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Federal Constitutional Law Cram Notes

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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Federal Constitutional Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Federal Constitutional Law Cram Notes will refer frequently to the Commonwealth as the Cth.

2. BACKGROUND – PRINCIPLES TO APPLY IN CONSTITUTIONAL INTERPRETATION

A. HEADS OF POWERS

The Commonwealth's (**Cth**) head of powers are listed in s 51 of the Constitution. The Constitution assigns to the Cth Parliament a specific list of powers relating to a range of subjects and purposes (s51). This means that the Cth only has power to legislate with respect to these enumerated powers. The residual power is given to the states under s 107 as well as concurrent power of the exclusive powers conferred on the Commonwealth.

Initially the founders of the Constitution wanted the majority of the powers to remain with the States. However, while this suggests a restricted scope of power, as envisaged by the drafters of the Constitution, the Cth head of powers in s 51 have been interpreted with an increasingly expanded scope by the High Court. As such, because Cth legislation prevails against states under s 109, this has led to the ever increasing legislative power of the Cth, at the expense of the states.



B. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION – THE ENGINEERS CASE

i. THE POSITION BEFORE THE ENGINEERS CASE

1) Implied Immunity of Instrumentalities

There was an implied inter-governmental immunity against each jurisdiction's laws (as implied from federalism). The idea is that both the States and the Cth were normally immune to each other's laws, and was used to protect the States and their agencies from Cth interference.

- *D'Emder v Pedder* (1904):
 - o Cth officer did not have to pay state tax – Cth and state not allowed to tax the other
 - o Both levels of government are not allowed to tax the other, i.e. the State cannot tax the Federal level, and the Federal level cannot tax the State.

2) Reserved State Powers

Cth grants of power were to be interpreted so as to ensure that they did not encroach too far upon the "residual" powers of the states.

- *R v Barger* (1908):
 - o As the subject-matter lay within State legislative power, such power could not lie within Cth's power.
 - o Section 51 powers are read down to preserve State power even though it was clearly within a s 51 head of power.
 - o Dissent (Isaacs and Higgins JJ):
 - using the analogy of a will, the dissenting judges argued that you cannot first determine the scope of the residuary and then determine the content of specific grants.
 - Must first give effect to the specific grants of Cth. Power in s 51

ii. AMALGAMATED SOCIETY OF ENGINEERS V ADELAIDE STEAMSHIP (1920) 28 CLR 129

- The question for the HCA: is the State bound by Cth. decision? Question whether a Cth. law made under the "conciliation and arbitration" power (s 51(xxxv)) could authorise the making of an award binding on State employees.
- Court found that the previous cases were not applicable as:
 - Previous interpretations of the constitution were based upon "vague, individual conceptions of the spirit of the compact".
- The constitution should be read as a whole and in its natural sense (plain and natural meaning). This is to be done in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, the statute law which preceded it. "Unexpressed assumptions" must give way to express provisions – there must be no speculation as to motives of the drafters
 - Fear that the Cth may overpower the States (based on distrust that the Cth may abuse powers) is no reason to depart from reading the Constitution in its natural meaning.
 - If Parliament abuses its powers, then it is up to responsible government to fix this.
- If the legislation in question falls within the general scope of s 51 powers, and if it violates no express condition or restriction by which those powers are limited, it is not for any Court to inquire further or to enlarge constructively those conditions and restrictions – the legislation will be valid.
- Implications drawn from the constitution are acceptable – however, the implications and restrictions on the s 51 heads of power must be clear.



- Implications can be drawn from necessity, but only those that are “logically necessary” not “politically necessary”
 - This is due to the fear of abuse of power – there is no reason to depart from natural meaning unless it is clear.
- Section 107 is not to be seen as reserving any power from the Cth that falls fairly within the explicit terms of an express grant in s 51 – there is no place for the doctrine of “implied prohibition”.

The effect of the *Engineers* case was the recognition of the limits of the residual state powers and the expansion of Cth’s powers under s 51 without any constraints to protect the State powers. The HCA has not departed from this case since.

1) Reactions to the *Engineers* Case

Victoria v Commonwealth (1971) 122 CLR 353 (as per Windeyer J)

- The colonies which in 1901 became states in the new Cth. were not before then sovereign bodies; they were self-governing colonies which, when the Cth. came into existence, lost some of their former powers and gained no new powers.
- The decision of the *Engineers* case in 1920 reflected the Constitution being read in a new light, a light reflected from events that had led to a growing realisation that Australians were now one people and Australia one country and that national laws might meet national needs.
- For lawyers the abandonment of the old interpretation of the limits of the constitutional powers was readily acceptable as it meant only insistence on rules of statutory interpretation to which they were well accustomed.
- The new reading which emerged did not mean that the original judges of the HCA were wrong in their understanding of what at the time of federation was believed to be the effect of the Constitution. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based upon the interpretation of a written constitution may vary and develop in response to changing circumstances.
- When the Constitution was first drafted, these doctrines were understandable. But now throughout the development of Australia’s history this may not be the case.

Following the *Engineers* case, the implied inter-governmental immunity and concept of reserved state powers have been effectively overturned, allowing the Commonwealth’s head of powers under the constitution to be given greater primacy. The *Engineers* case was one of the most important constitutional cases in Australia, as it paved the way for the modern accepted understanding of Australian federalism and constitutionalism.

3. PRINCIPLES TO APPLY IN CHARACTERISATION OF THE LAW WITHIN THE HEADS OF POWERS

A. THE CHARACTERISATION PROCESS

The process of characterisation is the determination of whether the particular law falls within the heads of powers in s 51. To satisfy this, there must be a sufficient connection “with respect to” a s 51 head of power.

The process of constitutional interpretation is to interpret the limits of the subject-matter. A broader interpretation will be sufficient unless a narrower interpretation will better carry out its object and purpose (*Bank Nationalisation case* – Dixon J). This is because the heads of power under s 51 are plenary in nature and are thus to be interpreted broadly.



Bank of New South Wales v Commonwealth (Bank Nationalisation Case) (1948) 76 CLR 1

- The terms of the Constitution are broad and general, intended to apply to the varying conditions which the development of the community must involve → the Court should lean to a broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.
- Once, then, Parliament passes a law which is within the provision of the Constitution, that is all characterisation involves – there only needs to be a sufficient connection. It is not up to the Court to determine what is done with that power.

Re Dingjan; Ex parte Wagner (1995) 183 CLR 323 (per McHugh J)

- Steps in characterisation:
 - First, the character of the law must be determined
 - Done by reference to the rights, powers, liabilities, duties and privileges which it creates.
 - Secondly, a judgement must be made as to whether the law so characterised so operates that it can be said to be connected to a head of power conferred by s 51.
 - The practical, as well as legal, operation of the law must be examined.
 - If a connection exists between the law and a s 51 head of power, the law will be 'with respect to' that head of power unless the connection is 'so insubstantial, tenuous or distant' that it cannot be sensibly be described as a law 'with respect to' the head of power.

Grain Pool of Western Australia v Commonwealth (2000) 202 CLR 479

- General principles to be applied in construction:
 - First, the constitutional text is to be construed "with all the generality which the words used admit". (broad approach)
 - When the validity of legislation is in question the task is to consider whether it "answers the description, and to disregard purpose or object"
 - Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates.
 - Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.
 - In a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two.
 - If a sufficient connection with the head of power does exist, the justice and wisdom of the two, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.



We hope you have enjoyed this short preview of the Federal Constitutional Law Cram Notes.

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