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Federal Constitutional Law Cram Notes

1st Edition



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1. INTRODUCTION

A. HOW TO USE CRAM NOTES

The Federal Constitutional Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS

The Federal Constitutional Law Cram Notes will refer frequently to the Commonwealth as the Cth.

2. BACKGROUND – PRINCIPLES TO APPLY IN CONSTITUTIONAL INTERPRETATION

A. HEADS OF POWERS

The Commonwealth's (**Cth**) head of powers are listed in s 51 of the Constitution. The Constitution assigns to the Cth. Parliament a specific list of powers relating to a range of subjects and purposes (s51). This means that the Cth only has power to legislate with respect to these enumerated powers. The residual power is given to the states under s 107 as well as concurrent power of the exclusive powers conferred on the Commonwealth.

Initially the founders of the Constitution wanted the majority of the powers to remain with the States. However, while this suggests a restricted scope of power, as envisaged by the drafters of the Constitution, the Cth head of powers in s 51 have been interpreted with an increasingly expanded scope by the High Court. As such, because Cth legislation prevails against states under s 109, this has led to the ever increasing legislative power of the Cth, at the expense of the states.



B. PRINCIPLES OF CONSTITUTIONAL INTERPRETATION – THE ENGINEERS CASE

i. THE POSITION BEFORE THE ENGINEERS CASE

1) Implied Immunity of Instrumentalities

There was an implied inter-governmental immunity against each jurisdiction's laws (as implied from federalism). The idea is that both the States and the Cth were normally immune to each other's laws, and was used to protect the States and their agencies from Cth interference.

- *D'Emder v Pedder* (1904):
 - o Cth officer did not have to pay state tax – Cth and state not allowed to tax the other
 - o Both levels of government are not allowed to tax the other, i.e. the State cannot tax the Federal level, and the Federal level cannot tax the State.

2) Reserved State Powers

Cth grants of power were to be interpreted so as to ensure that they did not encroach too far upon the "residual" powers of the states.

- *R v Barger* (1908):
 - o As the subject-matter lay within State legislative power, such power could not lie within Cth's power.
 - o Section 51 powers are read down to preserve State power even though it was clearly within a s 51 head of power.
 - o Dissent (Isaacs and Higgins JJ):
 - using the analogy of a will, the dissenting judges argued that you cannot first determine the scope of the residuary and then determine the content of specific grants.
 - Must first give effect to the specific grants of Cth. Power in s 51

ii. AMALGAMATED SOCIETY OF ENGINEERS V ADELAIDE STEAMSHIP (1920) 28 CLR 129

- The question for the HCA: is the State bound by Cth. decision? Question whether a Cth. law made under the "conciliation and arbitration" power (s 51(xxxv)) could authorise the making of an award binding on State employees.
- Court found that the previous cases were not applicable as:
 - Previous interpretations of the constitution were based upon "vague, individual conceptions of the spirit of the compact".
- The constitution should be read as a whole and in its natural sense (plain and natural meaning). This is to be done in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, the statute law which preceded it. "Unexpressed assumptions" must give way to express provisions – there must be no speculation as to motives of the drafters
 - Fear that the Cth may overpower the States (based on distrust that the Cth may abuse powers) is no reason to depart from reading the Constitution in its natural meaning.
 - If Parliament abuses its powers, then it is up to responsible government to fix this.
- If the legislation in question falls within the general scope of s 51 powers, and if it violates no express condition or restriction by which those powers are limited, it is not for any Court to inquire further or to enlarge constructively those conditions and restrictions – the legislation will be valid.
- Implications drawn from the constitution are acceptable – however, the implications and restrictions on the s 51 heads of power must be clear.



- the challenged law gives effect to treaty obligations.
- A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality itself is enough to make it a subject-matter a part of a nation's "external affairs".
 - This may include "conduct on the part of a nation, or of its nationals, which affects other nations and its relationship with them".
- That a consequence would seem to be an intrusion by the Cth. into areas previously the exclusive concern of the States does not mean that there has been some alteration of the original federal pattern of distribution of legislative powers – all that has occurred is a growth in the content of "external affairs" reflecting new global concerns.
- There is no actual need for a treaty if international concern is present – although a treaty would indicate that there is such a concern, there is no formal requirement that there be one.
- Majority argues that the mere fact of entering bona fide into an international treaty is of international concern. To look for another international concern is redundant.
- The "lowest common denominator" of the four majority judgements: the implementation of a treaty is valid under s51(xxix) at least when the subject is of "international concern". However, since this test was relied on only by Stephen J, this case may stand for nothing more than its result.
- The law remained uncertain after this case.

