**Contents**

**Topic 1 - Fundamentals of Australian Constitutional Law** ................................................................. 6

1.1 What is the Constitution? .................................................................................................................. 6

1.2 The Structure of the Constitution ................................................................................................. 7

1.3 An Introduction to the Rule of Law, judicial review and the separation of judicial power .......... 8

**Topic 2 - The High Court, Constitutional Interpretation** ................................................................. 14

2.1 Interpretation and the role of the High Court .............................................................................. 14

   What is the scope of Commonwealth Power? .................................................................................... 15

2.2 Methods of constitutional Interpretation ...................................................................................... 16

   Literalism/Legalism ............................................................................................................................. 16

   Implications ........................................................................................................................................ 19

   Original intent and use of historical materials ................................................................................ 20

2.3 Principles of statutory construction ............................................................................................. 24

**Topic 3 – Characterisation** ........................................................................................................... 26

The relevance of characterisation to the solution of constitutional problems .................................. 26

The role of Characterisation and answering a problem question .................................................... 26

   Steps to answering a Constitution law problem question: .............................................................. 26

   Steps to characterising a Cth Act ...................................................................................................... 26

Commonwealth’s legislative powers .................................................................................................... 27

Showing Validity ................................................................................................................................... 27

Why Characterise? ............................................................................................................................... 27

   History ............................................................................................................................................ 28

   ‘Sufficiently connected’ .................................................................................................................. 28

   Sufficient connection test summarised *(From 4 cases: Fairfax, Herald & Weekly Times, Murphyores, Re Dingjan)* ................................................................................................................ 28

1st type – Non-Purposive or Subject Matter power ......................................................................... 28

   The Bank Nationalisation Case ...................................................................................................... 28

Dual and multiple characterisation ..................................................................................................... 29

Characterisation — a question of degree ............................................................................................ 29

2nd type – Purposive Approach ........................................................................................................... 30

3rd type – incidental powers: ............................................................................................................. 31
Section 116 — freedom of religion ................................................................. 169
s.51(xxxi) - Acquisition Of Property On Just Terms ........................................ 171
The Implied Freedom Of Communication ....................................................... 175
Topics in the exam ......................................................................................... 180
Fundamentals of Australian Constitutional Law .............................................. 181
Characterisation ............................................................................................ 182
Steps to answering a Constitution law problem question (inconsistency): .......... 182
Steps to characterising a Cth Act ................................................................. 182
Showing Validity ........................................................................................... 183
Why Characterise? ....................................................................................... 183
History ........................................................................................................... 183
’Sufficiently connected’ ................................................................................. 183
Sufficient connection test summarised (From 4 cases: Fairfax, Herald & Weekly Times, Murphyores, Re Dingjan) ........................................... 183
1st type – Non-Purposive or Subject Matter power ....................................... 184
The Bank Nationalisation Case ...................................................................... 184
Dual and multiple characterisation ................................................................ 184
Characterisation — a question of degree ..................................................... 185
2nd type – Purposive Approach .................................................................... 185
3rd type – incidental powers: ......................................................................... 186
Express and implied incidental power ........................................................... 186
Precedent ........................................................................................................ 187
Commonwealth Act only in a problem question .......................................... 189
State Act only in a problem question ............................................................ 191
S109: Inconsistency between State & Commonwealth Acts problem questions .... 191
1. State legislative power ................................................................................ 194
Grants Power ................................................................................................ 194
Limits on State powers ................................................................................ 195
State laws will not affect the Commonwealth ............................................ 195
2. Territories Power, including the power of the territory legislatures ............ 197
Are there any limits on s122? ....................................................................... 198
3. Inconsistency of laws: s109 ........................................................................ 199
4. Nationhood power ..................................................................................... 200
Limitations on the Nationhood power ......................................................... 201
For the essay... A couple of well publicised cases:
Pape v Commissioner of Taxation 2009 – stimulus package; Williams v Cth 2012 – Cth funding the school’s chaplaincy program
Compare interpretive methods, then give your opinion as to which is preferred and why
Exam is problem based. Characterisation is looking at a law and trying to determine which head of power in the constitution ... often overlooked, an important topic.
Topic 1 - Fundamentals of Australian Constitutional Law

1.1 What is the Constitution?
The aim of this lecture is to equip the student with the requisite knowledge to understand:

- the basic framework of the Australian Constitution, including the division and separation of powers
- the elements taken from the Westminster model of constitutional government
- the elements taken from the Washington model
- how the Australian constitution compares with other national constitutions
- the process of judicial review
- the Rule of Law and its influence on the Constitution

What is Constitutional Law?

- The rules that constitute the state.
- It is both a legal and a political document
- It defines the powers of the Govt and their institutions – the machinery of Govt.
- Constitutions may be written or unwritten

What is Australian Constitutional Law?
The Constitution: An Act proclaimed in 1901 to reflect the balance and powers between the Commonwealth and the States at Federation. Each State also has its own Constitution (most are still using Colonial Constitution…by and large it is the same Constitution that the colony of NSW used prior to Federation).

