Kirby J: "properly characterised" scope of s51(xx) corporations power is reduced due to s51(xxxv) interstate conciliation & arbitration power

- Safeguard, restriction, qualification to grants of Cth power**,** P has no general power to regulate industrial dispute

Majority: Primary rule ***Pidoto*** applies here

- Secondary rule inapplicable: s51(xxxv) does not answer the description in ***Bourke*** as a positive prohibition (e.g. "other than")
- Reserved State powers doctrine no longer applicable since 1920

Commonwealth v ACT (2013)

Facts: In Commonwealth v ACT, the question was whether a territory law authorising same-sex marriage was inconsistent with the Commonwealth's Marriage Act.

- As the Commonwealth law was intended to cover all forms of marriage, then the ACT law could not provide for a form of same-sex marriage, especially if it was 'equated' ('marriage equality') with the constitutional form of marriage. This is what the Court held, striking down the ACT law as inconsistent.
- There was no need to decide whether the Commonwealth had the power under s 51(xxi) to make a law with respect to same-sex marriage, as it clearly had a power under s 122 of the Constitution to make a law with respect to same-sex marriage in a territory. It did so anyway.
- The Court noted that the 19th century definitions of Marriage regarded as (1) a voluntary union, (2) for life, (3) of one man and one woman, (4) to the exclusion of all others.
- The Court decided not to interpret 'marriage' by reference to the legal content the term had according to English law at the time of federation, but rather as a 'topic of juristic classification'. It rejected arguments about originalism and contemporary meaning as irrelevant
    - Discussed divorce, polygamy in other countries, then same sex marriage
    - *Once it is accepted that "marriage" can include polygamous marriages, it becomes evident that the juristic concept of "marriage" cannot be confined to a union having the characteristics described in Hyde v Hyde and other nineteenth century cases. Rather, "marriage" is to be understood in s 51(xxi) of the Constitution as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognizes as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations*.
- there was 'no warrant for reading the legislative power given by s 51(xxi) as tied to the state of the law with respect to marriage at federation.' It referred to the centre and circumference of the power.

Stenhouse v Coleman (1944)

Per Dixon J:

- subject matter powers are described by reference to
    - a class of legal, commercial, social activity (eg trade & commerce, banking, marriage)

The tests tend to overlap and are not rigid. Judges have been sometimes critical of the tendency to categorise inconsistency as direct and indirect – but this method still provides useful guidance, especially for students.

- Look to direct inconsistency first. If there is direct inconsistency, there is (technically) no need to consider whether the field has been covered. (For exam purposes, it is safer to consider both)
- If there is no direct inconsistency, it is still possible to have indirect inconsistency ***(Telstra Corporation Ltd v Worthing (1997)*** So you need to go on to consider whether the legislation shows an intention to cover the field and if so, the nature and extent of the field

The Kakariki

2 Dixon J tests: instead of usual direct/indirect

Two propositions:

1. When a valid State law would alter, impair, or detract from the operation of a Cth law, then to that extent it is invalid;
2. If it appears from the terms, the nature or subject matter of a Cth law that the Cth law is intended as a complete statement of the law governing a matter or set of rights and duties, then a State law attempting to regulate or apply to the same matter is regarded as a detraction from the Cth law's full operation, and the State law will be inconsistent

'Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.' (Dixon J, The Kakariki, as quoted with approval ***in Telstra v Worthing, Dickson v The Queen and Jemena Asset Management)***

Telstra Corporation Ltd v Worthing 1997

- If there is no direct inconsistency, it is still possible to have indirect inconsistency. So you need to go on to consider whether the legislation shows an intention to cover the field and if so, the nature and extent of the field.
- Quotes ***Kakariki*** Dixon J test with approval: "Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.'

Outback Ballooning Pty Ltd (2019)

Forms the basis of test for inconsistency, HCA said effectively, prefer the two tests noted by Dixon rather than labels of "direct and indirect", these are just labels.

- Section 119 of the Constitution says: 'The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'.
- S 35 of the Defence Act 1903 provides for the GovernorGeneral to call out the Defence force on the application of a State if the Commonwealth Minister agrees. • Section 68 of the Constitution says that the command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative. The Governor-General acts on the advice of responsible Ministers in exercising this power. It is not a reserve power

Nature of the defence power – waxing and waning

- Section 51(vi) is regarded as a purposive power. It supports laws that are reasonably conducive to the purpose or object of the defence of Australia (as opposed to laws on the subject of defence).
- The defence power waxes and wanes depending on circumstances – eg whether the country is at war, or preparing for war, or dealing with post-war readjustment, or in a time of peace. Its scope therefore depends upon the existence of particular facts, of which a court will usually take 'judicial notice'.
- A law that was validly enacted during the course of a war may later become invalid because it ceases to be supported by the defence power in a time of peace

Andrews v Howell 1941
Explains waxing and waning

Dixon: noted that while the meaning of the defence power does not change, its application depends upon the facts, which may change

- The existence & character of hostilities (or threats) against Cth determines the extent of s51(vi) power. The nature & dimension of the conflict, the actual & apprehended dangers of the war are relevant factors

