

LAW2011 FEDCON – PROBLEM QUESTION SCAFFOLDS

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Topic A: Principles of Constitutional Interpretation and Characterisation

1. Federal Constitutional Law

a. Doctrines of Federalism (Pre-Engineers) → no longer applied

- i. **Implied Immunity of Instrumentalities** – Each govt, as a sovereign entity, cannot be bound by the other's exercise of legislative power
 1. **Implied Reserved State Powers**
 2. If a broad or narrow interpretation of a Commonwealth grant of power is possible, the Court must prefer to narrow interpretation to ensure that Cth power does not encroach on the 'residual power' of the States

2. Engineers Case

a. General Principles

- i. The court essentially axed the entire doctrine of both implied immunity of instrumentalities and the reserved powers doctrine
- ii. Take a natural reading approach first from the text of the Constitution moving towards a model or theory of federalism
 1. I.e. more legalist interpretation – not just literal interpretation of the text
- iii. Must apply the 'settled rules of construction' (143)
 1. '... finding the intention from the words of the compact, and upholding it throughout precisely as framed' (142)
 2. Focus must be on, first, the 'natural meaning' of empowering provisions, 'unrestricted' by implied theory (144)
 3. 'The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally 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, and then *lucet ipsa per se* [the thing reveals itself].' (152)

3. Constitutional Interpretation and Characterisation

- a. **Interpretation** → about heads of power in the **Constitution**
- b. **Characterisation** → what the law that has been passed means
- c. **Determine if Cth or State Act**
 - i. If State Act: As State Parliaments have plenary legislative power, subject only to prohibitions in the Constitution, X is prima facie valid
 1. Is the State law inconsistent with a Cth law? **(s 109)**
 - a. Does the State law breach an express or implied limit or prohibition in the *Constitution*? **(IFPC; s 90; s 92 etc)**
 - i. E.g. it will be invalid if it breaches s 92 Constitution by restricting the freedom of interstate trade and commerce
 - ii. **If Cth Act:** Even if X is within power pursuant to **s 51(i)**, it will be invalid if it breaches the prohibition in **s 92 Constitution** [Note: much harder for protectionism to be made out with respect to Cth laws]
 1. **Continued below**
- d. **Is the Act of the Cth Parliament invalid?**
 - i. **S 51 of Constitution** – Heads of Power give power to the Cth Parliament to make laws with respect to 39 subject matters
 1. These are **concurrent powers**: States can still legislate in these areas, but in the event of an inconsistency, the Cth law prevails **(s 109)**
 - ii. **Interpret the relevant constitutional provisions**
 1. **STEP 1:** Define the relevant head of power – what is the ‘core’ meaning and what matters ‘incidental’ to that core can also be regulated?
 - a. Look at the **Engineers** principle – “constitutional text is to be construed with all the generality which the words used admit”
 2. **STEP 2:** Is the head of power purposive or non-purposive power?
 - a. **Purposive: must be exercised pursuant to the specific purpose provided for in the head of power**
 - i. E.g. Defence power: law must not only regulate armed forces but be for the purpose of defending Cth + maintaining Constitution and its law
 - b. **Non-purposive: simply state a subject matter**
 - i. Trade and commerce, external affairs, taxation, immigration
 - ii. Aliens, corporations OR
 - iii. Lighthouses, fisheries, currencies
 - iii. **Characterise the Cth Act** to determine whether the impugned legislation falls within the scope of the subject matter
 1. **[STEP 1 (OPTION A)]:** If power is **purposive**: characterise the Act to determine its **subject matter + purpose**
 - a. E.g Act deals with transportation of commercial goods between states
 2. **[STEP 1 (OPTION B)]:** If power is **non-purposive**: characterise the Act to determine its **subject matter**
 3. **[STEP 2]:** Examine the practical and legal operation of the law to determine if there is a **sufficient connection** to the head of power **(Grainpool)**
 - a. Must be interpreted with strict textualism so that the Constitution is read “naturally 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 precedes it and then the thing reveals itself'

(Engineers)

