<u>Characterisation</u>

What is this about?

- If a law can be described as a law on or 'with respect' to a Cth head of power, it is within power and **valid**.
- If it does not have this connection, it is *ultra vires* and **invalid**.

<u>Guide to proper characterisation</u>

- What does the text of the section say (*Engineers' case*)?
  - Should primarily interpret Constitution according to express words.
  - Implied meanings allowed <u>only</u> where such a meaning is necessarily/logically implied from the <u>text</u>.
- How do you determine if a law is within power according to the text?
  - *'Can the law be properly described as a law "with respect to" a power or powers? Is the law sufficiently connected or incidental to the power invoked to support it?'* (*Fairfax v FCT*, Kitto J).
  - Key point: what **obligation, right or privilege** is imposed by that law?
    - Focus solely on direct effect of law, not economic/social consequences or purposes.
      - Motivation for law irrelevant (*Murphyores; Workchoices*).
    - Dual/multiple characterisation permissible so long as law fits under at least one Cth head of power.
      - e.g. *Workchoices* fitted under s 51(xx) so valid despite regulating industrial relations.
    - Rejected sole characterisation test in *R v Bargers* – rejection of sole characterisation in its entirety held in *Workchoices*.
      - However, Callinan J in *Workchoices* critical of D/M characterisation – 'accidental bullseye' proposition.
  - Case examples:
    - *Fairfax* – Since obligation is to pay tax, it is valid under s 51(ii).
    - *Murphyores* – Law was held to be about exports and so within s 51(i) (international trade and commerce). It was irrelevant that the law was being used to impact on the environmental arena.

- What if the law can't be characterised as being 'with respect to' the <u>core</u> of a topic?
    - Still valid if falls within <u>incidental scope</u> of the head of power.
        - s 51(xxxix) grants general power to legislate on 'matters incidental to the execution of any power' contained within the Parliament, executive or judiciary.
            - *'Every legislative power carries with it authority to legislate in relation to acts, matters and things the control of which is found necessary to effectuate its main purpose, and thus carries with it power to* ***make laws governing or affecting many matters that are incidental or ancillary to the subject matter****.'* (*Grannal v Marrackville*)

<u>Incidental Scope of the Power</u>

- Is the power purposive or non-purposive?
    - Purposive – describe specific purpose for Cth to make laws, e.g. defence (s 51(vi) or external affairs (s 51(xxix)).
    - Non-purposive – describe general activity for which multiple purposes can be surmised, e.g. activities like trade and commerce (s 51(i)), type of person such as corporations (s 51(xx)).
- **If purposive:** Can the law reasonably be regarded as appropriate and adapted to the fulfillment of the end in mind/Head of Power (*Leask v Cth*)?
    - There should be a reasonable balance between the aim of a law, and the means used to achieve that end.
    - Can also use proportionality to determine whether the Cth law has a 'sufficient connection' to a head of power.
- **If non-purposive:** *Is the law sufficiently connected or incidental to the power invoked to support it?'* (*Fairfax v FCT*, Kitto J).
    - Use *Fairfax* test **only**.
        - Proportionality irrelevant for these powers (Dawson J in *Leask v Cth*).

<u>Case Examples – Incidental Power</u>

- *Griffin v Constantine:*
    - Tax on potable alcohol and not industrial spirits.

    - C argued that s 16(b) of the *Sprits Act* invalid, as not a law in respect to tax, but in public health interests.
    - Court: s 16 valid:
        - Lower tax designed to benefit industry so acceptable. Public health benefits irrelevant.
    - Key issue – proximity of subject matter of the law to tax power.
- *O'Sullivan v Noarlunga Meats:*
    - Because slaughter was for export, regulation by the Cth was acceptable within incidental scope of s 51(i).

<u>Case Examples – Proportionality</u>

- *Communist Party v Cth*:
    - Commonwealth attempted to enact the *Communist Party Dissolution Act 1950* (Commonwealth) under Defence Power.
    - Majority – Banning Party was a **disproportionate** method 'for the defence of Australia'. The 'need to combat Communism' could not be classified as suitable subject matter under s 51(vi).
- *Thomas v Mobray*:
    - Overturned *Communist Party case* – broader view of 'defence' under s 51(vi).
    - Power not limited to wars against foreign nations/external threats/conventional war. Could be used to combat activities such as terrorism at home or abroad.

s 51(xx) – Corporations Power

What is a 'constitutional corporation'?

- **Foreign** – incorporated, or 'formed', under the law of a foreign nation.
- **Financial** – engages in financial activities, that is those transactions the subject of which is financial exchange (*State Superannuation Board*).
  - e.g, borrowing, lending or investing in money, currency or funds.
- **Trading** – corporations where a substantial or sufficiently significant proportion of its activities comprise trading activities.
  - 'Current activities' test – *R v Adamson*.
    - Note: If trading slight/trivial/completely incidental to another purpose, may not be considered sufficient.

Is Cth law directed at CCs only (Core Scope)?

- Can use the core of the Corps Power to regulate trading activities of trading corporations (*Concrete Pipes case*, overruled *Huddart Parker*):
  - Barwick CJ: reliance on the old ***reserved powers*** **doctrine had "emasculate[d] the legislative power given by s 51(xx)".**
    - Laws at issue in *HP* dealt with the *'heart of the purpose for which the corporation was formed'* – i.e. law controlling a corporation's trading activities clearly a law 'with respect to' s 51(xx).
    - Cth couldn't be stopped from regulating CCs on basis that *'their trading activities in intrastate trade was a matter for the State legislation exclusively'*.
- Can regulate activities of CCs done preliminary to/for the purposes of later trading activities (*Tasmanian Dam case*).
  - Cth can enact laws to regulate the trading activities of trading corporations, **in addition to** activities done for the purpose of trade.
  - A broad and narrow view of the scope split in case – ultimately broad prevailed in *Workchoices*.
- If law is directed towards a CC, it falls within the Corporations Power regardless of what activities it regulates (*Workchoices*):
  - 'Object of command' test – what is it that the law commands?

- i.e. If CC is a trading corporation, Cth can regulate any part of it, **not just trading activities**.
- Multiple characterisation approach is acceptable.
  - *Workchoices* – Law covered both Corporations Power and Industrial Relations Power.
  - Does not matter if there is not independent connection between two fields of law.

Is Cth law directed towards someone/thing other than a CC (Incidental Scope)?

