



Commonwealth Constitutional Law - Exam Notes

Commonwealth Constitutional Law (Australian National University)



Scan to open on Studocu

Commonwealth Constitutional Law – Exam Notes

GENERAL PROBLEM-SOLVING STEPS WHEN APPROACHING A QUESTION

A. Are you dealing with a Commonwealth or State law?

- a. If YES to State →
 - i. Does the law fall within the general grant of legislative power under the state Constitution.
 - ii. Does the law infringe on an express/implied limitation on state legislative power?
 - iii. Is the law inoperative under s 109 because of inconsistency with a valid Commonwealth law?
- b. NO → move onto next

B. If Commonwealth law →

- a. Is the Cth law with respect to a head of power? E.g., is the law supported by a Constitutional head of power? To answer this, you must determine:
 - i. What does the constitutional head of power mean? [interpretation]
 - ii. Is there a sufficient connection between that head of power and the way the law operates? [practical operation → what does the law do in order to have a connection?]
- b. Does the law infringe on an express or implied limitation on Cth legislative power?
 - i. Hence, does B(i) and (ii) infringe on a limitation?
- c. Does X [e.g., type of corporation] fit within the scope of that power??

RACES POWER

HEAD OF POWER – S 51 (XXVI)

S 51(xxvi) provides power to make laws with respect to ‘the people of **any race** for whom it is **deemed necessary** to make **special laws**’.

<p>Is the law supported by the head of power? **</p> <p>Meaning/Interpretation **</p>	<p>First issue is to interpret the meaning of section 51(xxvi).</p> <p>“Any Race”</p> <ul style="list-style-type: none"> According to <i>Western Australia v Cth (NTA Case)</i> Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ interpreted that ‘any race’ also included Indigenous Australians for the purposes of the races power. This was confirmed by a majority judgement in <i>Kartinyeri</i> The HCA only considered the word ‘race’ in the context of Indigenous Australians (who meet the tripartite test in <i>Mabo No. 2</i> – person of indigenous descent; identify as indigenous; recognised as such by community and elders). <p>“Deemed Necessary”</p> <ul style="list-style-type: none"> This power is limited to requiring who can make such laws under s 51(xxvi). Rejecting view in Koowarta, the court in the <i>NTA Case</i> held that it is of the political judgement of the Parliament to decide on such matters. Common law of Native Title cannot have statutory force as this law would not be determined by Parliament Raised possibility of Court to have a supervisory role to examine the manifest abuse of power (<i>NTA Case</i>). This was also reiterated in <i>Kartinyeri</i>. <p>“Special Laws”</p> <ul style="list-style-type: none"> According to the <i>NTA Case</i>, the law must be regarded as ‘special’. A law will be special where it <u>confers a right or benefit</u>, or <u>imposes an obligation</u> or <u>disadvantage</u> on Indigenous Australians (<i>NTA Case</i>) Needs to differentiate them – this is a persons power. The right or benefit or obligation or disadvantage can be conferred or imposed on a sub-group of Indigenous people (<i>NTA Case</i>). In the <i>NTA Case</i>, the law was special because it protected native title – it conferred a benefit on holders of common law native title. It was a special law even though it placed restrictions on others in the course of providing benefits of native title land holders. <ul style="list-style-type: none"> The sub-group was identified by reference to common law native title rights. It was enough that the defining condition went to the heart of Aboriginal culture, heritage, tradition etc. The law may even be special if it confers a benefit generally if the benefit is of special significance or importance to the Indigenous Community (<i>NTA Case</i>). Contrast to <i>Tas Dams</i> – law protecting Indigenous sites was supported by the power as it was considered special – of particular importance or significance to Indigenous Australians. Contrast to <i>Koowarta</i> – the Racial Discrimination Act benefited all races – not a particular race = not supported.
<p>When will a law be with respect to s 51(xxvi)?</p>	<p>It is contested whether laws under s 51(xxvi) can discriminate against the people of a race or if they can only benefit them. Thus, even if it is deemed necessary by Parliament, if it is not a proportionate response by Parliament to a relevant difference (Gaudron J in <i>Kartinyeri</i>).</p> <p>There is no majority view on this.</p> <p>Can it be used to discriminate or only to the benefit of a race?</p> <ul style="list-style-type: none"> The NTA Case did not wholly deal with this issue. Gibbs J suggested laws under the races power could both discriminate against and in favour of the people of a race (<i>Koowarta</i>). Murphy J argued the word ‘for’ meant it could only be used for the benefit on (<i>Koowarta</i>). The only justice who put forward a framework is Gaudron J in <i>Kartinyeri</i>. Gaudron J argued s 51(xxvi) augments the scope of power, and there is a limitation on the word ‘necessary’. <p>Gaudron J’s Test for Deemed Necessary – go through this test even though it is not fully accepted.</p> <p><i>Kartinyeri v Cth</i></p> <ul style="list-style-type: none"> To be necessary, the law must be a proportionate response by Parliament to a relevant difference <ul style="list-style-type: none"> (1) there needs to be a relevant difference between the people of the race in

