

Constitutional Law

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Week 1 – Intro & Constitutional Interpretation

Paramount Cases

Both the 'Engineer's Case' and the 'Jumbunna Principle' interpret the following sections & concepts:

S 51 (xxxv) → 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State'.

- Industrial relations (between employers & employees) is a matter traditionally within state power. S 51 (xxxv) however gives Cth authority to make laws when such a dispute extends beyond the limits of any one state.
- Modern definition (industrial disputes) as in the **Industrial Relations Act 1996 (Cth)**: disputes about matters or things affecting or relating to work done or to be done in any industry, or the privileges, rights, duties or obligations of employers or employees in any industry.
 - o Industry = any sector of employment.
 - o The power the Cth has in this case 'industry' interpreted as trading between people, commercial relationships – not production or manufacturing.

The Engineer's Case (1920)

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

- **Facts:**
 - o Involved a claim by a union in the Cth court of conciliation and arbitration for an award related to 843 employees – 3 of whom were state govt employers/entities involved in sawmilling operations.
 - o Involved imposing an industrial relations award on a state govt with respect to their relationships with employees who were engineers.
- **Issue:**
 - o The states claimed that the award should not be binding on state govts or state govt employers.
 - o So, was the award (regarded as 'law') binding on 3 state govt employers as per the s 51(xxxv) power?
 - Behind issue: 2 doctrines that had been implied by HCA since federation. They acted as limits on Cth parliaments' powers over the states (based on concerns of political necessity):
 - **Reserved powers doctrine:** states (formerly colonies) always operated in this area of lawmaking – therefore should be taken as a given.
 - **Implied immunities doctrine:** implication that state govts were not subject to Cth exercises of power in areas of the traditional lawmaking authority.
 - o In answering this, the constitution said that:
 - State govts are affected by Cth laws.
 - Start with the constitution instead of traditional authorities (which in this case, the constitution explains the Cth position – instead of protecting the state's initial position).
- **Significance:**
 - o The reasoning of the court in interpreting the s 51(xxxv) power.

- HCA said that in interpreting a constitutional power is to start with the ordinary and natural meaning of the term.
- HCA rejected the idea of importing any words to limit the power if they are not there in the ordinary & natural meaning.
- **Decision:**
 - HCA held the validity of the Act & its application to the state employers.
 - The Cth awards governing industries covered the states and its govt agencies.
 - The approach of Isaacs and Higgins JJ was endorsed:
 - Express terms of the constitution were to be construed free of any implied doctrine based on political necessity. This debunked the:
 - Reserved powers doctrine; and
 - Implied immunities doctrine.
 - Interpreted with the literalism and legalism rules.
 - General principles of interpretation were applied with the ‘natural & ordinary’ meaning of the text:

‘...the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their express or necessarily implied meaning’ Ibid (Knox CJ, Isaacs, Rich and Starke JJ)

‘...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.’ *Engineers (1920)* (Knox CJ, Isaacs, Rich and Starke JJ) at 155.

The Jumbunna Principles (1908)

Jumbunna Coal Mine NL V Victorian Coal Miners’ Association (1908) 8 CLR 309

- **Facts:**
 - Jumbunna coal mine sought to avoid the operation of the Cth’s industrial relations system and claimed that the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) allowed the Cth to have power beyond its scope.
 - They did this when the Victorian coal miners association wanted to settle disputes using that legislation.
- **Issue:**
 - If the legislation and Cth’s power was valid under s 51(xxxv)?
 - If ‘coal mines’ fell within the scope of ‘industrial’?
- **Significance:**
 - Interpretation was favored to be conducted broadly rather than strictly (unless it is indicated that a narrower approach is required).
 - Now, the industrial disputes provision has extended to encompass:
 - School teachers: *Federated State School Teachers Association of Australia v Victoria*.
 - Professional engineers: *R v Commonwealth Conciliation and Arbitration Commission; Ex Parte Professional Engineers’ Association*.

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Decision:

- It was held that ‘industrial’ did not just apply to industry, but it should instead be read in a broader sense to encompass ‘coal mines’ as well.

