

MODEL ESSAY



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HOW TO WRITE A LAW ESSAY

Depending on the required work length, writing a law essay can be a long and involved process. START AS EARLY AS POSSIBLE! Many students develop their own style of attacking an essay topic. Generally however it is useful to break the essay-writing process down into the following steps:

1. Analysing your essay topic

Before you can create an effective argument, you must determine exactly what you are being asked to answer. Your lecturer would have chosen his/her words carefully when setting the essay topic so avoid making generalisations and interpreting the question to suit your interests or level of knowledge. Seek clarification from your lecturer where necessary. It is often a good idea to highlight key words in the essay question and use them to structure your essay.

2. Researching

Be thorough in your researching and try to locate as wide a variety of sources as possible i.e books, journals, texts, internet articles. Make extensive use of Austlii and the AUSTROM database for tracking down journal articles (see the lawskool.com.au research guide). Many law journals are available online these days and you'll find that printing out web articles is much cheaper than photocopying from the hard-copy journals.

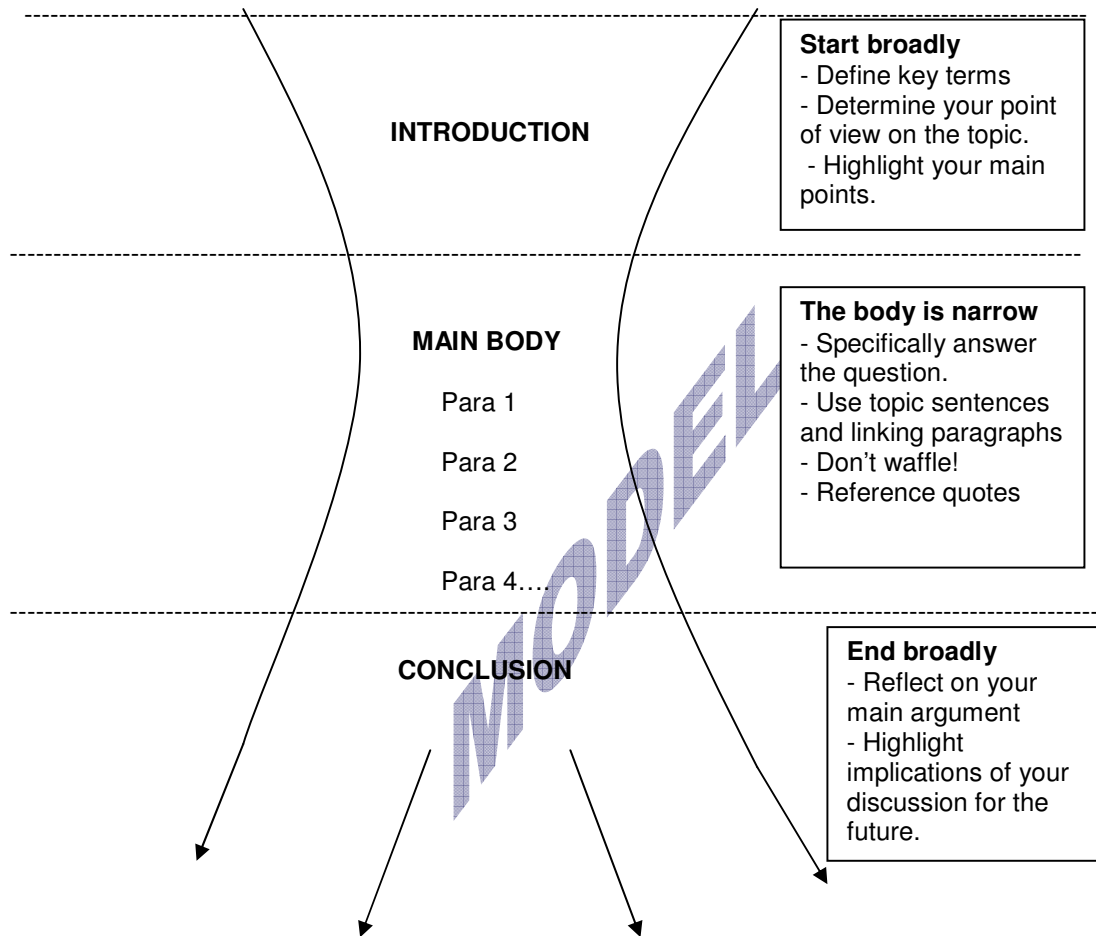
3. Reading/note taking

This will no doubt be the longest part of the essay-writing process. You should have a tentative essay plan in mind at this stage.

