

Australian Constitutional Law exam notes

Ordinary claim skeleton

To weave in authority (case and legislation):

- ____ is authority for the proposition that _____. In these circumstances therefore _____.
- _____ is authority that there is justification for a _____.
- - 'the application of s ____ will result in _____'

When using case law, consider:

- Does the case apply? Are the facts sufficiently similar or can it be distinguished?
- What is the ratio of the case? Is it binding precedent or just persuasive?
- Why is the current scenario similar to justify applying the case?

NOTE: This process is to determine if the law made by the Commonwealth, or a State, is Constitutionally valid. Repeat this process for every section under examination – do section by section (or sub-section by sub-section).

1. Clearly determine and state which section of the legislation applies to the question, which is under examination.
2. State if it is a Commonwealth or State law under examination.
3. **If STATE:** Does the State have power to pass the law:
 - a. 'States (i.e. SA) have plenary legislative power, per the *Constitution Act 1934* (SA) s 5. The Commonwealth Constitution ss 106-107 'saves' these powers, subject to the Commonwealth Constitution. Accordingly, it has the power to make laws for any area including _____.'
 - b. See below if the State is using tax power – *See notes for more detail!*

4. **If COMMONWEALTH:** Does the Commonwealth have power to pass the law under the *enumerated heads of power*? i.e. is the law made 'with respect to' the heads of power – undertake characterisation:

McHugh J in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369, affirmed in *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492, is authority for the two stage process:

- a. **Interpret** the following applicable heads of power:

Note: the Engineers Case (1920) 28 CLR 129 is authority that the Constitution is to be viewed as a statute, with legalism as the guiding interpretive principle. So, the ordinary meaning is to be given to the words, informed by the common law and statutory context.

NOTE: O'Connor J in Jumbunna Coal Mine NL v Victorian Coal Miners' Association (1908) 6 CLR 309, 367 is authority that 'the Court should... always lean to the broader interpretation unless there is something in the context pf in the rest of the

Constitution to indicate the narrower interpretation will best carry out its object and purpose.'

- i. Corporations power s 51(xx) – *see topic below for in depth detail.*
 1. **Determine scope of power using *Work Choices* definition – only include relevant aspect of the Gaudron J quote. *See below*
 2. Do b. and c. below – applying the subject matter power test.
 3. Conclude whether the law is valid.
 4. **Determine whether the law applies to the entity in the question.
 - a. Is it a foreign, trading or financial Corporation? Mention *Adamson*, *Superannuation* and *Tasmanian Dams*. *See below*
 - b. Apply the tests to the facts i.e. to the operation of the entity. Include For and Against!
 - c. Conclude likely result. Advise client based on the question.
 - ii. External Affairs Power s 51(xxix) – *see topic below for in depth detail.*
 1. Relations with other nations?
 2. Matters external to Australia?
 3. Implementing treaties and conventions?
 - a. Is the treaty *Bona fide* and have precise obligations?
 - b. No need for the matter to be of 'international concern'.
 - c. Is the law reasonably appropriate and adapted to achieving the purpose of the treaty? - *Steps b. and c. below.*
 - iii. Defence power s 51(vi)
 1. Characterise the power using Fullagar J's two aspects from the *Communist Party Case*.
 2. Consider constitutional facts that give rise to a threat for which there is a defence need.
 3. Determine whether the action taken is proportionate to the threat.
 - a. Steps b. and c. below.
 - iv. Taxation s 51(ii): *NOTE: Always need to consider this, due to s 55 as if the law imposes a tax, it can't do anything else!*
 1. (Step b. below) Is the law imposing a 'compulsory extraction of money, by a public authority, for public purposes, enforceable by law and is not a payment for services rendered'?
 2. If so, is it a:
 - a. Fee for services
 - b. Fee for privilege
 - c. An arbitrary exaction
 - d. A penalty
 - e. A charge for the use or acquisition of property?
 3. *Note: s 96 – Commonwealth can grant financial assistance to States on any terms.*
- b. **Analyse** the legislation in question:
- i. Determine 'the character of the law' by reference to the 'rights, powers, liabilities, duties and privileges that it creates'.
 - ii. Consider 'the practical as well as the legal operation of the law.'

