

(1) Constitutional Interpretation

Different Approaches to Constitutional Interpretation

Originalism/Intentionalism

Overriding duty of the court is to give effect to the intentions of those who formulated the constitution' – NSW v Cth (Corporations Case) (1990)

- Allowed court to look at convention debates to ascertain original meaning of language in constitution
- BUT: the plain meaning of the constitution can not be substituted with the subjective intentions of the drafters or the Convention debates
- Cole v Whitfield (1988)
- Does this imply being 'ruled by the dead hand of the past'?

Textualism

- Finding the original meaning of the text
- Words should be given their natural and ordinary meaning
- Implied terms accepted by the High Court must come from within the text / structure and context of the Constitution
- "duty of this court faithfully to expand and give effect to it (Constitution) according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed" (Knox, Isaacs, Rich and Starke)
- "its only duty, is to expound the language of the Act in accordance with the settled rules of construction"
- "the settled rules of construction"
- 1. focus on the express terms on the words of the Constitution
- 2. focus without prior assumptions
- 3. interpret Commonwealth powers fully according to the ordinary meaning of the words
- Read in the language of the statute in what seems to be its natural sense looking to the terms of the instrument where powers are created and restricted, "if the text is explicit the text is conclusive"
- Engineers (1920) 28 Common LawR 129

Contemporary Meaning

- Deane J: embraces the notion of the 'living force' of the Constitution
- Representing the will and intentions of all contemporary Australians
- Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

Characterisation

Generally

- A valid law must be capable of being characterised as being within a Cth head of power - Fairfax v Federal Commissioner of Taxation (1965)
- Involves (a) determination of limits of subject matter (b) determination of whether law is within those limits - Bank Nationalisation Case (1948)
- Legislative power is plenary within each granted area of subject matter – Bank Nationalisation Case (1948) per Dixon J
- The terms 'peace, order and good government' do not limit the heads of power -Union Steamship Co of Australia v King (1988)
- Powers granted in the Constitution should be understood in a broad and general way – Bank Nationalisation Case (1948) per Dixon J

- If the constitution gives the Commonwealth the power to make laws with respect to an activity, it is within the power for the Commonwealth to prohibit that activity altogether - Bank Nationalisation Case (1948) per Dixon J
- Statutory declaration cannot deem a law to be within power. There must be a judicial process to determine whether or not it is actually within power - Deputy Federal Commissioner of Taxation v Brown
- BUT, if construction of act is ambiguous, statutory declarations may be considered - Leask v Commonwealth
- Deeming clauses are invalid – Re F, ex parte F (1986)
- Attempted to deem an ex-nuptial child a 'child of marriage'

Subject matter approach – non-purposive powers

- Approach outlined by McHugh in Re Dingjan; Ex parte Wagner (1995)
- (1) Determine character of the law
 - (2) Can the law be connected to head of power?
 - (3) Is this connection too tenuous?

Character and connection

- Characterise law with reference to what the law does in “creating, changing, regulating, or abolishing rights, duties, powers or privileges” - Bank Nationalisation Case (1948); First Uniform Tax Case (1942)
- The 'consequential effects' are irrelevant for this purpose – First Uniform Tax Case
- Purpose or motivation behind a law is generally irrelevant - Murphyores (1976)
- Even though the law had environmental motives in imposing prohibitions on exports (discretion to lift prohibitions involved environmental considerations), it was still essentially a law with respect to the export of goods
- Validity of a law should be tested by reference to its substantial operation, if its substance can be characterised under a head of power, it is valid – once it appears that the law has “an actual and immediate operation within a field assigned ... as a subject of legislative power, that is enough” – Fairfax v Federal C of Tax (1965)
- The law's connection with the power may be determined, not merely from its legal terms and operation, but from its practical operation - Cunliffe v Cth (1994), Cth v Tasmania (1983), Herald & Weekly Times Ltd v Cth (1966)
- Court unconcerned with substance of law in terms of 'motives, purpose or policy' - Osborne v Cth (1911)
- The fact that the legislation purported to control the ownership of land does not make it outside the taxation power
- Where the end falls within the subject matter of the power, the means adopted, so long as they are capable of achieving that end, are for the legislature to decide
- Burton v Honan (1952) per Dixon J; Herald & Weekly Times v Cth (1966) per Kitto J;
- Proportionality is not irrelevant to the prima facie characterisation of a non-purposive law – Leask v Cth (1996) per Dawson J
- Dual characterisation – it is enough that a law may be characterised under one given subject matter, regardless of whether it can be equally characterised under other subject matters – Actors and Announcers Equity Association v Fontana Films (1982)
- It is no objection that a law “touches or effects a topic which the Cth has no power to legislate” -

Murphyores

Is the connection tenuous?

- The prima facie connection between the law and the grant of power is sufficient unless it is 'so insubstantial, tenuous or distant' that it cannot be described as being made with respect to that head of power - Melbourne Corporation (1947) per Dixon J
- Connection must be a substantial and not merely tenuous one – cannot use head of power as launch pad for other activities having only indirect effect on subject matter - Re Dingjan; Ex Parte Wagner (1995) per Brennan J
- Notions of desirability and proportionality are not relevant to the sufficiency of this connection – Leask v Cth (1996) per Dawson J

Purposive powers

- If the head power is a purposive one (eg defence power), a connection can be established by comparing the purpose of the law and the purpose of the power - Leask v Commonwealth (1996)

Uncertainty about relevance of motive

- Motives of parliament and purpose of law are relevant if legislative power granted is purposive (eg defence power) - Murphyores Inc Pty Ltd v Commonwealth (1976)
- Purpose of law refers to end or objective the legislation serves, not the underlying motive - Kruger v Commonwealth

Incidental powers

- There is a general doctrine of implied incidental power at common law, giving power to legislate on matters incidental to the subject matter of a head of power
- There is also an express incidental power provided by s 51 (xxxix) giving power to legislate with respect to matters incidental to the execution of powers vested
- Note that these powers are distinct

Implied incidental power

- General principle at common law – “where any power or control is expressly granted, there is included in the grant ... every power and every control the denial of which would render the grant itself ineffective” – D’Emden v Pedder (1904);
- Must be a sufficient connection - O’Sullivan v Noarlunga Meat (1954) per Fullagar J
- ‘With respect to’ - extends powers broadly where there is a relevance or connection to the subject matter - Grannall v Marrickville Margarine (1955)
- Implied incidental matter extends to matters ‘found necessary to effectuate its main purpose’ (of the power conferred) - Grannall v Marrickville Margarine (1955)
- ‘It is enough that the provision is appropriate to effectuate the exercise of the power; one is not confined to what is necessary’ – Nationwide News v Wills (1992)
- Must be a real connection (not sufficient that it ‘touches or concerns’ the subject matter) - Grannall v Marrickville Margarine (1955)
- Example: The grant of power over interstate trade and commerce does not incidentally include ‘power to legislate for intrastate trade and commerce when its only relationship to interstate trade and commerce lies in the fact that the purpose of engagement in such intrastate activity is to conduce to the efficiency, competitiveness, and profitability of the interstate activity’ - A-G (WA) v ANA Commission (1976) per Stephen J
- Use of the incidental power may be rejected if found to be disproportionate, it must be reasonably