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High Court and Constitutional Interpretation

What the words mean:

- Difference between constitutional words rather than ordinary or legal words important because constitution made not to be easily changed therefore meaning of the words has impact upon foundation of government.
- Constitutional words special: *Australian National Airways v Commonwealth* (1945)- interpretation of instrument meant to endure but needs certain amount of flexibility in order to apply to changing factual scenarios.
- Eg. S51(xix) 'alien'= ordinary discourse alien mean out of space. In legal context= other/foreign. Means context can bestow meaning.

Approaches to Constitutional Interpretation: eg of 'illegals' used

- *Literalism*: read word and see what means literally. Problem is has number of possible definitions. Would have to bear in mind legal word to narrow scope → legalism
- *Legalism*: legal context or meaning of the word applied no matter the specific factual context (known as black letter law)
- *Originalism*: considering words in light of original meaning or intentions of people who framed/drafted the constitution in the 1900s and applying that meaning in current context. Also known as intentionalism.

Variant and hybrid versions of originalism include:

Moderate Originalism: by Goldsworthy

Ambulatory approach: treating some words as not limited to 1900 meaning because at the time further advancements were not contemplated eg. S51(xviii) extended telegraphic and telephonic services to television and internet.. Look to the connotation- actual definition of word that does not change. Denotation is the changing events and attitudes that attaches to the word over time.

Historical approach: look at historical or extrinsic materials to help interpret. In *Cole v Whitfield* said that parliamentary and convention debates and secondary sources are acceptable to help find original intention of framers.

→ Limitations:

- o anachronism
- *Contextualism*: read words in context of contemporary society and international norms and values ratified by Australia. Also known as progressivism.
Kirby J should use international law to interpret ambiguous terms in Constitution: *Newcrest Mining v Cth.*
- *Deane Js* living instrument where constitution should reflect the times of society: *NSW v Cth (The Incorporation Case)* (1990)

Engineers Case:

- Section 107: 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 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.

→ means states constitution can continue to exist once form federation. Plus States retain all power had originally when joins Commonwealth unless it is specifically taken away or deferred by State to Commonwealth

- Reserve powers doctrine= interpret s 51 narrowly because states required to keep powers under s 107.

By 1920 residual power doctrine rose- greater centralised government. Nothing in s 107 that says states have reserve power. S 51 bestows Commonwealth power, then whatever left over belongs to states → s 109 Commonwealth prevails.

- *Engineers Case* (1920): established residual powers doctrine.

Facts- s51(xxxv). State the employer for conciliation and arbitration for prevention and settlement of industrial disputes extending beyond limits of any one state. → Could the Commonwealth make laws that were binding on the States?

Reasoning for shift in doctrines- have to look at text of constitution and what is actually said. Doesn't say anything about narrow or broad etc nothing specifically limiting- literalist approach.

Implications: If text ambiguous then look at intention, context, structure → means that certain rules and prohibitions could be implied into the Constitution if not textually present. Implications not based on personal views but must be construed from context etc.

→ Sum: start with literalist approach (and natural meaning of word). If ambiguity then may imply from the context and structure/scheme and purpose of Act.

Overturned implied intergovernmental immunities doctrine.

- *ACTV*: affirmed that implications can be made when interpreting the Constitution. Found that when looking at structure of Constitution can see separation of powers- responsible and representative government- and for the integrity of this to occur need to have freedom of political communication.
2 kinds of implications: 1) actual terms of Constitution. It's sufficient if it manifests according to accepted principles of interpretation eg right to vote
2) Where structural must be logically or practically necessary for preservation of integrity of that structure (used here). Not sufficient if it is an unexpressed assumption (desire but not necessary).

Role of the High Court, Precedent and Overruling:

- Sections 71 and 76 makes High Court ultimate appellate court, interprets statute, makes common law; original jurisdiction in interpreting the constitution.
- *Stare decisis*= doctrine of precedent- HC should follow its earlier decisions but not bound by them. All courts below HC are bound by decisions of HC.
- When can a prior decision of the HC be challenged? Only when leave to do so given by HC (*Evdá Nominees v Victoria*) Kirby stated Court bound to reconsider decisions when issue arises (*Brownlee v the Queen*). Will tweak earlier decisions where factual scenario are different.

4 Matters that will Justify Departure from prev decision: i) earlier principle not worked out in significant succession of cases ii) if majority in earlier decision had different reasoning between them iii) earlier decisions led to consideration inconvenience (practically speaking) iv) earlier decision not acted upon in manner which militated against reconsideration (when court decision was wrong and not relied upon in practical terms).

- But precedent should not be elevated to greater status than the Constitution: *Old v Cth* (1977) at 610 per Murphy J.
- *John v Federal Commissioner of Taxation* (1988): earlier decision didn't rest on principle worked out in significant successive cases. Difference between reasons of justice constituting majority in earlier decisions. Earlier decision achieved no useful result but led to inconvenience.

Statutory Interpretation Acts:

- s15A- every act obligated to attempt to save as long as doesn't exceed Constitutional powers- so Court required to do a reading down/ severance. But in doing so cannot overly change purpose of the act.
- Reading down- limit application of the statute to those cases where it can validly apply.
- Severance- cut away offending part of statute so remainder can continue to validly apply.
- **Limits:**
can't read down if language too clear, means can't limit to specific application eg. *Railway Servants Case*: apply to employees of State Railways and couldn't bind states in those days, couldn't read down without changing purpose so invalid.
Severance- can't substitute or add words. Can't reverse intent of legislation. Can't sever if Parliament intend Act to stand or fall as a whole: *Stirkland v Rocla Concrete Pipes*.

Characterisation

- Purpose of characterisation: *Grain Pool of WA v Cth* (2000): to determine whether a law is supported by a Cth power the court considers whether the law can be defined as a law 'with respect' to a power (ie comes within the ambit or scope of power).
- No presumption of validity- must come to conclusion by applying the following:

To solve issues of constitutional powers and whether Commonwealth law is valid:

1. Identify the head/s of power
2. How has the Power(s) been interpreted by the High Court? (ie use authorities)
3. What is the scope of the power? What limits have been applied by the High Court in its interpretation?
4. Is the power non-purposive or purpose?
Or is it an implied incidental power?
5. Characterise the law
6. Once characterised, consider any constitutional limitations on the Commonwealth's exercise of power (both express eg s51(xxxi) and implied (freedom of political communication))

Step 5: Characterisation:

1. What does the Commonwealth Act actually do?
2. Is the subject matter of the Act covered by a head of power?
3. Is it i) a subject matter power or ii) a purpose power?
 - i) If it is a subject matter power does the Act have sufficient connection to the subject matter?
 - Incidental power: If not sufficient connection to the subject matter does invoking the implied incidental power bring it into the subject matter?
Then it is appropriate and adapted to the purpose.
 - ii) If it is a purpose power use proportionality test (is it appropriate and adapted test)

The 3 Powers and Tests Used in Characterisation:

Subject matter/ non-purposive power: power about the subject matter/thing

→ **TEST: Is it a law 'with respect to' the head of power- look to the rights, duties, obligations and privileges which it changes, regulates or abolishes.**

- *Sufficient Connection Test:*
 - Is the head of power sufficiently connected to the law through an examination of the rights, duties, powers and privileges of the law's operative affects or the purpose of the law.
 - Doesn't mean connection must be close. Just not so insubstantial, tenuous or distant that it can't be regarded as a law with respect to the relevant head of power: *Tas Dams* and *Herald & Weekly Times v Cth*.