- c. **Compare** the legislation to the interpreted head of power:
 - i. Is it a **Subject Matter** power? If so, use the test of *sufficient connection*: the connection is not 'so insubstantial, tenuous or distant' that it cannot sensibly be described as a law 'with respect to' the head of power: *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, 369 (McHugh J), quoting *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J).
 - 1. Purpose and proportionality are irrelevant (Kitto J in *Herald and Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418)
 - 2. The wisdom of the law is irrelevant (*Grain Pool*)
 - ii. Is it a **Purposive** power? If so, use the test of *proportionality*: whether the law is proportionate, or appropriate and adapted, to the relevant purpose: *Text* page 785.
 - 1. Use for Defence power (s 51(vi)) and Treaty implementation aspect of external affairs (s 51 (xxix)).
 - iii. **NOTE**: Only one 'character' of the law needs to be within power: *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; Stephen J in *Actors and Announcers Equity Assn v Fontana Films* (1982) 150 CLR 169; *Re F; Ex parte F* (1986) 161 CLR 376, 387.
- 5. **If Corporations Power**, refer above to see if law applies to the corporation in question.
- 6. IF use of **tax power, any limitations** apply?
 - a. If Commonwealth:
 - i. S 53 or 55 procedural limits?
 - ii. S 51(ii) or 99 substantive limits of discrimination or preference between States?
- 7. **Implied Freedom of Political Communication**
 - a. *Lange test*:
 - i. Does the law burden political communication?
 - ii. Is the law appropriate and adapted to achieving a legitimate purpose?
 - 1. What is the object of the law?
 - 2. Is this legitimate?
 - 3. Are the means appropriate and adapted?
 - a. Does the law achieve its purpose?
 - b. Any less-drastic means?
 - c. Is it an undue burden?
- 8. **Implied immunities**
 - a. Commonwealth law applying to State 'crown'?
 - i. Does the law actually apply to the crown?
 - ii. Does the law actually apply to the State as a matter of statutory construction? *Look for an express statement to rebut presumption.*
 - iii. Per *Austin*, does the law impose a 'special burden' or 'curtail' the 'capacity' of the States to function as governments?
 - 1. Does it apply to higher level State employees, or control hiring/firing? *Re AEU.*
 - b. State law applying to Commonwealth 'crown'?
 - i. Does the law actually apply to part of the Commonwealth Crown?

- ii. Does it apply to the Commonwealth as a matter of Statutory construction?
 - 1. Remember SA *Acts Interpretation Act*
 - iii. *Cigamatic/Henderson's* test:
 - 1. Discriminate against the Commonwealth? *Invalid*
 - 2. Remove or regulate the capacities of the Commonwealth? *Invalid*
 - 3. Regulate the use of the capacities? *Valid*
 - c. IF invalid, read it down as to not apply to the crown?
- 9. **Apply freedom of interstate trade limitation: Section 92**
 - a. Per *Cole v Whitfield*, is there a 'discriminatory burden of a protectionist kind'?
 - i. Discriminatory burden – *Castlemaine Tooheys, Betfair (No 1) and Betfair (No 2)*.
 - ii. Protectionist purpose – *Cole, Betfair (No 1) and Betfair (No 2)*.
- 10. **If State law**, is the law imposing an **excise (s 90)**?
- 11. **S 109 inconsistency?** To make the State law inoperative.
 - a. Direct inconsistency – impossible to obey both laws
 - b. Direct inconsistency – conflict of rights/privileges/entitlements
 - c. Indirect inconsistency – Commonwealth covering the field?
 - i. Manufacturing inconsistency?
 - ii. Operational inconsistency?
- 12. If the Commonwealth makes a law within their limits, it is valid. Otherwise, it is invalid and has no force! *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 492 is authority that 'if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.'
- 13. If invalid, **read down or sever provisions?** – *see below*.

The Corporations Power s 51(xx)

51. 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: (xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. NOTE: This is a subject matter power!

SEE PROCESS ABOVE FOR ALL STEPS! Below are elaborated steps!

