**Characterisation**

**Direct Characterisation**
- Interpret Constitution according to express words (*Engineers’* case).
- Is law within an appropriate head of power?
  - Is it ‘with respect to’ the power (*Fairfax v FCT*).
  - Purpose of law not relevant – direct effect all that matters (*Murphyores; Workchoices*).
- Can a law be under two heads of power?
  - Yes, dual characterisation acceptable.
- What if law isn’t under a HoP?
  - See **Incidental Scope**.

**Incidental Scope**
- Can legislate on incidental matters under Constitution (s 51(***xxix**); *Grannal v Marrickville*).
- Work out if purposive power or not.
  - Purposive – describe specific purpose for Cth to make laws, e.g. defence power.
  - Non-purposive – Cth can enact many laws under general power, e.g. trade/commerce.
- If purposive:
  - Law reasonably appropriate and adapted for purpose (*Leask v Cth*)?
- If non-purposive:
  - Sufficient connection to power (*Fairfax v FCT*)?
s 51(xx) – Corporations Power

Cth law for CCs only (core scope)
• Any law for CCs falls under power, regardless of what activities it regulates (Workchoices).
  o Object of command test.
  o Can regulate more than just trading activities of trading corporation.
• Can regulate CC activities done preliminary to/for purpose of trading (Tas Dams).
• Multiple characterisation approach is acceptable – no need for independent connection between fields of law (Workchoices).

Cth law directed towards someone/thing other than CC (incidental scope)
• Two possible tests – use both in exam as correct one unclear:
  o ‘Sufficiency of connection’ test (Re Dingjan):
    ▪ Law falls outside power if no effect on CC.
  o Workchoices test:
    ▪ Any potential effect to CC will be deemed incidental.
    ▪ Did not apply Dingjan so authority unclear.
    ▪ Case facts highly analogous to the Dingjan case facts, so interesting that different result occurred.

Is the Cth law directed at the incorporation of a company?
• If so, invalid (Incorporation case).
Grants Power (s 96)

- Cth can use s 96 to induce a state to use/not exercise its powers (First Uniform Tax case).
  - Cth can discriminate between states when giving grants
- Very few limits
  - Cannot legally bind state into accepting grants.
  - Once accepted, states cannot renege a grant.
External Affairs Power (s 51(xxix))

Four categories
- Implementation of treaties – **main one** (use rest if treaty not present).
- Extraterritorial reach of the power.
- Relations with other countries.
- Matters of international concern.

Implementation of Treaties
- Treaty is an external affair, so related laws valid under EAP (*Tasmanian Dams*; affirmed in *Richardson*)
  - Broad view.
  - However, qualifications to this rule.
- Must be **bona fide** (*Koowarta*):
  - Only treaties entered into in good faith, not used by Cth to gain legislative power (*Tas Dams*).
  - Look at countries ratified treaty, notable absentees.
- Must be **treaty obligations** (*Richardson*):
  - Language of treaty relevant, not Cth law.
  - If specific obligation, then Cth can pass treaty obligations in domestic law (*Tas Dams; Richardson*).
  - If no specific obligation, can exercise incidental power under EAP (*Richardson*).
  - If specific obligation but draft/no treaty, can still pass law (*ILO case*).
  - No obligation, no treaty – uncertain, see 3-3 *Tas Dams* split.
- **Specificity Principle** (*ILO case*):
  - Language of treaty relevant, not Cth law.
  - Need general directions on how to implement obligation (*ILO case*).
- **Conformity Principle** (*Tas Dams*):
  - Language of Cth law, not treaty.
  - Must be reasonably appropriate and adapted (*ILO case*).
  - Cannot be disproportionate (*Richardson*).
Extraterritorial reach of the power

- Refers to matters/things outside Australia (NSW v Cth – Sea and Submerged Lands case).
- Plenary power, applies to anything relating to EAP (Polyukhovich).
  - Geographic externality by itself enough to invoke EAP (XYZ v Cth).

Relations with other countries

- Cth can legislate in respect to relations with foreign nations (R v Sharkey).
  - Can also legislate in respect to international bodies (Koowarta).