Commonwealth v Tasmania (Tasmanian Dam Case) (1983) 158 CLR 1

- Facts: Government had taken action under the *World Heritage Properties Conservation Act (Cth)* to stop the damming of the Franklin river in Tasmania. s6 of the Act provided that a proclamation may be made in relation to an identified property that is/not in any State and is either: suitable for inclusion in the World Heritage List, the protection of which is a matter of international obligation/giving effect to a treaty. Under s9 of the Act, it would be unlawful for a person to do any act that damages/destroys the proclaimed property.
- Found: Since it was accepted that the Tasmanian wilderness was a part of world heritage, its preservation, as well as being an internal affair, was also a part of Australia's external affairs. However, the dissenting judges felt that the building of a dam in Tasmania was not of "international concern", and hence not an external affair.
- The majority of judges applied the "international concern" test.
- Minority (Gibbs CJ, Wilson and Dawson JJ): settled for the test proposed by Stephen J in *Koowarta* – "international concern".
 - Whether a matter is of international concern depends on the extent to which it is regarded by the nations of the world as a proper subject for international action, and on the extent to which it will affect Australia's relations with other countries (Gibbs CJ).
- Majority (Mason, Murphy, Brennan and Deane JJ):
 - Mason, Brennan and Deane JJ accepted that the mere existence of an international obligation was enough to attract the external affairs power.
 - Mason J rejected the test of "international concern" as being "too elusive" and as yielding "no acceptable criteria or guidelines".
 - If a topic becomes the subject of international cooperation or an international convention, it is necessarily international in nature.
 - The decision as to whether the subject-matter of a convention is of international concern is a question for the executive and legislature to decide, not the court to second guess what is of international concern (not judiciable issue for court).



- Murphy J did not reject the test of “international concern” but treated it as only one of several different criteria, any one of which was sufficient to attract a power under s51(xxix).
 - The fact that a subject becomes part of external affairs does not mean that the subject becomes a separate plenary head of legislative power. If the only basis upon which a subject becomes a part of external affairs is a treaty, then the legislative power is confined to what may reasonably be regarded as appropriate for the implementation of the provisions of the treaty.
 - Recommendations from international bodies may be sufficient
 - Partial implementation of a treaty may be sufficient but there is a threshold e.g. can’t have inconsistent provisions.
- Deane J:
 - Test of proportionality: the law needs to be capable of being reasonably considered to be appropriate and adapted to the purpose of implementing the treaty.
 - Rejected the idea that a law under s51(xxix) must, as a condition of its validity, carry into effect the whole treaty or completely discharge all the obligations. It is competent for the Parliament partly to carry a treaty into effect. On the other hand, if the relevant law “partially” implements the treaty in the sense that it contains provisions which are consistent with the terms of the treaty and also contains significant provisions which are inconsistent with those terms, it would be extremely unlikely that the law could properly be characterised as a law with respect to external affairs.
- The case establishes that any treaty is enough to enliven the “external affairs” power but only if the law can be reasonably capable of being considered appropriate and adapted to implementing the treaty

Richardson v Forestry Commission (1988) 164 CLR 261

- Facts: Cth. Act established a Commission to investigate whether the Lemonthyme and Southern Forest areas in Tasmania could qualify to be nominated as a world heritage area under the 1972 Convention for the Protection of the World Cultural and Natural Heritage. During the period of investigation, the Act prohibited works from occurring within the areas, including forestry operations and the construction of roads.
- Found: Majority (Mason CJ, Wilson, Dawson, Brennan and Toohey JJ) found the Act to be valid.
- Held:
 - Dawson J:
 - It is enough to attract legislative power if, even though there is no treaty, a subject-matter is of sufficient international concern.
 - Although he did not accept the view that, subject to express constitutional prohibitions, any matters covered by a bona fide international treaty are, by their very inclusion in the treaty, brought within the ambit of the external affairs power, he felt in this case he was bound by precedent.
 - The fact that an agreement is international in character does not necessarily mean that the matters with which it deals cease to be of domestic nature and become part of the country’s external affairs.
 - Deane and Gaudron JJ (dissent):
 - Adopted a ‘proportionality’ test.
 - Found that because the Act may be viewed as affording general environmental protection rather than protection of the qualities and features which may be of outstanding universal value, it was not reasonably capable of being viewed as



appropriate or adapted to the circumstances.

