

## [A] CONSTITUTIONAL INTERPRETATION, CHARACTERISATION

### PROBLEM QUESTIONS:

- Most cases in Fed Con are HCA decisions,
- But, HCA is not bound by its own decisions,
- Thus, the decision may not hold in the future,
- Need to be aware of minority judgments

*You believe this is the position (x HCA decisions on this matter), but, strong dissents which have not gone away (must be aware of these dissenting trends), how strong is the precedent?*

### *s 51 CONSTITUTION*

- *List of subject matters in respect of which Cth parliament can make laws*
  - The subject matters are not exclusive
  - They are *concurrent* powers with States (have plenary legislative power)
  - Except for the powers which the Constitution exclusively vests in the Cth
- Any law purportedly made by Cth parliament which is not within one of the subject matters, is unconstitutional (law is invalid if declared by courts to be unconstitutional)
- Any court (but usually HCA) can declare a law to be unconstitutional
- *A law only becomes unconstitutional if the court declares it as unconstitutional*
  - If no person challenges a unconstitutional law, the law remains

### *s 51 Constitution*

The Parliament shall, **subject** to this **Constitution**, have **power** to **make laws** for the **peace, order, and good government** of the Cth with respect to

#### *[1] Subject to this constitution:*

- Prohibition aspect
- Is this law otherwise prohibited by the constitution?
- Even if parliament does make a law constitutionally within one subject matters listed, it will be invalid, if it breaches the constitution in another way

#### *[2] Power to make laws for the peace, order and good government of the Cth:*

- Power aspect
- Assuming that the making of the laws is for this purpose, you cannot challenge laws on the basis that you do not think that the law is for this purpose, must rely on other sections to have the law removed ('peace, order and good govt' are terms of art)

#### *[3] With respect to:*

- Element of generality
- Does not have to be absolutely
- No descriptions to the listed subject matters (openness of the words)

### **It is a significant departure from British constitutionalism**

- That a court can declare invalid laws of the parliament,
- As, the dominant in British constitutionalism is parliamentary sovereignty, supremacy
- In pure Westminster systems, courts cannot declare a law of parliament to be invalid

#### *Blackstone*

- There is no court in the realm that can declare a law of parliament invalid

#### *What then is the remedy?*

- Political remedy
- Rioting, during the next election, the people who declared such laws not be elected

### **But, this can be done in Australia, because**

- *Written constitution,*
- This gives limited powers to central government (American influence)

#### ***HCA → 7 unelected judges can invalidate the will of the Australian people manifested through the acts of parliament (massive responsibility)***

- *Must invalidate in accordance with proper legal reasoning (not on political grounds)*
  - If this is not done, you and the confidence in the court will be attacked
- Must have the guts to make a decision to invalidate
- HCA is very reluctant to invalidate laws of parliament

### **Why is the Cth parliament limited?**

- Followed American model
- Central parliament has limited powers
- State parliaments have plenary powers
- *s 51 powers are concurrent powers*
  - State and Cth parliament can make laws on these matters,
  - But, if there is an inconsistency, Cth laws prevail (*s 109 Constitution*)
- *Federalism*
  - Federal state prevents the concentration of power in a particular government
  - Breaking down power to prevent the abuse of power

## PRINCIPLES OF CONSTITUTIONAL INTERPRETATION

- *Interpretation*
  - Giving a definition to the relevant head of power
  - When interpreting, refer to *Engineers, Grain Pool*
- *s 51 – words that express power*
  - Extent of power is determined by the definition the court gives to words
  - The broader the interpretation, the broader the power given to parliament
- *First 20 years*
  - HCA adopted an attitude to *s 51* that limited Cth parliament,
  - Favouring state governments (act as autonomous entities),
  - Limited Cth parliament to national matters
- *HCA used 2 doctrines of interpretation*
  - *Doctrine of the immunity of instrumentalities*
    - No Cth laws could bind state governments,
    - But, Cth laws could bind the people of the states
  - *Doctrine of reserved state powers*
    - Interpret the head of power (*s 51*) in a way that does not take away from the states the legislative power that traditionally belonged to them

### *Grain Pool of WA v Cth*

Must **interpret the constitution** with **all the generality of which the words will permit**

### *Engineers v Adelaide Steamship (Engineers Case) (Knox CJ, Isaacs, Rich, Starke JJ)*

Facts	<ul style="list-style-type: none"> <li>• Claim lodged by a trade union of engineers in Cth court</li> <li>• Sought declaration re industrial award concerning 800 employers</li> <li>• <i>In WA, the employers included 3 government employers</i> <ul style="list-style-type: none"> <li>○ Argued the doctrine of immunity of instrumentalities,</li> <li>○ We are state government employers/agencies,</li> <li>○ Under Cth law, conciliation, arbitration court cannot apply to us</li> </ul> </li> <li>• <i>Isaacs J → had previously argued against the doctrine of immunity of instrumentalities and doctrine of reserved state powers</i> <ul style="list-style-type: none"> <li>○ UK statute, apply normal techniques of statutory interpretation</li> <li>○ Should not think about federalism and other political principles,</li> <li>○ Should interpret the words as words, as we do as a court,</li> <li>○ Should remove both the implied doctrines and,</li> <li>○ Apply strict textualism, legalism to the constitutionalist text</li> </ul> </li> </ul>
Issue	Whether a Cth law made under conciliation and arbitration power in <i>s 51</i> could authorise the making of an award binding those 3 governmental employers in WA