What is Sovereignty?

It is the source of the legitimacy of the power of the state – where the authority comes from (question of sovereignty arises in this course...where the source of legitimacy for power of government comes from... why should govts abide by the Constitution? “Imperial Parliament” was the source (this believed for many years) – in the 1980s... Australia Acts. It is now generally accepted that ‘even if it had ever been’, that authority no longer exists... the source for the authority is “the people” – people elect govt and the people and only the people can change the Constitution. Citizens are the source of legitimacy of govt in Australia.

Questions to consider:

- What are the strengths and its weaknesses of the Australian Constitution?
- The Constitution operates in the context of in a changing Australian society. Why does this matter?
- Why is it significant that the Constitution is both a political and a legal document
• Does our Constitution generate its binding power because it was enacted by the Imperial Parliament at Westminster, which is regarded to have had the power to do so (in 1900)? Or should we favour the view expressed by many contemporary observers (such as Professor Geoff Lindell, and also by Justice Deane and others) that the true source of the authority of the Constitution is that the people endorsed it and continue to acquiesce in its operation?

What implications might flow from this approach?

• Is Australia independent of the United Kingdom? What features of our legal and constitutional history compel the conclusion that it is?

1.2 The Structure of the Constitution

• What are the three branches of government?
• How is power distributed between the three branches of government?
• How is power distributed between the Federal Government and the States and Territories?

Required Reading:

AC: Preamble, ss 51, 61, 6, 71, 72, 73, 75 and 109

A Constitutional Road Map: Some Basic Principles and Ideas

The Constitution

• Australian Constitution enacted as s 9 of the Commonwealth of Australia Constitution Act 1900. This is a British Act.
• It establishes the Commonwealth and the States as a federal system.
• The States also have Constitutions - these are the 19th century statutes that gave each colony responsible government.
• They continued as State constitutions.
• The Constitution is enforced by the High Court which has the power to invalidate any unconstitutional exercise of legislative, executive or judicial power. High Court is seen as the guardian of the Constitution, power of judicial review.

Legislative powers

• The Commonwealth can pass laws as long as they come within the heads of power set out in s 51 (are laws ‘with respect to’ those heads of power) or another provision of the Constitution. S51 is important...grants most of the legislative powers of Commonwealth. “External affairs” – subject matter of any treaty or international agreement...eg power to make implementations on environment because treaty on environmental law. However, Cth has been restrained in use of power (mainly in use of Environment) – govts of both sides are not too inclined to use the external affairs power.
• The States can pass any laws provided they are for the ‘peace, welfare and good government’ of the State (they are not restricted by s 51 or any other heads of power)
• Sometimes the Constitution specifically prevents a State from making particular laws - eg the States can’t make laws with respect to excises or can’t impose customs duties (s 90).
• If a State law is inconsistent with a Commonwealth law, the State law is read down to the extent of the inconsistency (s 109).

Executive power

• Most significant powers of the Executive are conferred by legislation but some derive directly from the Constitution (eg the Governor-General’s power as Commander-in-Chief of the armed forces) and some from common law (ie prerogatives).
• The Executive cannot impose penalties or spend money without parliamentary approval.
• According to the principles of responsible government, the Governor-General exercises nearly all powers only on the advice of the Prime Minister and/or another minister. Therefore the real executive power belongs to elected representatives.

Judicial power

• Judicial power is the power to resolve disputes by the application of law.
• It is exercised by the High Court, the Federal Court, the Family Court and some State courts.
• Because judges are independent, the exercise of their functions cannot be interfered with by the legislature or the executive.

Freedoms

• Freedoms as expressed or implied in the Constitution are limits to Commonwealth law making power (the Commonwealth cannot make a law which infringes a freedom).
• Freedoms can also limit the scope of State laws. It depends on the wording of the section or the scope of the implied freedom.
• There are very few freedoms or “rights” within the Constitution. Up until Cole v Whitfield, not a freedom (trade); right to trial by jury...not really a right; freedom of religion, but this is not really a right at all.

1.3 An Introduction to the Rule of Law, judicial review and the separation of judicial power

Required Reading:

Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp)

Chapter III of the Constitution, especially ss 71, 75(iii) and 75(v)

Further References:

• Marbury v Madison 5 US 137 (1803)
• Australian Communist Party v The Commonwealth (1951) 83 CLR 1
• A v Hayden [No 2] (1984) 156 CLR 532

What is the rule of Law?

