

## Table of Contents

|   |           |
|---|-----------|
| <b>DEFENCE POWER</b>  | <b>3</b>  |
| DEFENCE POWER   | 3         |
| <b><u>LECTURE 5: LEGISLATIVE POWERS – S51(I) TRADE AND COMMERCE POWER; IMPLIED INCIDENTAL POWER</u></b> | <b>4</b>  |
| IMPLIED INCIDENTAL POWER  | 5         |
| <b><u>SEMINAR 2: S. 51(XXVI) RACE POWER</u></b>   | <b>5</b>  |
| THE AUSTRALIAN COLONIES AND STATES  | 5         |
| THE COMMONWEALTH CONSTITUTION   | 6         |
| <b><u>EXTERNAL AFFAIRS POWER</u></b>  | <b>8</b>  |
| <i>STEPS INVOLVED IN EXECUTIVE TREATY-MAKING</i>  | 9         |
| MATTERS GEOGRAPHICALLY EXTERNAL TO AUSTRALIA  | 9         |
| <b><u>PART 7: EXTERNAL AFFAIRS POWER</u></b>  | <b>10</b> |
| <b><u>SEMINAR 5: EXECUTIVE POWER, INCLUDING NATIONHOOD POWER</u></b>                                    | <b>19</b> |
| NATIONHOOD POWER  | 21        |
| SECTION 81 AND THE CASES THAT HAVE TESTED THE CONNECTION  | 21        |
| <b><u>LECTURE 3: JUDICIAL POWER</u></b>   | <b>22</b> |
| THE SEPERATION OF POWERS  | 22        |
| JUDICIAL POWER OF THE COMMONWEALTH  | 23        |
| THE POLITICAL THEORY OF A SEPARATION OF POWERS  | 24        |
| <b><u>LECTURE 7: S 80 TRIAL BY JURY; S 116 FREEDOM OF RELIGION</u></b>                                  | <b>26</b> |
| <b>S.80 TRIAL BY JURY</b>   | <b>26</b> |
| <b>SECTION 80 TRIAL BY JURY</b>   | <b>26</b> |
| A. WHO DOES IT APPLY TO?  | 26        |
| B. WHAT DOES IT GUARANTEE?  | 27        |
| C. DOES S 80 REQUIRE UNANIMOUS VERDICTS?  | 28        |
| <b>SECTION 116 FREEDOM OF RELIGION</b>  | <b>28</b> |
| D. WHO DOES IT APPLY TO?  | 28        |
| E. S 166 IS LIMITED IN SCOPE  | 28        |
| F. DOES S 116 STATES AND TERRITORIES?   | 28        |
| G. WHAT IS A RELIGION?  | 29        |
| <b><u>INCONSISTENCIES OF COMMONWEALTH AND STATE LAWS</u></b>  | <b>29</b> |
| INCONSISTENCY OF LAWS   | 29        |
| TEST FOR ‘INCONSISTECY’   | 30        |
| THREE TESTS OF INCONSISTENCY  | 31        |
| PRINCIPLE: INCONSISTENCY CAN BE DIRECT AND INDIRECT THE TESTS   | 31        |
| TEST ONE: DIRECT’ OR ‘TEXTUAL’ COLLISION  | 31        |
| TEST TWO: CONFERRAL OF RIGHTS TESTS   | 31        |
| TEST THREE: TESTING INTENTION: THE ‘COVER THE FIELD’ TEST   | 32        |
| EXPRESS INTENTION TO COVER THE FIELD  | 32        |
| REPUGNANCY OF LAWS IN THE TERRITORIES   | 34        |

## TOPIC 1: Defence Power

### DEFENCE POWER

#### DEFENCE POWER

##### **Commonwealth Constitution s 51(vi)**

The Parliament Shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(vi) The naval and military defence of the Commonwealth and of several States, and the control of the forces to execute and maintain the laws of the Commonwealth...

The main aspect of Commonwealth legislative powers is to create laws in relation to a subject matter. The defence power is a purposive power: *Thomas v Mowbray* (2007) 233 CLR 307

In *Stenhouse & Coleman* (1944) 69 CLR 457, Dixon J pointed that defence power could only be defined in terms of purpose. This is different as the constitutional's general characterisation depends on subject matter. The **High Court** is required to look at the purpose of the measure and to determine whether it could assist in the defence of the Commonwealth. The court must be satisfied that there is a connection between the law and the defence of Australia.