4(a)(i)(1). Scope of the Corporations Power – uses of power that are 'with respect to' it: The majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) in the *Work Choices Case* at 114 defined the scope of the Corporations power by adopting dissenting statements by Gaudron J in *Re Dingjan; Ex Parte Wagner* (1995) 183 CLR 323 and *Re Pacific Coal Pty Ltd; Ex Parte Construction, Forestry, Mining and Energy Union* (2000) 203 CLR 346:

From *Re Pacific Coal* at 375: 'I have no doubt that the power conferred by s51(xx) of the Constitution extends to the

- regulation of the activities, functions, relationships, and the business of a corporation described in that sub-section, (*almost everything a corporation does*)
- the creation of rights, and privileges belonging to such a corporation,
- the imposition of obligations on it and, (*can force, or refrain, action of corporations*)
- in respect of those matters, to the regulation of the conduct of those through whom it acts,
 - its employees,
 - and shareholders and, also, (*BUT, only in relation to the above three dot points*)
- the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.

NOTE: In answer, quote the relevant and applicable aspects of the passage above, not all of it!

HOWEVER, a law that merely 'hooks' a corporation onto a law in attempt to draw third parties or employee's conduct within power will be invalid; there must be an active, real connection to the corporation – *Re Dingjan* (Gaudron J).

Also note: that laws relating directly to the subject matter of the power (the trading and financial activities of trading and financial corporations, respectively) go to the very heart of the power, and almost definitely fall within it – *Concrete Pipes Case* (Barwick CJ)

- Look for words like 'trade', 'sale' or 'investment' in the legislation

Apply these examples and analogies where possible!

<i>New South Wales v Commonwealth (Work Choices Case)</i> (2006) 229 CLR 1 <i>I.e. Internal workings of corporations, indirect to trading.</i> <i>See above for full ratio!</i>	The Howard Government created the <i>Workplace Relations Amendment (Work Choices) Act 2005</i> (Cth) that regulated all aspects of relationships between corporations and their employees.	The majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) held the laws were valid. – see above for ratio of case. ' <i>the regulation of the conduct of those through whom it acts...</i> ' example.
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	ss 365 and 366 – offence to place or deny prohibited content in workplace agreements S 775(1)(a) – restricted union officials from entering premises owned or occupied by corporations for any reason, including OH&S checks Schedule 1 – required unions to register and incorporate.	
<i>Strickland v Rocla Concrete Pipes Ltd ('Concrete Pipes Case')</i> (1971) 124 CLR 468 <i>I.e. relationships between corporations</i>	A law regulating restrictive trade practices between corporations.	Was valid: ' <i>regulation of the activities, functions, relationships...</i> ' example. BUT, this case employed the distinctive Character Test!
<i>Actors and Announcers Equity Association v Fontana Films Pty Ltd</i> (1982) 150 CLR 169. <i>I.e. protecting corporations from the actions of others.</i>	A law prohibiting a 'secondary boycott'. If allowed, the boycott would have caused damage to the businesses trading.	Was valid: ' <i>conduct... capable of affecting activities...</i> ' example. BUT, this case employed a different test!
<i>Commonwealth v Tasmania ('Tasmanian Dams Case')</i> (1983) 158 CLR 1. <i>I.e. protection of the public or public assets from corporation's trading activities</i>	A law prohibiting corporations, for the purposes of their trading activities, from carrying out excavation works, building, damaging buildings, damaging trees, making roads, or using explosives on certain lands.	Was valid: ' <i>the imposition of obligations...</i> ' example. BUT, this case employed the distinctive Character Test! Mason J notes that s 51(xx) is not a purposive power – it is the connection that is relevant, not the purpose of the legislation
<i>Re Dingjan; Ex Parte Wagner</i> (1995) 183 CLR 323 <i>Outside scope of power!</i>	A law giving the Industrial Relations Commission power to vary or set aside unfair contracts 'relating to the business of a constitutional corporation'. I.e. the Commonwealth sought to regulate the relationship between contractors and sub-contractors.	Was INVALID. Per McHugh J: 'A law operating on the conduct of outsiders will not be within the power conferred by s 51(xx) unless that conduct has significance for trading, financial or foreign corporations.' At [370].
<i>Williams v Commonwealth (No 2)</i> [2014] HCA 23 <i>Outside scope of power!</i>	A law authorising the Commonwealth to give money to organisations giving wellbeing services to schools.	Was INVALID under this head of power. It did not mention corporations, and even if it did, it did not regulate the legal rights or actions of a corporation. Para [50]!
<i>New South Wales v Commonwealth (Incorporation Case)</i> (1990) 169 CLR 482.	A law providing for the incorporation of trading and financial corporations.	Was INVALID. S 51(xx) assumes corporations are already formed by a State law at [498]. 'There is... no ground for