• A set of contestable doctrines
• **AV Dicey** (greatest Constitutionalist from the UK!) defines it by separating it into three categories:
  1. Ruled by the law - supremacy or predominance of the law as opposed to arbitrary power
  2. Equality before the law - equal subjection of all classes to the ordinary law of the land PM, GG or a regular person, all equally subject to the law
  3. Power comes from the people - the rights of individuals is the source of the law the people are the source, ultimately, through our acceptance of laws that they are exercised with authority.

• The rule of law connotes regulation by:
  o laws that are democratically made by the process with which we are well familiar;
  o laws that protect and enforce universal human rights;
  o laws that are certain, being prospective, open, clear and relatively stable;
  o laws that apply generally and equally to all, including (so far as possible) to the government;
  o laws that can be applied impartially, honestly and fairly and whose effects are subject to review by independent arbiters.

1. **Ruled by the Law**

**Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp)**

“This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.”

*This above is confirmed in... Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27-28 per Brennan, Deane & Dawson JJ*

Every citizen is ‘ruled by the law, and by the law alone’ and ‘may with us be punished for a breach of law, but he can be punished for nothing else.’ (eg generally only punished by finding of court...but if you’re not a citizen, it’s a “free for all”... eg ability to detain asylum seekers – if you’re not a citizen protections do not cover you...this is different to the US, where if you’re in the US, you are protected)

**Fardon v Attorney-General (Q), (2004) 78 ALJR 1519; [2004] HCA 46** [Farden convicted sex offender in Qld, govt tried to pass a law to keep him in prison after release... it was the principle, not right to allow a govt to say, served sentence, but going to keep in jail longer because don’t like you. HC rejected the argument... 3 types of protection: punitive, protective and (3), only where it is punitive. If protective, court can lock up. Court under French CJ, have not accepted this view and have stepped back]

This case directly raises the issue whether the “rule of law” doctrine gives rise to certain implications about the proper (read desirable) content of law. It reinforced the notion that the separation of powers does not extend to the States
2. Equality before the law

Note that there is no constitutional guarantee to equality before the law.

*Kartinyeri v The Commonwealth (1998) 195 CLR 337* [Race Power, govt can pass laws that discriminate against people because of their race, so we don’t have fully equality before the law]

The Cth has the power to pass laws which discriminate against classes and subclasses of people, including Aborigines.

Limited Recognition

*A v Hayden [No 2] (1984) 156 CLR 532 per Brennan J (at 580)* [“Exercise” hostage situation... done in a hotel. Rented a room, set up the operatives. Never told the hotel! Argued “acting under authority of Attorney General”...Hayden. Have “authority” of government. Courts – govt does not have authority to put above the law, AG cannot put above the law. Limited recognition of equality before the law]

“The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy”

“The principle is that all officers and ministers ought to serve the Crown according to the laws”

“This is no obsolete rule; the principal is fundamental to our law, though it seems sometimes to be forgotten when the executive government or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies.”

*Leeth v Commonwealth (1992) 174 CLR 455 per Gaudron J at 502*

“All are equal before the law. And the concept of equal justice – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such – is fundamental to judicial process”

3. Power comes from the People

- Australia is now considered to have popular (or Constitutional) sovereignty as opposed to Parliamentary sovereignty, therefore the idea is that the people have control through the Constitution.
  - As an Act of the Imperial Parliament there where many who saw this as the source of legitimacy of the Constitution.
  - However there has been a shift in attitude
- The passage of the Australia Acts in 1986 is now seen as confirmation of ‘popular sovereignty’.
- In a series of cases in the 1990s the High Court, under the leadership of Mason CJ acknowledged, the essential role of the people under the Constitution.

Giving Effect to the Rule of Law
In order to give effect to the rule of law as outlined by Dicey certain propositions are presumed:

1. There is a separation of judicial power from executive and legislative power
2. A process of Judicial Review of executive and legislative actions

**Separation of powers**

*Inherent in the system created under the Constitution is a separation of the powers of the three arms of government*

Section 71

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes

- The Constitution imposes a separation of powers on the Commonwealth. That is, there is a separation between legislative and executive powers on the one hand and judicial power on the other.
- There are also some limitations on the intermingling of legislative and executive powers (see eg s 44(iv), but compare s 64).
- The States are not required to have a separation of powers (though they tend to in practice).
- This clear position has been to some extent confused by the High Court Kabale decision in 1996 in respect of State courts that also exercise federal jurisdiction

*Wilson v Minister for Aboriginal Affairs (1996) 189 CLR 1 at 10-11* per Brennan CJ, Toohey, McHugh & Gummow JJ: “The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category - whose character is determined according to traditional British conceptions - are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed.”

*R v Davison (1954) 90 CLR 353* per Kitto J at 380-381: it is “necessary for the protection of the individual liberty of the citizen that these three functions [of government] should be to some extent dispersed rather than concentrated in one set of hands.”

**The Separation of Judicial Power**

*R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254* at 275

- Only Chapter III courts can exercise judicial power
- Chapter III courts can only exercise Chapter III power and powers incidental to Ch III power
- We will examine the separation of judicial power in more detail later in the course.
The difference between the departments (of government) undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes, the law.