- Judicial opinion differs greatly in this regard - mainly subjective questions of degree.
- 'Sufficiency of connection' test (*Re Dingjan*):
  - A law will fall outside s 51(xx) if it operates so as to have no effect on a CC (whether beneficial or detrimental).
  - *Dingjan* case facts:
    - *Industrial Relations Act 1988* provisions (ss 127A, 127B) purported to regulate CCs contracts, including power to review and vary unfair contracts to which an independent contractor was a party.
    - Held that Cth couldn't impose regulations just because they 'related to' the business of a trading corporation.
    - Dawson J - Reference to CCs in s 127C(1)(b) was 'merely ... a peg upon which to hang legislation'.
- *Workchoices* test:
  - Expanded *Re Dingjan* (though did not apply its test) so that any **potential** effect to CC will be deemed incidental.
    - Case facts highly analogous to the *Dingjan* case facts, so interesting that different result occurred.
  - If contractor is engaged **in the course** of providing services to a CC then there is sufficient connection between the law and s 51(xx).
  - Likely this test will make a law (in exam) valid - however, emphasise that **unclear authority** for matter.

Is the Cth law directed at the incorporation of a company?

- If so, **invalid** (*Incorporation case*).

- Words 'formed' under s 51(xx) indicate that provision only applies to existing corporations formed under some other existing Australian law.

History of Corporations Power core scope

- Prior to *Workchoices* scope not clear.
- Two main views of the power:
  - 'Distinctive character' test (narrow view).
    - Aspects/activities of a CC that can be regulated by Cth must relate to characteristics that bring CC into head of power.
    - e.g. Can regulate trading activities of trading corporations, foreign activities of foreign corporations, etc.
  - 'Object to command' test (broad view).
    - Emerged in *Actors Equity* (Mason, Aickin, Murphy JJ), but no clear majority and *dicta* only.
    - Split continued in *Tasmanian Dams case*.
      - s 10(2) prohibited CCs from doing certain activities (felling trees) that weren't 'trading activities'.
        - Mason, Murphy, Deane JJ – broad view, so valid.
        - Wilson and Dawson JJ – narrow view, so invalid.
      - s 10(4) prohibited these activities 'if done for purposes of trade' (sort of like a catch-all provision).
        - Brennan J, Gibbs CJ – decided case on basis of this provision, ignored first one. Gibbs CJ found valid use of incidental power.
      - Ultimately, Cth could **at minimum** regulate a trading corporation's trading activities <u>and</u> activities done for purpose of trade.
        - Mason, Murphy, Deane JJ – could go further.
        - Brennan J, Gibbs CJ – did not elaborate.
    - Finalised in *Workchoices* – broad view authority.
      - Applied Gaudron J in *Re Pacific Coal*:
        - '… activities, functions, relationships and the business activities of a corporation … the creation of rights, and

privileges belonging to such corporations, the imposition of obligations on it.'

- Power could regulate internal employee relations as well as external.
- Legislation could be characterised as having multiple subject matters as per *Fairfax*. Need to look at direct legal application, not its purpose.
    - In this case purpose clause of legislation doesn't even mention the regulation of corporations!

<u>Financial (Grants) Power (s 96)</u>

<u>Grants Power</u>

What is the Grants Power?

- s 96 - created to prevent the Federation from financial disaster.
- Now used to effectively regulate State activity through their finances - vertical fiscal imbalance.
    - States cannot have their entitlements to grants legally entrenched.

What is s 96's scope?

- If something is 'plainly warranted' by s 96 then it will likely fall within the scope of the provision (*Federal Roads* case).
    - 'Federal Aid Roads' created to encourage rural development and population distribution.
    - No further reasoning in this case, best used as an example or if exam facts are similar.
- Cth can use s 96 to induce a state to use/not exercise its powers (*First Uniform Tax* case).
    - So long as law does not legally compel the states to do something, it will be valid.
    - Can discriminate between states under Grants power - though perhaps not with other powers.
    - Further upheld in *Second Uniform Tax* case - uniform taxation system a recognised part of Australian fiscal system so too late to reverse the trend of s 96 grant interpretations.

Facts of First Uniform Tax case

- During WW2 Cth attempted to become sole recipient of income tax. Wanted to stop States taking own taxes, and instead receive grants under s 96 to compensate their loss of tax income.
- States rejected this. Cth then enacted four Acts to deprive States from levying taxes.

- States requested that all Acts be reviewed as interdependent scheme - deprived states of power to levy income tax, threat to constitutional functions or capacities of the states.
- Decision:
  - Each Act considered **separately**; each **valid in own right**.
  - *Income Tax Act* - an ordinary tax Act, so a law with respect to taxation. No limit to what Cth could impose, so no need to consider whether unreasonable.
  - *Income Tax Assessment Act* - within incidental scope of taxation power.
  - *Income Tax (Wartime Arrangements) Act* - Supported by Defence power.
  - *States Grants Act* - valid under s 96.
- Principles (per Latham CJ re: Grants Power):
  - Cth can use power to induce a state to exercise/abstain from exercising its powers.
  - Cannot legally compel states to give up powers - however, can put economic/political pressure on them.
    - Essentially blackmail - states **could** tax citizens, but would face political damage. Could also not accept the grants, but face bankruptcy.
  - Can discriminate between states under s 96 - no constitutional restraint otherwise (as per tax power for example).

Limits on Grants Power

- Very few limits - Cth has enormous political power under s 96.
  - Cannot **legally** bind state into accepting grants.
  - Once accepted, states cannot renege a grant. Must endure any applicable conditions (so long as not legally coercive).

[Also check out DOGS case re: freedom of religion]

<u>Appropriations and Spending Power</u>

Not examinable!

<u>External Affairs Power (s 51(xxix))</u>

> *"The Parliament shall, subject to this Constitution, have power to make laws ... with respect to external affairs."*

What are 'external affairs'?

- '… a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase 'external affairs'' (*Polyukhovich*)

Status of EAP?

- Plenary power – can legislate for <u>anything</u> under the topic of 'external affairs'.

Does the law purport to implement a treaty?

- Yes – go to **Implementation of treaties**.
- No – go to one of the other sections:
  - Extraterritorial reach of the power.
  - Relations with other countries.
  - Matters of international concern.

<u>Implementation of Treaties</u>

Starting Point

- Who makes international treaties?
  - Executive branch has prerogative to make treaties (s 61); <u>but</u>
- Who incorporates treaties into domestic law?
  - Only legislative branch can incorporate treaties into domestic law (s 51(xxix)).
  - Unincorporated treaties can have <u>procedural effects</u>, but cannot alter <u>substantive rights and duties</u> (*Minister for Immigration v Teoh*).
    - *Teoh* – Argued he should have been given an opportunity to <u>argue</u> that CRC should be followed. Would not stop Minister from

deporting him, but <u>only after</u> correct procedures followed (i.e. <u>consider</u> whether CRC should be applied).

- What is the scope of the power?
    - Two views:
        - Narrow view (*R v Burgess*) – Only treaties with 'sufficient international significance' can be implemented with power.
        - **Broad view** (*Tasmanian Dams*; affirmed in *Richardson*) – treaty <u>itself</u> is an external affair, so any laws under power valid. Subject matter is not a factor.
            - EAP will allow laws that are 'reasonably incidental' to treaty obligations (*Richardson*).
            - However, <u>qualifications below</u>:
- Limits of the Commonwealth's power?
    - Must be **bona fide** (*Koowarta*);
    - Treaty **obligations** must exist (*Richardson*);
        - Likely includes matters incidental to implementing obligations, if specificity principle satisfied.
    - Must meet the **specificity principle** (*ILO* case);
    - Must meet the **conformity principle** (*Tasmanian Dams*).