Victoria v Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416

- Facts: The *Industrial Relations Reform Act* enshrined a range of workers' rights. Its claim to validity depended primarily on the external affairs power since the new provisions extended to workers were said to implement the requirements of various Conventions and Recommendations adopted by the General Conference of the International Labour Organisation.
- Result: Certain elements of the legislation could not be supported as "appropriate and adapted" to the purpose of implementing the relevant Conventions.
- Court rejected the approach of Stephens J in *Koowarta* and instead adopted the broader view that the existence of any treaty is enough to enliven the power.
 - The intrusion of Cth. law into a field that has hitherto been the preserve of State law is not a reason to deny validity to the Cth. law provided it is, in truth, a law with respect to foreign affairs.
- Although any treaty with any subject matter has the potential to enliven the power, not all treaties will due to the second test of "reasonable proportionality": the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty. If the treaty is stated in too broad terms, then it will be difficult to apply this test.
 - The test will be easier to apply with regards to treaties cases than in defence cases

7. DOES THE LAW FALL WITHIN THE DEFENCE POWER?

Section 51(vi) provides a Cth power with respect to:

"The naval and military defence of the Cth. and of the several States, and the control of forces to execute and maintain the laws of the Cth."

Note: This is a purposive power.

A. THE DEFENCE POWER DISTINGUISHED FROM OTHER POWERS

The principles from *Andrews v Howell* (1941) and *Stenhouse v Coleman* (1944):

- Elusiveness of other facts and the court's role: the executive and legislature may have confidential facts that cannot be disclosed to courts but will be essential in determining proportionality of legislation.
- Elasticity: the power waxes and wanes.
 - o "The existence and character of hostilities or a threat of hostilities, against the Cth. are facts which will determine the extent of the operation of the power" (*Andrews v Howell*).
- Purpose: a purposive power, though it is hard to apply the proportionality test as it is hard to challenge the executive's decision
- Judicial notice of facts: a lot of facts will be just common knowledge (e.g. fact that a nation is at war)

B. TIMES OF WAR

Farey v Burvett (1916) 21 CLR 433

- The defence power is virtually unlimited during a time of total war when the existence of Australia is threatened. It becomes a "paramount" source of power – overriding all constitutional restraints.
- If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgement and wisdom and discretion of the Parliament and the Executive.



- If the measure questioned may even incidentally aid defence, it will not be invalid.

However, the dicta of Isaacs J have not met later judicial acceptance.

Victorian Chamber of Manufacturers v Commonwealth (Women's Employment Case) (1943)

- Facts: *Women's Employment Act* – purpose to encourage and regulate the employment of women for the purpose of aiding the prosecution of the present war.
- Argument: It was argued that even if there was authority under the defence power to deal with the employment of women, there was no authority to deal with such employment in the manner in which the legislation dealt with it because that legislation was not limited by any reference to women engaged in work which is directly associated with the war, but extends to all kinds of work which may be done by women.
- Found: Legislation had a real and substantial relation to the prosecution of the war and was calculable in an appreciable degree to it.
- Held:
 - Legislation to deal with war-created problems (whether considered in relation to the general community or to the fighting services) is within the power to legislate with respect to defence.
 - In order to determine whether legislation is within the defence power it is necessary to examine the substance and purpose of the legislation in order to ascertain what it is that the legislature is really doing.
 - But if the real substance and purpose is such that the legislation is capable even incidentally of aiding the effectuation of the power then it is within the ambit of the power.
 - It is important to bear in mind that a state of war creates a situation that is abnormal and temporary so that laws which can only be justified by the enlarged operation of the defence power which occurs in an emergency must not extend beyond what is reasonably required to cope with such abnormal and temporary conditions.

C. COLD WAR

A real or perceived escalation of terrorist activity within Australia might expand the defence power even in the absence of a formally declared "war".

Australian Communist Party v Commonwealth (Communist Party Case) (1951) 83 CLR 1

- Facts: Act to ban the Communist Party, including recital specifying that the Act is for the defence of Australia. The Act provided that the decisions of the Governor-General were not subject to judicial review
- There are two aspects of the defence power:
 - 1) Authorises laws which have, as their direct and immediate object, the naval and military defence of the Cth. and of the several States.
 1. This power is not confined to time of war. In peace time – matters which could reasonably be considered to be a threat to the safety of Aus in the event of future war.
 2. If operation of law dependant upon actual existence or occurrence of any act, matter or thing having specific relation to defence power, then it would be ancillary to the defence power.
 - But validity not dependent upon the opinion of the law-maker – recitals do not provide such a link.
 - Extreme/exceptional circumstances – extension of defence power may support provisions which do not have a sufficient link, and depending entirely on the recitals to make them ancillary to defence.