How does separation of judicial power protect individual liberties?

Right to a Fair Trial

*Kingswell v The Queen (1985) 159 CLR 264 at 300*

*Krakouer v The Queen (1998) 194 CLR 202 at 224*

*Cheatle v The Queen (1993) 177 CLR 541 at 552.*

*Dietrich v The Queen (1992) 177 CLR 292 per Gaudron J at 362:* “The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch III’s implicit requirement that judicial power be exercised in accordance with judicial process

The content of the law should be accessible to the public

*Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation (1971) 125 CLR 659 at 672 per Windeyer J:* “In any country governed by the common law, the publication of the reports of decisions of the superior courts is essential for the continuance of the rule of law.”

Standing

*Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 at 35:* Standing is the right of a person to appear before a Court to have a question of law determined

Legal Representation

*Dietrich v The Queen (1992) 177 CLR 292*

Presumption of Innocence

*Fardon v Attorney-General (Q), 2 March 2004*

Judicial Review

That is, the power of the courts to review legislative and executive decisions

*Australian Communist Party v The Commonwealth (1951) 83 CLR 1 per Dixon J at 193* [Court said, doesn’t matter...court established as superior court, inherent power to ensure Constitution was abided by... High Court has power to review legislation and any administrative actions to ensure they’re in power. Adopted position adopted in 1883 by US Supreme Court... (Below)]

*Marbury v Madison 5 US 137 (1803) per Marshall CJ* [Madison Thomas Jefferson’s AG, refused to honour previous appointments, Marbury said, make them honour appts. Madison said, Court doesn’t have power. Court said, yes, within the power – able to ensure not acting outside grants of power]

- Held that the Supreme Court’s function was to uphold the Constitution
- It could therefore issue the order of mandamus to compel the executive government to honour the appointment
- This case is oft cited in the US and in Australia as being the authority that judicial review is a feature of the Constitutional system in both countries

**Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 at 564:** “The Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified supremacy of the legislature. It placed upon the federal judicature the responsibility of deciding the limits of the respective powers of State and Commonwealth governments.”

**Section 75(v)**

The decisions of ministers and public servants acting as the Crown in right of the Commonwealth are also susceptible to judicial review through the prerogative writs outlined in s 75(v) of the Constitution.

**Section 75 - Original jurisdiction of High Court**

*Confirmed HC has power to invalidate legislation or executive actions where exceeds power of legislature or executive – if Courts couldn’t do this, Constitution would be meaningless and ogvts would do whatever they wanted!* **Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476** per **Gleeson CJ:** The Australian Constitution is framed upon the assumption of the rule of law, including the power of the courts to review legislative and executive actions

**Constitutional Reform**

The Constitution can only be altered by referendum under s 128 of the Constitution. Section 128 requires the approval of a majority of electors in a majority of States for any change to the Constitution to be effected
**Topic 2 - The High Court, Constitutional Interpretation**

The aim of this lecture is to equip the student with the requisite knowledge to:

- understand the methods used by the High Court to determine the meaning and limit of a Constitutional head of power
- critically analyse the approach of the High Court to interpretation in a number of key Constitutional law cases
- be able to identify key methods of interpretation including but not limited to: legalism, literalism, originalism and progressivism.
- understand and apply the key concepts of constitutional law, with reference to established principles of constitutional interpretation

### 2.1 Interpretation and the role of the High Court

Interpretation of a head of power examines the meaning and limit of that power.

**Required Reading:**

- Hanks MC, Ch 1, paras 1.8.1-1.8.27, 1.8.30-1.8.48
- AC, ss 71, 75, 76, 52, 51,107

**Recommended Reading:**

- High Court of Australia Act 1980
- Judiciary Act 1903, ss 18, 30, 40, 35A, 78A and 78AA

**What is the role of the High Court?:**

- High Court is the ultimate appellate court in Australia
- It interprets the statutes of the Commonwealth, States and Territories with authority
- It states and develops the common law of Australia
- The High Court ‘makes’ constitutional law
- S76 specifically gives power to determine
  - The Parliament may make laws conferring original jurisdiction on the High Court in any matter:
    - (i) arising under this Constitution, or involving its interpretation;
- Judiciary Act 1903 – s30
  - Original jurisdiction conferred
    - In addition to the matters in which original jurisdiction is conferred on the High Court by the Constitution, the High Court shall have original jurisdiction:
      - (a) in all matters arising under the Constitution or involving its interpretation; and
      - (c) in trials of indictable offences against the laws of the Commonwealth.
- Guardian of the Constitution
Since 1986, with the abolition of appeals from Australian courts to the Privy Council, the High Court sits at the apex of the Australian judicial system, exercising a general appellate jurisdiction in all matters, whether state, territory or federal.