Bona Fide treaty

- Cth can only implement treaties if they are entered into in 'good faith' and are therefore *bona fide* (*Tasmanian Dams*).
    - If the treaty is entirely superficial and simply allow Cth to gain legislative power over an area that is normally unconstititional, this means the purported law is invalid (Brennan J in *Tas Dams*).
    - However, limited effect – 'a frail shield' per Gibbs CJ.
- Potential factors to consider:
    - Number of countries who have ratified treaty (more = better).
    - Notable absentees (if Aus supports a treaty with only Yemen, Pakistan and North Korea the Cth law is probably going to be invalid).

Existence of Treaty Obligations

- Never explicitly confirmed by a HCA majority, but review anyway.

  - Key Point: Look to language of international treaty, not Cth law.
- Is there an obligation to impose?
  - If yes, okay for Cth to impose treaty obligations (*Tas Dams*; *Richardson*).
    - Since international treaties often imprecise due to accomodation of multiple nations (Deane J in *Tas Dams*), words ofm obligation should not be interpreted pedentically (Wilson J).
  - If no, continue.
- Is there no specific obligation in the treaty?
  - If yes, can legislate on 'reasonably apprehended obligations' and matters which are 'reasonably incidental' to these obligations (*Richardson*).
    - i.e. Can exercise incidental power under EAP.
  - If no, continue.
- Is there an obligation, but NO TREATY (i.e. draft or recommendations)?
  - Can still implement these provisions in domestic law (*ILO* case).
  - If no, continue.
- What if no obligation AND no treaty?
  - Unclear, split 3:3 in *Tas Dams*:
    - Mason, Murphy & Deane JJ (broad view) – can implement non-obligations.
    - Gibbs CJ, Brennan & Wilson JJ (narrow view) – can only implement treaty provisions with obligation to act.

Specificity Principle

- Key Point: Look to language of international treaty, not Cth law.
- Treaty must 'prescribe a regime … that is defined with sufficient specificity to direct the general course to be taken by the signatory states' (*ILO* case).
  - Need some general direction on how to implement the provisions so Cth can achieve the treaty's aims.
    - cf Mere aspirations without any guidelines may fail.
- How to check?
  - Look at treaty language.
  - Look at amount of discretion given.
    - How many ways can an obligation be
  - See if international consensus on how to achieve the obligation.

        - e.g. Near-universal opinion on how to combat AIDS, so radical departure by Australian law would not satisfy the specifity principle.
- Examples:
    - 'Minimise drug deaths' – probably not specific, as could tackle problem by zero tolerance policing, or harm minimisation, or improved medical resource, etc.
    - 'Promote full employment' – probably not specific, as governments could do many possible things to resolve issue.

Conformity Principle

- Key Point: Focus on Cth legislation, not international treaty.
- To be a law with respect to 'external affairs', it must be 'reasonably capable of being considered **appropriate and adapted** to implementing the treaty' (*ILO* case).
    - Must conform to requirements of the treaty, cannot use plainly disproportionate means to achieve the object/purpose of a treaty (*ILO*; *Richardson*).
        - *Richardson* (min – Deane & Gaudron JJ) – Blanket prohibition of tree-fellign and road construction was disproportionate because of effect it had on freehold landowners.
    - Partial implementation is not fatal unless deficiency so substantial so as to deny the law its character (*ILO* per Dawson; *Tas Dams* per Deane).
- Examples:
    - Cannot promote racial discrimination if treaty's purpose is to combat racial discrimination.
    - Cannot combat poverty by killing the unemployed.

Extraterritorial reach of the power

- To start, it refers to 'matters or things geographically situated outside Australia' (*NSW v Cth – Sea and Submerged Lands case*).
- It is a plenary power:

    - Applies to 'any matter, thing or person occurring or situated outside of Australia', and 'is a law with respect to external affairs for the purposes of s 51(xxix)' (*Polyukhovich*)
        - Rejected earlier 'nexus' test between legislating Parliament and matter being regulated.
    - Geographic externality by itself enough to invoke EAP (*XYZ v Cth*).
- Examples:
    - Retrospective prohibition of war crimes that occurred outside Australia, regardless of nationality of victim/perpetrator (*Polyukhovich*).
    - Prosecution of sex offences committed in Thailand (*XYZ*).
    - Territorial boundary is the low water mark (*Sea and Submerged Lands*).

Relations with other countries

- Cth can legislate in respect to relations with foreign nations (*R v Sharkey*).
    - 'The relations of the Cth with all countries outside Australia… are matters which fall directly within the subject of external affairs… The preservation of friendly relations with other Dominions is an important part of the management of the external affairs of the Cth'.
    - Zines – Does not need to concern friendly relations, just ties to foreign government.
- Can also legislate in respect to international bodies (*Koowarta* per Brennan J).
    - e.g. UN, other intergovernmental bodies.
- Case examples:
    - *R v Sharkey* (valid) – offence of sedition against government of UK and Dominions.
    - *XYZ v Cth* per Kirby J (valid) – law enabled prosecution of child sex tourists in Australia if they committed these acts in other countries.
        - cf Callinan/Heydon JJ – link to other countries tenuous as no indication that sex tourism affected relations with other nations, could even damage relations by intruding in sovereign affairs.
    - *Thomas v Mowbray* (valid) – application of anti-terrorism laws affected relations with other countries:

        - Terrorism has potential to touch all countries, worldwide phenomenon, preventative action possibly justified, national security in one country promoted by cooperation between states.

<u>Matters of international concern</u>

- Can Cth implement legislation on matters of <u>international concern</u>, but:
    - Are not extraterritorial;
    - Don't directly affect IR; and
    - Aren't covered by power to implement treaties?
- Unclear:
    - No decision using this power since *Koowarta* (and such a case is likely to be decided by power to implement treaties today).
- Case law discussion:
    - Stephen J (*Koowarta*) – Held Cth could only implement treaties of 'international' concern'
        - Rejected by *Tas Dams* majority.
    - Murphy J (*Tas Dams*) – Legislation under EA power potentially valid if gives effect to matters of international concern.
        - Rejected by Callinan/Heydon JJ in *XYZ v Cth*.
    - Callinan/Heydon JJ (*XYZ*) – Too novel and impossible to formulate a test, 'immense difficulties' facing any court attempting to do so.
- <u>NOT</u> 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

Separation of Powers – Starting Point

- In theory – three functions of government to be kept clearly and institutionally separate.
- In reality – this does not occur. The Executive and Legislature are intertwined.
  - Legislature delegates powers to executive – valid so long as not too 'vague or extensive', and Parliament is not *abdicating* its power (i.e. cannot delegate ALL its laws).