- b. **Dual characterisation** principle applies **(Fairfax)**: If at least one of the possible characterisations of the statute brings it within power, then Statute will be valid (more than one head of power)
- c. The fact that only some elements in the description of law fall within 1 or more heads of power won't be fatal to the law's validity, so long as the remaining elements are not of such significant that the law cannot daily be described as one with respect to 1 or more heads of power

(Fontana Films)

iv. **Express limits and prohibitions:** Even if the impugned legislation is authorised by a head of power, the next question is whether the law breaches the constitution by way of either express or implied prohibitions (e.g. State banking)

v. **If the law is prima facie unconstitutional...**

1. Generally – Look at whether:

- a. The statute can be validly 'read down'
- b. If the statute is still invalid, can the Court sever the offending section?
- c. **S 15A of the Acts Interpretation Act 1901 (Cth):** Construction of Acts to be subject to Constitution

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

2. **STEP 1: Reading Down**

a. Reading down = saving impugned legislation by interpreting it in a way which is within power

i. Requirements

1. The law must be ambiguous

a. The law permits two or three meanings

b. Where one meaning is constitutionally valid, this will be selected

b. NOTE: Reading down not possible if:

i. The 'read down' interpretation no longer means what the Parliament intended it to mean;

ii. The expression is undistributed e.g. when regulation encompasses other things, you cannot read it from a division;

iii. The language of the statute does not lend itself to reading down, or there is a clear intention that the provision was to operate 'in a way which must inevitably lead to invalidity' **(Monis [329])**;

iv. Reading down can be done in multiple ways and the law does not point to one way over another **(Industrial Relations Act Case 502)**

3. **STEP 2: Severance**

- a. Severance = cutting away invalid parts of an Act so that the rest can be enforced
- b. Most appropriate where the ‘invalidated portions are relatively few and specific’ (**Industrial Relations Case**)
- c. NOTE: Severance not possible if:
 - i. The rest of the Act cannot operate without the part you wish to sever;
 - ii. The Act does not make sense without the severed provision;
 - iii. The remainder of Act imputes a new meaning on the statute so as to undermine the true meaning of the Act (remaining Act is clearly contrary to the intention of Parliament);
 1. 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 **Work Choices Case**)
 - iv. The rest of the act does not ‘remain unchanged’
 1. The law ‘was [not] intended to operate fully and completely according to its terms, or not at all’ (**Victoria v Cth**)
 - v. The court can *interpret* the law, but not in a way that is so radically different that it is “new” law because ‘**the Court cannot be required to perform a feat that is, in essence, legislative and not judicial**’ (Kirby J in **Work Choices Case**)

4. Trade and Commerce

a. Determine if Cth or State

- i. **S 51(i)**: The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (i) trade and commerce with other countries, and among the States ...
- ii. **S 92**: ... trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free
- iii. **S 98**: The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

b. Interpretation and characterisation (see above if unclear)

- i. It is a **non-purposive power** → reason why Cth is regulating is irrelevant
 - a. AKA: government can regulate and prohibit exportation

c. EXPRESS POWER: Is the law with respect to the express power?

- i. GENERALLY: The law will be supported by the trade and commerce power under **s 51(i) of the Constitution** if:
 1. About **interstate and overseas** trade and commerce OR
 - a. Interstate = between states
 - b. Intrastate = within a state (exclusion derived from the word “among” in s 51(i))
 2. Regulates a matter incidental to interstate and overseas trade and commerce, such that it is supported by the incidental power) (→ go to **c. incidental power**)

