Constitutional Law Notes

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OVERVIEW

LEGISLATION

CTH LEGISLATION

Is there authority for the Cth Law?

HEADS OF POWER
- External Affairs Power: s 51(xxix)
- Corporations Power: s 51(xx)
- Grants Power: s 96
- Executive Power: Nationhood power: s 61 and s 51(xxxix)
- Appropriations Power: s 81 & 83

STATE LEGISLATION

Is there authority for the State Law?

S 16 of the Victorian Constitution and s 2 of the Australian Acts give the Victorian Parliament effectively plenary power

Are there any qualifications on the State's ability to legislate?

EXPRESS
- Freedom on Interstate Trade: s 92

IMPLIED
- Separation of Powers (Boilermakers)
- Intergovernmental Immunity
- Implied Representative Democracy

Are there any limitations on the Cth's ability to make the law?

EXPRESS
- Inconsistency: s 109
- Excise Duties: s 90
- Freedom of Interstate Trade: s 92

IMPLIED
- Freedom of Political Communication
- Chapter III Limitation
CORPORATIONS POWER

POGG with respect to:

(xx) **foreign** corporations, and **trading** or **financial** corporations formed within the limits of the Commonwealth;

There are 2 key questions:

1. **Whether the organisation is a Constitutional Corporation**
   - **Financial**: ‘Transactions in which the subject of the transaction is finance’ (Deane J in *Kuring-gai Co-operative Building Society*)
   - **Foreign**: corporations formed outside the limits of the Cth: *Incorporations Case*
   - **Inactive** corporations – *Fencott v Muller* – may look at the purpose test when the current activities test cannot be applied.
   - **Trading Corporation**: use the current activities test: Mason J in *Adamson’s Case* trading activities must constitute a ‘sufficiently significant proportion’ of overall activities.
   - **Current Activities Test** - **substantial** or **sufficiently significant** proportion of its activities constitute ‘trade’ (*Adamson* – per Mason J at 233)
     - Amount of trading must **not be insubstantial**: *Adamson*
     - Regardless of the purpose the corporation was incorporated for: *Adamson*

**Application**: what are the ‘revenue raising’ activities of the corporation?

- Compare the amount of revenue raised and compare to the overall size of activities
- Must be trading on a substantial scale: *Adamson*
- Is the trading so ‘slight and incidental to some other principal activity?’ (religion, education) that it can’t be described as a trading corporation? *Adamson* Mason J
- Corporations may have very different activities including policy functions and still be a CC, as long as trading activities are carried out on a ‘large scale’ *Tas Dams*

**Cth can still legislate over an entity if its conduct affects a constitutional corporation**

- **Workchoices** (at 178) broadened the test of ‘**not insubstantial, tenuous or distant**’ (Quoting Dixon J *Melbourne Corp v Commonwealth* at 79) by reinterpreting (but not overruling) *Dingjan*:
  - ‘also, the regulation of those **whose conduct** is or is capable of affecting its activities, functions, relationships or businesses’ (Gaudron J in *Re Pacific Coal* at 83)

**NB**: Usually occurs in context of companies contracting with Constitutional Corporations.

**Post- Workchoices** this area of law is less clear: Draw analogies from these cases:

- **Fontana Films**: the court recognized that the Cth may legislate over non-corporations when it’s ‘**protecting**’ a constitutional corporation.
  - ‘directed to any person … (and) designated to protect a corporation from certain conduct’
109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Invalid means: “suspended, inoperative and ineffective” (The Majority in the Native Title Case at 464-5)

1. Impossibility of Obedience
   • R v Licensing Court of Brisbane; Ex parte Daniell
     State (Qld): Liquor Act 1912, s166 – referendum on the same day as the Senate election.
     Cth: Electoral (Wartime) Act 1917, s14 – no referendum on a Senate election day.

2. Denial of Rights
   • In the absence of contradictory duties: when a State law, if valid, would alter, impair or detract from the operation of a law of the Cth Parliament, to the extent it is invalid. (Dixon J in the Kakariki Case at 630)
     o If a State law creates rights that are abrogated by Cth: where the State law would “qualify, impair and, in some respects, negate the application of federal law... the State law is invalid” (Telstra v Worthing, Court at 31)
   • Statutes may... confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or
abandoned without disobeying the statute which conferred it (Knox CJ and Gavan Duffy J in *Clyde Engineering Co Ltd* at 478)

- The application of s109 does not depend upon any assignment of legislation to specific categories which are to be assumed on an a priori basis to be mutually exclusive (ie: community welfare v employment standards) (Latham CJ in *Colvin* at 161)

**Cases**

- **Clyde Engineering Co Ltd v Cowburn**
  
  **State (NSW):** *Fourty-four Hours Week Act 1925* – “ordinary working hours” no more than 44 hours per week, if award says > 44 hours, should still receive full wage  
  **Cth:** *Award* – 48 hour week and if less, worker loses pay.

- **Colvin v Bradley Bros Pty Ltd**
  
  **State (NSW):** *Factories and Shops Act 1912* – offence to employ women on milling machines  
  **Cth:** *Award* – may employ females.

- **Telstra v Worthing**
  
  **State (NSW):** *Workers Compensation Act 1987* – lump sums, medical expenses and weekly payments  
  **Cth:** *Safety, Rehabilitation and Compensation Act 1988* – limited payments of compensation (different ceilings)

### 3. Covering the Field

Even if there are no conflicting rights or duties, if the Cth intends to cover the field, a State cannot legislate on the matter.

- If a competent legislature expressly or impliedly evinces its intention to cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field (Isaacs J in *Clyde Engineering Co Ltd* at 489)
  
  - No inconsistency if a Federal Law was intended to be supplementary to or cumulative upon State law(Dixon J in *Ex parte McLean* at 483)

- It depends upon the intention of the paramount legislature to express by its enacted completely, exhaustively, or exclusively what shall be the law governing the particular conduct or matter which the attention is directed. (Dixon J in *Ex parte McLean* at 483)

- Inconsistency when the sanctions they impose are diverse (Dixon J in *Ex parte McLean* at 483 citing *Hume v Palmer)*

**Cases**

- **Ex parte McLean**
  
  **State (NSW):** *Masters and Servants Act 1902* – offence for employees to fail to fulfil contractual obligations  
  **Cth:** *Conciliation and Arbitration Act 1904* – offence of breaching a Cth industrial award.

### A. Subject matter

- Intermeshing of laws – each legislature having confined itself to those aspects of a particular situation (Stephen J in *Wardley* at 250)