Legislature – makes laws **Executive** – puts law into effect	--------->	Efficient govt requires *some delegation* of Legislative power to Executive (*Victorian Stevedoring v Dignan*). • Court found act which allowed regulations to be made by GG were valid exercise of legislative power.
Judiciary – adjudicates disputes	--------->	Judiciary remains relatively independent

What defines judicial power?

- Can only be exercised by Ch III courts.
- Federal Courts cannot exercise non-judicial power (although exceptions).
- Griffith CJ in *Huddart Parker & Co v Moorehead* (1909):
  - 'Judicial power as used in s71… means the power which every *sovereign* must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the *rights* relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a *binding and authoritative decision* (whether subject to appeal or not) is *called upon* to take action.'
  - However, this is a **starting point** only – JP is virtually indefinable.

Indicators of judicial power

- **Enforceability** (strongest indicator of JP – *Brandy v HREOC*).
  - *Brandy v HREOC*:
    - Facts:

    - HRECO, a non-judicial body, was allowed to make enforceable decisions once registered with the Federal Court. Brandy argued this was an invalid mix of JPs and non-JPs.
  - Decision:
    - Unenforceable. HREOC not judicial body and so cannot have enforceable powers (would breach separation of powers doctrine).
    - Decision only enforceable after court proceedings undertaken – administrative decisions only.
- **Binding and conclusive decisions**.
  - A hearing *de novo* must be available to all questions before a court.
    - i.e. New hearing as if initial decision had never occurred.
  - Administrative bodies can make findings of fact and law if *de novo* hearing available.
    - e.g. *Luton v Lessels* – decision of Child Support Registrar non-judicial as the allowed court 'appeal' exercised original (not appellate) jurisdiction.
- Decisions regarding **existing rights and duties**.
  - If decision is in regard to past conduct – JP.
    - Courts decide old rights and duties only.
  - If decision creates new rights/duties – non-JP.
    - New rights are 'legislative' in character (*Alexander's* case).
      - i.e. Parliament legislates new rights/duties.
        - However, can retrospectively change existing rights.
- **Breadth/nature of discretion** to be exercised.
  - The more discretion conferred, the less likely it is JP (*R v Trade Practices Tribunal; ex parte Tasmanian Breweries*).
    - e.g. Caught importing drugs, it's a crime. No discretion, hence JP.
  - Look for rules and restrictions guiding a court – e.g. *Thomas v Mowbray* (per Gummow and Crennan JJ), where term 'reasonable' gave court guidelines to determine if control order appropriate.
    - cf Hayne J – Involves consideration of future actions, which cannot be known or predicted by a court.
- Need for **'controversy'**.

    - Courts only decide matters if a dispute between parties.
        - i.e. Gillard cannot go to HCA to ask about Malaysia Solution – legal proceedings must commence for HCA to adjudicate.
- **Historical considerations**.
    - Has such a power been historically exercised by the courts?
        - e.g. *Thomas v Mowbray* – judiciary traditionally involved in preventative justice, such as bail orders or AVOs, so control order fell into traditional judicial use.

Key Case: *Thomas v Mowbray*

<u>Facts</u>:

- Section 104 *Criminal Code* (Cth) authorised the issuance of a control order by a court when the court was satisfied on a balance of probabilities that:
  - the order would substantially assist in preventing a terrorist act; OR
  - the person had provided training to or received training from a terrorist organisation; AND
  - the terms of the order were reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public interest from a terrorist act.
- Thomas (P) argued interim control orders required Magistrates to create new rights and duties, the decision allowed too much discretion and that the order was made ex parte (no procedural fairness).
- Even if the decision was found to be judicial in nature, it was argued that the legislation required the Magistrates to act in a non-judicial manner.
  - They had to predict whether actions were likely or not and whether the restrictions were 'reasonably necessary' in the circumstances.

<u>Decision</u>:

Majority

- Although control orders create new rights and duties, there were historical precedents for the exercise of such powers by Magistrates. They were not exclusively non-judicial. Section 104 conferred judicial power on the courts.
- Gummow and Crennan JJ: courts commonly consider the term 'reasonable'.
  - '… where legislation is designed to effect a policy, and the courts then are called upon to interpret and apply that law, inevitably consideration of that policy cannot be excluded from the curial interpretative process.'
- Also existence of 'legal criteria', as well as historical parallels with 'binding over' orders and statutory protection orders.

Kirby and Hayne JJ (dissent).

- Hayne J – what set impugned provisions apart from the exercise of judicial power is the indeterminacy of the criterion that the courts are required to apply 'for the purpose of protecting the public from a terrorist act…It is a criterion that would require a federal court to consider future consequences, the occurrence of which depends upon work done by police and intelligence services that is not known and cannot be known or predicted by the court'.

<u>Why JP separated from other branches</u>

- Basically to maintain independence and impartiality of those who exercise judicial power.

What are relevant parts of the Constitution?

- s 71 – Courts that can be vested with JP:
  - (i) High Court, (ii) other Federal Courts Parliament creates (FMC, FC, Family), and (iii) other courts vested with federal jurisdiction (State Courts of Appeal).
- s 72 – Terms and conditions of Federal judges:
  - Appointed by GG, cannot be removed until 70 years old (except for misconduct), receive fixed remuneration that cannot be diminished.
- s 75 – Original jurisdiction of HCA (matters go straight to HCA) in all matters:
  - (i) arising under any treaty;
  - (ii) affecting consuls or other representatives of other countries;
  - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
  - (iv) between States, or between residents of different States, or between a State and a resident of another State;
  - (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
- s 76 – Federal Parliament can confer original jurisdiction on HCA in any matter:
  - (i) arising under this Constitution, or involving its interpretation;
  - (ii) arising under any laws made by the Parliament;
  - (iii) of Admiralty and maritime jurisdiction;
  - (iv) relating to the same subject-matter claimed under the laws of different States.

Separation of Powers – Boilermakers' Principles

- Two principles constitute the doctrine of the separation of judicial powers at Cth level.
- **Principle 1 – JP may only be exercised by Ch III (Federal) courts**
  - Cth can only vest judicial power in the courts listed in s 71 (*NSW v Cth (The Wheat Case)*).