In addition to its appellate jurisdiction, the High Court has a substantial original jurisdiction derived from ss 75 & 76 of the Constitution - Interpreting the Cth’s powers to make laws
  - Each time the court considers whether an Act falls within a Commonwealth head of law making power they have to:
    - (a) interpret the meaning and scope of that head of power and
    - (b) characterise the Act to see if it falls within that head of power (we will come to this in lecture 3)

1. Have to interpret the sections it falls within (meaning and scope of a head of power)
2. Have to characterise the law in the problem (Tuesday we do characterisation)

**What is the scope of Commonwealth Power?**

What law making powers of the Cth are exclusive to the Cth? Examples include:

- the power to make laws with respect to the seat of government (s52)
- Power to make laws with respect to currency (s51(xii) combined with the prohibition on States coining money (s115)
- See also s90 combined with s51(iii) (bounties)
- S114 combined with s51(vi) (armed forces)
- S107
  - Every power of the Parliament of a colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

**So how should s51 be interpreted? Does it take away powers from states, or do the States retain powers, or does it stay with Cth and give States a little bit of power?**

**THE IMPACT OF THE ENGINEERS CASE!!!**

- Up until 1920, interpreted as reserving to the states their powers. S51 was interpreted as narrowly as possible, because that is what s107 requires “reserved powers doctrine”
- As s51 was subject to the Constitution and the view was that s107 reserved to the States their lawmaking power, up until 1920 all s51 powers were interpreted narrowly.
- The rule of interpretation that applied up to 1920 was that the grants of power under s51 be construed narrowly so as to reserve to the States as much of their law making power as possible.
- After Engineers however, States were found to have residual power over matters in s51 and not reserve powers resulting in a new and expansive approach to Cth lawmaking power.
By 1920, have a functioning Cth Govt, a significant centralised govt and a judiciary which sees the way Cth was operating. So the judiciary said it should now be interpreted differently...shouldn’t be read narrowly. Should read s51 as broadly as required, and what is left over is what the states get “residual power”

This was a watershed moment! Changed everything...expanded enormously the ability of States to make laws

Also contracts powers of States to make laws, as well as giving Cth powers to make more laws

Consider this below as to HOW they were able to do this!! METHOD!

2.2 Methods of constitutional Interpretation
Regular words vs Constitutional words: eg ‘alien’ – has meanings in different contexts.

Legalism: considering legal meaning of the word.

Originalism: original understanding of the words.

Intentionalism: the words as what the people who first drafted them intended.

Contextualism: in the context of the whole constitution and the principles it was set up to uphold eg representative and responsible government, federalism etc.

Progressivism/flexible interpretation/”judicial activism”: context of contemporary society.

A lot of judges now say it is appropriate to draw on more than one theory. Eg Cole v Whitfield used a variety of methods.

The Constitution and the words/structure/history of precedent and interpretation provides some limitation and constraint. Have to abide by some of the “rules”.

Literalism/Legalism

Recommended Reading:

- Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) (The Engineers Case) 28 CLR 129

[This case is one of the most important in Aust. constitutional jurisprudence. All attempts should be made to read this case in full] – watershed case (as above)

- Concerned the power of the Commonwealth to make laws under s51(xxxv) for conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State;

- One significant question was whether the Cth could make laws that were binding on the States because here the dispute involved the State as an employer

1. Overturned the Reserved State Powers Doctrine
   - Powers of CW set out in s51 were not exclusive but concurrent unless otherwise specified
o no implication from s107 that s51 must be interpreted narrowly to reserve to the States their traditional areas of lawmaking.

2. NB Also overturned the implied intergovernmental immunities doctrine in so far as it claimed to protect States from Commonwealth law and in dicta vice versa (not the focus of this lecture)

1) Does it fall within Cth ability to make a law
2) Could they make a law which bound state as an employer

Original reading made above not possible, but new reading overturned this and made it possible. Also overturned the intergovernmental immunities doctrine!

So how did they do this? In order to reject the reserved powers doctrine the court challenged the interpretive process whereby certain rules and prohibitions could be implied into the Constitution if they were not textually present. Doesn’t say, should be interpreted narrowly, doesn’t say Cth can’t bind States...just says:

S107: Every power of the Parliament of a colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be. So courts say, nothing specifically limiting...

Approach was: “It is the chief and special duty of this court faithfully to expound and give effect to [the constitution] according to its own terms, finding the intention from the words of the compact and upholding it throughout precisely as framed” If it’s not in the words, can’t say it is there.

Re practice of implying things into Constitution (old form of interpretation, their opinions on this): Maj: “… an interpretation of the Constitution depending on an implication … is formed on vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language to be quoted, not referable to any recognised principle of the Common Law of the Constitution, and which, when started, is rebuttable by an intention or acknowledged common law constitutional principle, but arrived at by the Court on the opinions of Judges as to hopes and expectations respecting vague external conditions.

