

LAWS2150 Problem Question Notes

Exam Tips	2
Powers.....	3
Constitutional Interpretation Principles.....	3
Characterisation.....	3
External Affairs Power: s 51 (xxix)	5
Trade & Commerce Power: s 51(i).....	7
Corporations Power: s 51(xx).....	9
Races Power: s 51 (xxvi)	11
Taxation Power: s 51(ii)	13
Grants Power: s 96	16
Reading Down/Severance.....	17
Limitations and Guarantees	18
Inconsistency of Laws	18
The Federal Compact: Melbourne Corporation Principle	21
Freedom of Interstate Trade & Commerce	23
Express Guarantees: Trial by Jury	26
Express Guarantees: Freedom of Religion (Cth only)	27
Implied Freedom of Political Communication.....	29
Judicial Power and Detention.....	32

Exam Tips

READ AND ANSWER THE QUESTION

Problem Question

- Show clear understanding of the facts
 - **Note:** Okay to say more facts are needed to answer the question
- **Be specific**
 - Authority (which judge?)
 - Facts
 - Reason via analogy and distinctions
- **Think about the logic of your structure, and integration and application of law to facts**
 - Don't write blocks of legal rules; make it principle --> application
- **Structure**
 - **1. Is there power to pass the law?**
 - **State:** Has residual/plenary power
 - **Cth:** Need to find a sufficient connection between law and HoP
 - **2. If Invalid:** Can we save it via reading down and severance?
 - **3. Does the law breach any constitutional prohibition?**

Essay

- **Standard:** Define/explain and give your views
- **Note:** You can disagree with essays
- **Structure**
 - **1. Definitional clarity**
 - **A) Substance of the question:** e.g. what is the quote saying, the area of law
 - **B) What is the question asking of you:** e.g. criticise, discuss, consider the pros and cons
 - **2. Thesis**
 - **3. Give examples**
- Short and well answered essay that really nails the issues is preferable to a long rambling one

Powers

Constitutional Interpretation Principles

Jumbunna Principle (O'Connor J): Where there is a broad or narrow interpretation available, **the judge should choose the broader interpretation**, unless the context or the Constitution dictates a narrower interpretation should be preferred

Engineers' Case (Rejected RSP and implied immunities)

- Constitution must be read naturally in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law
- When the text is ambiguous ... recourse may be had to the context and scheme of the Act

Characterisation

Note

- Remember the general principles BUT
- Most of your focus will be on the specific jurisprudence on the specific provision

Principle: Commonwealth laws are constitutionally valid only if it is a law 'wrt' a grant of power listed in s 51

Step 1: Does the law fall within the scope of a HoP?

Generally: Commonwealth's power to legislate is limited to specific HoP: **Engineers**

Scope: Should be construed broadly: **Jumbunna**

Step 2: Is the law with regard to the HoP?

1. Determine character of the law

- This is done by reference to the **rights, powers, liabilities, duties and privileges which it creates and its practical and legal operation**: **Grain Pool; Bank Nationalisation; Re Dingjan (McHugh J)**
 - Fear of abuse from parliament: Is irrelevant: **Grainpool**
- Dual characterisation: A law can have more than one character, it is sufficient if it falls under 1 HoP: **Melbourne Corporation, Fairfax v Federal Commissioner of Taxation**

2. Subject matter and purpose powers

Subject matter powers	Purpose powers
<p>What are subject matter powers? Powers which are not purposive powers</p> <p>Test: Sufficient connection: Re Dingjan, Grain Pool</p> <ul style="list-style-type: none"> • 'Connection must be more than 'insubstantial, tenuous or distant': Melbourne Corporation v Cth 	<p>What are purpose matter powers: Defence powers, external affairs (treaty making power)</p> <p>Test: Proportionality: War Crimes Case</p> <ul style="list-style-type: none"> • Whether the law is a 'reasonably and appropriately adapted' means to achieve a legitimate purpose

Step 3: Is the law incidental to the HoP?

