

Introduction of Australian Federal Constitutional Law

Australian Federalism System

- ◆ The Constitution, and constitutional law, explains the foundation and the authority of the exercise of public power, and defines the limits of that power.
- ◆ Governments and parliaments may only act in conformity with the Constitution – any attempt to use legislative, executive or judicial power in an unconstitutional manner will be unlawful; a ruling by the HC of Australia will have legal paramouncy, overriding the state or federal government's statues or actions.
- ◆ There is a dual sovereignty, with two levels of government
 - * National (Commonwealth government)
 - * Regional (State governments)
- ◆ The Constitution is divided into eight chapters, with the first three chapters setting out the rules for the Commonwealth legislature, the executive and the judiciary, and the remainder mainly dealing with the rule for trade and finance, the states and territories, and amending the Constitution.
- ◆ The structure indicates the drafters' intention to structurally separate the three branches of Commonwealth government, indicating some adherence to the doctrine of "separation of powers".
- ◆ Parliamentary sovereignty means that Parliament is absolutely sovereign and has the constitutional power to make or unmake any law at all.
 - In Australia, this doctrine is modified, as no Parliament is absolutely sovereign– all the legislature are limited by the Commonwealth legislation and the HC can examine laws for compliance with it.
 - But the doctrine still has a role in constitutional interpretation, as the HC will only invalidate Australian laws for lack of constitutionality, not because they are bad, unjust, or morally wrong.
- ◆ The rule of dictates that society must be governed by a system of law, not by arbitrary unconstrained expressions of power; the law applies to all equally (including the government) and the law must be clear, accessible and stable.
- ◆ The Constitution therefore incorporates British concepts of responsible government, constitutional monarchy, parliamentary sovereignty and the absence of a strong statement of individual rights, such as a Bill of Rights.
- ◆ These sit alongside the federalist nature of the Constitution, the state-oriented Senate and the modified separation of powers doctrine.

Powers of Parliament

- ◆ 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 96, 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).

- 1) According to the intention of the framers – the interpretation of the Australian Constitution is to look at the Constitution itself, **and to gather from it what is its intention**: [Drawbacks](#).
- 2) Intention is to be identified according to the rules of statutory interpretation.
 - Commonwealth heads of power are to be interpreted in accordance with the **natural meaning of the words**: [Engineers Case](#).
 - Words limiting the scope of those powers are not to be read into the Constitution, unless that implication follows necessarily or logically from the Constitution's text: [Engineers Case](#).
 - But necessity does not mean political or social necessity, and
 - Ambiguity, manifest absurdity and injustice are to be avoided.
 - An Act is assumed not to abrogate rights unless a contrary intention is made expressly clear. – Principle of legality.
 - An Act will be assumed to conform to international law, unless the contrary is expressly made clear.
 - An Act will be read as conforming to the Constitution as far as this is possible, as provided by s 15A of the [AIA](#).
- 3) When text is ambiguous, recourse must be had to the context and scheme of the whole Act or Constitution: [Engineers Case](#).
- 4) Words have a fixed connotation but their denotation may differ from time to time ... The attributes ... will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them: [Street](#).
- 5) In practice, different interpretation approaches may be differed on a case by case basis.
- 6) The HC is not bound by its own decisions, but it will normally follow its own decisions unless there are strong reason to depart from them. The stability and predicability of the Constitution is a strong incentive for following the doctrine of stare decisis.

Approaches to Constitutional Interpretation

- ◆ The principles underlying constitutional interpretation are not very different from those underlying the interpretation of ordinary statutes.
- ◆ This is because the Constitution is a fundamental document, and it is phrased in more open and general language than a tax or a real property statute is framed.
- ◆ Major approaches to constitutional interpretation includes:
 - Literalism and legalism
 - Use of historical materials
 - Intention of framers.
 - Textualism
 - Incremental accommodation

Literalism and Legalism

- ◆ A literal or formalist interrogation of the text of an Act of Parliament is the conventional starting point for statutory interpretation, and this is true also for Constitutional interpretation.