Blurry language in the Constitution leads to necessitation of interpretation.

Engineers Case...Rules of construction:

- Golden rule - Exclude consideration of everything except the state of the laws as it was when the Statute was passed and read the language of the Statute in what seems to be its “natural” sense
  o (This has come to be known as Literalism – read the language of the Constitution in its natural and ordinary sense)
- If the text is ambiguous only then may you have regard to the context and the scheme of the Act.

In terms of the Engineers case itself......Re s51(xxxv) “power to make laws for...”
- Engineers court said it was in general terms and did not make an exception regarding industrial disputes in which States were involved.
- The only limit in the terms of the section itself are the words “subject to this Constitution”...that means, other provisions in Constitution can override s51! Eg if wanted to make power to say can only make power for Christians to marry...this would be subject to s116 on the religious freedom!
- S51 is subject to s107, but they said s107 does not limit in this context...Re s107 they said it continues the previously existing powers of the States with respect to their exclusive powers and powers which are concurrent with the Cth. S51 does not have to be construed narrowly.

**Engineers and the doctrine of implied prohibition**

- Court said they would not read into s107 an “implied prohibition”. The idea was that s107 about maintaining states and sovereign powers
- Knox CJ, Isaacs, Rich and Starke JJ ... With respect to earlier decisions that had found the opposite:
  “some are individually rested on reasons not founded on the words of the Constitution or on any recognized principle of the common law...but on implication drawn from what is called the principle of “necessity” that being itself referable to no more definite standard than the personal opinion of the judge who declares it.” Slamming of judges! If saying it is necessary for ti to function, based on personal opinion, then you’re going outside text of Constitution.

*Cf Engineers with Melbourne Corps and ACTV or Nationwide News*

If we jump ahead in time to Melbourne Corps case (1947) dealing with an implied prohibition of discrimination against the States and ACTV (1992) where the implication of a freedom of political communication was found based on the structure of the Constitution we see that this view was modified or softened. (We will return to this below)

**Engineers – was it a triumph of legalism?**

What is legalism?

- Although the “Golden Rule” suggest a literal approach to the text ie “read the words in their “natural sense” Isaacs indicated that the natural sense of any word must depend on the subject matter in connection with which it is used
- Isaacs reiterated this two years later in Australasian Temperance when he said: “literal and popular are not interchangeable with “plain and natural”” Plain and natural to Isaacs did not mean the same thing as popular.
  “the natural sense of any words must depend on the subject matter in connection with which it is used and its colocation”.

**Legalism and the resort to legal principles rather than rules**

- Legalism allows reference to external aids so long as they are authoritative legal material...when trying to understand meaning of words in Constitution meant. Not legal rules, but big legal principles that are overarching eg equality before the law
- Do legal principles count as authoritative legal material to which judges can have resort?
- Legal principles as opposed to rules admit of a higher level of generality.
- Some commentators argue that in the context of the Constitution a principle based approach works better for hard cases and allows for reflection, judicial choice, reference to higher order values and debate.

**Literalism versus legalism**

- This distinction between literalism and legalism has been the source of controversy over the years.
- Sir Owen Dixon CJ – in 1952 indicated that the proper approach was a strict and complete legalism. But by that he meant the technique by which the words should be interpreted
  - Dixon’s speech when sworn in as CJ advocated “close adherence to legal reasoning [as] the only way to maintain the confidence of all the parties in Federal conflicts” and also argued that there was “no other safe guide to judicial decisions in great conflicts than a strict and complete legalism” **technique by which words should be interpreted**
- **BUT**
  - PUSH for Literalism… Barwick CJ in 1981 (19 years later) was arguing for literalism – denying the significance of the interpretive context – giving the words their apparently self-evident meaning.
  - Return of “implied” into Constitution...Mason CJ in 1992 (11 years later still) was again taking up the question of what can be implied from the text

**Implications**

**Recommended Reading:**

*Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106* - whether Cth could place limits on political advertising. Making sure playing field limited between political parties…($) Court said, no it was contravention of implied freedom of political communication. Conclusion that:

- The determination of the meaning of the Constitution is not restricted to its express language, but extends also to implications which may be made regarding its meaning
- A constitutional implication may be defined as a suggestion that the text or structure of the Constitution represents some truth or the existence of some fact that is not expressly stated in its language.

**Mason CJ in ACTV:**

- He rejects the view that Engineers supported the contention that no implications could be made in interpreting the Constitution (p134) doesn’t say no implications could be made, only that they couldn’t be based on personal opinion
- This view is supported by Owen Dixon from the High Court after the Isaacs Court and by reference to cases since that have implied matters (*Melb Corps* 1947 case for eg, says there were implications there)
- Distinguishes two kinds of implication (interesting!)
Cases where the implication is sought to be derived from the actual terms of the Constitution. It is sufficient if it is manifest according to accepted principles of interpretation (eg chosen by the people, creates a right to vote implicitly)

- Where the implication is structural it must be logically or practically necessary for the preservation of the integrity of that structure (is this contradictory to Engineer?)
  - in any case, difference between... (below)

The idea that there is a separation of powers is based on the structure of the Constitution!