It is a Purposive power

- The defence power is a purposive power, rather than a subject matter power. This means that a proportionality test is applied.
- The High Court does not determine whether a law will lead to military success, or even if it is likely to do so. It simply looks at whether the measure can reasonably be regarded as one that might achieve a defence objective. Whether it is a good or bad measure is another matter that is not for the court to decide.
- The courts will also give deference to legislative and executive judgment, particularly in cases of war and serious threat, because the courts may not be privy to all the relevant defence information, as much of it could not be publicly revealed. In peacetime, however, the courts are less likely to show such a level of deference to the executive and legislature.

    a. i.e. ***Dinjan***: only supported trading activities or financial activities of trading corporations
3. Third, that s 51(xx) must be read down or confined in its operation by reference to s 51(xxxv).
    a. 51(xx) to be read as a whole, no restrictions or mutations

Held: The majority rejected all these arguments, noting the difficulty with applying these tests, the awkward results and the failure of the plaintiffs to deliver a clear test. Their Honours also rejected resort to the notion of federal balance

The majority supported a statement by Gaudron J in her **dissenting** judgment in ***Re Pacific Coal.*** There she said that the power conferred by s 51(xx) extends to:

- the regulation of the activities, functions, relationships and the business of a constitutional corporation
- the creation of rights and privileges belonging to it
- the imposition of obligations on it, and with respect to those matters
- the regulation of the conduct of those through whom it acts (eg employees and shareholders) and
- those whose conduct is capable of affecting its activities, functions, relationships or business.
    - **>>> This now appears to be the test applied by the High Court regarding the scope of s 51(xx).**

Kirby J dissent: pointed out that Gaudron was in dissent, and her obiter was taken out of context by majority here. Major shift in balance of gvt power in Australia

Callinan J dissent: Agreed obiter out of context. Cth corporations power here has potential to obliterate States' power

Williams v Commonwealth (no2)

HCA: a law that gives Cth the authority to make an agreement or payment is not a law w.r.t. trading or financial corporations. Distinguished from Work Choices: law did not regulate or permit any act by or on behalf of any corporation

Facts: Recall no1: chaplaincy scheme, noted that the chaplaincy scheme was not directed at payments to trading corporations, or indeed, any corporation. It simply applied to any legal entity affiliated with a religious institution. Passed Financial Framework Legislation Amendment Act (no3) which allowed Cth to enter into agreements or make payments to schools

Issue: could corporations power support the Act?

Held: Majority: a law that merely grants money to a trading corporation is not supported by s 51(xx)

- the corporations power did not support the chaplaincy scheme, even if the bodies providing the chaplaincy services could be regarded as trading corporations and even if the law was directed specifically at trading or financial corporations.
- Again the Justices noted that the law involved 'makes no provision regulating or permitting any act by or on behalf of' any trading corporation and does not regulate its activities, functions, relationships or business, unlike the law in the Work Choices case. It was therefore not a law with respect to trading or financial corporations.

Section 114

Section 114 of the Constitution provides: *'A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.'*

- For example, this made the application of the GST upon local government difficult, because local government forms part of the State. Technically, the GST could not be imposed by a Commonwealth law on local government. Instead it applies 'voluntarily', but on the basis that funding to local government under s 96 will be cut off if GST is not paid.

Section 53

Section 53 provides that money bills (imposing tax or appropriating revenue) may not originate in the Senate.

Powers of the Houses in respect of legislation

- *Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.*
- *The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.*
- *The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.*
- *The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.*
- *Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.*

- The lower House, representing the people, traditionally has primary responsibility over money bills.
- If a government does not have control over taxation and expenditure, then it cannot govern. Hence there are some limitations on the Senate's powers with respect to money bills.
- Section 53 provides that money bills (imposing tax or appropriating revenue) may not originate in the Senate.
- Fines, penalties and fees for services are excluded from the description of money bills.
- The Senate may not amend money bills (except standing appropriations), but may request amendments. The Senate may, however, reject money bills.
- The Senate may also not amend any proposed law so as to increase any proposed charge or burden on the people.

Territories cannot impose excises. Excise to remain a tax on production, manufacture, sale or distribution of goods: too late to turn back from Dennis. X rated videos not to be counted in liquor and tobacco focus.

In Capital Duplicators (No 1) the High Court held that s 90 also prevents the territories from imposing excises.

Facts: In Capital Duplicators (No 2) there was a challenge to a licensing scheme for sellers of X-rated videos in the ACT: Business Franchise ("X" videos) Act 1990 (ACT)

- ***Dennis Hotels*-style licensing fee for sale of X-Rated videos
    - 40% of value in 2 mohts before licence period
    - "advance fee" for first 2 months payable based on estimate of videos to be sold

Issue: did the fees infringe s90?