Express incidental: s 51(xxxix)	Implied incidental
Gives the Cth power to legislate wrt 'matters incidental to the execution of any power' under the constitution.	<p>Test: Availability of an incidental power depends on if the power is 'reasonably incidental' or 'necessary for the reasonable fulfillment of the legislative power': Dixon in Burton v Honan</p> <ul style="list-style-type: none">• Sufficient connection is necessary: Before the law can be sustained under the incidental power: Burton v Honan• Conflicting views (Should use both)<ul style="list-style-type: none">◦ Sufficient connection (Preferred approach): Leask v Cth per Dawson J◦ Proportionality: Mason J in Nationwide News

Interaction amongst the HoP

Generally: Each HoP should be construed independently per its natural meaning, so that one HoP cannot be used to limit the scope of another: **Pidoto v Victoria**

Exceptions: The restrictions expressed in one HoP may operate to **restrict the scope** of another HoP: **Bourke v State Bank of NSW**

- **Example:** s 51(xiii) states that Cth can make laws in relation to banking **OTHER** than state banking, thus, Cth cannot use other HoP to make laws on state banking

Grainpool (2000)

(Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ)

1. The Constitution is to be construed with all the generality that the words use admit (but remember that some heads of power restrict all powers)
2. Character of the law must be determined by reference to the rights, powers, liabilities, duties and privileges that it creates
3. In determining whether there is a sufficient connection, both the practical and the legal operation must be examined
4. It is sufficient if the law falls within one head of power (dual characterisation)
5. If a sufficient connection with a head of power exists, the justice and wisdom of the law and the degree to which the means it adopts are necessary or desirable are for the Parliament and not the Courts

External Affairs Power: s 51 (xxix)

S 51(xxix): external affairs

Relations with Other Countries (Subject matter power)

Things within the scope of the “relations with other countries” aspect of the external affairs power

- Relations of Cth with all countries outside of Australia: **R v Sharkey**
 - Laws WRT matters affecting Australia's relations with other countries (*not just friendly relations*): **Seas and Submerged Lands Case** → non-friendly conduct, in violation of “international comity”
- Relations with '*international persons*' – including international organisations such as UN and other agencies: **Koowarta v Bjelke-Petersen per Brennan J**
- **Asserting sovereignty** over Australia's territorial sea and continental shelf: **Seas and Submerged Lands Case**

Issues

- Remains unclear how Court will determine which matters have sufficient capacity to affect Australia's relationships with other countries and which do not
- Potential for application of proportionality test: **Kirby in XYZ v Cth**

Matters External to Australia (Subject matter power)

Test: A *mere externality* with no Australian connexion is sufficient to enliven the external affairs power: **Majority in Polyukhovich**

- Majority affirm mere externality principle: **XYZ v Commonwealth**

Alternative test: It is valid under the external affairs power if there is some connexion/nexus (not necessarily substantial) to Australia: **Brennan J dissent in Polyukhovich; Horta v Cth**

- **Note:** Mention it, but note that it is a dissent

Factors against validity under EAP: **Pape (Strong dissent, other judges did not consider issue)**

- Where rights and obligations involve no reference to matters and things outside Australia
- **Distinction between cause and consequence:** Matters & things within Australia cannot be enacted on the basis of s 51(xxix) simply because '*the perceived need for such a law arose from cause outside of AU*'
 - Example: A law relating to consequence (the economic crisis in Australia) is not necessarily a law related to cause (the GFC trigger events, external to Australia)

International law (other than treaties) (Subject matter power)

Overall: Not yet settled

- Power to enter into international conventions is a prerogative power: **R v Burgess; Ex parte Henry**
- A law vesting in an Australian court a jurisdiction recognised by international law as a 'universal jurisdiction' is valid: **Brennan J in Polyukhovich**
- Legislative responses to UN Security Council resolutions are valid: **Kirby J in Thomas v Mowbray**