        - Interstate Commission given mix of JP/non-JP – e.g. had JP to grant injunctions. Federal Interstate Commissioners had 7-year tenure.
            - However, IC <u>not</u> one of the three types of courts listed under s 71, therefore could not exercise federal JP.
    - Judges on Ch III court must also have tenure – avoids risk of political bias if judge reaching end of serving period (now upon reaching 70 years of age).
        - *Waterside v Alexander* (key case) – President of 'Court' of Conciliation and Arbitration did not have life tenure, thus not a court pursuant to s 71.
        - *Wheat case* – Commissioners could serve only seven years, not life tenure as required by Ch III courts at time. As no tenure, could no constitute court.
- **Principle 2 – Ch III (Federal) courts cannot exercise non-JP**
    - Fed Courts cannot exercise non-JP or mixture of JP/non-JP (*Boilermakers' Case*).
        - Court of Conciliation and Arbitration mixed both powers, so despite it complying with tenure requirements it was not a valid Ch III court.
            - Was an 'arbitral tribunal', therefore non-judicial and conferred JP invalid.
        - Principle <u>not</u> based on text of Constitution – is implied because (i) Ch III separate from rest of document and (ii) policy considerations mean JP cannot be 'infected' by non-JPs (i.e. preserve court integrity).
    - Cth can vest State courts with federal jurisdiction (s 77), but States <u>cannot</u> vest JP in federal courts (*Re Wakim* – extension of Boilermakers).
        - Case involved cross-vesting scheme. States gave Cth courts state jurisdiction for convenience, but HCA held this was unconstitutional.

Exceptions to Principles

- <u>Principle 1</u>:
    - Ch III courts can delegate judicial power to non-judicial bodies.
        - *Harris v Caladine* – Limited ability for Family Court Registrars to make consent orders.
    - Court martials/military tribunals (*White v Director of Military Prosecutions*).

        - Falls under Defence Power (s 51(xi)) – essential to maintain discipline, also traditional ability of military to deal with own problems.
    - s 49 – Allows Parliament to punish for contempt of parliament (see *R v Richards*).
- Principle 2:
    - Incidental powers – 's 51(xxxix) extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Ch III' (*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*):
    - Court held that FC judges could sign wiretapping warrants because of their experience exercising impartiality.
    - However, two exceptions:
        - Power must be conferred and exercised with judge's consent; and
        - Power cannot be incompatible with exercise of JP.
            - Cannot impede performance of judicial functions.
            - Cannot undermine public confidence in integrity of the judge/institution of the judiciary.
    - Dissent (McHugh J): Power placed judge 'in the uniform of the constable' and secrecy of warrants would undermine public confidence.
        - 'Slowly but surely, persons who hold office as judges of the Federal Court are becoming an important part of the criminal investigative process.'
- **Three step test to determine incompatibility** (*Wilson v Minister for Aboriginal Affairs* (*Hindmarsh Island* case)):
    1. Is the function closely connected with the legislature or the executive? (i.e. Is there a close connection with political functions?)
        - No – compatible.
        - Yes – complete step 2 and 3.

2. Is the function to be performed independently of non-judicial instruction, advice or the wish of one of the other arms of government? (i.e. judge dependent on advice from the Executive/Legislature?)
    - No– **<u>incompatible</u>**.
    - Yes – go to step 3.
3. Is a discretion required to be exercised free of political grounds?
    - Yes – compatible.
    - No (i.e. political discretion by judge required) – **<u>incompatible</u>**.

- *Hindmarsh Island* case:
    - <u>Facts</u>:
        - Bridge proposal by SA State govt to Hindmarsh Island, Indigenous groups objected.
        - Fed Govt appointed Matthews J of Federal Court to prepare a report on heritage effects of bridge.
    - <u>Held</u>: Incompatible with role as FCA judge:
        - Judge did not have to act independently of Minister, nor was a judicial standard of performance required of the report.
        - Essentially it was too political to show a gulf between the judiciary and political branches of government.

<u>Separation of Judicial Powers – State</u>

***Kable v DPP* Principle**

- States can *prima facie* vest State courts with non-judicial powers.
  - See **Cth Separation of Powers** for non-judicial definition.
- <u>However</u>, if the powers undermine the 'institutional integrity' of the courts then the laws are invalid under <u>Cth Constitution</u> (see *Fardan*, revised *Kable*).
  - Similar to *persona designata* doctrine from *Grollo*.
  - Only applies to State courts with federal jurisdiction (i.e. Magistrates, Supreme Courts).
  - Institutional integrity = capacity to exercise federal jurisdiction under Ch III impartially and competently (McHugh J in *Kable*).

Further case developments

- Held to be of limited application until recently (*Fardon v A-G (Qld)*).
  - Case facts: Constitutional validity of keeping sex offenders in prison indefinitely if satisfied they would constitute a serious danger to community.
    - Upheld the law as valid. Different facts from Kable:
      - Not *ad hominum* legislation, onus of proof on the State, A-G had to monitor offenders, effectively more stringent requirements to keep offenders imprisoned.
- However, more recent cases moving in the other direction:
  - *International Finance Trust*:
    - Law allowed Crime Commission to apply to court for *ex parte* order restraining dealings with suspected criminal property.
    - Court <u>had</u> to make order at direction of State Executive body, even where no notice given to affected persons.
    - Held to be invalid – denial of procedural fairness incompatible with exercise of judicial power, and 'repugnant' to Ch III requirements of judicial independence.
  - *SA v Totani*:
    - Non-JP forcing magistrate to make control order following declaration by A-G was invalid.

- Magistrates' Court vested with federal jurisdiction.
- Act effectively obliged magistrate to make an order with no ability to question the facts that led the A-G to make the declaration.
- Acting this way detracted from court's independence, thus law invalid.

State Constitutions ('Manner and Form')

'a law … respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may … be required by a law made by that Parliament' (s 6 *Australia Act* – 'AA')

How to check a Restrictive Procedure (RP) valid?

- **Original law:** Is the relevant section a binding RP per s 6 AA?

1. Is the section 'double entrenched' (*McCawley; Trethowan*)?

- Is there a provision preventing the repeal/amendment of the section without RP?
    - *If yes, double entrenched.*
    - *If no, Parliament can repeal via simple majority – not protected.*

2. Does the section use a permissible manner and form provision?

- If it is too onerous M&F provision invalid, therefore not binding (King CJ per *Westlakes*).
    - e.g. 95% approval by Parliament is too onerous.
- If extra-Parliamentary body approval required, must be a representative body.
    - *Westlakes*: Developer approval invalid M&F – amounts to abdication of power by Parliament (King CJ).
        - cf Referendum – Parliament represents the people, so people voting for a law themselves is not an abdication.

- **Subsequent (amending) law:** Does the law respect the constitution, powers and procedures of Parliament (s 6 AA)?
- *If yes, then must satisfy earlier law's M&F provisions.*
- *If no, can be introduced without regard to M&F.*
    - Meaning of 'constitution'?
        - '… the features that give Parliament and its house its representative character' (*Marquet*, per Gleeson CJ, Gummow and Hayne JJ).
        - Examples:
            - Composition of Parliament (i.e. abolishing/adding new House).
            - Composition of the Houses (i.e. members directly elected by the people – see *Trethowan*).

                - *Attorney-General v Marquet* – Two bills modifying the electoral boundaries would do away with, and then replace, the constitution of WA's Houses of Parliament. Thus satisfies CPP.
    - Meaning of 'powers and procedures of Parliament'?
        - Procedures – regulate internal procedures.
        - Powers – regulates Parliament's law-making powers (i.e. law that restricts or expands power).
            - Not every law that expressly/impliedly amends M&F provision is one that regulates 'powers' of Parliament.
- NOTE: Irrelevant if first law satisfies CPP requirements or not.