<i>Outside scope of power!</i>		thinking that s 51(xx) was framed with the intention of conferring upon the Commonwealth the power to provide for the incorporation of companies' [502]. This head of power does not give the Commonwealth power to make corporations.
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4(a)(i)(4). Constitutional Corporations: Applies to 3 different types of Corporations – *will know something is a corporation in a problem question as it will have Inc., Pty Ltd, or Ltd after its name.*

1. Foreign Corporation: a corporation formed outside the limits of the Commonwealth per the *Incorporation Case* - i.e. formed outside of Australia: *New South Wales v Commonwealth (Incorporation Case)* (1990) 169 CLR 482, 498.

2. Trading Corporation: *Adamson's Case* is authority that it this will depend on the trading activities in which the corporation engages. Further, *State Superannuation Board of Victoria v Trade Practices Commission*; *Tasmanian Dams Case*; Mason J in *Adamson's Case* are authority that the trading activities need not be the primary or dominant activities of the corporation, but they must be substantial or significant. – *Substantial activities test!*

- Per *Adamson's Case* trading activities include buying and selling goods and services with a view to a profit.

3. Financial Corporation: Per *State Superannuation Board of Victoria* at [303] a financial corporation is one which engages in substantial financial activities. – same as that for a trading corporation.

- These activities will include dealing in finance e.g. making loans, or providing financial advice, or management.

Note: not-for-profit corporations are included in above: Adamson's case.

4. Shelf company i.e. no activities yet: If a corporation has few no or negligible activities, then the purpose of the corporation (from Constitution or Charter) will determine if it is a financial or trading corporation: *Fencott v Muller* (1983) 152 CLR 570, 602. The majority said 'absent [trading or financial] activities, the character of a corporation must be found in other indicia.'

1. On the facts, from the entities charter, it was both a trading and financial corporation, despite its lack of activities.

<i>State Superannuation Board of Victoria v Trade Practices Commission</i> (1982) 150 CLR 282	Had the purpose of providing Superannuation benefits to State employees. In the course of investing the funds, it provided mortgages on a substantial scale.	The granting of the mortgages was significant enough to characterise the Board as a financial corporation.
<i>Tasmanian Dams Case.</i>	The Tasmanian Hydro-Electric Commission undertook trading	The sheer size of the trading activities were found to be

	activities of selling electricity in bulk and by retail on a very large scale. But, it also undertook non-trading activities of generating electricity for distribution to the public, constructing dams and plants and policy-making.	classified as substantial. Hence, the corporation fell within the scope of s 51(xx). Authority is from [155] Mason J.
<i>R v Federal Court of Australia; Ex Parte WA National Football League (Adamson's Case)</i> (1979) 143 CLR 190.	Brian Adamson played for the West Perth football league. He wanted to transfer to Norward football club. He needed clearance from the WA football league. His application was denied. He challenged the requirement as a restraint of trade. The football clubs argued they weren't trading corporations to which the Trade Practices Act applied.	Per Mason J: a trading corporation is a label given when 'its trading activities for a sufficiently significant proportion of its overall activities' [233]. Accordingly 'not every corporation which is engaged in trading activity is a trading corporation... [it] is a question of fact and degree' [234]. Hence, as income was gained from selling tickets, broadcasting rights, renting, catering, parking fees and payments from the football league, the football league was seen as a trading corporation.

Discussion: In both *Work Choices* and *Williams (No 2)* the issue of the test for 'trading and financial corporations' was expressly left open. The High Court inferred that this issue may be revisited in the future.

Arguments for limits on power – rejected in Work Choices: Federal Balance (federalism):

Underlying many arguments on the scope of the Corporations Power was the idea that it was necessary to place limits on the power in order to maintain the balance between the Commonwealth and the States. Higgins J in *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 famously warned against adopting wide interpretation of the power as the result would be an unacceptable intrusion into areas that were traditionally the domain of the States. His 'List of Horribles' warned that the wide interpretation could vest too much power in the Commonwealth, which has the potential to be abused.