Original intent and use of historical materials

Recommended Reading:

*Tasmania v Commonwealth (1904) 1 CLR 329*

*Cole v Whitfield (1988) 165 CLR 360*


Further Reading:

Leslie Zines, 'Characterisation of Commonwealth Laws' in HP Lee and George

Winterton, Australian Constitutional Perspectives (1992)

Leslie Zines, The High Court and the Constitution (4th ed, 1996), Ch 2 and 3


**Definition** – also called originalism - ascertain the intentions of those who wrote the Constitution

**Originalism**

Original intent
What aids can you use to determine the intent?
- *Tas v. CW and Vic (1904)* Griffith CJ Constitution Bills but not the debates
- *Cole v. Whitfield (1988)* History of the section including relevant convention debates

**The historical context and current standards: connotation and denotation of constitutional language**

**Originalist & Ambulatory approaches**

**Originalist** – Original meaning of words

- But words can often have different meanings…which should the Court adopt?

> “To construe the Constitution on the basis that the dead hands of those who framed it reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines would deprive what was intended to be a living instrument of its validity and its adaptability to serve succeeding generations...The Constitution must be construed as a “living force” representing the will and the intentions of all contemporary Australians, both women & men, and not as a lifeless “declaration of the will and the intentions of men long since dead.” *Lock yourself into a system that perhaps does not apply today...*

**Ambulatory approach**

- Look to the connotation AND the denotation (ie. The current meaning of words)
- The connotation of a word remains the same BUT the denotation changes

(this if flipped in linguistics!! But this is the way it has been used in the legal context...so don’t use it at all when do this stuff! Not required to use these terms! Plenty of other ways to describe what we’re talking about...word stays the same but the meaning changes!!)

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

> “Reference to history may be made, not for the purpose of substituting for the meaning of the words used the scope and effect — if such could be established — which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged”

*reference back to contemporary understanding...just meant to give background to help to know what it means now.*

**Use of historical materials**

- Traditionally the High Court rejected the use of historical materials in interpreting the meaning of the words of the Constitution
- However in 1988 in *Cole v Whitfield* a unanimous Court stated that reference to historical materials could be made to identify the original and current meaning of words in the Constitution
  - But they could not be used to determine the subjective intention of the framers.
- Convention debates are now regularly used by the Court
See for example *Ha v NSW*
- A majority of the Court have consistently rejected the use of referenda results in interpretation.
- Kirby J had accepted as legitimate the use of referenda results in determining the scope of a constitutional grant of power

**Constitution to be read in light of common law**

*In the Engineers case, Knox CJ, Isaacs, Rich and Starke JJ said that the Constitution should be read ‘naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it’: at 55. Not only to be interpreted in light of its own terms, but also in terms of the common law which was inherited…common law notion of natural justice and equality before courts and exercise of judicial power are common law principles that the Constitution works within, sits inside a larger common law system.*

**Constitutional words are special!**

*Australian National Airways v Commonwealth (1945) 71 CLR 29*

“…it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.”

Has certainty and fundamental status, because it is not an ordinary law, have to give it a broader interpretation…referring wide enough! Unlike eg taxation law or criminal law, Constitutional Law has a different status, more like general propositions than if reading a narrow statute.

**(Con)textualism** – not just context of the words themselves, but also the context of the person who is interpreting it

- The interpreter is always situated in a tradition
- Toohey in McGinty “although the essence of representative democracy remains unchanged… the current perception…is embodied in the Australian Constitution” it is our contemporary perception of the Constitution. Eg people were excluded from the vote in 1901! Basic things like representative democracy has a different meaning today.
- Jerome Frank, a legal realist, is credited with the idea that what a judge had for breakfast might determine a judicial decision.
- Realists argued that the role of the High Court is political

**BALANCING Contemporary theories; context, politics and international law** – goes to the point about using more than one theory…balancing all of the theories, and when it is appropriate to use each of the different theories……judge is not taking on board everything, but making judicious decision about when each theory is relevant. Eg race power, take into account international. Don’t forget, it is a political document! Shouldn’t be read just like anything else, has a certain dynamism to it.

- Some judges view the job of interpretation as balancing some part of all of these techniques of interpretation.
Determining when it is appropriate to look at original intentions or the words on their face or the legal meanings will be contingent upon external factors such as the place of the words in the Constitution as a whole, the underpinning values of the political system and its structural framework or the international conventions and treaties to which Australia has become party.