Background Information

State Constitution differences from Cth Constitution

- State Constitutions are flexible and do not necessarily impose constraints on State legislative power (*Taylor; McCawley*).
    - Cannot bind successor Parliaments – would undermine Parliamentary sovereignty.
    - However, can make it hard for future Parliaments to change laws.
- State Parliaments generally have plenary power (*Union Steamship*).
    - In Victoria no words in Constitution
- 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.

s 128 at Cth level, and State equivalent

Cth – applies to alteration of ANY Cth Constitution provisions. Includes express terms and relevant implied terms.

Must be passed by majority of both Houses, followed by referendum.

State – s 6 *Australia Act* gives effect to manner and form requirements that affect the provisions in any law, not just Constitution, so long as law respects CPP.

3 restrictive procedures in Victoria:

Referendum; Special majority (3/5ths both Houses of Parliament); Absolute majority of both HoP.

s 18 – Certain parts of Vic Const <u>must</u> be passed with RP.

Std procedure for passage of laws through Victorian Parliament

- Legislature has power to make laws (Victorian Constitution s 15).
  - Cth equivalent s 1.
- If bills deadlocked, 'alternative procedure' may be applicable (s 65A-65G).
  - If Bill is rejected by Upper House, small politically representative parliamentary committee makes recommendation on the Bill to pass or not to. If the upper house rejects advice and still fails to pass bill then declared deadlocked and a joint sitting convened.
  - Cth equivalent s 57.

<u>Implied Intergovernmental Immunities – Cth legislative power over States</u>

Starting Point

- Now no blanket immunity for states from Cth legislation (*Engineers' case*).
  - <u>But some exceptions</u>.
- *Melbourne Corporation v Cth* is the basis for present-day IGI:
  - Can make laws with an intergovernmental impact upon state govts, but:
    - Cth may not discriminate against the States; or(?)
    - Cth cannot pass laws of general application that fundamentally impede States from carrying out essential government functions.
- <u>However</u>, reformulated test in *Austin v Commonwealth* combines these limbs into the following overarching question:
  - **Does the law impair State's capacity to function?**
- The first limb discrimination test appears to have become a sub-test of this question.
  - A discriminatory law will now be invalid to the extent that it impairs the state's ability to function as a government.
  - Questions to ask:
    - Does the Cth law discriminate against the state/s either directly/indirectly?
      - If so, is the discrimination rational or permissible?

Discrimination test (*QEC v Cth*)

- Does the Cth law discriminate against States somehow?
  - State/s singled out for special disadvantage; or
  - Particular governments/agencies of a State singled out?
    - *QEC v Cth* – Act purported to impose special processes on Qld-ETU dispute.
      - <u>Held</u>: Invalid, as impermissibly discriminated against both a single state (Qld) and a statutory instrumentality (QEC).
      - Instrumentalities vs central govt organs – for exam <u>key fact</u> is whether State statute created the entity.
  - <u>Can be:</u>
    - Direct discrimination.

            - Arises when State govt/entity explicitly treated differently from other persons/entities.
                - *QEC* – Qld state/instrumentalities treated differently.
        - Indirect discrimination.
            - Rule/law applied evenly, <u>but</u> impact is entirely disproportionate on a particular group.
                - *QEC* – QEC ran 97% of Qld electricity, so disproportionately affected even though others also affected by the law.

No – Law is valid.

<u>Yes</u> – Continue to next question.

- Does the law fulfil a rational non-discriminatory purpose?
    - Meaning of 'rational' purpose:
        - A law may discriminate against a State when it is justified/reasonable to do so (Brennan J).
    - Examples:
        - *Richardson v Forestry Commission* – Prohibition of logging certain Tas forests had purpose of protecting heritage sites that *happened to be located* in the state. <u>Reasonable, thus valid law</u>.

Yes – Law is valid.

<u>No</u> – Law is <u>invalid</u>.

Impeded function test

1. Cth cannot pass laws of 'general application' that fundamentally impede the States from carrying out essential government functions.
    - Possible 'essential govt functions'?
        - *Native Title Act* case – (i) Capacity of States to engage the servants it needs, (ii) acquisition of goods and services, (iii) acquisition of land for discharge of essential state functions.
    - <u>Examples</u>:
        - *Re Australian Education Union* – two specific immunities:

- Cth cannot interfere with State-based hiring/terminating practices (interim award thus set aside by HCA).
- Cth cannot interfere in State's right to determine multiple factors relating to higher level public servants (HLPS):
    - Number and identity; whom it wishes to make redundant; terms and conditions of employment.
    - HLPS = Ministers, ministerial assistants/advisors, heads of departments, high level statutory office holders, Parliamentary officers, judges.
        - cf Dawson (dissent) – Artificial to distinguish between high-level/low-level public servants.

Implied Intergovernmental Immunities – State legislative power over Cth

Background

1. Early view held that Cth had no immunity from State laws (obiter in *Engineers* case).
    - Reciprocity notion – since Cth legislation could bind State instrumentalities, States could bind Cth within their respective areas of control.
    - Further upheld in *Pirrie v McFarlane* – Vic traffic laws could bind the RAAF (Cth organisation). Officer liable for driving on road without license.
2. View overturned in *Cigmatic*:
    - Cth had broad immunity from State laws.
        - Cth given express grants of Constitutional power, but States had nothing expressly conferred. Hence no power existed (Dixon CJ).
    - States cannot control rights and legal duties between Cth and its subjects (Dixon CJ).
    - However, extremely lopsided, and has since been amended.

Current Test (per *Henderson's case*)

- Is it a State law that:
    - Affects the capabilities and functions of the Cth?
        - Unique powers, privileges or immunities under s 61 (i.e. powers conferred by statute).
        - Discriminates/singles out Cth (as per State immunities)
    - Or merely binds Cth in the exercise of those capacities?
        - State does not take away Cth capacities – merely regulates the way the capacities are exercised.
        - State laws do not discriminate against Cth – treats it as ordinary subject.

Yes to **former** – Law may be invalid. Move to next step.

Yes to **latter** – Law is valid.

- Does either of the following exceptions apply?
    - s 64 of the *Judiciary Act* (Cth):
        - ‘In any suit to which the Cth or State is a party, rights of the parties shall be determined to be the same as if it was a suit between two people.’
            - i.e. Bound by ordinary laws governing private individuals engaged in a ‘suit’ – includes federal/common/state laws.
            - *Cth v Evans Deakin Industries* – Cth’s procedural and substantive rights governed by the same laws that governed a private litigant in the same situation.
        - <u>Limitations to exception</u>:
            - Cth must be party to the suit (*Maguire v Simpson*).
                - However, applies as soon as Cth becomes party to a suit <u>whether actual litigation has occurred or not</u>.
            - Criminal actions not covered (*Pirrie*).
            - Administrative tribunals not covered (*Henderson’s case*).
    - Criminal law exception:
        - State criminal laws apply to Cth servants/agents, but not Cth itself (*Pirrie*).
        - Cth cannot authorise servants/agents to breach state criminal laws – no immunity granted to these individuals (*Henderson’s case* per Brennan CJ).

