

LAWS5101:

CONSTITUTIONAL LAW

key

Start of topic

Section in code

Element

case

or (case)

CONSTITUTIONAL INTERPRETATION AND CHARACTERISATION

- What is the *scope* of the head of power?
- What is the *character* of the law?
- Is there a *sufficient connection* between the head of power and the law?
- Are there any *limits* on Commonwealth legislative competence?

– S51 legislative powers of Parliament

- ‘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. taxation; but so not to discriminate between States or parts of States;
 - iii. bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
 - iv. borrowing money on the public credit of the Commonwealth;
 - v. postal, telegraphic, telephonic and other like services;
 - vi. the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
 - vii. lighthouses, lightships, beacons and buoys;
 - viii. Etc.’
 - xi. the quarantine power
 - The Commonwealth Parliament is given lawmaking power with respect to ‘quarantine’ under s 51(ix) of the Constitution.
 - ‘They seem to be ignoring the law. The constitution section 51 says quarantine is the responsibility of the Commonwealth’ (Mark McGowan, 17 September 2020).
 - ‘[The Commonwealth] have the responsibility for quarantine under the Constitution. But [Mr Dutton] does not want to do that. So, therefore, it has fallen to the states to perform the role that Mr Dutton should be performing under the Constitution’ (Mark McGowan, 1/2/2020).
 - Commonwealth power doesn’t have to be exercised if the states can deal with it without intervention

– S52 exclusive powers of Parliament

- ‘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. the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
 - ii. matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;
 - iii. other matters declared by this Constitution to be within the exclusive power of the Parliament.

Reserved state powers and doctrine

- The doctrine held that the Constitution had impliedly ‘reserved’ to the States their traditional areas of law-making power, and that the grants of law-making power to the Commonwealth should be narrowly interpreted so as not to encroach on those traditional law-making powers.

Step 1: What is the scope of the power (*Commonwealth v Tasmania*)

- The power ‘to make laws “with respect to” a specific subject is as wide a legislative power as can be created (*Bank of New South Wales v Commonwealth* (*Bank Nationalisation Case*))

R v Barger: The Excise Tariff Act 1906 (Cth) imposed a tax on manufacturers of agricultural implements. Griffith CJ, Barton and O’Connor JJ held that the s 51(ii) Taxation power ‘was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States...’

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case): An engineers’ trade union lodged a claim in the Commonwealth Arbitration Court against various employers, including three Western Australian government employers. The issue was whether the Commonwealth Parliament could pass legislation binding State instrumentalities under the s 51(xxxv) Conciliation and Arbitration power. The majority held that the heads of power should be interpreted in accordance with the natural meaning of the words and not subject to implied limitations unless these follow necessarily or logically from the text and structure of the *Constitution*.

The Jumbunna Principle: ‘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’ (***Jumbunna Coal Mine v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 367 (O’Connor JJ)**).

Step 2: is the law in truth a law with respect to the subject matter of the power, once its scope has been ascertained (**appropriate and adapted to the scope**) (*Commonwealth v Tasmania*)

- The High Court divides the heads of power in sections 51 and 52 into ‘subject matter’ and ‘purpose’ powers
- For subject matter heads of power a ‘sufficient connection’ test is applied; for purpose heads of power a ‘proportionality’ test is applied.
 - ****The ‘purpose’ powers so far identified by the High Court are the ‘defence power’ (section 51(vi)) and the ‘external affairs’ power (section 51(xxix)).
- Characterisation was once guided by a search for the ‘pith and substance’ – or single character – of the law.
- Dual characterisation recognises that a law may possess dual or multiple characters and only one of these needs be ‘with respect to’ a head of power.
- ‘If a connection exists between the law and a s 51 head of power, the law will be “with respect to” that head of power unless the connection is, “so insubstantial, tenuous or distant” (*Melbourne Corporation v Commonwealth*) that it cannot

sensibly be described as a law “with respect to” the head of power’ (*Re Dingjan; Ex Parte Wagner*)

– (*Clubb v Edwards; Preston v Avery*):

- Reading down: ‘The process of reading down in such cases involves the court preferring an interpretation of a statutory provision that renders a provision constitutionally valid over one which would render it invalid’ [416].
- Severance: ‘The doctrine of severance, where it applies, permits a court to strike down part of a statute that is beyond power, leaving the remainder of the statute operative’ [418].
- Patrial disapplication: ‘...the essential meaning of statutory words which cannot be read down or severed is not applied generally to all facts and circumstances that would otherwise have been encompassed’ [424].