**Rules of precedent and overruling**

**Stare decisis** – doctrine of precedent

- The High Court should follow its earlier decisions
- All courts below the High Court are bound by the decisions of the High Court
- The High Court as an apex court (highest appellate court) does not always have to follow its own decisions. Note that the House of Lords was bound by its own decisions until 1966
- When can a prior decision of the High Court be challenged? Only when leave to do so has been given by the High Court (*Evda Nominees Pty Ltd v. Victoria* 1984) Kirby was not in agreement with this requirement but considers the Court bound to reconsider its decisions when an issue arises (*Brownlee v. Queen*)
- 4 matters that might justify departure from an earlier decision (see Gibbs in *CW v. Hospital Contribution Fund* 1982)
  - (1) earlier principle not worked out in a significant succession of cases (not entrenched...scope for rethinking)
  - (2) If the majority in the earlier decision had different reasons between them
  - (3) Earlier decision had led to considerable inconvenience
  - (4) Earlier decision had not been acted upon in a manner which militated against reconsideration (how significant would the interpretation be in harming)

**Statutory Interpretation: Acts Interpretation Act**

[makes it a requirement that the enactment in excess of power will be to extent not in excess, will continue to be valid to extent can] s15A Every Act shall be read and construed subject to the Constitution and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

**Reading down and severance**

- Reading down – limit the application of the statute to those cases where it can validly apply. Eg where to construe it too broadly would mean that it exceeds the Commonwealth power in the area.
- Severance – to cut away the offending part of the statute so that the remainder can continue to validly apply
- Limits on reading down – if the act in question is too clear eg *Railway Servants Case* – was too clear! Could not be read down...because it defined the very nature, was clearly not a case of reading it down
• Limits on severance – is it possible without fundamentally changing the Statute? (Cannot do this if it requires you to be creative! Can’t add words in, can’t reverse by cutting out words to change effect)
  - Ie if substitution of words is required severance cannot go ahead
  - If it reverses the intent of the legislation it cannot go ahead eg by removal of the word “not”.
  - If the Act is written in such a way that Parliament intended it to stand or fall as a whole?

**Strickland v Rocla Concrete Pipes**

Parliament cannot direct courts to reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application.

In this case the only way to save the legislation was to limit the generality of s35 and 36 of the TPA (which would have taken it out of power) by reading them in accordance with various provisions in section 7 that made them specific to certain kinds of individuals and transactions.

**Which brand of constitutional interpretation holds favour now?**

Impossible to answer this question partly because there are seven different members of the High Court but also partly because the kind of interpretive strategy used sometimes changes with the section or instrument being interpreted.

**Robert French CJ**

Murray Wilcox described Robert French when his appointment as CJ was announced:

“He’s black-letter in terms of he’s a judge with integrity who decides cases according to what he thinks is the legal position” Wilcox referring to his role in upholding the Howard government decision to turn the Tampa away says “Knowing him, I think he would’ve preferred that the result be different, because he’s a person who’s always had a great sympathy for people in trouble, and that includes refugees. But he was persuaded that the law required him to reach the decision he did.” (SMH Weekend Edition 2-3 August 2008)

**Interesting facts about the High Court**

- in 2009, the Court decided almost half its cases with total agreement among its members (usually the rate is about 1 in 4)
- But the Court was still just as likely to split over constitutional issues as it was in the past.
- 2009 was also notable as the first year in which three of the Court’s serving Justices were women. Only four women have ever been appointed to the High Court bench

**2.3 Principles of statutory construction**

- What is the role of precedent in statutory construction?
- When can an earlier decision be overruled?
Topic 3 – Characterisation

The relevance of characterisation to the solution of constitutional problems

Techniques

- The High Court has adopted a number of techniques to solve issues concerning constitutional powers.
  - Identify the power or powers which the Commonwealth might invoke to support the Federal law.
  - The power(s) must be interpreted, and their scope ascertained.
  - Characterise the law - it is a law “with respect to” the subject matter of the identified power(s)
  - Consider any express or implied constitutional limitations which might render the Commonwealth law invalid. Either limit the way the law operates or in fact invalidate the law.

The role of Characterisation and answering a problem question

Steps to answering a Constitution law problem question:

1. Is there a Commonwealth law?
2. What is the source of authority for that law?
3. Characterise the Law
4. What are the tests and what are the cases for the power under which the law is characterised? Does the Cth law satisfy those tests?
5. Are there any Constitutional limits on the exercise of that power by the Commonwealth?
6. Is there a State Law?
7. What is the source of authority for that State law?
8. Are there any Constitutional limits on the exercise of that power?
9. Is the State law inconsistent with the Cth law?

(By the end of the course all aspects of this process will have been covered.)

Steps to characterising a Cth Act

1. Ask what does the Cth Act in question actually do?
2. Is the subject matter covered by a Commonwealth head of power? Here the issue of how the Court has interpreted the power will be relevant.
3. Is it subject matter power or a purpose power?