*Engineers v Adelaide Steamship (Engineers Case) (Knox CJ, Isaacs, Rich, Starke JJ)*

Decision	<p><b>HCA rejected doctrines of immunity of instrumentalities + reserved state powers</b></p> <ul style="list-style-type: none"> <li>• WA government employers were subject to Cth Act,</li> <li>• 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</li> </ul>
Principle (dominant method)	<p><b>Apply principle of strict textualism, legalism when interpreting the constitution</b></p> <ul style="list-style-type: none"> <li>• States are subject to a Cth law under <i>s 51</i> if such legislation on its true construction applies to them</li> <li>• Ordinary principles of construction applied so as to discover in the actual terms of the instrument their <b>expressed/necessarily implied meaning</b></li> <li>• Not decide on Cth power by looking over your shoulder as to what effect the decision will have on state power (constitution will take care of that), so, HCA must give to the words their <b>full and fair meaning</b> (<i>Barwick</i>)</li> <li>• <b>No other considerations</b> (federalism, preserving state powers)</li> </ul>
Effect of decision	<ul style="list-style-type: none"> <li>• It took from HCA the notion/limiting principle,</li> <li>• HCA now favours strong Cth powers (supremacy of Cth over states is enforced through <i>s 109 Constitution</i>)</li> <li>• Now, the abolition of both doctrines means that if supported by a head of power in <i>s 51</i>, Cth can implement legislation that affects the states</li> <li>• Clearly, Cth does not restrain itself and give the power back (power shift)</li> </ul>

*Vic v Cth (Payroll Tax Case) (Windeyer J)*

*The former doctrines which operated as limits on federal power were discarded due to the new realisation in changing circumstances that*

- Australians were now one people, and Australia one country, and
- That national laws might meet national needs

*Cole v Whitfield*

Facts	<ul style="list-style-type: none"> <li>• <i>s 92</i> ('trade and commerce amongst the state should be absolutely free')</li> <li>• HCA could not decide what this meant, but looked at what the convention debates said (breach of <i>Engineers</i>, as HCA went beyond the strict text)</li> </ul>
Principle	<p><b>Ambiguity, difficulty in interpreting the constitution</b></p> <ul style="list-style-type: none"> <li>• Refer to <b>convention debates</b> from the framers of <i>const</i> (originalism)</li> </ul>

*Theophanous v. Herald & Weekly Times (Deane J)*

**Contemporary meaning** (*interpret constitution pursuant to contemporary values*)

- Not be limited by dead hands of the framers (controversial, as it elevates the judge),
- But, constitutions are meant to last and,
- Australian people have the power to change the constitution and,
- The fact that they have not changed it means it should still be current
- (*But* → difficulties with changing the constitution, procedure)

*Kirby J's view (not accepted)*

**Interpret const consistently with international instruments**

- Because, international treaties have no status as domestic law

**Connotation and denotation:**

*Ex parte Professional Engineers:*

- We must not, in interpreting the constitution, restrict the denotation of its terms to the things they denoted in 1900
- The denotation of words becomes enlarged as new things falling within their connotations come into existence/become known
- But, in the interpretation of the constitution the connotation(s) of its words should remain constant
- We are not to give words a meaning different from any meaning which they could have borne in 1900
- Law is to be accommodated to changing facts, not to be changed as language changes

**CHARACTERISATION AND INTERPRETATION:**

- Terms of art in constitutional law

**Process (two-tier test to determine the constitutional validity of an Act):**

**[1] Powers:**

<i>[1] Interpretation (of cons provision)</i>	Court gives a definition/meaning to the words of the head of power
<i>[2] Characterisation (of the statute)</i>	<i>Whether the act falls within the scope of the subject matter</i> <ul style="list-style-type: none"><li>• Characterise the act to determine the subject matter</li><li>• Does the subject matter characterised of the statute come within the previously interpreted words of s 51?</li><li>• If characterisation produces a subject matter which is outside subject matter of a head of power → unconstitutional, invalid</li></ul>

**Determine whether the law falls within a head of power;**

1. *Ascertain the nature of the law in question*
  - a. Rights, duties, powers, privileges it changes/regulates/abolishes (what it does)
2. *Determine the scope of the relevant head of legislative power in the constitution and whether the law in question falls within that head of power:*
  - a. Whether the law relates to the subject matter/purpose of the head of power in a way that allows it to be described as a law with respect to that power
  - b. *Subject matter power* → sufficient connection with the head of power?
  - c. *Purposive power* → law capable of being seen as reasonably appropriate and adapted to achieve that purpose?
3. *Whether the law breaches an express/implied prohibition in the constitution*