- ii. **STEP 1:** Identify what the law trying to do?
 - 1. E.g. The Act is a conditional prohibition on manufacturing drugs for export
- iii. **STEP 2:** What does ‘trade and commerce’ mean?
 - 1. Ordinary meaning as understood by businesspeople (sale of goods and services) (*WA McArthur v Qld*)
 - 2. Profit is not necessary (e.g not for profit per Dixon J in *Bank Nationalisation Case*)
 - 3. “Show at least it has some definable relationship with that class of trade and commerce.” (*Pape*)
 - a. Pape – did not show “purpose that the trade and commerce in which recipients of the bonus will participate will be trade and commerce with other countries, and among the States” (*Pape*)
 - 4. Includes:
 - a. Transportation (*Airlines Case*)
 - b. Purchase or sale of commodities (*WA McArthur v Qld*)
 - i. Commodity – “Movement of a person, thing, tangible or intangible’ from one state to another.” (*WA McArthur v Qld*)
 - c. The supply of gas; transmission of electric current (*Bank of NSW v Cth*)
 - d. Communication - telephone, telegraph, wireless, broadcasting, TV, visual signals (*Bank of NSW v Cth*)
 - e. Creation of government owned transport services (*ANA v Cth*)
 - f. Intangibles (*Bank of NSW v Cth*)
 - g. Enactment of pricing regulations (*WA McArthur v Qld*)
 - h. Power to select and identify people who may engage in, and goods that may be subject of, trade and commerce (*Murphyores; ANA v Cth*)
 - i. Importation and exportation of goods (*Murphyores*)
 - 5. NOT:
 - a. Production/manufacturing
- iv. **STEP 3:** Does it satisfy ‘Among the States’ (**s 51(i)**)
 - 1. Why does it have to be among the states: “Trade and commerce
 - a. Fundamentally based on actual movement across borders
 - b. Includes:
 - i. “All carriage for reward of goods or persons between States...whatever may the reason or purpose for which the goods or persons are in transit.” (*Airlines Case*)
 - ii. Intangibles and movement of goods and persons (*Bank Nationalisation Case*)
 - 1. Supply of gas and transmission of electric current
 - 2. Communication including telegraph, telephone, wireless, broadcasting
 - 2. Does not include:
 - a. Petroleum exchange scheme involving distribution across states but did not require transport across state borders (*HC Sleight v SA*)
- v. Other
 - 1. There must be sufficient connection between the law concerned and s 51(i)

2. This is 'wide enough to be capable of flexible application to the changing circumstances' (Dixon J in *Airlines Case*)

vi. RESULT:

1. **If it falls under trade and commerce → Cth law is prima facie valid**
2. **If NOT** purporting to regulate interstate trade to commerce → look at whether it is nevertheless **still valid under the incidental power?** [GO TO NEXT STEP]

d. **INCIDENTAL POWER: Is the law with respect to the incidental power?**

- i. Principle: Where 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 (**s 51(xxxix); *D'Emden v Peddler***)
 1. Establish that all heads of power have an implied incidental power, the standard of which is whether a 'provision is appropriate to effectuate the exercise of the power' (Mason CJ in *Nationwide News Pty Ltd v Wills*)
- ii. **For intrastate trade and commerce**
 1. [Starting Point] **Section 51(i)** does not permit the regulation of intrastate trade with the HCA maintaining distinction between interstate and intrastate trade (***Burgess***)
 2. [Exception] Unless 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 (Kitto J in ***Second Airlines Case***)
 - a. BUT: Incidental power can only be used to protect interstate trade and commerce from physical interference → CANNOT be used to secure the economic efficiency of interstate trade and commerce (***Western Australian Airlines Case***)
- iii. **For Production of Goods/Mining/Farming (*Noarlunga*) – EXCLUSIVE TO PRODUCTION**
 1. **Incidental power can extend to matters antecedent or subsequent to trade and commerce.**
 2. [STEP ONE] Is it necessary to regulate the production of these goods to make effective the Commonwealth's regulation over the product to be exported?
 - a. **Does it beneficially or adversely affect the export trade of Australia?**
 - i. E.g Grade/quality of foods, the packing, description, labelling, handling of goods
 - b. LOOK AT PURPOSE: What is the Cth seeking to do?
 - c. Usually includes anything reasonably considered likely to affect an export market by developing or impairing it
 - d. [Result] If it affects export trade → go next step
 3. [STEP TWO] Is there **some objective concept being regulated**, in the mind of the legislator, rather than leaving the operation of Commonwealth law up to the subjective intentions of the producer?
 - a. Is there an objective difference between producing domestically vs for exports?
 - b. If YES → falls within incidental range + CAN regulate for production

