

Characterisation constitutional law assignment

Law



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Chapter 16 ??? Process of Characterisation ??? Sections 51 & 52 assign legislative powers to Cth Parliament. ??? Characterisation = process of determining whether a law falls within one of these heads of power. ??? The question is whether the law relates to the subject matter or purpose of the heads of power in a way that allows it to be described as a law “ with respect to” that head of power. ??? Simplest view of ‘ characterisation’& the judicial review of legislation encapsulated by Roberts J in *United States v Butler* (1936) United

States v Butler (1936) ??? Legalism – *Engineer’s case* (1920) ??? assumed that the question is whether the subject matter on which the federal parliament has legislated “ squares with” one of the designated subject matters on which it has the power to legislate. If it does, then the legislation is valid. ??? Approach from this case = Constitutional text identifies particular definitional area and its important to determine whether the subject of impugned legislations within that area. 1) Define the limits of the subject matter area ??? constitutional interpretation (2) then determine whether the challenged law wiles within those limits. ??? Characterisation ??? Judicial approach to characterisation depends on ascertaining the “ pith and substance” of the relevant law. The Act specified one list of legislative powers assigned to the Dominion of Canada (s91) and another list assigned to the Provinces (s92). So typically each list contained a head of power to which impugned legislation plausibly be assigned. Problem ??? determining which two competing characterisations of the law was the more appropriate. ? Approached in a way to identify the true nature and character of the legislation. ? Australia don’t have the competing characterisation,

have only one list of enumerated powers for federal/central legislature. So in Australia law characterised in a way that brings it within the Cth power not where it falls under. ? Eg of the use of this phrase: to determine the effect of a law was to interfere with freedom of interstate trade under s92.

In Bank Nationalisation case HC held, “ law should not be characterised as a law with respect to banking was accepted only in the dissenting judgement” Thus this phrase, “ pith and substance” was rejected by Latham CJ. ??? This would be plausible only if the question were whether or not a law could be characterised as being “ on” the permitted subject. AKA, model highlighted in United ?? States v Butler is rejected in Australia. Bank of NSW v Commonwealth (Bank Nationalisation case) (1948) ??? Latham CJ: Plaintiff’s argument based on that the constitutional validity of legislation should be ??? ??? ??? ??? etermined by enquiring what was the “ pith and substance” of the law. [184]” The constitution must be read as a whole, and each power conferred upon the Federal Parliament must be read in the context of the words prescribing the other legislative powers of the parliament. ” Constitution only assigns specific legislative powers to the Cth Parliament as it is a Federal Constitution not a unitary one. Established in Engineer’s case (1920), Cth is a government of selective legislative powers and there are no single power which is construed in a way that would make the Cth Parliament a universal power of legislation.

Great West Sadlery Co Ltd v the King [1921]; “ The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine its true character”. In determining the validity of the law, (1) necessary to construe <https://assignbuster.com/characterisation-constitutional-law-assignment/>

the law and to determine its operations and effect (2) determine the relations of that which the Act does to the subject matter

1 ??? ??? ??? ??? ??? ??? on respect of which it is contended that the relevant Parliament has power to make laws. Note: It is not enough that a law should refer/apply to the subject matter.

General rule in regards to motives of Parliament ??? the objects which a Parliament seeks to achieve are not relevant to questions of constitutional validity. Thus, the face is irrelevant when it comes to validity. *South Australia v Commonwealth (Uniform Tax Case)* Validity of legislation ??? Courts duty to determine what is the actual operation of the law in creating, changing, regulating or abolishing rights ??? Consider whether that which the enactment does falls in substance within the relevant authorised subject matter/ it touches it only incidentally.

Dixon J: Principles of constitutional interpretation. Based on O'Connor J's reasoning in *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908), "... must always remember that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve". According to Dixon J, courts should always lean towards the broader interpretation unless there is something in the Constitution indicating that the narrower interpretation will be best to carry out its object and purpose.

Foundation of these principles ??? Higgins J in *Attorney-General for NSW v Brewery Employers Union of NSW (Union Label Case)* (1908), " although we are to interpret the words of the Constitution on the same principles of

interpretation as we apply to any ordinary law,... take into account the nature & scope of the Act that we are interpreting,... not a mere Act which declares what the law is to be. The purpose of enumeration of powers in s51 is not to define or delimit the description of law that the Parliament may make upon any of the subjects assigned to it.

The purpose of enumeration is to name a subject for the purpose of assigning it to that power. Dual Characterisation ??? Usually Characterisation ??? each statute must possess only one subject matter. ??? The issue in *Fairfax v Federal Commissioner of Taxation* (1965) was whether s 11 of the *Income Tax & Social Services Contribution Assessment Act* (1961) was validly enacted under Cth's taxation power in s51(ii) *Fairfax v Federal Commissioner of Taxation* (1965) ??? Mason QC 2