Matters of international concern

- Unclear if Cth can implement legislation on matters of international concern, but:
  - Are not extraterritorial; don’t directly affect IR; and aren’t covered by power to implement treaties.
  - No decision using this power since Koowarta (unlikely to be used today as well).
- Case law discussion.
- Potentially NOT international concern:
  - World Heritage Convention (Tas Dams) – Gibbs CJ held that action in Australia, did not affect relationship with other nations (though perhaps changed stds in present era).
  - Prosecution of war crimes (Polyukhovich) – Brennan J held that no expectation in international community that prosecutions would occur in nations with no direct connection to crimes committed (though perhaps changed stds in present era).
  - Existence of treaty alone insufficient to establish international concern (Tas Dams).
Separation of Powers – Cth Judicial

Judicial Power

- Hard to define – *Huddart Parker* starting point.
- Can only be exercised by Ch III courts – maintain judicial independence/impartiality.
- Federal Courts cannot exercise non-judicial power (although exceptions).

Indicators of judicial power

- **Enforceability** (strongest indicator of JP – *Brandy v HREOC*).
- **Binding and conclusive decisions**.
- Decisions regarding **existing rights and duties**.
- **Breadth/nature of discretion** to be exercised.
- Need for ‘**controversy**’.
- **Historical considerations**.

Separation of Powers – Boilermakers’ Principles

- Principle 1 – JP only exercised by Ch III (Federal) courts:
  - Courts listed under s 71 (*NSW v Cth (The Wheat Case)*).
  - Judges on Ch III court must also have tenure (*Waterside v Alexander*).
- Principle 2 – Ch III (Federal) courts cannot exercise non-JP:
  - Cth can vest State courts with federal jurisdiction (s 77), States cannot vest JP in federal courts (*Re Wakim*).

Exceptions to Principles

- **Principle 1**:
  - Ch III courts can delegate judicial power to non-judicial bodies (*Harris v Caladine*).
  - Court martials/military tribunals (*White v Director of Military Prosecutions*).
  - s 49 – Allows Parliament to punish for contempt of parliament (see *R v Richards*).
- **Principle 2**:
  - Incidental powers (*Boilermakers’ case*).
  - *Persona Designata* (see below).
Persona Designata Exception

- Federal judges can carry out non-judicial functions if acting in a personal capacity (Grollo v Palmer):
- However, two exceptions:
  - Power must be conferred and exercised with judge’s consent; and
  - Power cannot be incompatible with exercise of JP.
- Incompatibility (Wilson v Minister for Aboriginal Affairs (Hindmarsh Island case)):
  1. Is the function closely connected with the legislature or the executive?
  2. Is the function to be performed independently of non-judicial instruction, advice or the wish of one of the other arms of government?
  3. Is a discretion required to be exercised free of political grounds?
     - Yes – compatible.
     - No (i.e. political discretion by judge required) – incompatible.
Separation of Judicial Powers – State
State Constitutions (‘Manner and Form’)

How to check if Restrictive Procedure (RP) valid

Original Law

- Is section ‘double entrenched’ (McCawley; Trethowan)?
- Does the section use a permissible manner and form provision (Westlakes)?
- If it is too onerous M&F provision invalid, therefore not binding (King CJ per Westlakes).

Amending Law

- Does the law respect the constitution, powers and procedures of Parliament (s 6 AA)?
  - No – ignore M&F requirements.
  - Yes – must satisfy M&F requirements.
- Constitution’s meaning?
  - Features that give Parliament its representative character (Marquet, per Gleeson CJ, Gummow and Hayne JJ).
- PP of Parliament meaning?
  - Regulates internal procedures/Parliament’s law-making abilities.

Background Information

- State Constitutions are flexible and do not necessarily impose constraints on State legislative power (Taylor; McCawley).
  - Cannot bind successor Parliaments – would undermine Parliamentary sovereignty.
- State Parliaments generally have plenary power (Union Steamship).
- Certain restrictions on State legislative power by Cth Constitution:
  - s 52 – Exclusive powers of the Parliament.
  - s 90 – Exclusive power over customs, excise, and bounties.
  - s 109 – Inconsistency of laws.
Implied Intergovernmental Immunities – Cth legislative power over States

Starting Point
• *Melbourne Corporation v Cth:*
  o Can make laws with an intergovernmental impact upon state govts, but:
    ▪ Cannot discriminate against the States.
    ▪ Cannot pass general laws that fundamentally impede essential State government functions.
• **However,** reformulated test in *Austin v Commonwealth:*
  o **Does the law impair State’s capacity to function?**
    o Basically the same, but now one test – use same authority as Melb Corp.