Fairfax v Federal Commissioner of Taxation: The issue was whether section 11 (inserted an amendment that could be used to induce the trustees of superannuation funds to invest in Commonwealth bonds by exempting the funds from income tax if they did and by subjecting them to a special rate of taxation if they did not.) of the *Income Tax and Social Services Contribution Assessment Act 1961* (Cth) was validly enacted under the Commonwealth’s taxation power in section 51(ii) of the Constitution. ‘But is by no means a settled doctrine that a law which purports to provide for a tax upon behaviour is in substance not a law with respect to taxation if it exhibits on its face a purpose of suppressing or discouraging the behaviour and is to be explained more convincingly as a means to that end than as a means to provide the Government with revenue’

Murphyores Incorporated Pty Ltd v Commonwealth: The plaintiff companies were engaged in sand mining on Fraser Island and were advised that under the relevant regulations export of their products would not be approved by the Minister until an environmental inquiry had been undertaken. In a unanimous decision, the court held the legislation was a valid exercise of the trade and commerce power. Section 51(i) was a non-purposive power, and the only relevant factor was the subject matter of trade and commerce. The motive and purpose behind the legislation was irrelevant

Grain Pool of Western Australia v Commonwealth (HOW TO INTERPRET):

1. ‘First, the constitutional text is to be construed “with all the generality which the words used admit” [*R v Public Vehicles Licensing Appeal Tribunal (Tas); Ex Parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, 225-6]...’
2. ‘Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates.’
3. ‘Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.’
4. ‘Fourthly, as Mason and Deane JJ explained in *Re F; Ex Parte F* [(1986) 161 CLR 376, 388]: “In a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two subject matters.”
5. ‘Finally, if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.’

S 51(XX) CORPORATIONS POWER

Section 51(xx): ‘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 foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.’

“The Act may be supported by the corporations power under s51(xx).”

Step 1: Which corporations come within Commonwealth power under section 51(xx)?

“The first issue is whether {entity} is a constitutional corporation. Firstly, {entity} {is / is not} a ‘foreign corporation’ because it {was / was not} formed outside the limits of the Cth (*Incorporation case*). Applying the current activities test (*Sarah Joseph and Melissa Castan*), {entity} {is / is not} likely to be a ‘{trading / financial} corporation’ because {trading activity / financial activity} makes up a substantial part of their activities. Therefore, {entity} is subject to Cth legislative power under s 51(xx).”

- refers to foreign, trading and financial corporations.
- In determining whether a corporation is a trading corporation, should the court consider the *purpose* for which the corporation was incorporated or the *current activities* (preferred) of the corporation?
 - The current activities test is ‘presumed to cover a wide variety of corporate bodies such as schools, universities, child care centres, hospitals, charities, non-profit organisations and various other incorporated State statutory bodies’
 - Examples of trading activities: trading tertiary education services, trading ANY goods
 - Examples of financial activities: wages, fees, funding etc.
- University:
 - It’s likely as the Act is in relation to universities that the Cth will seek to enact the law under the head of s 51(xx). Regarding the scope of the corporation’s power (Grain Pool), it’s likely a uni falls within the scope of a corporation under this power due to the fact that it is a university (see Joseph and Castan, Federal Con Law; Quickendean).
 - However, the current test requires that a significant portion of its operations be trading activities (Adamson’s Case; see also Trade).
 - How much (%) of its activities are actually from trade? Not finance
 - However, Adamson’s also specifies that a significant portion does not necessarily mean the largest portion, and if the effort and operation of the trade relationship and conduct takes up a significant portion of the uni’s overall activities then it may be deemed sufficient

***R v Trade Practices Tribunal; Ex parte St George County Council*:** the issue was whether an entity established under the Local Government Act 1919 (NSW) to sell electricity and electrical appliances was a trading corporation. ‘It is necessary to determine the true character of the corporation upon a consideration of all the circumstances that throw light on the purpose for which it was formed’ i.e., not subject to s51(xx).

***R v Federal Court of Australia; Ex Parte WA National Football League (Adamson’s Case)*:** ‘Essentially it is a description or a label given to a corporation when its trading activities form a sufficiently significant proportion of its overall activities as to merit its description as a trading corporation’

Step 2: Which aspects or activities of a constitutional corporation can be regulated under section 51(xx)?

“The next issue is whether {law or provision in question} is an activity that can be regulated under s 51(xx). Applying the majority opinion in the *Work Choices* case, it is likely that {law or provision } fits within the scope of s51(xx) because this is part of {entity’s} business {functions, activities, relationships}.”

- The scope also extends to ‘the persons who carry out those functions/activities and the persons with whom they enter into relationships with’. {if applicable}
- Broad view: There are no limits at all. Provided that the corporation has the characteristics that bring it within section 51(xx), any aspect or activity of that corporation can be regulated by the Commonwealth.
- Narrow view: The aspects or activities that the Commonwealth can regulate must have something to do with the characteristic that brings corporations within Commonwealth power. This would mean, for example, that only the trading activities of trading corporations can be regulated.

Actors and Announcers Equity Association v Fontana Films Pty Ltd ‘The subject matter of the power is corporations – of the kind described; the power is not expressed as one with respect to the activities of a particular kind or kinds. A constitutional grant of legislative power should be construed liberally and not in any narrow or pedantic fashion ... The power should, therefore, in accordance with that approach, be construed as a plenary power with respect to the subjects mentioned...’

New South Wales v Commonwealth (Work Choices Case): The Work Choices Case arose from the Howard government’s attempt at a fundamental reshaping of industrial relations in Australia by the Workplace Relations Amendment (Work Choices) Act 2005 (Cth). The majority contrasted a (narrow) ‘distinctive character test’ and a (wide) ‘object of command’ test, and found that ‘the plaintiff’s argument against the object of command test and in favour of the distinctive character test has several difficulties’

S 51(VI) DEFENCE POWER

- **Section 51(vi):** ‘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 the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.’
- **Section 114:** ‘A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force...’

“The Act may be supported by the defence power under s51(vi).”

Step 1: What is the scope of power?

- Go through each of the following and see if they fall under the scope (reference specific facts**)
 - The defence power ‘waxes and wanes.’ (**Stenhouse v Coleman & Payroll Tax Case**)
 - The scope of the defence power is contingent upon facts. (Are the facts *appropriate and adapted* to the use of the defence power **Polyukhovich v Commonwealth**) **proportionality test**

Commonwealth v Australian Commonwealth Shipping Board: The High Court held that s 51(vi) did not extend to a statutory provision empowering the Commonwealth Shipping Board to enter into an agreement for the supply, delivery and erection of six steam turbo-alternators. Knox CJ, Gavan Duffy, Rich and Starke JJ: ‘Extensive as is that power, still it does not authorise the establishment of businesses for the purpose of trade and wholly unconnected with any purpose of naval or military defence’ (9).

Attorney-General (Vic) v Commonwealth (Clothing Factory Case): The High Court held that s 51(vi) authorised the Commonwealth to establish a clothing factory to manufacture uniforms not only for the defence forces but also for other bodies such as Commonwealth and State government departments and the Boy Scouts Association. Gavan Duffy CJ, Evatt and McTiernan JJ: ‘...the sales of clothing to bodies outside the regular naval and military forces are not to be regarded as the main or essential purpose of this part of the business, but as incidents in the maintenance for war purposes of an essential part of the munitions branch of the defence arm’ (558).

- The courts are likely to accord deference to legislative and executive determinations about measures required for the purpose of defence.
 - However, note that the proportionality test may be applied with varying degrees of deference. Deference should be distinguished from non-justiciability, which applies where a matter is not capable of resolution by a court.
- The defence power is a ‘purpose’ power. (**Farey v Burvett; Dawson v Commonwealth**)
 - **proportionality test** NOT SUFFICIENTLY CONNECTED TEST
 - [In 1942 (war), the Women’s Employment Board was made to rule on cases about the wages and conditions of women’s employment] ‘...if the real substance and purpose is such that the legislation is capable even incidentally of aiding the effectuation of the power then it is in

my opinion within the ambit of the power...' (*Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Case)*)

- Although the power is 'elastic', it does not immediately snap back at the end of a period of international conflict (*R v Foster*)

Communist Party Case: In 1950, amid Cold War fears, the Menzies government passed the Communist Party Dissolution Act to ban the Communist Party in Australia, labeling it a revolutionary threat. The Act broadly targeted communists, including non-threatening supporters, and relied on unproven assertions rather than judicially noticeable facts. The purpose of the Act is to respond to activities which pose a defence threat, but there is a proportionality issue, as not everyone who is identified as a communist poses a threat (the Act does not actually target the activities which pose the threat). Essentially, legislation is not appropriate & adapted to respond to the threat (as such), instead it responds to a category of people.

- 1.) Disproportionality
- 2.) Unreviewable nature of the decisions (at this time, decisions of Gov-Gen were not subject to JR)
- 3.) Constitutional facts (in more extreme circumstances, the Act may be valid- but sufficient facts were not available here to be taken notice of)

Capital Issues Case - distinguish from Communist Party Case: Case concerned Defence Preparations Regulations. Prohibited the borrowing of money upon security and the issue of share capital over a certain limit unless accompanied by the consent of Treasurer. Unlike the Communist Party Dissolution Act, the regulations made provision for judicial review of the Treasurer's decision. The Act was valid based on the possibility (subject to criteria articulated in the legislation) to seek JR of Treasurer's decision. Connection with defence: the expansion of the capacity of Australia to produce or manufacture goods or to provide services for one purpose will be aided by measures tending to limit or restrict the production of goods or the provision of services for other purposes

Subsection 1 step 1: threat assessment

"This situation involves circumstances that are not wholly peaceful, but short of total war. The first issue is whether {the threat} enlivens s 51(vi)"

- '...every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to make laws governing or affecting many matters that are incidental or ancillary to the subject-matter' (*Grannall v Marrickville Margarine Pty Ltd*)
- What is the threat? (*Thomas*)
 - The scope of s51(vi) is not limited to conventional wars – i.e. can include threats of terrorism / cold war
 - The scope of s51(vi) is not limited to external threats – i.e. can include internal threats
 - The scope of s51(vi) is not limited to protection of the body politic – i.e. can include threats to individuals

Thomas v Mowbray: making a control order against an individual about to or has committed a terrorist act (must apply to the court for approval). The defence power ‘is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public’ The defence power is ‘not limited to protection of bodies politic as distinct from the public, or sections of the public. It recognises that a law, supported by s 51(vi), must, of its general character, be addressed to protecting the identified bodies politic in some way or other, directly or indirectly’.

Subsection 2 step 1: primary or secondary?

“defence power appears to have two aspects (Fullagar J in *Communist, Thomas*). This threat of {description of threat} fits within the {primary / secondary} aspect because”

- Primary aspect authorises direct defence of the nation – this is not confined to times of war – i.e. can include ‘defence preparedness’
- Secondary aspect extends to infinite variety of matters which could not be regarded in the normal conditions of national life as having any connection to defence – i.e. matters which are only within the scope of s51(vi) in unusual circumstances (like war, terrorism). Examples: price controls, rationing, control of rents, conditions of employment

“However this aspect is only enlivened by constitutional facts (*Thomas*). These are facts available through judicial notice (Dixon J in *Stenhouse*) and extend to facts that are ‘matters of general public knowledge’ (*Stenhouse*) or notorious (*Communist*).”

- Facts admitted as evidence or expert testimony cannot be relied upon.
- Heydon J in *Thomas* – ‘news broadcasts, print media and public discussion are sufficiently open, notorious and within the public knowledge’

“On balance, it is {likely/unlikely} that the secondary aspect of s 51(vi) has been enlivened.”

Step 2: Characterisation

“Section 51(6) is a purpose power (*Stenhouse*). Applying a proportionality test, the {law} will be ‘to’ defence if it is reasonably appropriate and adapted to achieving {the purpose of defence} (*Pokyukhovich*).”

- Facts to consider:
 - Access to judicial review? (**Communist**) → more likely to be proportional
 - Who does it apply to? Broad? (**Communist**) → better if based on conduct
 - Objective tests are better than subject views from an authority (**Capital Issues**)
 - Embedding the proportionality test in the legislation (**Thomas**)

Step 3: Conclusion

- Can the Commonwealth argue severance of certain aspects of the power that are not appropriate and adapted in order to pass the law?

S 51(XXIX) EXTERNAL AFFAIRS POWER

- **Section 51(xxix):** ‘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 external affairs.’
 - The external affairs power may be enlivened by: treaty implementation; customary international law; extraterritorial power; relations with other countries; and (possibly) matters of international concern.

“The Act may be supported by the external affairs power under s51(xxix).”

Step 1: Scope (Interpretation) – ONLY FOR RELATION TO TREATY/CONVENTION

“The Commonwealth relies on the {treaty name}, previously ratified in {date} by Australia.”

Step 2: Scope/Limits

Subsection 1 step 2: If there IS a treaty/convention

- The first issue is whether the {treaty / convention} in question may be implemented/was implemented correctly
 - A treaty may be implemented regardless of its subject matter.
“This treaty concerns {subject matter}. It is not necessary to establish that this is of sufficient international concern because treaties may be implemented regardless of their subject matter (*Koowarta v Bjelke-Petersen & Tasmanian Dam Case*)”

***R v Burgess; Ex parte Henry*:** ‘It should not be assumed that the legislative power over external affairs is limited to the execution of treaties or conventions. Parliament may well be deemed competent to legislate for the carrying out of “recommendations” as well as the “draft international conventions” resolved upon by the International Labour Organisation.’.

- As long as the legislation is appropriate and adapted to the enforcement of the convention

- The treaty ratification must be *bona fide* (good faith) (***Koowarta v Bjelke-Petersen***)

- If evidence of good faith: The treaty has been ratified in good faith because {...}
- If no evidence of bad faith: This is satisfied because there is nothing on the facts to suggest this treaty has been ratified in bad faith. Even if there the treaty has been made in bad faith, there is a high evidentiary burden to prove this.
- If evidence of bad faith: This treaty may have been ratified not bona fide because {...} . This is not too detrimental because it will be very difficult to prove bad faith.

***Koowarta v Bjelke-Petersen*:** Aboriginal man sought to buy land, Qld gov said no, man argued its against racial discrimination act, Qld argued that act is not valid under treaty. Held legislation was valid. Racial discrimination is an external affair (global).

- Case argued that s51(xxix) needs to be of international not domestic concern (OVERRULED NO LONGER APPLIES)