Yes – Law is valid.

<u>**No**</u> – Law is <u>invalid</u>.

Side Note

- To avoid this issue, the Cth can simply legislate its own law that overrides the State law.
- If this occurs then go to **s 109 Cth-State Inconsistencies**.

<u>s 109 Cth-State Inconsistencies</u>

'When a law of a State is inconsistent with a law of the Cth, <u>the latter shall prevail</u>, and the former shall, to the extent of the inconsistency, be invalid.'

Step-by-step Guide

- Does a Cth and State law conflict?
  - If yes, Cth law takes precedence (s 109).
- How is the term 'law' defined?
  - A 'law' includes:
    - Act/Statute of Parliament.
    - Subordinate/delegated legislation (e.g. regulations, statutory rules, industrial agreement made pursuant to Statute – *Ansett v Wardley*).
      - In such cases inconsistency is between Cth statute <u>empowering subordinate legislation</u>, and relevant State law (*Ex parte McLean*).
  - A 'law' <u>is not</u>:
    - Administrative orders.
    - Common law.
    - Territory rules (see s 122 instead).
- How is 'invalidity' defined?
  - Cth law has superior authority, takes effect to exclusion of inconsistent State law.
  - State law only invalid to the extent of the inconsistency – i.e. inconsistent provisions can be severed.
    - However, if provisions <u>not severable</u> entire Act deemed inoperative from the date the inconsistency arose (*Wenn v Attorney-General*).
  - The State law is inoperative <u>until</u> the Cth law is repealed (*Carter v Egg and Egg Pulp Marketing Board*).
    - i.e. Inconsistent law lies dormant, and State govt <u>not required</u> to re-enact dormant legislation.
- **What are the <u>three</u> tests for inconsistency?**
  - Simultaneous Obedience (direct).

- Impossible to logically follow both laws at once.
  - e.g. One law forbids what other commands, one law compels to the disobedience of the other.
- Examples:
  - *R v Licensing Court* – Liquor trading hours state referendum held on same day as Senate election. Cth law prohibited referendums being held on same day as Senate elections.
    - Held: State law inconsistent as impossible to obey both laws.
  - *McBain v Victoria* – s 8 *Infertility Treatment Act* (Vic) prevented unmarried couple from obtaining IVF. However, s 2 *Sex Discrimination Act* (Cth) prohibited such discrimination.
    - Held: Impossible for McBain to obey both tests, so State law invalid.

- Conferral of Rights (direct).
  - State law is invalid if it 'takes away a right conferred' by the other (*Clyde Engineering v Cowburn*).
    - i.e. If Cth law confers rights/privileges/entitlements, and these are taken away by State laws, Cth law prevails.
  - Examples:
    - *Clyde Engineering*:
      - NSW legislation required 44-hour working week, Cth required 48-hour working week, with pay deductions for less hours worked.
      - Cowburn worked 44-hour week, but employer deducted pay in reliance of Cth law.
      - Held: Inconsistent. Although Simultaneous Obedience *possible*, State law diminished employer's right under Cth law to expect employees to work 48 hour weeks.
    - *Mabo v Queensland (No 1)*:
      - State law purporting to extinguish traditional property rights to land was invalid because it limited/diminished human rights under Cth *Racial Discrimination Act*.
- Cover the Field (indirect).

- 'If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where other legislature assumes to enter to any extent upon the same field' (Isaacs J per *Clyde Engineering*).
- Isaacs J's 3-stage test:
    - Identify/characterise the 'field' the Cth law deals with;
    - Has the State law attempted to regulate on matters in the 'field'?; and
    - Was it the Cth's intention to 'cover the field' (express <u>or</u> implied).
        - If no intention, no inconsistency.
        - 'When a Federal statute discloses such intention, <u>it is inconsistent with it for the law of a State to govern the same conduct or matter.</u>' (Dixon J, *Ex parte McLean*).
- **Steps 1 and 2 – Subject matter of Cth/State laws**
    - What is the area/topic/subject matter of each of the legislative schemes?
        - Has been interpreted both broadly and narrowly in different cases – for exam best analyse both.
        - <u>Examples</u>:
            - *O'Sullivan v Noarlunga*: What field was 'slaughtering stock for export' part of?
                - <u>Held</u>: Broad view – Cth established legislation regulating abattoirs, so State laws fell under Cth field.
            - *Airlines v NSW*: Narrow view – Court held that legislation covered different sub-areas of air operations and so no inconsistency.
                - Would be inconsistent if field was defined as 'licensing commercial air operations'.
            - *Ansett v Wardley*: Difficulty identifying field. Used both views, but narrow prevailed regarding

relationship between Cth IR law and State's Equal Opportunity law.

- If overlapping fields, subject matter approach (Stephen J, *Wardley*):
  - Less likely to overlap if laws contain different subject matters.
  - *Wardley* – State law operated in a number of areas of human activities, Cth law only concerned with industrial matters.
    - Held: No inconsistency, State Equal Opportunity laws were valid.

- **Did Cth intend to cover the field?**
  - Express intention (perhaps express words in legislation) to:
    - Cover the field (*Wenn v Attorney-General*);
    - Not cover the field (*R v Credit Tribunal*);
      - Won't save State law if direct inconsistency.
    - Cth must have power in the area in which it seeks to cover the field.
  - Implied intention – look to:
    - Detail of the legislative act:
      - If extremely detailed/elaborate, more likely to cover the field (*Noarlunga Meats*).
      - If absence of detail, less likely (Stephen J per *Wardley* – Cth IR law 'silent' on sex discrimination, so not inconsistent with Vic law made for that express purpose).
    - Subject matter of the legislation:
      - If uniform regime needed then more likely an implied intention to cover the field.
        - e.g. Fulfilment of treaty obligations (*Viskauskas v Nylan*), currency, copyrights, trademarks, quarantine, etc.).

Implied Limitations to Cth Powers

Express Freedoms – LIMITED

- Right to vote (ss 7, 24 – both Houses of Parliament).
    - See detailed section.
- Property must be acquired on just terms (s 51(xxxi)).
- Trial by jury for indictable offences (s 80).
- No religious legislation (s 116).
- No discrimination (s 117).

Implied Freedom of Political Communication

- An implied freedom to political communication exists (*Nationwide News*; *ACTV v Cth*).
- **Must implement the two step test from *Lange v ABC*** – see detailed sections:
    - Does the law effectively burden freedom of communication about governments or political matters?
    - 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?'
            - Focus on the <u>way</u> the relevant law affects communication, and whether justifiable.

1) Does law burden freedom of political communication?