- Firstly skim through your sources and try to work out some categories for your notes.
- Now read through each source thoroughly, highlighting your printouts and tabbing your books, as you go.
- Record extensive dot-point notes for each category (either on paper or on your word processor). Write/type out direct quotes verbatim. Ensure that you record all of your references as you go (trust us, this will make your life so much easier later on).

4. Planning

You probably won't be able to finalise a definitive essay plan until after you have teased out all of the relevant information from your sources. The following diagram provides you with a useful way of planning out your essay.



5. Draft

The hard part! Personal writing styles will differ; some preferring to stick rigidly to their plan and whittle down the essay in chunks; others taking a stream of consciousness approach in order to just get everything up on the screen before worrying about the text making any sense. Try to follow your plan but by no means worry about writing in perfect English at this stage. That's what the next step is for. Make liberal use of direct quotes and ensure that they are properly sourced.

6. Revising and refining

This is where you turn your shambolic 'essay' into a piece of solid gold that you can be proud of hurling through the essay chute on due date day. Be sure that you fully ANSWER THE QUESTION. It is imperative that there is a logical argument flowing through your entire essay that is easy for your marker to ascertain. If you have time, TAKE THE ESSAY TO YOUR UNI'S STUDY-SKILLS CENTRE. The dedicated individuals working at Study-Skills will be happy to read over your essay and give you thoughtful criticism and advice.

6. Footnoting

Everything must be fully referenced in a law essay, not just direct quotes. EVERY SINGLE PARAGRAPH MUST BE REFERENCED. Don't underestimate how long this can take you. Legal referencing is very precise and particular. Find out which legal referencing style your lectures prefer. It will no doubt be in the format of the *Australian Guide to Legal Citation*. If you keep a record of all your references as you go along, you will avoid having to frantically fumble through your notes at 2am the morning before its due, trying to work out where you pulled your quotes.

Happy essay-writing!

Jonny-boy's Model Constitutional Law Essay

Introduction

The High Court has taken a too narrow approach in interpreting sections 51(i) and 51(xx) of the Constitution. Initially, the discussion focuses on an analysis of different constitutional interpretative methods. Then, the discussion will focus on the interpretative methods used by the joint judgment and Deane J in the *Incorporation Case*¹ in characterizing a 51 (xx) and will offer a critique of the majority judgment. Finally, the characterization of s 51 (i), in particular, the distinction drawn by the High Court between inter and intrastate trade and commerce will be analysed particularly in the light of the *Western Airlines Case*². The argument will be that the distinction drawn by the High Court is too narrow and it needs to take into account practical realities.

Constitutional Interpretative Methods

The High Court's constitutional interpretative method in the *Engineer's Case*³ when they discarded the reserved state powers doctrine was one of literalism. Craven describes literalism as interpreting the Constitution 'by reading the words according to their natural sense and in a documentary context, and thus giving them their full effect.'⁴ Nonetheless, literalism does not involve construing the words naturally but rather as was stated in *Jumbunna*, the Court should always favour a broader interpretation unless there was something in the Constitution that suggested otherwise⁵. However, as Craven notes there have been two

¹ *New South Wales v Commonwealth* (Incorporation Case) (1990) 169 CLR 482.