- Such extreme/exceptional extensions may result from necessities or imminence of war.
- 2) Secondary aspect is the extended power, where the law does not have, as its direct and immediate object, the defence of Australia.
 1. The existence or immediate apprehension of war/national emergency will extend defence power as a matter of judicial notice (of an emergency)
 - May even arise under circumstances that fall short of an immediate apprehension.
 - On the basis of facts (not recitals) of which the Court could take judicial notice, is there a sufficiently serious national or international emergency to extend the power that far.
 - At the fullest extent of this "secondary" aspect, might confer an uncontrolled discretion to determine the facts on which the exercise of the discretion depends.
 2. Character of the law in dealing with the emergency. This will turn on particular facts of apprehended war (as distinct from the fact of actual war or national emergency).
 - Concerned with external enemies - If a situation is to justify an extended defence power, it must be an international situation.

Marcus Clark & Co Ltd v Commonwealth (Capital Issues Case) (1952) 87 CLR 177

- Facts: Due to the Korean War being escalated, the Cth enacted an Act which authorised the Governor-General to "make regulations for or in relation to defence preparations" Provided for judicial review.
- The Court will allow the legislation to stand when:
 - The provisions specify a course to be pursued and considerations and purposes to be effectuated (the operation and practical consequences of which will show whether the measure does tend or might reasonably be considered to promote/advance the defence of the Cth.)
 - i.e. specifies an end to be achieved and redress available to show whether it is appropriate/adapted
 - Judicial remedies are available to ensure that the judgement/discretion of the administrative decision-maker do not go beyond what is the true scope and meaning of "defence preparations".

D. THE "WAR ON TERROR"

Can s 51(vi) support terrorism offences and preventative orders?

Thomas v Mowbray [2007] HCA 33.

- Facts: Thomas had been charged with three offences regarding the provision of support to a terrorist organisation. The convictions were later quashed by an order of the Court of Appeal (COA) made on the basis that admissions, attributed to Thomas during an interview with AFP officers should not have been admitted in trial. The COA adjourned for a further hearing the question of whether there should be a retrial. The A-G then applied for an interim control order, representing that he considers that such an order would "substantially assist in preventing a terrorist act". Mowbray made the order issuing the control order, being satisfied that "each of the obligations, prohibitions and restrictions to be imposed" was "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act".
- Result: The *Anti-Terrorism Act* falls within the powers of the defence power.
- Gummow and Crennan J (majority) adopted a flexible approach:
 - power not to be confined as you do not know what the nature of the threat may be.
 - may be used to anticipate and suppress apprehended violence and disorder.
 - Power can protect citizens because they are integral to the body politic.



protect such communications and those who participate in representative and responsible government from those activities that are incompatible with this.

14. WERE JUDICIAL POWERS AND DETENTION PROCEDURES CONSTITUTIONAL?

A. HOW DETENTION CAN BE ORDERED AND ITS IMPLICATIONS

Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1

- Court/Judicial ordered detention
 - involuntary detention of a citizen in custody may only be ordered by a court, and in consequence of a judicial finding of criminal responsibility.
 - i.e. only the judiciary can order punitive and penal detention for criminal guilt.
- Executive ordered detention
 - Non-punitive – exceptions for the executive:
 - Detention in custody before being tried.
 - Involuntary detention in cases of mental illness or infectious disease.
 - Aliens – exceptions for the executive:
 - Lies in their vulnerability to exclusion or deportation.
 - Extends to authorising detention of alien to extent necessary to make the deportation effective.
 - Authority to detain an alien valid if the detention is limited to what is reasonably capable of being seen as necessary for the purposes of deportation (i.e. limited time).
 - Cannot detain aliens in an unqualified manner – unconstitutional if merely for a punitive nature.

B. PUNITIVE – COURT ORDERED DETENTION

i. IS A CH III JUDICIAL POWER BEING EXERCISED?