"The extent of this defence power may vary according to the *degree* and *nature* of the danger of external or internal **aggression** at a certain period in time."

Some judges have questioned the validity of the distinction between wartime and peacetime. The most significant modern peacetime cases relate to anti-terrorism laws.

#### **ANTI-TERRORISM LAWS**

The defence power is not limited to external threats from governments, but also extends to internal threats.

**Case Analysis:** *Thomas v Mowbray* [2007] HCA 33.

*Facts:*

- New Anti-terrorism laws were enacted after the 9/11 attacks.
- The Appellant [Thomas] had admitted to training with terrorist organisations, however he claimed that such evidence was obtained under duress and he was acquitted.
- He was issued a 'control order' imposing restrictions on him, under the new anti-terrorism laws. He challenges the validity of those laws.

*Held:*

- The Court rejected the Communist Party's Case which held that the defence power is only concerned with external threats
- The protection from a terrorist act falls within the conception of defence power
- Callinan J found that the measure was reasonably proportionate to the threat.
- Kirby J in dissent.

#### **DISCIPLINE OF DEFENCE FORCE MEMBERS**

Modern cases concern discipline of members of the defence force in peacetime. In the following cases, the courts held that the defence power extends to the creation of a certain disciplinary code that stands outside *Ch III of the Constitution* – the Judicature.

*Re Tracey; Ex parte Ryan* (1989) 166 CLR 518: The court considered the validity of legislation that adopted the criminal law of the ACT. These service offences were tried by tribunals. Defence personnel could not be tried in a civil court for a civil offence where they had been convicted or acquitted of a similar offence.

Three words are of significance: ‘people’, ‘any’ and ‘race’. In *Koowarta v Petersen*, the first case to consider s 51(xxvi), the justices held that the ‘race’ power did not support the Racial Discrimination Act.

*‘For whom it is deemed necessary to make special laws’*

The native title act upheld that Act as a ‘special law’ because it treated indigenous people differently, imposing restrictions on the latter’s use and allocation of native title land.

Section 51(xxvi) of the Constitution allowed the Commonwealth to legislate with respect to people other than aboriginals. The part about Aboriginals was struck out in 1967. Some of the words in the section need to be defined:

‘Race’ – race is to be defined broadly, and not according to specific genetic origin (Tasmanian Dam Case)

‘Special’ – special laws are laws which confer a right or benefit or imposes an obligation or disadvantage especially on people of a particular race (Native Title Act).

‘Necessary’ – what is necessary is to be defined by the Parliament’s judgment. However, where there are ground to do so, the court will not entirely abstain in matters of manifest abuse.

### **Case Analysis: Kartinyeri v Commonwealth**

#### *Facts:*

- Minister had the power to make declarations for the protection of Aboriginal areas; 1 group of women claimed the island was used for secret women’s business; this business could not be disclosed to men; a women was carrying out an enquiry; numerous problems with the enquiry so the government passed an act so that the bridge would go ahead despite Aboriginals objections.

#### *Issue:*

- Whether the Commonwealth could pass a law under the race power which was detrimental to a racial group

#### *Held:*

- The court was 2:2:2 – undecided.
- **Yes:** Gummow & Hayne – power can be used both for benefit and detriment; rejects the idea that race power can only be validly enacted to benefit Aborigines.
- **No:** Gaudron & Kirby JJ – power cannot be used for disadvantage of racial minority; such laws would be invalid
- **Gaudron J:** Law must be ‘necessary’. In this case, the law can’t be used to deprive a citizen of their right due to race as it is not necessary to make a law form them.
- **It must not be a ‘manifest abuse’.** Is it Rational or Irrational?

## **COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 25**

### **Provision as to races disqualified from voting**

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

## **TOPIC 4: EXTERNAL AFFAIRS POWER**

### **EXTERNAL AFFAIRS POWER**

Subject matter of external affairs power is explained in *Victoria v Commonwealth (1996) 187 CLR 416*. The external relations were in a condition of continued evolution, it commenced federation.