² *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

³ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁴ G Craven, "The Crisis of Constitutional Literalism in Australia" in HP Lee and G Winterton (eds) *Australian Constitutional Perspectives* (1992) 1 at 6

⁵ *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 367

other methods, “progressivism” and “intentionalism”, that could be inferred from the judgments of some members of the High Court. “Progressivism” is an approach to constitutional interpretation ‘which maintains that provisions should be interpreted as to give meaning most consonant with the recognition and satisfaction of the need of contemporary Australian society.’⁶ On the other hand “intentionalism” holds that the constitution should be interpreted ‘to give effect to the intentions of those who formulated the constitution.’⁷

These three main constitutional interpretative methods, literalism, intentionalism and progressivism each have their advantages and disadvantages in giving aid to interpreting the Constitution. One of the most persuasive arguments towards the literalism approach is that it is apolitical, it avoid judges making decisions by some other considerations.⁸ While others argue it also gives certainty to meaning, it can be shown that the English language is ambiguous in many instances and this may lead to uncertainty. Intentionalist argue that ambiguity can be overcome by analyzing the framers intentions by looking at the Convention Debates and the Constitution Drafts which the High Court has done.⁹ The major criticism of “intentionalism” is that it does not allow for the nation to progress by restricting the interpretation of the Constitution to that of the founders.¹⁰ On the other hand, “progressivism” does not restrict the interpretation of the Constitution to the intentions of the framers or the plain meaning but allows the Constitution to be interpreted to the needs of an ever-changing liberal-democracy.¹¹ Critics of “progressivism” suggest that it is political and allows unelected judges to state what they view to be the needs of Australian society.¹²

per O’Connor J.

⁶ G Craven, already cited, at 20.

⁷ Ibid at 17.

⁸ Ibid at 10.

⁹ *Cole v Whitfield* (1988) 165 CLR 360

¹⁰ J Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 *Fed LR* at 27.

¹¹ G Craven, already cited, at 15.

¹² Sir A Mason, “Interpretation in a Modern Liberal Democracy” in C Sampford and K Preston (ed) *Interpreting Constitutions – Theories, Principle and Institutions* 1996 at 31.

The Incorporation Case: Interpretative Methods and Critique.

The Incorporation Case provides an excellent example of the different constitutional interpretations used by the High Court. In that case the Commonwealth attempted within the Corporations Law 1989(Cth) to legislate for the incorporation relying on s 51(xx) of the Constitution. The majority held with Deane J that the Commonwealth did not have power to make laws for incorporation of companies for three reasons. Namely, the plain meaning of the provision, the history of the provision and authority (precedent)

The majority stated that the word “formed” in s 51(xx) a ‘past participle used adjectivally’¹³ in its plain meaning. Deane J rejected this meaning stating that it had temporal meaning¹⁴, neither past nor present and supported this proposition with the authority of single High Court judgments¹⁵. The majority also made use of the Convention draft and debates to support their reasoning. The draft bill at the 1891 convention gave the Commonwealth Parliament power to legislate for “(t)he status in the (C)ommonwealth..of corporations formed in any state or part of the (C)ommonwealth.” At the 1891 convention, Samuel Griffith, answered positively as to whether or not the states would have the power legislate for incorporate.¹⁶ Between 1891 and the final bill the words “within the limits of the commonwealth” were substituted for the words “in any State or part of the Commonwealth.” The majority argued that despite the change in the provision the alteration did not change the meaning of the words “formed in.” Deane J expressly repudiated such an approach which was taken by the majority: ‘(I)t is not permissible to constrict the effect of words which were adopted by the people

¹³ (1990) 169 CLR 482 AT 498.

¹⁴ *Ibid* at 506.

¹⁵ *Mikasa (NSW) Pty Ltd v Festival Stores* (1972) 127 CLR at 660-1 per Stephen J; *Kathleen Investments (Aust) Ltd v Australian Atomic Energy Commission* (1977) 139 CLR 117 at 159 per Murphy J.