‘...it must always be remembered that **we are interpreting a Constitution broad and general in its terms**, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, 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.’

- **Meaning of clauses are not necessarily tied to its meaning in 1900 when the constitution was enacted. They are now expanded to fit modern contexts.**
 - Examples:
 - S 51(v) → ‘postal, telegraphic, telephonic, and other like services’ → *R v Brislan; Ex Parte Williams*.
 - Is now used for internet control.
 - S 51 (xviii) → ‘copyrights, patents of inventions and designs, and trademarks’ → *Grainpool of WA v Commonwealth*.
 - Is now used for new intellectual property rights etc.
- **Are historical sources (e.g. draft bills or convention debates etc.) used by the court in interpreting the constitution?**
 - Court usually takes an approach that emphasises the contemporary meaning of the constitutional text.
 - Court does however does sometimes look at history to determine meaning.
 - *Cole v Whitfield* (1988) → the HCA broke new ground by referring to the convention debates to determine the meaning of s 92 (trade within the Cth to be free).
 - There were arguments and contention as to what ‘absolutely free’ meant.
 - Convention debates were used NOT to understand their subjective thoughts on the matter, but how the term is described in the contemporary context.
- **How important is precedence in contemporary law?**
 - HCA does not readily depart from precedent, *especially* constitutional precedent → *Alqudsi v R; John v Federal Commissioner of Taxation*.
- **Drawing implications from the constitution:**
 - Implication: some truth or the existence of some fact which is not expressly states in the language of the constitution → *West v Commissioner of Taxation*.
 - Implied freedom to discuss political & govt matters implied from the system of representative govt prescribed by the constitution → *Lange v ABC* (1997).
 - There cannot exist legislation that prevents or controls communication upon political/govt matters in a manner inconsistent with the ‘representative govt’ principle.
 - Implications can only be made on the grounds of necessity → *Engineers* (1920).
- **Using comparative law?**

- Using US authorities is evident where there are similarities in constitutional structure → *Marbury v Madison*; *McCulloch v Maryland*.
- **Using international law?**
 - Not for interpreting the constitution – as majority of HCA have not accepted this approach.
 - Only Kirby J has used intl law norms in constitutional interpretation in many of his judgements, particularly strong dissents.

Theoretical approaches to constitutional interpretation

- There are many theoretical approaches – but the span is:
 - Originalism** ↔ **Progressivism**
- The theories that fit in here ascribe meaning to different key factors: textual meaning, political & legal history, intention, and moral/political theory.

Originalism/Intentionalism

- This theory recommends that judges should determine the intentions of the drafters in interpreting a constitution and give effect to those intentions.
- The constitution is seen as a foundational law, whose existence, meaning and authority derive from the determinate and historical acts of its authors.
- It has a very fixed and stable view of the constitution.
- ‘Dead hands of the past’ approach.
- Assumes the drafters had known and had in mind the standard applications of the words they used.
- HOWEVER, the original intentions are often unclear and there may not be uniform ‘intent’ demonstrated by the drafters.

Progressivism

- The court should interpret the constitution in a manner which reflects the contemporary needs and shared values of the Aus community.
- ‘Living tree’ approach – since the constitution should grow and adapt, suggesting a flexible and adaptable constitution.
- HOWEVER, should the constitution be malleable in the hands of contemporary interpreters (the judiciary)?
- This could be the only way forward since the process of formal amendment of constitution by referendum is difficult.

Textualism

- Interpreting the literal (natural & ordinary) meaning of the text.
- The semantic (language) content of a constitutional provision is a rule/norm intended to convey meaning and set limits to its proper interpretation.
- Discovering meaning of text is largely factual matter.
- HOWEVER, meanings of text are not necessarily stable over time and there is not one single interpretation of some words.
 - E.g. domestic violence (s 114) used to mean ‘domestic’ as inside of Australia, but now, ‘domestic’ means family.

Week 2 – Validity, Characterisation & Corporations Power

VALIDITY – when is a law valid?