Discrimination test
• If law discriminates against States/agencies, invalid (*QEC v Cth*).
  o Can be direct or indirect discrimination.
• Exception to this rule if ‘rational’ purpose (Brennan J)
  o Justified or reasonable to enact the law (e.g. *Richardson*).

Impeded function test
• Cth cannot pass laws of ‘general application’ that fundamentally impede the States from carrying out essential government functions.
  o May include (i) capacity of States to engage servants (ii) acquisition of goods and services, (iii) acquisition of land (*Native Title Act* case).
  o *Re Australian Education Union* – two specific immunities:
    ▪ Cannot interfere with State-based hiring/terminating practices.
    ▪ Cannot interfere in State’s rights in relation to higher level public servants.
Implied Intergovernmental Immunities – State legislative power over Cth

Current Test (per Henderson’s case)

• Is it a State law that:
  o Affects the capabilities and functions of the Cth?
  o Or merely binds Cth in the exercise of those capacities?

• If yes to former, invalid unless exception applies:
  o s 64 of the Judiciary Act (Cth).
  o Criminal law exception (Pirrie).
s 109 Cth-State Inconsistencies

Step-by-step Guide

• Cth law takes precedence over State laws (s 109).
• Meaning of invalidity?
  o Inconsistent provisions can be severed. However, if not severable entire Act inoperative (*Wenn v Attorney-General*).
• Three tests for inconsistency:
  o Simultaneous Obedience (*R v Licensing Court; McBain v Victoria*).
    ▪ Impossible to logically follow both laws at once.
  o Conferral of Rights (*Clyde Engineering v Cowburn*).
    ▪ State law is invalid if it ‘takes away a right conferred’ by Cth.
  o Cover the Field (Isaacs J per *Clyde Engineering*).
    ▪ Three step sub-test:
      • Identify/characterise the ‘field’ the Cth law deals with (*Ansett v Wardley* plus other examples);
      • Has State law attempted to regulate on matters in the ‘field’?; and
      • Was it the Cth’s intention to ‘cover the field’ (express or implied).
        o Express or implied intentions to cover/not cover field.
          ▪ If no intention, no inconsistency.
          ▪ If intention, State law invalid (Dixon J, *Ex parte McLean*).
Implied Freedom of Political Communication

Step-by-step Guide

• Implied freedom to political communication exists (*Nationwide News; ACTV v Cth*).
• Two step test (*Lange v ABC*):
  o Does the law effectively burden freedom of communication about governments or political matters?
  o If so, is the law reasonably appropriate and adapted to serve a legitimate end?
    ▪ Refined in *Coleman v Power* – *‘[In a manner] compatible with the maintenance of representative and responsible government?’*

1) Does law burden freedom of political communication?
• Both verbal and non-verbal communication (*Levy v Victoria*).
• ‘Government or political matters’?
  o Essentially discussion of politics and political bodies/individuals (*Theophanous*).
  o However, only to the extent that such communication could affect their choice in elections or referenda (*Lange v ABC* – more restrictive).
    ▪ Does the law impact voters’ choices in Australian Federal politics
  o Includes executive branch (*Coleman v Power*).

2) Is law reasonably appropriate and adapted?
• Are the means adapted and appropriate for that end?
  o Value-laden question, difficult to reach a predictable answer.
  o *Nationwide News* per Mason CJ – Distinction between:
    ▪ Laws that restrict ideas as such (only compelling justification would work here); and
    ▪ Laws restricting the means by which ideas are communicated.
s 92 – Freedom of Interstate Trade & Commerce

What is ‘interstate trade and commerce’?

- **Interstate** – trading between States.
- **Trade and commerce** – wide interpretation (*McArthur v Queensland*).

4-part test to comply with s 92 (*Cole v Whitfield*)

- Is there a burden on interstate trade?
- Is the burden discriminatory on its face or in its practical effect?
  - Occurs if law on its face/by factual operation gives trade/commerce a disadvantage.
  - Enough if some traders are discriminated against (*Castlemaine Tooheys*).
- Does the discrimination have a protectionist effect?
  - s 92 prohibits two types of laws (*Bath v Alston Holdings*):
    - Law that removes a competitive advantage from interstate industry; or
    - Law confers a competitive advantage on local industry.
  - Marketing/pooling scheme or similar export restrictions (*Barley Marketing Board*):
- If YES to all so far, prima facie invalid
- Defence – Is protectionist effect pursuant/incidental to non-protectionist purpose?
  - If so, are burdens appropriate and adapted?