

1. FUNDAMENTALS OF CONSTITUTIONAL LAW

PRECEDENT + OVERRULING

1. **Precedents CAN be overruled in the HC** *John V Fed Com Taxation*
2. **Process for overruling**
 - a. **No set rules/ approach** *AG v Perpetual Trustee*
 - b. **Will the question be entertained?** *Evda Nominees*
 - c. **Should the decision be overruled?** *John v Fed Com Taxation*
 - i. Embedded decision
 - ii. Differences in the majority opinion
 - iii. Inconvenience
 - iv. Reliance on a decision
 - d. **Weigh reasons for + against** *Wurridjal*

READING DOWN + SEVERANCE

Despite the ability to overturn precedent- Courts are reluctant to invalidate a law

PRESUMPTION = VALIDITY

1. **Can validity be "preserved"?**
 - Courts attempt to preserve the validity of an act through reading down and severance *s51A Acts Interpretation Act*
2. **Can the legislation be read down?**
 - If the meaning of the word can be narrowed to a less offensive application the legislation can stand
3. **Can the offending provision be severed?**
 - Can ONLY be used where the rest of the statute is capable of operating on its own
 - o Does the rest of the provision make sense?
 - o Is the invalid provision fundamental?

IF YES= Legislation stands (minus the provision + any indirectly related/ dependent provisions)
IF NO= The Entire legislation will fall

2. HIGH COURT + CONSTITUTIONAL INTERPRETATION

The States Doctrines

(These are now abolished but good to understand)

1. **Immunity of instrumentalities**
 - a. **State cannot bind Cth and vice versa** *D'Emden v Pedder + Railway Servants*
 - i. **UNLESS:**
 1. **Matter is in exclusive Cth jurisdiction** *D'Emden v Pedder*
 2. **It is necessary** *AG NSW*
 3. **Matter of national concern** *R v Sutton*
2. **Reserved States powers**
 - a. **S107- narrowly construed to specifically reserve powers of the state** *Rv Barger*

Engineers:

- **Rejected the states doctrines**
 - o **States are subject to Cth legislation**
1. **Is the Cth law within power?**
 2. **Golden rule of interpretation-** The words of the constitution are to be read in their NATURAL and ORDINARY sense
 3. **If ambiguous look to the context and scheme within the Constitution**
 - a. **DO NOT** imply things into the text
 4. **Always lean to a broader approach of the Constitution** *Jumbunna*

3. METHODS OF CONSTITUTIONAL INTERPRETATION

Three key methods of constitutional interpretation

1. **Literalism**
 - a. Give literal effect to the written words of the constitution
2. **Originalism**
 - a. Interpretation of the Constitution should adhere to the “original intent” or original understanding of the text
3. **Incremental Accommodation**
 - a. Version of originalism- whereby the language of the constitution must be understood according to the meaning it had in 1900 but adjusted to accommodate for later developments

Methods are NOT mutually exclusive

- **Combination of literalism + originalism**= uses plain meaning of constitution as a guide to 1900 meaning
- **Combination of literalism + incremental accommodation**= Uses ordinary meaning today as correct meaning

4. HIGH COURT CHARACTERISATION

1. **Define the limits of the subject matter area (Constitutional interpretation)**
2. **Determine whether the law lies within those limits (Characterisation)**
 - a. **Does the law relate to the subject matter or purpose head of power in a way that allows it to be described as a “law with respect to” that head of power?**
Broad interpretation of head of power *Engineers + Jumbunna*
 - i. Are the laws in reality and substance upon that subject matter? *Bank Nationalisation*
 - ii. What are the EFFECTS of the law? *Bank Nationalisation*
3. **Whether a law is “within power” depends upon whether it is a subject matter or purpose power?**
 - a. **Is it a subject matter power?**
SUFFICIENT CONNECTION TEST
 - Can the law fairly answer the description of a law with respect to the subject matter?
 - o Easily fulfilled unless connection is “insubstantial, distant or tenuous” *Re Dingjan*
 - b. **Is it a purpose power?**
PROPORTIONALITY TEST *Polyukhovich*
 - Is it reasonably appropriate and adapted to serving the stated purpose?
 - o Does it go beyond what is reasonably necessary/ desirable *Nationwide News*
 - c. **Is it an incidental power?**
 - i. **Express incidental (s51xxxix)**
 - ii. **Implied Incidental**
 - Must be attached to the head of power *D’Emden v Pedder*
 - Must be “sufficiently connected”
 - “Incidental is a question of degree” *Burton v Honan*
4. **Can a law have two characterisations?**
 - a. **A law may be a law with respect to more than one subject matter SO LONG as one of the characterisations falls within s51** *Fairfax v Fed Com Taxation*
5. **Process for dual characterization**
 - a. **Only the FIRST characterization matters** *Fairfax v Fed Com Taxation*
 - b. **Focus on the DIRECT LEGAL OPERATION**
 - i. **So long as the end is within power then the choice of means is a matter for parliament** *Herald Weekly*
 - c. **Parliament should not be able to “cloak its laws”- held accountable by electorate**

Interactions b/w heads of power:

1. **PRIMARY RULE: One head of power cannot be used to limit the scope of another** *Pidoto v Victoria*
UNLESS
2. **SECONDARY RULE: Express restrictions on one head of power may restrict the scope of another**
Bourke + Workchoices

5. INCONSISTENCY OF LAWS

Inconsistency arises where there is **CONCURRENT** powers for the State and Cth to legislate

1. Is it a law?

- Are there actually two laws?

2. Is the law valid?

- Is the law within a head of power?

3. Is there inconsistency?

Apply ALL THREE TESTS—Only has to fail ONE to be invalid

Direct inconsistency:

TEST 1: Impossibility of simultaneous obedience

- Is there actually a conflict of duties (not just an additional duty)? *Boot Trade Federation*

TEST 2: Denial of Rights + Privileges

- Law A creates a legal right and Law B takes away/diminishes it *Boot Trade Federation*
 - o MUST have the effect of precluding, overriding or rendering ineffective the law *Commercial Radio Coffs Harbour*
 - NOW “impair, alter or detract” may also be invalid *APLA*

Indirect Inconsistency:

TEST 3: Covering the Field

- Has the Cth evinced an intention that it intends to legislate comprehensively? *WorkChoices*
 - Level of detail
 - Breadth of the law
 - Nature of the legislative power
 - Statements as to inconsistency
- What does the “field” concern?
- Does the state law attempt to enter, to any extent that field?
- IF YES= laws are inconsistent (EVEN IF no direct inconsistency)

4. Is there operational inconsistency?

- Where inconsistency exists only as a theoretical possibility- there is no inconsistency until the situation arises *Cth v WA (Mining Case)*

5. What happens in the case of inconsistency?

- s109- The Cth law shall prevail
- State law becomes “invalid”—dormant and inoperative *Carter v Egg*
 - o CAN come back to life
- Only invalid to the EXTENT of the inconsistency

NOTE: The interpretation under s109 will affect balance of powers

Broad interpretation= wide powers of Cth over the state (increasingly adopted by HC)

6. Cth Can clear the field

- Ensure that it doesn't cover the field by stating such an intention (manufacture NON inconsistency) *GMAC Case*
- HOWEVER- does not save laws which are DIRECTLY inconsistent

7. Inconsistency CANNOT be undone

- Can prevent future inconsistencies HOWEVER cannot override the past/present effect of s109 *University of Wollongong*