- What is 'communication'?
    - Both verbal and non-verbal communication (*Levy v Victoria*).
        - Can include protest signs, entering a hunting area to collect injured animals, etc.
- What are 'government or political matters'?
    - Essentially discussion of politics and political bodies/individuals, including their fitness for office and conduct (*Theophanous* – broadest definition).
        - However, <u>only</u> to the extent that such communication could affect their choice in elections or referenda (*Lange v ABC* – more restrictive).
        - Not restricted to periods of federal elections (cf McHugh J?)

- Includes executive arm of government (*Coleman v Power* – insulting police officer).
- Also includes federal and non-federal matters:
  - Test – does the law impact voters' choices in Australian Federal politics (*Lange v ABC*)?
    - Could be used to protect discussion of state or international politics, as these events can 'throw light' on Aus govt matters.
      - cf *Theophanous* broader view – extends to all matters of public affairs and political discussion even if little connection to Fed politics.
- Not G/P matters:
  - Immigration advice (*Cunliffe v Cth*).
  - Purely commercial or certain private speech.
  - Entertainment is not 'political', except for satirical commentary (*Theophanous* – 'reasonable' insults in case protected).

2) Is law reasonably appropriate and adapted?

- What is the 'end' goal of the law?
  - e.g. Protection from defamation (*Lange*), cheaper political advertising (*ACTV*), public safety (*Levy*).
- Is the end compatible with the 'maintenance of a representative and responsible government'?
  - What is the objective of the law itself? Does it adhere to the principle above?
- Are the means adapted and appropriate for that end?
  - Value-laden question, difficult to reach a predictable answer.
  - *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.
  - Examples of insufficient means to the end:
    - Improving quality of public debate, reducing cost of election campaigns (*ACTV*);

        - Protecting credibility/authority of IR Commission/other executive bodies (*Nationwide News*);
        - Quality control of migration advice (*Cunliffe v Cth*);
        - Public safety (*Levy*);
        - Protection and facilitation of the voting system (*Lange*);
        - Protection of public order (*Coleman v Power*); and
        - Protection of reputation, i.e. defamation laws (*Theophanous; Lange*).

<u>Right to Vote</u>

- ss 7, 24 – Parliament has to be 'directly chosen by the people'.
- However, Parliament can make decisions regarding the appropriateness of restrictions on right to vote (*Roach v Electoral Commissioner*).
    - Voting restrictions permitted if 'reasonably appropriate and adapted to serve an end' consistent with maintenance of representative government.
        - Gleeson CJ – Voting exclusions have to be based on a 'substantial reason'
            - Banning <u>all</u> prisoners from voting is disproportionate (in *Lange* sense) as many people may be incarcerated for reasons beyond their control (e.g. mental health, homelessness).
            - However, serious offenders (3 yr sentences or more) was acceptable – they have a 'temporary suspension of their connection with the community' by nature of the crimes committed.

Rowe v Electoral Commissioner

- <u>Facts</u>:
    - Reductions to Electoral Act enrolment period in 2006 meant that prior to 2010 Federal Election up to 100,000 potential voters were unable to register.
    - Plaintiffs sought declaration that amendments to Act that had the effect of cutting off the right to vote if not registered in time was invalid.
- <u>Decision (maj)</u>:
    - Cutting off registration period was invalid – denied the election the character of a true popular choice as mandated by ss 7 and 24.

- Deprived many voters of the opportunity to record a valid vote in accordance with the requirement that parliamentary representatives be chosen by the people of Australia.

- Decision (min – Hayne, Heydon, Kiefel JJ):
  - Failure to register the fault of the voter, not the law. Law should therefore stand as valid.

<u>s 92 – Freedom of Interstate Trade & Commerce</u>

'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'

Purpose of the section?

- To prohibit legislation that imposes discriminatory protectionist burdens on interstate trade and commerce (*Cole v Whitfield*).
  - Section seeks to protect interstate trade from discriminatory taxes and duties; and
  - Prevents governments from interfering through non-fiscal intervention.

What is 'interstate trade and commerce'?

- <u>Interstate</u> – trading between States.
  - cf *Intrastate* – trading within single State.
- <u>Trade and commerce</u> – as per *McArthur v Queensland*:
  - Wide interpretation, according to <u>ordinary meaning</u> of term.
  - Includes negotiations, bargaining, transport, and delivery.
  - Also intangible transactions such as transmission of money (Dixon J in *Bank of NSW v Cth*).

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

- Is there a burden on interstate trade?
  - Includes fiscal burdens and non-fiscal (e.g. Ratios, quotas, conditions such as size limitations – see crayfish in *Cole v Whitfield*).
- Is the burden discriminatory on its face or in its practical effect?
  - Discrimination occurs *'if the law on its face subjects that trade or commerce to a disability or disadvantage or if the factual operation of the law produces the result.'*
    - e.g. *Castlemaine Tooheys* – Although <u>all</u> brewers would suffer if non-refillable bottles used, <u>practical effect</u> of law gave SA brewers competitive market advantage.

    - Does not have to discriminate against <u>all interstate produce</u> – enough if <u>some</u> are discriminated against (*Castlemaine Tooheys*).
        - cf *Cole* – Held not to disadvantage interstate producers.
- Does the discrimination have a protectionist effect?
    - Protection of domestic industries against 'foreign' (read: interstate) competition.
    - s 92 prohibits two types of laws (*Bath v Alston Holdings*):
        - Law that <u>removes</u> a competitive advantage form interstate industry; or
        - Law <u>confers</u> a competitive advantage on local industry.
    - Marketing/pooling scheme or similar export restrictions (*Barley Marketing Board*):
        - Only breaches if a State keeps scare resource or cheap commodity in one state and prevent distribution to other states.
            - Protectionism comes from limits on who can <u>buy</u> product rather than who can <u>sell</u>.

If YES to all so far, *prima facie* invalid

<u>Defence</u>: Is the protectionist effect pursuant or incidental to some non-protectionist purpose?

- Does the law have a legitimate non-protectionist purpose? Depends on the object of the Act.
    - Examples include protection of:
        - Valuable ecological resources (*Cole v Whitfield*).
        - Environment and energy resources (*Castlemaine Tooheys*).
        - Economic/societal interests.
        - Social welfare/objective (*Castlemaine* – obiter).
- If so, are the protectionist burdens appropriate and adapted to achieving a legitimate, non-protectionist purpose?
    - Are other means available that do not discriminate against other states?
    - Examples:
        - *Cole v Whitfield* – Valid to maintain crayfish stocks.
        - *Castlemaine Tooheys* – Invalid, as only minor reductions in energy use, and could apply non-discriminatory laws to reduce litter.

    - *Betfair* – Invalid, as if integrity of racing industry was primary motivation law would have been more targeted to address issue.
- Possible replacement test (*Betfair v WA*) – 'reasonable necessity':
    - s 92 does more than facilitiate a level playing field across states – may also ensure that State legislation does not inhibit freedom within the national economy.