-> The Majority of the High Court rejected this argument as it was not 'necessary to limit the reach of the power'. They said this sort of thinking was rejected in the *Engineers'* case. It was therefore a very legalistic approach as no limits were expressly stated in the Constitution. However, Kirby J did accept this argument and formulated a more modern 'list of horrors'. Callinan J in his dissent also supports this argument, in a more legalistic fashion. He argues that the Constitution specifically establishes a federal balance which should be used to limit the power.

Distinction between Internal and External Activities: This argument was first raised in *Huddart, Parker & Co Pty Ltd v Moorehead* by Isaacs J in his dissenting judgement. He said s 51(xx) '...entrusts to the Commonwealth Parliament the regulation of the conduct of corporations in their transactions with or as affecting the public.' Hence, it was argued the Corporation Power extends to the

regulation of corporations external activities, not internal activities!

-> The majority also rejected this argument in Work Choices as Isaacs J 'gave a very particular meaning to events and circumstances that were not external to a corporation... which would evidently present great difficulty in distinguishing what is external... and what is not.'

Distinctive character of corporations (Distinctive Character Test): *This was SA's argument in the Case. It was argued that there should be limits on the Corporations Power by reference to the nature of the Corporations identified in s 51(xx). For example, a law regulating the trading activities of a 'trading corporation' for example. This argument was adopted from the dissenting judgement of Gibbs CJ and Dawson J in Tasmanian Dams. Furthermore, in the Concrete Pipes Case, the High Court held that for a law to be valid under s 51(xx), the facts that the corporations upon which it operates are foreign corporations, or trading or financial corporations, should be significant in the way in which the law relates to them.*

-> In Work Choices, the Majority of the High Court said: that this test seeks to put an extra requirement into s 51(xx), for which the only possible basis is the maintenance of the 'federal balance'.

I agree with Kirby J's dissent in regards to accepting the Federal Balance argument. As he identified, the privatisation and outsourcing of activities formerly conducted by State governments would now allow the Commonwealth to legislate in areas it had not been able to before, such as local transport, aged and disability services and many Aboriginal Activities. The States had traditionally legislated solely in these areas as they were best equipped to cater for their own unique circumstances and needs. Not every State is identical; each has unique circumstances and issues requiring unique solutions.

The External Affairs Power s51(xxix)

51. 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to: (xxix) external affairs.'

The Commonwealth can use the External Affairs Power (s 51(xxix)) in three ways to validate legislation:

1. Laws that effect Australia's relation with other States
 - a. (*R v Sharkey*, *Thomas v Mowbray*)
2. Matters geographically external to Australia
 - a. (*Pape v Commonwealth*, *Polyukhovich*, *XYZ v Commonwealth*)
3. Treaty implementation
 - a. (*Koowarta*, *Tasmanian Dam*, *Industrial Relations Act Case*)

1. Examine if the law affects Australia's relations with other States:

Two step process followed from *Re Dingjan* – interpret the head of power, and then characterise the law in relation to it. → See skeleton for characterisation process

Latham CJ [136] in *R v Sharkey* is authority that 'The relations of the Commonwealth with all countries... are matters which fall directly within the subject of external affairs.' Accordingly, does the law enliven the power under any of the below three ways: - Examine on facts!

1. 'The prevention and punishment' of the causing of unfriendliness (within the Commonwealth) against the Government or Constitution of another State 'may reasonably... constitute an element in the preservation of friendly relations with other Dominions': *R v Sharkey* (1949) 79 CLR 101, 137 (Latham CJ)
2. '... the external affairs power at least includes power to make laws in respect to matters affecting Australia's relations with other countries. The commission of Terrorist Acts ...[is] one of these matters': *Thomas v Mowbray* (2007) 233 CLR 307, 364 (Gummow and Crennan JJ)
3. Relations with other 'international persons' – e.g. the United Nations and its agencies
Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 258 (Brennan J)

<i>R v Sharkey</i> (1949) 79 CLR 101	s24 of Crimes Act prohibited sedition	The purpose of prohibiting seditious speech against the Cth dominion and other states was to support our relation with other countries. Law is necessary to preserve relations with other states and is valid under external affairs power.
<i>Thomas v Mowbray</i> (2007) 233 CLR 307	Definition of terrorism in the criminal code which spoke about not allowing terrorist acts that affect Cth or any other country.	The external affairs power includes power to make laws in respect to matters affecting Australia's relations with other countries. The commission of Terrorist Act is one of these matters.