

CONSTITUTIONAL LAW SUMMARY



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INTRODUCTION

It is important to understand that Australian Constitutional law is made up of a number of sources, including:

- the Commonwealth (Commonwealth) Constitution;
- the Statute of Westminster;
- the Australia Act;
- The Constitution Acts of the various States;
- Commonwealth and State legislation which deal with constitutional matters,
- constitutional conventions; and
- the courts.

However, for the purposes of this document, our focus will concern the operation of the Commonwealth Constitution, which is the primary source of Australia's Constitutional law.

Constitutional Law concerns the areas with respect to which the Commonwealth and State/Territory legislatures can make laws. The *Constitution 1901* (Commonwealth)¹ outlines areas of power for which the Commonwealth can legislate. These are mostly listed within Section 51 of The Constitution. In all, this section contains 39 specific heads of power for which the Federal (or Commonwealth) parliament has the power to make legislation. In addition the Commonwealth government has exclusive powers in Section 52 and implied powers that will be examined.

A central concern for Constitutional lawyers is whether a piece of Commonwealth legislation is lawful in so far as the law in question can rightly be characterized as falling within a recognised head of legislative power under The Constitution. This is described as 'characterising' a law. If the law can be described as a law on or with respect to the subject matter of the head of power, it is within power; if it lacks that connection, it is beyond power and such a law is 'unconstitutional'. Note that Australian High Court has maintained that the process of characterisation merely determines compliance with The Constitution; the merits or efficacy of a law are not for the courts to pass judgment on. This is consistent with the Australian version of parliamentary sovereignty – the idea that Parliament's laws are supreme and cannot be impugned except so far as they are not in conformity with constitutional requirements. Evidence of this approach can be seen in cases following the *Engineers' Case* (1920) and as recently as the *WorkChoices Case* (2006).

¹ Here after referred to as The Constitution.

PRINCIPLES OF CHARACTERISATION

In characterising a law the central starting point to remember is that a Commonwealth head of power should be read broadly. This is known as the *Jumbunna Principle* (see *Jumbunna Coal Mine NL v. Victorian Coal Miners' Assoc.*²) and forms the first stage in characterising a law.

In *Fairfax v Federal Commissioner of Taxation*³, Kitto J described the process of characterisation⁴ in the following manner:

'it is a question as to the true nature and character of the legislation: is it in its real substance a law upon, "with respect to", one or more of the enumerated subjects, or is there no more in it in relation to any of those subjects than an interference so incidental as not in truth to affect its character?'

Justice Kitto went on to articulate the modern test of characterisation (at 7) as follows:

'the question is always one of subject matter, to be determined by reference solely to the operation which the enactment has if it be valid, that is to say by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes'.

The Central Question

As outlined above the central question to ask yourself is: *is the law supported by a head of power or can the law be seen to fall within the subject matter of a power?*

Considerations:

In interpreting the words used in The Constitution and the scope of those words, it is important to remember that since the *Engineers' Case*⁵, the High Court has departed from the principled basis adopted in *Barger*⁶ after rejecting the doctrine of "reserved state powers". The old position required that a given power be interpreted with regard to their "true nature and character" such that the Commonwealth was strictly limited to its enumerated powers under s. 51 (etc). This was done in a purported effort to protect Federalism and the "federal balance" (see *Barger*⁷).

Under the modern, formalistic approach, cases such as *Barger*⁸ were based too much on principles borrowed from jurisdictions such as the US and Canada. However, fundamental differences between those jurisdictions and Aust (namely different conceptions of responsible govt and the fact that the law-making powers of both tiers of govt in Canada are enumerated) makes this inappropriate and risks inconsistent divergences in the law. Therefore, The Constitution must be interpreted according to the ordinary principles of interpretation applicable under the common law of the United Kingdom.

² (1908) 6 CLR 309

³ (1965) 114 CLR 1.

⁴ See Joseph and Castan, *Federal Constitutional Law - A Contemporary View*, 2ed, Thomson Lawbook Co, 2006.

⁵ (1920) 28 CLR 129.

⁶ *R v Barger* (1908) 6 CLR 41.

⁷ *Ibid.*

⁸ *Ibid.*

This means that The Constitution must be read naturally in light of the circumstances in which it was made. Thus, when reading The Constitution, full effect must be given to the powers of the Commonwealth without concern for the effect this may have on the States or any other entity. Therefore, each head of power is viewed as conferring plenary (“full”) legislative power with respect to that subject.

The Test

In order to determine whether the law in question can rightly be said to fall within a recognized head of power under The Constitution, we must consider:

1. the meaning or scope of the subject matter of the relevant Commonwealth power; and
2. whether the law in question is one that can be described as falling within the subject matter of the Commonwealth power (is the law with respect to the head of power).

A law may be characterised as a law with respect to more than one of the subject matters set out in s 51.⁹ Indeed, given the broad approach taken by the High Court in interpreting the heads of power under The Constitution, generally, where a law enacted under one powers, touches on subject-matter covered by another head of power, the law will be valid (*Fairfax v. F.C.T.*¹⁰ per Kitto J).

However, the prima facie position may not apply in cases where the second subject on which the law touches contains a “positive prohibition or restriction”. Such a restriction may apply so as to restrict Commonwealth law-making generally (see e.g. **Work Choices**). That is, if a law in purportedly enacted under the corporations power, but also touches on a second head of power, and that second head contains a positive prohibition, such as the one in s 51(xiii) (“other than State banking”), then that restriction may be read so as to limit the power of the Commonwealth to make laws under the *Corporations Power* which touch on State banking. This however, is a rare happenstance.



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⁹ *New South Wales v Commonwealth* [2006] HCA 52, 51.

¹⁰ (1965) 114 CLR 1.