	<p>question and the people of other races → is it discriminatory? Usually disadvantageous</p> <ul style="list-style-type: none"> ○ (2) the law must be reasonably capable of being viewed as appropriate and adapted to the differences asserted • If (1) or (2) are not satisfied, then there is an abuse of power to be controlled within the court's supervisory jurisdiction (<i>Kartinyeri</i>). <p>Note that it is difficult to differentiate between beneficial and disadvantageous laws – a law might operate beneficially to some members of a racial group, but detrimentally on other members of that group</p>
--	--

INCONSISTENCY – SECTION 109

HEAD OF POWER – SECTION 109

Section 109 provides that when a law of a State is inconsistent with a law of the Cth, the latter shall prevail and the former shall (to the extent of the inconsistency) be invalid.

CATEGORIES OF INCONSISTENCY

Direct Inconsistency

- Direct inconsistency arises from the impossibility of obeying both laws (*Daniell*)
 - Use the 'Simultaneous obedience test'
 - Impossible to comply with both obligations

Direct Inconsistency arising where one legislative provisions takes away for denies a right, privilege, entitlement or power conferred by the other (*Ansett*).

- Use the 'Conferral of Rights Test'.

Indirect Inconsistency (*Metwally*)

- Use the 'covering the field test'.
- When the Cth has expressed intention to exclusively regulate a subject matter or area of the law, even if the state law is consistent with it

Is there an inconsistency between the Cth and State laws under s109?	
** An inconsistent law is not invalid (<i>Egg pulp</i>).	<p>Firstly, there must be a valid state and Cth law; if either is invalid, s 109 will not operate.</p> <ul style="list-style-type: none"> • Territory laws are not State laws for s109 • An inconsistent state law is invalid to the extent of the inconsistency and becomes inoperative/suspended (<i>Egg Pulp</i>).
<p>What are the functions of the laws?</p> <p>Do these functions bring rise to an inconsistency?</p>	<p>What are the functions of the laws? What are they effectively doing?</p> <p>Do these functions bring rise to a s109 inconsistency?</p> <p><u>Direct Inconsistency – Impossibility of simultaneous obedience test</u> To show there is a direct inconsistency, the Cth and State laws must meet the impossibility of simultaneous obedience test, where the laws impose conflicting duties or obligations so that it is impossible to obey both laws (<i>Ex parte Daniell</i>).</p> <p><u>Direct inconsistency arising where one legislative provision takes away or denies a right, privilege, entitlement or power conferred by the other – Conferral of Rights Test</u> To show there is Type 2 Direct Inconsistency, the laws must meet the conferral of rights test.</p> <ul style="list-style-type: none"> • Thus, there is inconsistency as it is impossible to obey both laws without giving up a right, privilege, power etc, conferred by another law as a result of the direct contradiction between both laws. • E.g., <i>Ansett</i> – if all provisions can work in concert = not discriminatory • E.g., <i>Colvin v Bradley</i> – state legislation created an offence to employ women on machinery, but the Cth law entitled women to do so. Found if legislative intention is for the right to be absolute, then there will be a direct inconsistency if the other law takes away or detracts that right. • E.g., <i>Dickson v R</i> – HCA found inconsistency bc the Cth provisions were designed to be narrower than State laws; Federal Parliament crafted more narrow provisions to specifically not regulate acts outside of this, <p><u>Indirect Inconsistency – covering the field test</u> To show indirect inconsistency, the covering the field test must be met. There is no need for a direct contradiction between two laws for an inconsistency to arise (<i>Metwally</i>).</p> <ul style="list-style-type: none"> • (1) what is the subject matter covered by the law? • (2) is there an intention to cover that subject matter exclusively and exhaustively – can be express or implied <ul style="list-style-type: none"> ○ The intention is where the Cth confers an absolute right or permission by way of positive authority to establish specific rights ○ The intention to cover the field is expressed by 'its enactment in a complete,