- The ACT and SA argued for a return to ***Peterswald*** (i.e. that an excise is confined to a tax on local production or manufacture of goods)

Held: The licence fees were an excise – struck down

- The majority, Mason CJ, Brennan, Deane and McHugh JJ considered excise applies to the production, manufacture, sale or distribution of goods.
- The majority again refused to reconsider ***Dennis Hotels*** on the basis that financial arrangements of great importance to the States had been made in reliance on those decisions.
- They also noted that if the decisions were to be overruled, the States would be confronted with claims by the vendors of liquor and tobacco for the recoupment of licence fees already paid.
- Suggested that there may be a special category for liquor and tobacco regulation.
    - They struck down the law regarding X rated videos, because it was not regulatory in manner.
        - They looked at the size of the fee, which exceeded the cost of implementing the scheme.
        - They looked at the proximity of the prior period and the shortness of the licence period.

Dawson, Toohey and Gaudron JJ dissented, taking the narrower view of excise as applying only to the local production or manufacture of goods.

Ha v NSW 1997

State licence fees cannot be revenue raising – must be regulatory or a genuine licence fee to be valid, even when tobacco/liquor

Facts: Business Franchise Licences (Tobacco) Act 1987 (NSW): sale of tobacco prohibited without a licence

- Retailer's licence fee: $10 + a specified % of the value of tobacco sold during the mth starting 2 mths prior to licence period
- The specified % was 30% in 1989
- In 1995, the specified % was 100%

- To the extent that they involve an acquisition of property from those adversely affected by the intellectual property rights which they create, s 51(xxxi) does not apply.
- Further, this was a law which was concerned with the adjustment of competing rights, claims or obligations of persons in a particular relationship or area of activity.

Mutual Pools No 2

S51(xxxi) does not apply to laws were the acquisition is not the sole or dominant character. Even though there was an acquisition of property, was outside of sections reach

Facts: The tax office entered into an agreement with pool builders to repay to them a tax if it was held invalid. It was held invalid, but the builders had passed the tax on to the pool owners.

Issue: The Government legislated to override the agreement and pay the money back those who had borne the burden of it.

Held: Mason CJ, Dawson and Toohey JJ held that there was no acquisition of property as a result of overriding the agreement.

- Brennan and McHugh JJ held that there was an acquisition of property, but it was not covered by s 51(xxxi).
- Brennan J explained that this was because it was not a law the sole or dominant character of which was for the acquisition of property. The acquisition was appropriate and adapted to achieve another legitimate objective which was within power.
- Deane and Gaudron JJ held that if there was an acquisition of property, it was outside the reach of s 51(xxxi).
    - They discussed what was meant by an acquisition, observing that it was different from 'deprivation'. They said:
        - *The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property. For there to be an 'acquisition of property', there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property. On the other hand, it is possible to envisage circumstances in which an extinguishment, modification or deprivation of the proprietary rights of one person would involve an acquisition of property by another by reason of some identifiable and measurable countervailing benefit or advantage accruing to that other person as a result*

They also identified two general categories of law that are unlikely to fall under s 51(xxxi):

1. Laws which provide for the creation, modification, extinguishment or transfer of rights and liabilities as an incident of or a means for enforcing, some general regulation of the conduct, rights and obligations of citizens in relationships or areas which need to be regulated in the common interest;
2. Laws defining and altering rights and liabilities under a government scheme involving the expenditure of government funds to provide social security benefits or for other public purposes.

1. The first question remains whether the law effectively burdens the freedom in its terms, operation or effect.

2. The second question involves 'compatibility testing'. It requires the **identification of the purpose of the law and the means adopted to achieve that purpose** and asks whether they (i.e. both the means and the end) are **compatible** with the constitutionally prescribed system of representative government in the sense that 'they do not adversely impinge' upon it.

- This clarifies previous uncertainty as to what amounts to a 'legitimate end' under the previous ***Lange*** test.

3. The third question requires **'proportionality testing'**. It is broken up into three parts. It asks whether the restriction imposed by the law on the freedom is justified as (a) suitable; (b) necessary; and (c) adequate in its balance.

a. A law is **'suitable'** if it has a rational connection to its purported purpose.
b. It is '**necessary'** if there is 'no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom'.
c. It is '**adequate in its balance'** if the court makes the value judgment that the importance of the purpose served by the law outweighs the extent of the restriction that it imposes on the freedom. Their Honours argued that this 'value judgment' 'does not entitle the courts to substitute their own assessment for that of the legislative decision-maker'. However, neither 'deference' to Parliament nor a 'margin of appreciation' apply.

McCloy v NSW –the other judgments

Neither Gordon J nor Nettle J were convinced of the need for a change in the test, especially as no party had argued for it. Both applied the existing ***Lange*** test, upholding the donations caps and the ban on indirect donations.

- Nettle J dissented upon the ban on donations by property developers, regarding it as impermissibly discriminatory.

Gageler J more forcefully attacked the new test arguing that it had not yet been justified. It was too prescriptive and did not include the latitude, such as the 'margin of appreciation', that accompanies it in Europe. He was also concerned that it was not sufficiently connected back to the source of the implied freedom, as it was imported from a European system that deals with express rights of individuals. (Anne agrees with this)

Political Communication pt2 + Freedom of Religion