¹⁶ *Convention Debates* (Sydney 1891) vol I,p.686.

as the compact of a nation by reference to ...the Convention Debates¹⁷
Furthermore, as Zines¹⁸ and Kennett¹⁹ point out, there can be no reason for supposing that the founding fathers did not intend to change the meaning. Moreover, by limiting the section to trading and financial corporations there was no longer Griffith's worry that the power might extend to a great number of local corporations. The use of history, as Zines concluded, 'is as ambiguous as the phraseology.'²⁰

The joint judgment also relied on precedent in concluding that the Commonwealth has no power to legislate for incorporation. The majority primarily relied on *Huddart Parker*²¹ where the five judges had said in *obiter* that the Commonwealth had no power to legislate for incorporation. The joint judgment implicitly acknowledged that the case was decided on the discarded doctrine of reserve state powers and therefore cited post-*Engineer's* cases as their authority.²² All of the cases cited in the majority judgment cited *Huddart Parker* as authority for their proposition that the Commonwealth has no power to legislate for incorporation. Kennett had questioned joint judgments' reliance on *Huddart Parker*, especially since the comments were *obiter* and the fact that three judges based their judgments on the now discarded reserve state powers doctrine.²³

¹⁷ (1990) 169 CLR 482 at 511 (emphasis added)

¹⁸ L Zines *The High Court and the Commission* (4th ed 1997) at 102.

¹⁹ G Kennett, "Constitutional Interpretation in the *Corporations Case*" (1990) 19 *Fed LR* 223 at 238.

²⁰ L Zines, already cited, at 102/

²¹ *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

²² (1990) 169 CLR 482 at 501.

²³ G Kennett "Constitutional Interpretation in the *Corporations Case*" (1990) 19 *Fed LR* 223 at 236.

Following the High Court's ruling in the *Incorporation Case* the states still handed over the right to legislate for incorporation to the Commonwealth. In *Hughes*²⁴, a recent High Court decision, Kirby J noted that this system had 'grotesque complications'²⁵ and suggest that the court would look again at the decision. It is submitted that because of the administrative difficulties which has occurred as a result of the State handing over power to the Commonwealth and the deficiencies in the joint judgment's reasoning, the *Incorporations*²⁶ case should be reconsidered. Although the High Court has continually held that convenience is not relevant in interpretation but there could be no sound reason for not following the most convenient interpretation.²⁷ In any case, if the States thought that corporations would not benefit from the one centralized system, why would they have handed over power to the Commonwealth? Section 51(xx) of the Constitution should be construed liberally in line with the *Jumbunna*²⁸ principle and the High Court should overrule the *Incorporation* case. It is not denied that such an interpretation is progressive by definition but the benefits for the entire nation in a globalised corporate world would be outweighed by the usurpation of state power.²⁹

Section 51(i): Inter and Intrastate Trade and Commerce

In characterizing s 51(i) the High Court has consistently held that the Commonwealth has power to legislate for interstate trade but the power to legislate for intrastate trade is limited to exceptional circumstances. Dixon CJ in *Wragg v NSW* commented (influentially) that although the distinction may be 'artificial and unsuitable to modern times...the distinction which the Constitution makes between the two

²⁴ *R v Hughes* (2000) 171 ALR 155

²⁵ *Ibid.* at 171.

²⁶ *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482.

²⁷ J. Kirk, "Constitutional Interpretation and Evolutionary Originalism" 27 (1999) 333 at 328.

²⁸ *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309.

²⁹ R L Simmons, "The Commonwealth cannot Incorporate under the Corporations Power: *New South Wales v The Commonwealth*" (1990) 20 *University of Western Australian Law Review* 641 at 652.

branches of trade and commerce must be maintained.³⁰ This has been held to be so do spite the presence of the incidental power s 51 (xxxix) in the Constitution.

*The High Court in the Western Airlines*³¹ case held that regulations which gave the Commonwealth corporation power to fly between places within a State was invalid unless it was flying to a territory, in which case the Commonwealth could rely on the territories power (s 122). Barwick CJ³² and Gibbs J³³ also emphasized that even though the distinction drawn in a 51(1) between inter and intra-State trade and commerce made it inefficient for the Commonwealth to carry out the aerial service was not relevant to the question of characterization. The distinction between physical interference and economic efficiency upon intrastate commercial air services as was suggested by Kitto J in the *Second Airlines Case*³⁴ was upheld. Mason J saw no need for a distinction to be drawn between economic and physical interference and thought that if it was a practical reality the Commonwealth would infringe on intrastate trade then the Commonwealth could do so.³⁵ (However, his comments were confined strictly as between a state and a territory). Murphy J in the *Western Airlines Case* held that the law would be valid under a 51(i) and if not under the incidental power (s 51(xxxix) and made some interesting remarks as to the scope of both powers.