	<p>exhaustive, and exclusive manner (<i>Ex parte McLean</i>).</p> <ul style="list-style-type: none"> ○ The law is so detailed it clearly intends to cover the entire subject to the exclusion of state laws • (3) does the state law regulate that subject matter and enter the field? → requires consideration of the character of the state law. <ul style="list-style-type: none"> ○ E.g., <i>Ansett</i> – considered indirect inconsistency and could not agree the Parliament was covering the field – two laws covering different fields. ○ E.g., <i>Viskauskus v Niland</i> – HCA majority found there was inconsistency on the basis that the racial discrimination act exhibited the intention for Cth to cover the field as the RDA was intended to be the vessel for the in international convention on racial discrimination. ○ E.g., <i>Clyde Engineering</i> – Difference between state law and Cth law for number of hours work paid- Cth was found to intend to cover the field ○ E.g., <i>ex parte McLean</i> – HCA found Cth intended to cover the field in relation to the Cth award to regulate rights which allowed him to do so.
Additional tests to consider?	<p>It is necessary to consider whether other tests of inconsistency can be applied.</p> <p><u>'Alters, impairs or detracts from' test – For Direct Inconsistency (Type 1 + 2)</u> If a state law alters, impairs or detracts from Cth law, it is invalid by s109 (Dixon J in <i>Kakariki</i>) – Applied in <i>Australian Mutual Provident Society Case</i> where court found inconsistency by finding it impairs and detracts from the Cth law of Equal Opportunity.</p> <ul style="list-style-type: none"> • If it appears 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 set of rights and duties, then for a state law to regulate or apply to the same matter it is inconsistent (<i>Kakariki</i>). <p><u>Operational Inconsistency</u> An inconsistency may arise in particular circumstances when legislative powers and functions are actually exercised.</p> <ul style="list-style-type: none"> • There is no inconsistency until the law is exercised. • E.g., <i>Cth v WA (Mining Act Case)</i> <ul style="list-style-type: none"> ○ There was a defence practice area where weapons and explosives were used ○ Cth defence regulations only restricted entry on that perimeter of land during periods when defence operation was authorized. ○ State mining act provided for the grant of these rights to enter private land for mining purposes ○ Cth law did not cover the field, inconsistency only arose when a defence operation was authorized, or authority had been granted under the state mining act to enter land during that period ○ Effectively, it is only inconsistent in operation.
Exclusion of state law operation	<p>The Cth can deliberately seek to exclude state law from any field of operation by express provision (<i>Wenn v AG</i>).</p> <p>Cth can also declare it does not intend to cover field (<i>R v Credit Tribunal</i>).</p>

DEFENCE POWER

HEAD OF POWER – S 51(VI)

Section 51(vi) states that Parliament shall have power to make laws with respect to the naval and military defence of the Cth and of the several states and the control of the forces to execute and maintain the laws of the Cth.

Notes to consider:

- The defence power is a purposive power – must be used for a specific defence purpose only.
- It contracts and expands depending on the war climate – in peace it contracts; in wartime it expands.
- The court will look at the current climate to determine if its valid.
- Note that after 9/11, we are never in a state of complete peace (*Thomas v Mowbray*)
- The defence power will be broader in scope under a war effort (*Andrews v Howell*) where the regulations of apples and pears came under the power.
- In peacetime – defence power can still over enlistment, training, preparedness etc. (*Stenhouse v Coleman*).
- Open-ended war?
 - Vagueness and wide breadth may be allowable in supreme emergency of war (Dixon J, *CCP Case*).