Boilermakers (1957)

- implied strict separation of judicial power
- Ch III courts cannot be given non-judicial powers, and other arms cannot exercise judicial powers.
- Can't confer non-judicial power on a Ch III court

Grollo v Palmer (1995):

- Exception to the persona designata exception: A judge cannot act in his personal capacity if it is incompatible with exercise of federal judicial power

The requirements of Ch III:

- At the federal level, courts cannot exercise non-judicial power.
- However, at the State level, this is diluted to a certain extent. Courts still can exercise non-judicial power, but only where this is not incompatible with their exercise of federal judicial power.

ii. STATE COURTS - NOT INCOMPATIBLE WITH EXERCISE OF CH III JUDICIAL POWER

Kable v DPP (1996) 189 CLR 51

- Facts: Kable in jail for manslaughter. Decision made by executive supported by legislature to keep him in jail past his sentence term (preventative detention).
- Note that Ch III also applies to State Supreme Courts when invested with federal



jurisdiction from time to time.

- Issue – did this lead to a risk of the public’s perception that the courts were subservient to the executive?
- Majority: Toohey, Gaudron, Gummow and McHugh
 - Toohey
 - The law was incompatible because it required the NSWSC to participate in the making of a preventative detention order where no breach of criminal law is alleged and there is no determination of guilt.
 - Where it operates to a group of persons, the result may be different. However, in this case, the law only applied to Kable.
 - Gaudron
 - Integrated Australian court system – state courts are part of Federal Ch III courts when exercising federal jurisdiction. Transcends being merely State courts.
 - *Boilermakers* does not apply to separate powers at state level – State government can still confer non-judicial powers to the State court.
 - But non-judicial power cannot be exercised where it is incompatible with the state court’s exercise of Ch III power.
 - By dressing up a non-judicial process as a judicial process, it weakens public confidence and compromises integrity of judiciary, including Ch III.
 - McHugh
 - What the executive cannot do is use the authority of the judiciary to make an order which compromises constitutional impartiality of the courts under Ch III.
 - Consider not only the intention, but also the effect of the legislation.
 - Idea that the court does not want public confidence to be undermined – consider how the public will view the legislation.
 - The idea is to preserve independence of the judicial arm: needs to be protected both in actuality, but also in the eyes of the public. Courts must not be an instrument of executive government policy or political decision.

Fardon v Attorney-General Queensland (2004) 210 ALR 50

- Facts: *Dangerous Prisoners (Sexual Offenders) Act 2003* which allowed a prisoner to be kept in detention if there was a serious likelihood that they would re-offend (for a sexual offence). An order for a continuing detention order was made against *Fardon*. The relevant law related to all dangerous sex offenders, not just *Fardon* (unlike *Kable*).
- McHugh:
 - The difference between the legislation in *Kable* and *Fardon* is substantial.
 - The current law is targeted at a group/class of persons, rather than an individual.
 - In this case, the state supreme court is exercising an actual judicial power, so can be punitive.
 - This was not a case of a disguised substitution for ordinary legislative/executive function (as in *Kable*)
- Gleeson
 - Does not confer functions incompatible with exercise of judicial power, because of substantial discretion, rules of evidence, onus of proof being placed on the A-G, the requirement for sufficient criteria, and giving detailed reasons.
 - There was nothing to suggest the state supreme court was to act as mere instrument of executive policy.
 - The law allows the court to act in a manner consistent with judicial character.
- Callinan and Heydon JJ
 - As long as State court is not effectively the alter ego of the legislature/executive, and so long as it is to undertake a genuine adjudicative process and as long as



integrity/independence not compromised, it will not infringe Ch III.