Murphy's judgment in *Western Airlines* is in May ways a strong argument. He notes that there is no division in a 41(i) between inter and intra-State trade, this has been read into the Constitution by the High Court.³⁶ The US commerce clause on which the s 51(i) was based has read to show that "Commerce among

³⁰ *Wragg v NSW* (1953) 88 CLR 353 at 386.

³¹ *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492

³² *Ibid* at 501.

³³ *Ibid* at 504.

³⁴ *Airlines v NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54 at 115.

³⁵ *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 523.

³⁶ *Ibid* at 529-30.

the States must of necessity be Commerce with the States...³⁷ and as Murphy argues this interpretation should be the proper interpretation. Furthermore, the reading of a 51 (xx) has been read in the light of assumption about State power, federalism and the division of powers between the States and the Commonwealth.³⁸ In this sense it could be asserted, as Murphy J does, that this is pre-*Engineer's* constitutional interpretation.³⁹

While Murphy's argument is persuasive the High Court has drawn up this distinction for good reason – if the interpretation is that which has been applied in *Gibbons*⁴⁰ and in other US Supreme Court decisions as to the Commerce clause, then the difficulty in drawing the lines as to what is commerce among the States and what is not. This is because in a modern economy almost all elements of intra-State trade and commerce will effect the federal realm of trade and commerce. The distinction drawn by the High Court could be seen as an intentionalist interpretation in that it is carrying out the framers intentions of allowing the States to legislate for trade and commerce within their jurisdiction. While this may be so, it is submitted that the intentionalist interpretation such as that in the *Western Airlines Case*⁴¹ of the High Court does not take into account one of the fundamental reasons for federation.

The federalists though that a central government could help foster the economy by being given the power to legislate for trade and commerce amongst the states.⁴² If for instance it could be shown by the Commonwealth that it would be more efficient to fly a Commonwealth aircraft between two parts of the one State and then into another State this law should be valid on the basis of economic arguments. If the Commonwealth can show that in the execution of its own

³⁷ *Gibbons v Ogden*, 22 US (9 Wheat) 1 at 196 (1924).

³⁸ K Booker, Glass A and Watt R Federal Constitutional Law: An Introduction (2nd ed 1998) at 69.

³⁹ *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492 at 530.

⁴⁰ *Gibbons v Ogden*, 22 US (9 Wheat) 1 at 196 (1924).

⁴¹ *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492.

⁴² S Bennett, *The Making of the Australian Commonwealth* 1971 at 22-24

powers in practical reality it needs to intrude into the area of intra-State trade and commerce to provide such a service then there appears no economic reason why the law would be invalid. The Commonwealth would be promoting trade and commerce amongst the states and is helping foster the state and national economy in general. This interpretation of the Constitution would be a progressive interpretation but also in a sense be an “intentionalist” construction. It could not be said that the framers of the Constitution wanted to limit the Commonwealth from promoting inter-State commerce because it would be intruding into an area which was strictly speaking intra-State commerce.

Conclusion

The characterization of the respective s 51 powers particularly by the dissenting judges in *Western Airlines* and joint judgment in the *Incorporation Case* was too narrow. Although the critique of the characterization of the s 51 powers is based on a progressive interpretation, it also accords in many ways with the intentions of the founding fathers. The Constitution should be interpreted in this modern age to both protect state rights but also to allow the Commonwealth to run efficiently and to promote trade amongst the states.

Lecturer’s comments

Well done! A great paper that is well argued and shows an excellent understanding of the law. Some very well argued ideas

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