Literalism

- ◆ With respect to literalism, it was held in [Engineers Case](#), the Constitution must be interpreted according to the “settled rules of [statutory] construction”.¹
- ◆ The settled rule is golden rule, which requires the language of a Statute must be read in its plain and natural sense (reading the statute as a whole).
- ◆ Since Constitution is in the form of a statute, Commonwealth heads of power are to be interpreted in accordance with the **natural meaning of the words**: [Engineers Case](#).
- ◆ Words limiting the scope of those powers are not to be read into the Constitution, **unless that implication follows necessarily or logically from the Constitution's text**: [Engineers Case](#).
 - But necessity does not mean political or social necessity, and
 - Ambiguity, manifest absurdity and injustice are to be avoided.
- ◆ The **context** in which a provision appears is also useful in interpretation, this is because “the ordinary meaning of the terms employed in one place may be restricted by terms used elsewhere”: [Engineers Case](#).
- ◆ Thus, when text is ambiguous, recourse must be had to **the context and scheme of the whole Act or Constitution**: [Engineers Case](#).
 - But no political considerations, or fear of misuse can be taken into account: [Tasmanian Dam](#)²
- ◆ The consequence is that Constitution must be 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 preceded it, and then *lucet ipsa per se*.”

Legalism

- ◆ Legalism requires “**close adherence to legal reasoning**”, which “is the only way to maintain the confidence of all parties in Federal conflicts”.³
- ◆ But legalism ‘does not insist that interpretive or justificatory reasoning be limited to only one source, but only that all its sources be located within a **self-contained autonomous body of law**.’
- ◆ However, legalistic ‘rules’ are very limited: ‘precepts’ change over time (this is not subjective to judges, but ‘intra- systemic’).

¹ Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case) (1920) 28 CLR 129.

² Commonwealth v Tasmania (Tasmanian Dam Case) (1983).

³ Dixon CJ, Swearing in speech, 1952.

Use of Historical Materials

- ✦ 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](#).⁴
- ✦ Intention of the legislature: the intention of the enactment is to be gathered from its words: [Drawbacks](#).
 - 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.

Intention of Framers

- ✦ 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](#).⁵

Textualism

- ✦ Doctrine of 'textual originalism' attempts to establish the meaning of the Constitution would have had according to the general understanding of the time.
- ✦ This is distinct from the 'intentional originalism' which attempts to discover the subjective intentions of its authors.
- ✦ Thus, the relevant intention of the constitutional provision is that expressed in the Constitution itself, not the subjective intentions of its framers or makers: [Eastman](#).⁶
- ✦ The concepts and purposes of the Constitution are to be constructed at a sufficient level of **abstraction** or **generality** so as to enable it to be infused with the current understanding of those concepts and purposes: [Eastman](#).

Incremental Accommodation

- ✦ A way to reconcile history and change (intention of framers vs textualism) is the incremental approach.
- ✦ Connotation here means "the 'central' or 'core' meaning at the time of framing". – therefore, it is the "essential characters": [Cheatle](#).⁷
- ✦ By contrast, denotation means circumference. The meaning the words may bear today.
- ✦ **Words have a fixed connotation but their denotation may differ from time to time** ... The attributes ... will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them: [Street](#).⁸
- ✦ That is to say, the connotation of words in the Constitution is fixed as at 1900; its denotation may be subject to change as new instances, or different kinds of instances, arise.
- ✦ Examples of new developments in science and technology:
 - [R v Brislan](#) – 'other like services' (s 51(v))⁹
 - [Grain Pool](#) – 'Copyrights, patents of inventions and designs, and trade marks' (s 51(xviii)) – 'inventions' incorporates later developments, eg plant variety rights.¹⁰

Miscellaneous

- ✦ An Act is assumed not to abrogate rights unless a contrary intention is made expressly clear. – **Principle of legality**.
- ✦ An Act will be assumed to conform to international law, unless the contrary is expressly made clear.
- ✦ An Act will be read as **conforming to the Constitution** as far as this is possible, as provided by s 15A of the [AIA](#).¹¹

⁴ *Tasmania v Commonwealth and Victoria (Drawbacks case) (1904)*.

⁵ *New South Wales v Commonwealth (Work Choices Case) (2006)*.

⁶ *Eastman v The Queen (2000)*.

⁷ *Cheatle v The Queen (1993)*.

⁸ *Street v Queensland Bar Association (1989)*.

⁹ *R v Brislan; Ex parte Williams (1935)*.

¹⁰ *Grain Pool of WA v Cth (2000)*.

¹¹ *Acts Interpretation Act 1901 (Cth)*.