iii. FEDERAL COURTS - NOT A CH III JUDICIAL POWER

Thomas v Mowbray

- Facts: Not detention in a prison, but at home pursuant to a control order the Act. It required the court do be satisfied that the granting of a control order would be “for the purpose of protecting the public from a terrorist act”
- Majority – what is considered judicial is of greater scope under the Federal jurisdiction
 - Control orders are not detention orders – analogy with existing orders that are preventative.
- Did the Act provide an ascertainable test capable of judicial application? Or was it too vague and uncertain?
 - Legislation needed to adequately specify the legal standards or criteria by which the Court was to act.
 - As the judicial procedure had been laid down, the form of order was a familiar one of restraining the liberty of the subject for the purpose of keeping the peace or preserving property and a judicial assessment of a future risk was not unusual.
- Wide scope of what is considered judicial – unlikely to prove fatal if:
 - the standard is open ended
 - it requires the Court to balance incommensurable factors
 - Court has to assess something as broad as the protection of the public
 - Court has to engage in a predictive exercise based on what third parties may do (e.g. the government, police etc).
- Dissent (Hayne J)
 - Invalid under Ch III
 - “Protecting the public from a terrorist act” is not the job of courts, but rather the executive.
 - Although a Court may validly exercise discretion, the legislation should provide a “defined or ascertainable” standard for the exercise of discretion:
 - ◆ “for the purpose of protecting the public from a terrorist act” is too indeterminate to constitute an exercise of judicial power:
 - did not call for the judicial formulation of standards of conduct or behaviour, nor require the application of any familiar judicial measure found in other fields
 - did not direct attention to whether an identified person was likely to commit any breach of the criminal law
 - would require the federal Court to predict the future consequences of the control order when much of that was unlikely to be known to the Court
 - subject matter of the power here (public protection) is one for parliament/executive to consider – judicature confining itself to whether steps taken are lawful:
 - Court would ordinarily be asked to act upon intelligence information gathered by Government agencies, leaving the Court often with no practical choice but to act on the view proffered by the executive, thereby undermining the appearance of institutional impartiality of the Court.



C. NON-PUNITIVE – EXECUTIVE ORDERED DETENTION

i. DETENTION WITHOUT CRIMINAL GUILT

Kruger v Commonwealth (Stolen Generations Case) (1997) 190 CLR 1

- Facts: Stolen generation case. The Law provided for Aboriginal children to be removed from their families.
- Gummow and Toohey said that even if we open up a Constitutional argument, the removal of children was for their benefit – i.e. its purpose was non-punitive → which is a legitimate exception.
 - Categories of non-punitive involuntary detention not closed
- Gaudron J, against the immunity:
 - There is no free-standing Ch III immunity which is subject to exceptions that are not clearly defined. This principle could be slowly whittled away.
 - Suggests that rather than starting from Ch III, the basis for immunity and limits to detain exists in s51.
 - s51 heads of power support the exceptions (races, quarantine powers, etc), so thus are not infinite exceptions. The exceptions must find basis in s51.

ii. DETENTION OF NON-CITIZENS

MIMIA v Al Masri

- Facts: Al Masri was detained for 7 years, argument was that his detention was unconstitutional by virtue of length of time detained.
- Proportionality determines the purpose. Thus, if the period of detention was too long, it becomes punitive.
- This converted an initially legitimate purpose to an illegitimate one.

Al-Kateb v Godwin (2004) 219 CLR 562

- Facts: Al-Kateb stateless person. Does this mean that he is to be detained indefinitely? There was an obligation to remove as soon as reasonably practicable an unlawful non citizen
- Decision (4 v 3) that the Cth. can detain indefinitely an individual in these circumstances.
- Majority approached the issue as a matter of statutory construction (authorises detention even if stateless).
- Hayne (majority):
 - ◆ Statutory construction – preferred to detain Al-Kateb until a state accepted him
 - ◆ Ch III – preference of Gaudron’s approach in *Kruger*, with decreased reliance on ChIII.
 - Rejects Lim’s “reasonable capable” approach – agrees with Gaudron that that line is difficult to identify with any certainty.
 - In this case, there was a legitimate application of the aliens power
 - ◆ Non-punitive
 - 1) Immigration detention is not detention for an offence.
 - 2) Protective – Detention segregates aliens from community (protection of society from outsiders).
 - Because the alien took the chance that Australia would not take him, his detention afterwards even if he is stateless is not punitive.
- McHugh (majority):
 - ◆ Non-punitive object: prevention of aliens coming into the country → within Cth executive power.
 - ◆ language of the sections was not ambiguous, and clearly required the indefinite



detention of Al-Kateb.

- ◆ Court has no other option: if Parliament passes law, it has to be accepted by the Court → a political question (idea from *Engineers* that the court's role is not to act as a check on political power).

Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS) (2004) 210 ALR 369

- Detention power is not an implication from Ch III separation, but from s51 powers.
- Any attempt to state a general proposition that the executive doesn't have power to detain is incorrect.
- Where does Ch III fit in?
 - Ch III still has some kind of limiting role)
 - ◆ s51 limits powers (characterisation under heads of power and incidental power to detain without judicial order) – usually the defence and aliens/quarantine powers
 - ◆ Ch III is a constitutional restraint on s51 heads of power – whether the law is punitive or protective, determines whether Ch III is offended.
 - ◆ Questions of proportionality cannot arise under Ch III – either punitive or not.



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