**HCA seeks to remedy the statute which is constitutionally ill**

*HCA is very reluctant to declare a state is invalid*

- Reluctance explained by the principle that the statute is an expression of the will of the Australian people expressed through its elected representatives through parliament

*Thus, HCA will ask 'is there anything we can do to save the statute'?*

- If the law is *prima facie* unconstitutional, then the procedures of reading down and severance must be engaged in an attempt to salvage the provisions

**[1] Reading down**

- Can the statute be characterised in a number of ways?
- *Interpret the statute in the way that makes it constitutional*
  - If the statute can be read in another way which is slightly different but can get the statute into power, then, the court will read the statute in this way ()

**[2] Severance (if reading down fails)**

- A part (few words, phrase) of the statute is constitutionally invalid
- This does not mean that the entire statute becomes invalid
- Court will sever the constitutionally invalid part

**2 conditions to severance/reading down**

1. *Severing/reading down must not have the affect of altering the intent of parliament*
  - Cannot change the meaning of the act
  - In so severing/reading down, am I still within general intention of parliament?
2. *Does the statute still make sense without the severed parts?*
  - Some provisions may be so connected to other provisions that the statute will not make sense without the severed provisions

**[2] Prohibition:**

- Even if the law comes within a head of power in *s 51*, is there a prohibition in the constitution which would prohibit the law in another way
- ('Subject to this constitution' in *s 51*)?

## TEST FOR CHARACTERISATION:

### *Fairfax v Federal Commissioner of Taxation*

Facts	<ul style="list-style-type: none"> <li>• 2 sections of <i>Income Tax and Social Services Contribution Assessment Act</i> were introduced into the act because the government was concerned about falling investment in public securities/government bonds</li> <li>• Income earned by superannuation funds would be exempted from income tax provided that the funds were invested in government bonds</li> <li>• The validity of these sections was challenged</li> <li>• Parliament argued that this was authorised under s 51 taxation power</li> </ul>
Decision	<p><i>Law is valid, as within one of the characterisations</i></p> <ul style="list-style-type: none"> <li>• Even though the dominant characterisation was the incentives characterisation, the law could be characterised as a law with respect to taxation, as the duty to pay tax was being affected/regulated</li> </ul> <p><i>Dual characterisation (can characterise the statute in a number of ways)</i></p> <ul style="list-style-type: none"> <li>• Law changes duty to pay tax that if I invest in government bonds, I am exempted from paying part of my tax (law valid as within taxation power)</li> <li>• Law changes privilege as to where I invest, as it provides incentives for investment in government bonds (dominant characterisation is investment in government bonds but this is not a relevant head of power)</li> </ul>
Principle	<p><u>[1] Interpretation (interpret tax, what does tax mean?)</u></p> <ul style="list-style-type: none"> <li>• A tax is a compulsory exaction of money by a public authority for public services, enforceable by law, not a fee for services</li> </ul> <p><u>[2] Characterisation</u></p> <ul style="list-style-type: none"> <li>• Must determine the <b>subject matter</b> of the statute which is determined by reference to the <b>rights, duties, powers and privileges</b> which the impugned <b>law changes/regulates/abolishes</b> (<i>Kitto J</i>)</li> </ul> <p><i>Dominant characterisation principle</i></p> <ul style="list-style-type: none"> <li>• If a law is capable of two/more characterisations, the court must determine which is the dominant characterisation</li> <li>• Which is the characterisation that gets to the core of the statute?</li> </ul> <p><i>Pre-Fairfax</i></p> <ul style="list-style-type: none"> <li>• It is only the dominant characterisation that can be used to test whether the law comes within the power/is valid or not</li> </ul> <p><i>Fairfax rejected dominant characterisation principle</i></p> <ul style="list-style-type: none"> <li>• Can have <b>dual characterisation</b> and,</li> <li>• If <b>one</b> of the <b>possible characterisations</b> found the <b>law to be with respect to a head of power</b>, then that was enough and the law is <b>valid</b></li> </ul> <p><u>[3] Any other prohibitions in constitution that would make this law invalid?</u></p> <p>No</p>

*Grain Pool of WA v Cth (Confirmed Fairfax principle)*

Confirmed Fairfax principle

*Process of determining whether a federal law is a law with respect to a head of Cth power*

1. Examine the rights, duties created by the law (nature of the law) (*characterisation*)
2. What is the connotation and denotation of words and phrases used to describe the power? What is the scope of the power? What is its core meaning and what matters incidental to that core can also be regulated (*interpretation*)?
3. What is the strength of the law's connection to the head of power?

Does the law have a **sufficient connection** with s 51 head of power (characterising statute)?

- Consider the **practical** + the **legal operation** of the impugned law