Is the law valid under the defence power?	
Does the Court have deference?	If the courts decline to use deference, there are no constraints on Cth. It is contentious whether the courts will be willing to assess the proportionality of the law or defer to Cth to deal with the issue.
Is it likely the court will assess proportionality of the law?	<p>If it is evident the issue is within the core conception of the defence power, it is likely they will defer to Parliament (<i>Wertheim v Cth</i>).</p> <ul style="list-style-type: none"> • Likely to be within core of power if there is an actual war • Contentious if war is relating to another country/state. • Contentious if war has not yet begun • Contentious post 9/11 as there is no such thing as a complete state of peace (<i>Thomas v Mowbray</i>). <p>**Go to proportionality test either way**</p>
Is the Act Proportionate?	<p>The defence power is a purposive power, therefore it will only be valid if it is serving its purpose under the constitution. Therefore, proportionality must be assessed.</p> <p>Proportionality Test: Go through the act and each regulation to determine if its valid.</p> <p>In order to assess whether the law is proportionate, it must be considered whether the law is proportionate for its purpose.</p> <ol style="list-style-type: none"> (1) What is the primary purpose/aim of the law? <ol style="list-style-type: none"> a. E.g., to prevent war, prepare for war etc. (2) Is this proportionate on the facts in accordance with the nature of the wartime? <ol style="list-style-type: none"> a. Cannot be too vague – needs to be specific or it may expand the scope too far and be unclear – different to overbreadth which is broader coverage (<i>CCP Case</i>). <ol style="list-style-type: none"> i. Parliament cannot recite itself into power (<i>CCP Case</i>). ii. Vagueness and wide breadth may be allowable in supreme emergency of war (Dixon J, <i>CCP Case</i>). iii. In an open-ended war – the line between war and peace is murky – under uncertain and rapidly changing international situations, broad powers may be used in the uncertain circumstances (<i>CCP Case</i>). b. Rational connection to the purpose? – the law must achieve what it sets out to do (<i>Andrews v Howell</i>; <i>CCP Case</i>). <ol style="list-style-type: none"> i. In <i>CCP case</i> there was no connection with any definitive course of conduct or design. c. Proportionate in the context (<i>Stenhouse v Coleman</i>) – the law must pursue a

	<p>particular defence purpose in the context of defence</p> <ul style="list-style-type: none"> i. "whether a given measure is authorised will depend on the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the means that are incidental thereto" (<i>Andrews v Howell</i>). ii. In context of defending breach of human rights – rights must be proportionate to defence purpose served (<i>Polyuchovich</i>). iii. E.g., can deal with a problem arisen from the war (<i>Vic Chamber of Manufacturers v Cth</i>). iv. After war – <ul style="list-style-type: none"> • laws are only valid if they are within the context of the war and dealing with consequences of war (<i>R v Foster</i>) • defence power can still cover things that are not usually under the defence power it just needs to be within context of the war to be proportionate (<i>Stenhouse v Coleman</i>; <i>Victorian Chamber of Manufacturers</i>). v. Internal v external <ul style="list-style-type: none"> • <i>CCP case</i> said defence power can only be applied externally, while <i>Thomas v Mowbray</i> held it can be both. <p>d. Is there provision for judicial review? If not it could be limiting</p> <p>e. Is it coercive?</p> <ul style="list-style-type: none"> i. Does it impact human rights? (<i>Polyuchovich</i>; <i>CCP Case</i>)
--	---

FREEDOM OF INTERSTATE TRADE AND COMMERCE

HEAD OF POWER – SECTION 92

Section 92 holds that ‘trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free’.

The question is whether the relevant law contravenes section 92, and if so, is it proportionate?

