerce: Barwick CJ
- Rejected that arguments of economic efficiency could be used to invoke the incidental power
  - However, didnt comment on arguments of economic necessity

**Ratio:** intrastate air navigation can be regulated to the extent that it provides for the safety of, or prevention of physical interference with, interstate or overseas air navigation

- Limitation: this does not extend to incidental/merely consequential matters such as the economic viability of interstate trade/

**FACTS:**

- 6(1)(f) of Air Navigation Regulations (Cth) expressly made the Cth regulations applicable to intrastate air navigation(Cth) 6(1)(f) Cth
  - Regulation 198 prohibited the use of an aircraft in public transport operations except pursuant to a licence issued by the Director-General of Civil Aviation 198
  - Regulation 199, in granting a license, the DG was required to have regard to: safety, regularity and efficiency of [inter-state] air navigation and to no other matters 199 []
  - Regulation 200B provided an airline licence authorised the conduct of operations in accordance with the provisions of the licence 200B
- The plaintiff unsuccessfully applied for a licence to carry out commercial operations between Sydney and Dubbo (intrastate)

**ISSUE:** Could the Cth regulations extend to cover purely intrastate flights?

**HELD:**

- Upheld Reg 198 and Reg 199: it was impossible to adequately regulate and protect the safety of aircraft engaged in interstate and overseas trade without regulating all aircraft in Australia Reg 198Reg 199
- Reg 200B invalid as it applied to intra-state navigation. Reg 200B .
- Within the competence of the Cth under s 51 to make laws that secure and promote the safety of the air, including the efficiency and regularity of inter-State and foreign air operations, as a means of protecting and fostering inter-state and foreign trade and commerce 51 : Barwick CJ
  - All air operations must be subject to the same control if the air is to be safe for inter-state and foreign commercial air transport: and, if inter-state and international commercial air traffic is to be encouraged, more than minimal standards of safety are required
  - The efficiency and regularity of air operations were seen as bearing directly upon the safety of the air operation itself
  - However, occasions when the particular subject matter of the law and circumstances surrounding its operation require that if the Cth law is to be effective as to inter-State or foreign trade and commerce that law must operate indifferently over the whole area of the relevant activity, whether I the intra-state or inter-state
- Kitto J drew a distinction between intra-state activities which operate upon the **physical/actual conduct of the Cth power** (e.g., safety) and **matters which are purely consequential** (e.g., profit or loss likely to result). Kitto J /.
  - Law was valid because it operated to protect against real possibilities of physical interference with the actual carrying on of air navigation
  - Query whether distinction applies only to transport cases

**Western Australian Airlines Case (1976):** accepted the incidental power if it applies to protecting the interstate trade from physical interference, but rejected that you could use the incidental power to regulate intrastate trade on the basis of economic efficiency

**FACTS:**

- s 19 of the Australian National Airlines Act 1945 (Cth) authorised the commission to operate services on interstate
- s 19B authorised the commission to operate air services between planes in the one State (i.e., intra state) where this was done for efficient, competitive and profitable conduct of the business of the Commission in respect of conducting interstate services
- Government airline authorised to conduct an air service between Perth and Darwin, but they said there would be a stopover in Port Headland in WA
  - Argument for stopover was to make it more economically profitable

**ISSUE:** Was s 19B valid? More generally, does s 51(i) include a grant of power to legislate for intrastate trade and commerce **when its only relationship to interstate trade or commerce lies in the fact that the purpose of engagement in such intrastate activity is to conduce to the efficiency, competitiveness and profitability of the interstate activity?** s 19B 51(i)

**HELD:**

s 51(i) did not authorise the intrastate flight. **Arguments of economic efficiency is not sufficient to invoke the incidental power 51(1)**

Murphy J (dissent): The legislation meets the criteria of connection with interstate government air transport services since it is obviously connected with the protection of revenues and expenditures of the Cth and promotion of interstate trade and commerce

Mason J (dissent): No practical difference between the economic and physical protection of the trade, since the practical result of both is that the trade would not occur or would diminish

- Extrajudicial comments: