

Overview of Constitutional Structure

Structure of the Australian Constitution o Preamble

- ♦ Chapter I- The Parliament
- ♦ Chapter II- The Executive Government
- ♦ Chapter III- The Judicature
- ♦ Chapter IV- Finance and Trade
- ♦ Chapter V- The States
- ♦ Chapter VI- New States
- ♦ Chapter VII- Miscellaneous
- ♦ Chapter VIII- Alteration of the Constitution

Nature of the Preamble-

- ♦ Outlined the history of the framing of the Constitution, stating “whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in **one indissoluble** Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established”.

Federalism and the Engineers Case

- ♦ Early federal constitutional law in Australia was informed by the two doctrines of ‘implied immunities of inter-governmental instrumentalities’ and ‘reserved States’ powers’ – these arose by implication from the history of the framing of the Constitution, as the Constitution was regarded as a federal compact in which the States retained their power.
 - * **‘Implied immunities of inter-governmental instrumentalities’ doctrine**
 - This doctrine asserted that both the Commonwealth and the States are sovereign within their respective spheres of power, thus they must be free from interference or the imposition of burdens by other government.
 - The doctrine was exemplified by *D’Emden v Pedder (1904)*, where Tasmanian legislation purported to impose stamp duty on the salary of Commonwealth employees – but the HC held that law to be invalid, because Commonwealth officers and procedures were immune from State laws.
 - Conversely, this doctrine also meant that State officers and procedures were immune from Commonwealth laws – as held in *Federated Amalgamated Government Railway and Tramway Service Association v New South West Railway Traffic Employees Association (Railway Servants’ Case)(1906)*, State railway employee in NSW were immune from industrial relation laws of the Commonwealth.
 - Thus, as described by RTE Latham in “The Law and the Commonwealth”, this doctrine was a sort of rule of mutual tolerance.
 - * **‘Reserved States’ powers’ doctrine**
 - This doctrine asserts that the Constitution established a Commonwealth of a small central government with limited powers, while the States exercised broad plenary powers, as preserved by ss 106-107 of the Constitution.
 - s 106 Saving of Constitutions
 - The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.
 - s 107 Saving of Power of State Parliaments
 - Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.
 - This meant that Commonwealth powers were to be interpreted in light of the federal distribution on powers, so that they do not unduly infringe upon State powers.
- ♦ Australian federalism today
 - There is a dual sovereignty, with two levels of government
 - National (Commonwealth government)
 - Regional (State governments)

- The Constitution empowered the Commonwealth Parliament to pass laws with respect to certain heads of power in s 51, which are effective across Australia (State laws are limited to their own jurisdiction, as provided by s 109).
- Most of these Commonwealth powers are 'concurrent' (can be exercised by both Commonwealth and the States)
 - But as provided by s 109, "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".
- The Commonwealth can legislate with respect to matters incidental to the execution of any power vested in the Parliament, the Commonwealth Government or a federal court or public servants in s 51(xxxix).
- Further, some powers are exclusive to the Commonwealth, so State laws on such subjects are invalid, including:
 - s 52(i): the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
 - s 52(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;
 - s 52(iii): other matters declared by this Constitution to be within the exclusive power of the Parliament;
 - s 90: exclusive power over customs, exercise and bounties – prevents States from imposing customs and excise
 - s 114: State may not raise forces. Taxation of property of Commonwealth or State – prevents States from raising armies or taxing Commonwealth property.
 - s 115: State not to coin money – prevents States from coining money.
- The Commonwealth has plenary power to make laws with respect to the Territories in s 122.
- The States otherwise have plenary powers, with their own Constitutions recognised in s 106 and their own laws recognised in s 108.
- The Commonwealth may induce the State to make particular laws by attaching conditions to financial grants in s 6, while the States can also 'hand over' or 'refer' specific powers to the Commonwealth through s 51(xxxvii)
- The Commonwealth may also pass laws which give effect to international obligations, overriding State laws, as provided by s 51(xxix).

Mental Storm of Constitutional Law

- ♦ Does the relevant Parliament have the power to enact the law in question?
 - * For the Commonwealth Parliament, start by characterising the law.
 - ➔ Is there a relevant head of legislative power?
 - ✓ Dual characterisation is possible.
 - ➔ Subject matter power or purposive power?
 - ✓ For a subject matter power, is there a sufficient connection with that head of power?
 - ✓ For a purposive power, is the law capable of being seen as reasonably appropriate and adapted to achieve that purpose?
 - ➔ Does the incidental power apply?
 - ✓ Express incidental power: s 51(xxxix)
 - ✓ Implied incidental power.
 - * For a State Parliament
 - ➔ There is plenary legislative power.
 - ➔ But is it a law with respect to the peace, welfare and good government of the State?
 - ➔ Is there a *Cigamatic* issue?
 - ✓ A State legislature has no power to impair the capacities of the Commonwealth executive.
- ♦ Does the law breach an express constitutional prohibition?
 - * For a Commonwealth law, does it breaches:
 - ➔ s 51(xxxi) – compulsory acquisition of property on just terms?
 - ➔ s 116 – freedom of religion?
 - ➔ s 92 – freedom of interstate trade?
 - * For a State law, does it breach:
 - ➔ s 90 – Commonwealth has exclusive power to impose customs and exercise duties?
 - ➔ s 92 – freedom of interstate trade?
- ♦ Does the law breach any implied constitutional prohibition?
 - * Does it breach implications flowing from federalism?
 - ➔ Melbourne Corporation Doctrine.

- * Does it breach implication flowing from representative government?
 - ➡ Implied freedom of political communication.
- ♦ Can the law be 'read down' or 'served'?
 - * s 15A of the [Acts Interpretation Act 1901 \(Cth\)](#).
- ♦ Do any issues arise as to the formalities of enacting the law? For example,
 - * s 53 provides that "proposed law appropriating revenue or moneys ... shall not originate [or be amended] in the Senate – but "proposed laws appropriating revenue or moneys" can be rejected by the Senate, while the Senate may also validly request amendments.
 - * s 54 provides that "Bills appropriating revenue for the ordinary annual services of the Government shall deal only with such appropriation" – no tacking is possible.
 - * s 55 provides that "laws imposing taxation shall deal only with the imposition of taxation and that any provision dealing with other matters shall be of no effect – no tacking is possible.
 - * s 56 applies to both categories of appropriation bills – it provides that "a vote for the appropriation of money shall not be passed unless the purpose of the appropriation has been recommended in the same session by a message from the Governor-General to the House in which it originated".
- ♦ Is the law ineffective or inoperative for any other reason? For example,
 - * Is the State law inconsistent with a valid Commonwealth law?
 - ➡ Directly?
 - ➡ Indirectly?
 - * Does a subject of the Queen have an immunity from the law under s 117?
 - ➡ Immunity from laws that discriminate against residents of other States.
 - * Is it a scheme to avoid the operation of s 51 (xxi)?
 - ➡ Compulsory acquisition of property on just terms.
- ♦ To whom the law applies? For example,
 - * Is the law intended to bind the Crown and can it do so? Cigamatic
 - * Does it only apply to trading, financial or foreign corporations and if so, is the body in question a trading, financial or foreign corporation under s 51 (xx)?

General Approach

- ♦ The interpretation of the Australian Constitution should employ the ordinary rules of statutory interpretation. Thus the only safe rule is to look at the Constitution itself, and to gather from it what is its intention.: [Drawbacks Case \(1904\)](#)
 - * Language of the Constitution
 - Golden rule: the only safe course is to read the language of the statute in what seems to be its natural sense: [Engineers Case \(1920\)](#)
 - In cases of ambiguity, "recourse must be had to the context and scheme of the Act": [Engineers Case \(1920\)](#)
 - * Intention of the legislature: the intention of the enactment is to be gathered from its words: [Drawbacks Case \(1904\)](#)
 - If the words are plain, effect must be given to them:
 - If the words are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances, also including the contemporaneous circumstances, i.e., to the history of the law, for example, the previous legislation, historical facts surrounding the bringing the law into existence.
 - The Constitution should be construed purposively. The founders' intentions and understandings...are relevant...and only can be construed to the extent that they can be seen to be generally consensual: [Work Choices Case \(2006\)](#)
 - Words have a fixed connotation but their denotation may differ from time to time: [Street v Queensland Bar Association \(1989\)](#)
- ♦ Other settled rules of statutory construction: [Engineers Case \(1920\)](#)
 - In cases of ambiguity, "recourse must be had to the context and scheme of the Act".
 - There are also a number of statutory assumptions:
 - An Act is assumed not to abrogate human rights unless a contrary intention is made expressly clear
 - An Act is assumed not to contravene international law unless a contrary intention is made expressly clear
 - An Act will be read as conforming to the Constitution as far as this is possible, as provided by s 15A of the Acts Interpretation Act 1901 (Cth)

I. This case involved a claim by a union of engineers in the Commonwealth Court of Conciliation and Arbitration for an award relating to 843 employers across Australia, including three governmental employers in Western Australia.

Issue:
Whether a Commonwealth law made under the 'conciliation and arbitration' power in s 51 (xxxv) could authorise the making of an award binding those three governmental employers in Western Australia
Held,
The Commonwealth law made under the 'conciliation and arbitration' power in s 51 (xxxv) indeed could authorise the making of an award binding those three governmental employers in Western Australia

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

Impact of the case

Its overthrow of the 'implied immunities' and 'reserved State powers' doctrine was decisive and of lasting effect.

- **'Implied immunities' doctrine**
 - This doctrine asserted that both the Commonwealth and the States are sovereign within their respective spheres of power- thus, they must be free from interference or the imposition of burdens by other governments
- **'Reversed State powers' doctrine**
 - This doctrine asserts that the Constitution established a Commonwealth of a small central government with limited powers, while the States exercised broad plenary powers, as preserved by ss 106-107 of the Constitution

Reasoning

In analysing s 51 (xxxv), Knox CJ, Isaacs, Rich and Starke JJ asserted that it was "in terms so general that it extends to all industrial disputes **in fact extending beyond the limits of any one State**, no exception being expressed as to industrial disputes in which States are concerned".

Interpretation of the Constitution

- ♦ The Court (Knox CJ, Isaacs, Rich and Starke JJ) prefers 'golden rule' or 'universal rule':
 - The only safe course is to read the language of the statute in what seems to be its **natural sense**.
 - The ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere: that is pure legal construction. But once their true meaning is so ascertained, they cannot be further limited by the fear of abuse.
 - The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court.
 - But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Court.
- ♦ **Settled rules of (statutory) construction (asserted by the court):**
 - The **'golden rule'**- "to read the language of the statute in what seems to be its natural sense", from Lord Haldane LC in *Vacher's Case* (1913)

Constitutional Interpretation

- In cases of ambiguity, “recourse must be had to the context and scheme of the Act”, from Lord Loreburn LC in *Attorney-General for Ontario v Attorney-General for Canada* (1912)
- There are also a number of statutory assumptions:
 - An Act is assumed not to abrogate human rights unless a contrary intention is made expressly clear
 - An Act is assumed not to contravene international law unless a contrary intention is made expressly clear
 - An Act will be read as conforming to the Constitution as far as this is possible, as provided by s 15A of the Acts Interpretation Act 1901 (Cth)

1. The Commonwealth of Australia was established on 1st January, 1901 and uniform duties of Customs and uniform duties of Excise were imposed on 8th October, 1901. Before the imposition of the uniform duties, the Commonwealth was to make monthly payments to each State of all revenues collected there in by the Commonwealth”, as provided by s89 of the Constitution.
2. Goods were imported, and then produced and manufactured in the State of Victoria between 1st January, 1901, and 8th October, 1901, and duties of Excise were paid thereon to the Commonwealth and the said duties of Excise were duly credited to the State of Victoria as prescribed by sec. 89 of the Constitution of the Commonwealth of Australia. The said goods passed into the State of Tasmania for consumption after 8th October, 1901.
3. The goods so imported passed into the State of Tasmania for consumption after 8th October, 1901. Some of the said goods were dutiable under the Tasmanian tariff in force prior to 8th October, 1901, at a rate higher than, some at a rate equal to, and some at a rate lower than the rate paid thereon under the said Victorian tariff as aforesaid.
4. Neither the whole nor any part of the said duties of Customs collected in Victoria by the Commonwealth or of the said duties of Excise paid in Victoria to the Commonwealth as aforesaid have been paid or credited by the Commonwealth to the State of Tasmania.
5. The said duties of Customs and duties of Excise amounted approximately to £12,000.
6. The State of Tasmania contends that upon the true construction of the Constitution of the Commonwealth of Australia (s 93 of the Constitution) the said duties of Customs and duties of Excise must be taken to have been collected in Tasmania, and that the State of Tasmania is entitled to be credited therewith by the Commonwealth.

Issue:

1. Is the State of Tasmania entitled under the Constitution of the Commonwealth of Australia to be credited by the Commonwealth with the duties of customs collected by the Commonwealth in the State of Victoria on goods imported into Victoria between 1st January, 1901, and 8th October, 1901, and passing therefrom into the State of Tasmania for consumption after the said 8th October, 1901?
2. Is the State of Tasmania entitled under the Constitution of the Commonwealth of Australia to be credited with the duties of Excise paid on goods produced and manufactured in the State of Victoria between 1st January, 1901, and 8th October, 1901, and passing therefrom into the State of Tasmania for consumption after the said 8th October, 1901?

Held,

The State of Tasmania was not entitled to be credited with the duties. Action failed.

State Law v Commonwealth Law

The High Court now favours strong Commonwealth powers, with the supremacy of the Commonwealth over the States enforced through s 109 of the Constitution.

- It is a fundamental and fatal error to read sec 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec 51, as that grant is reasonably construed, unless that reservation is as explicitly stated.
 - The effect of State legislation, though fully within the powers preserved by sec 107, may in a given case depend on sec 109.
 - Which means, in case of conflict, giving to valid Commonwealth legislation the supremacy expressly declared by the Constitution, measuring that supremacy according to the very words of sec 109.

Use of historical materials

Tasmania v Commonwealth and Victoria (Drawbacks case) (1904) 1 CLR 329

O'Connor J: [358]

- It appeals to me the only safe rule is to look at the Statute itself, and to gather from it what is its intention.
 - If the meaning of the language is plain and clear, we have nothing to do but to obey it – to administer it as we find it.
 - The intention of the enactment is to be gathered from its words.
 - If the words are plain, effect must be given to them;
 - If they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances.
 - In all cases in order to discover the intention, you may have recourse to **contemporaneous circumstances** – to the history of the law, and you may gather from the instrument itself the object of the legislature in passing it.
 - In considering the history of the law, you may look into previous legislation, you must have regard to the historical facts surrounding the bringing the law into existence.
 - There is no foundation for any such distinction that there might be a difference in the rules of interpretation to be applied to the Constitution and those to be applied to any other Act of Parliament.
 - **The rules of interpretation to be applied to the Constitution should be the same as those to be applied to any other Act of Parliament.** [Vanessa]

Intention of framers

- Doctrine of originalism:
 - The constitutional interpretation should adhere to its ‘original intent’ (the original understanding of the text): [Cole v Whitfield \(1988\)](#)
- Doctrine of ‘intentional originalism’
 - The Constitution should be construed in the light of its history. It should be construed purposively. The founders’ intentions and understandings...are relevant...and only can be construed to the extent that they can be seen to be generally consensual: [New South Wales v Commonwealth \(Work Choices Case\) \(2006\)](#) per Callinan J (dissenting)

Textualism

- Doctrine of ‘textual originalism’
 - The focus is on the constitutional text, with no attempt to discover the subjective intentions of its authors.