Does the relevant law contravene s 92?	
Purpose/meaning of section 92	<p>The purpose of s 92 is to ‘create a free trade area throughout the Cth, including equality of trade’ (<i>Cole v Whitfield</i>).</p> <p>Furthermore, a law is only invalid if it imposes a measure which is discriminatory against interstate trade and commerce in a protectionist sense (<i>Cole v Whitfield</i>).</p>
Is the measure discriminatory in a protectionist sense?	<p>(1) Is it a Cth law of general application? – If yes, likely valid</p> <p>a. For Cth laws directed to the regulation of all trade within the Cth, it is less likely it will be thought to be discriminatory (<i>Cole v Whitfield</i>)</p> <p>(2) Is it a state law that singles out, or discriminates interstate trade and commerce for particular treatment? – likely invalid (<i>Cole v Whitfield</i>)</p>
Legal Discrimination? Does the law on its face discriminate interstate trade or commerce?	<p>Does the measure on its face legally single out interstate trade or commerce? – If yes = invalid</p> <ul style="list-style-type: none"> In <i>Cole v Whitfield</i> court held legislation did not legally discriminate directly – ‘alike to crayfish caught in Tasmania and those that are imported’.
Factual Discrimination? Does the measure discriminate in operation?	To determine whether there is factual discrimination, the <i>Palmer</i> Structured Proportionality Test applies >>>
Structured Proportionality Test (Palmer)	<p>(1) Is there a burden on interstate trade, commerce or intercourse? – burden must be of a significant degree (<i>Betfair No. 2</i>).</p> <p>(2) Is there a legitimate objective? (<i>Betfair No. 1</i>: is the objective factually supported which is not protectionist? – is there common-sense evidence to support this?)</p> <p>(3) Are the means adopted reasonably necessary? (Cole, Castlemaine, Betfair No. 1)</p> <p>a. Suitable: Do the means rationally connect to the objective?</p> <p>i. Does the law achieve what it sets out to do?</p> <p>b. Necessary: Is there a less restrictive reasonably practicable means to achieve the same objective?</p> <p>i. <i>Castlemaine Tooheys</i> – 4c increase would achieve the same as 15c increase.</p> <p>ii. <i>Betfair No. 1</i> – found another less discriminatory law in another state which achieved the same thing).</p> <p>c. Adequate (strict proportionality): On balance, are the means justified by the objective? –</p> <p>i. how important is that objective and how balanced is the law for this?</p> <p>ii. E.g., how important is it to protect people from dying from Covid (<i>Palmer</i>).</p> <p>iii. E.g., <i>Castlemaine Tooheys</i> – 15c deposit does not proportionate to achieve the objective, thus, invalid.</p>

Older cases are still useful:

- What counts as a ‘burden’? Case(s): *Betfair No. 1*: WA law disallowing betting exchanges; *Tooheys*: regulated beer bottles with deposit to disincentivize non-SA beers.
- What objectives might not be legitimate for s 92? Case(s): *Tooheys* – to disincentivize non-SA beers
- Pre-Palmer cases touched on step 3(b). What factors did they look at? Case(s):

IMPLIED FREEDOM OF POLITICAL COMMUNICATION

BASIC LAW

The Commonwealth Constitution has an implied limitation with the IFPC.

ISSUES

The issues which arise are whether the law is invalid by the IFPC limitation. The test used to determine whether a law is valid is by applying the structured proportionality test from *McCloy v NSW* per French CJ, Kiefel, Bell and Keane JJ.

STRUCTURED PROPORTIONALITY TEST – MCCLOY V NSW

Burden: Does the law effectively burden the freedom in its terms, operation or effect?	<p>For a law to be invalid due to the IFPC, it must impose a burden on the freedom.</p> <p>Burden may include:</p> <ul style="list-style-type: none">• <i>Nationwide News</i> – Impugned law: <u>Industrial relations act</u>: 'a person shall not by writing or speech use words calculated to bring a member of the IR commission into dispute; held invalid as it burdened the operation of freedom of communication• <i>ACTV v Cth</i> – impugned law: <u>Political Broadcasts and Political Disclosures Act</u> – strictly regulated and banned radio/TV advertising during elections + referenda which are likely to affect voting. Held invalid = imposed burden on IFPC → the <u>burden on IFPC must be no more than is reasonably necessary to achieve the protection of a competing public interest</u>.<ul style="list-style-type: none">○ Citizens have (1) freedoms to communicate with gov and each other; and (2) right to freedom of political communication = meaning they have a right to communicate on public affairs and political discussion