For a law to be valid:

1. Parliament must have power to pass the law (parliament may make laws about A, B, C & D; parliament can make laws about anything).
2. There must be no constitutional limit on power (parliament may make laws about A, B, C & D as long as they do not reach X).

Valid law = a law authorised by the constitution

Invalid law = a law unauthorised by the constitution

Sources of Legislative Power

States

- Plenary power – *Constitution Act 1934 (SA) s 5*
- Commonwealth Constitution ss 106 and 107 – ‘saving’ provisions
- ‘subject to this constitution’ – limits bindings on states

Referral power: if states believe there is something that should be regulated by the Cth, they can refer their powers to make laws through the Cth → s 51(xxxvii)

Commonwealth

- S 51 (key section of Cth power) – gives Cth 40 heads of power.
 - o ‘The Parliament shall, subject to this Constitution (anything in the constitution that limits power will limit these sections), have power to make laws for the peace, order, and good government.’
 - These above are not words of limitation (High Court ruling *Union Steamship Co v King* (1988) 166 CLR 1), as it is entirely up to the parliament to decide whether a law is for the peace, order and good government of the Cth. Courts can’t review this (do not raise ‘peace, order and good government’ as an argument for a law being invalid.
 - ‘subject to this constitution’ – if there are limits elsewhere in the Constitution, parliament must comply with them.
- S 52 – exclusive powers
- S 122 – Cth power about territory

Who decides whether a law is valid?

- The courts can decide whether a law is valid or invalid – specifically the HCA.

Australia Communist Party v Commonwealth (1951) 83 CLR 1

- o PM Robert Menzies decided to ban the Communist party in Australia. But for that to be valid, Cth needed a head of power to make that law.
- o There wasn’t a head of power, so to get around this, Menzies opts for s 51(v) – the naval and military defence of the Cth and of the several states.
- o McTiernan J: ‘The Constitution does not allow the judicature to concede the principle that the Parliament can conclusively “recite itself” into power.’
- o Fullager J: ‘a stream cannot rise higher than its source’ – parliament cannot give itself more power than the Constitution allows.
- o Only the court determines the scope of the Cth’s legislative power.

CHARACTERISATION

‘with respect to’

Characterisation determines whether a law is with respect to a head of power in the constitution.

- Two elements are essential:
 - o Head of power (the constitutional source)
 - o Law (the statute or provision being tested)
- Basically, does the law sufficiently connect to the head of power?

SUMMARY → Legal Validity Analysis Process

1. Is the law valid?
 - a. Is the law with respect to a head of power?
 - b. Characterise the law.
 - i. Interpret the head of power.
 - ii. Interpret the character of law in question.
 - iii. Compare the law to the head of power.
 1. Establish a specific connection (if subject matter power).
OR
 2. Establish proportionality (if purposive power).
 - c. Find any apparent limits.
2. Does the law apply to our client?

Commonwealth v Tasmania (Tasmanian Dam Case), Ex Party Wagner, Grain Pool of Western Australia v Commonwealth

Go through the process in detail below!

1(a): Is the law with respect to a head of power?

? Subject matter powers

- Powers that are defined by what the law is about.
- E.g.
 - o s 51(xx) – corporations
 - o s 51(ii) – taxation
 - o s 51(i) trade and commerce
 - o s 51(xvii) – bankruptcy.

? Purposive powers

- powers defined by the purpose the law must serve – not the subject of matter.
- E.g.
 - o s 51(vi) – defence
 - o s 51(xxix) – external affairs

1(b): Characterise the law

1(b)(i): Interpret the head of power

Old approach

- Reserved Powers and implied immunities – no longer good law (Griffith Court).
- E.g. *R v Barger*:
 - o Cth made laws about minimum wages through the power of taxation, as they did not have power regarding minimum wages in ss 51, 52 or 122. Law about regulation of labour reserved for the states, hence Cth's law was rendered invalid.

Current Approach

- *Engineers Case* (1920) 28 CLR 129
 - o Constitution interpreted like an ordinary statute.
 - o Legalism as the guiding interpretative principle in interpreting constitution.
 - Ordinary meaning
 - Informed by common law and statutory concept.