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1) 08:30 to 09:15 (45 min)

2) 09:15 to 11:00 (45 min)

3) 11:00 to 11:30 (30 min)

- First thing, decide if it's a State law or a Cth law

A. Cth Law

- a. First we need to characterize the law and determine whether the law is supported by the head of power (Characterisation). 2 different process of Characterization: subject matter and purposive. Most of the time we are concerned about the subject matter and not the purpose. So the issue is whether the law has a sufficient connection with a head of power); If yes, then move on to b
- b. Second we need to determine if there is a prohibition in the Constitution? (implied—political communication?) (express?)

B. State Law

- a. We're going to assume legislative power exists (we know that states has plenary power)
- b. Is there a prohibition in the Constitution? (unwritten: Kable doctrine) (explicit: Section 109 inconsistency, Section 90 excise taxes)

Literalism: - close precise and grammatical examination of the exact words used in a constitutional provision (is a method of constitutional interpretation that focuses on the text). The word formed is used in the past tense then it applies only to corporations already in existence: *Incorporation Case (1990)*

Concepts

Separation of powers

A French philosopher Montesquieu argued that the three great powers of government, legislative power (the ability to pass laws), executive/administrative power (the ability to execute laws), and the judiciary (the ability to enforce or apply laws) needed to be separated in order to guarantee liberty. There is the idea of check and balances which means each of the three branches of government are given particular powers but each of the branches are given a way to check other branches. Although there is clear separation of judicial branch in Australia, but there is a melding of the legislative and executive branches. The idea of Legislative, executive, and Judicial is called horizontal separation of powers which can be contrasted with vertical separation of power which is the idea that different levels of government should be given different power (called federalism)

Federalism

Federalism is the Allocation of power between the federal (cth) government and the States. Australian constitution divides power between Federal and State power. Federalism means that there should be a division of power and allocation of power between different governments.

Rule of law

There are 2 approaches to understanding the rule of law. One is the Formal method that is if a law is promulgated (enacted/passed) by the correct body using the correct procedure, it is a binding law and should be respected as such. The second is the substantive method of the rule of law that is even if a law is formally recognized, that law must also comport with a fundamental notion of human rights/fairness dignity in order to be valid/worthy of respect. Some basic ideas of the rule of law are:

- Laws can be enacted and changed only according to specific procedures
- No one is above the law
- people are seen as fundamentally equal
- rule of law means there are generally applicable standards or principles, not arbitrary decision making, or singling out people for discriminatory purposes
- Decisions are made by elected people, not tyrants or aristocracy, etc.

Rule of law is a very contested concept (it's not a free-standing constitutional guarantee, and not enough on its own to invalidate legislation). Although the rule of law is embraced by HC and judges and government leaders but it is not something that Australia by itself is going to allow and advocate to get legal change.

Parliamentary supremacy vs. judicial review

Parliamentary supremacy is a basic idea that anything Parliament do, it can undo and no Parliament can bind a future Parliament and nobody is above Parliament or can invalidate a Parliamentary law. This idea is based in UK History. This concept represent the idea of Dicey of Parliament supremacy works that court can interpret the statutes but cannot invalidate statute. Similarly the common law is a law but is inferior to parliamentary law (statute law). We know that Australia does not have bill of right because there is absolute trust given to Parliament however the parliamentary supremacy doesn't apply fully in Australia the way it is in UK because Australia has written entrenched constitution but, it still carries some weight.

The concept of judicial review is the power of judges to interpret the constitution and invalidate legislation that conflicts with it that High court has the port/authority to invalidate legislation that conflicts with the Australian Constitution. One of the potential drawback of this concept in Australia is it gives judges power. One of the ways it is often phrased in US is Judicial Restraint vs Judicial Activism. Judicial Restraint is that judges should be cautious and only invalidate legislation if they absolutely have to but judicial activism is that judges should be protectors of human rights and they should be invalidate legislation that does not meet with the constitution, etc.

Washminster Mutation

"Washminster Mutation" or Washminster Constitution which is often Australian constitution is referred to as. It's a description of the Australian Constitution as comprising elements of American Constitution (Washington) and the British political system (Westminster). So the Australian constitution contains features of both systems:

- From US Constitution, Australia adopted the concept of Federalism, Judicial Review, Separation of Powers

Trade and Commerce (CTH POWER)

Issue

This raises issue of inconsistency but again we can't reach inconsistency issue until we determine Cth XXX(licensing) power is valid at all.

So first we need to characterize the law and determine whether the law(XXXact) is supported by the head of power (Characterisation). (Most of the time: subject matter and not the purpose). Second we need to determine if there is a prohibition in the Constitution?

Does the cth have a valid law?

S 51(1) gives Cth power over “**trade and commerce with other countries, and among the States**”.

Trade is given broad interpretation in *W and A McArthur v Queensland* and one of the questions we don't know for sure is whether production would count.

*Only Financial transaction

Trade and commerce Includes purely financial transactions where no tangible goods are bought or sold:

Commonwealth v Bank of NSW (1949)

*Cth enters into business

Cth has ability to enter into business itself (by creating companies and business, etc: *ANA Pty Ltd v Commonwealth*

In this problem XX(activities) can be determine as trade and commerce.

The power does not apply to trade within the States (**intrastate** trade). It only applies to trade between states (**interstate** trade): *R v Burgess*.

*other countries (import & export)

Other countries in this section means Cth has the power to import and export

* Production leading to international trade

In *O' Sullivan v Noarlunga* Court held that the ACT was valid under s 51(1) of the Constitution regulation could validly regulate interstate processes of trade and commerce that were linked to international trade. Court says in order to regulate the safety of the product destined for export, the Cth has to have the ability to regulate the production of the product.

* Interstate and intrastate trade mixed

If interstate and intrastate trade are “inextricably mixed” then the Cth has the power to regulate all of it: *Redfedern v Dunlop Rubber*.

*Regulate after the export

In *Crowe v Commonwealth* the HC ruled valid Cth legislation directed to regulate the marketing of dried fruits at the overseas marketing of goods exported from Australia was an essential part of international trade and could be regulated by legislation under s 51(1).

*regulate working condition

Cth has ability and can regulate working condition: (*Re Maritime Union*) (incidental power + trade and commerce power). They have to engage in interstate trade.

*Some specific limitation

S 92 trade “ among the states shall be absolutely free”

Ss 99: Cth can't give trade preferences to one State over others

S 51(31): Cth can't take property without paying fair compensation

Interstate or intrastate (economic v physical interference)

There is distinction between physical integration that can create interstate trade, but economic integration cannot. If there is something that is intrastate trade but it is mixed together with interstate trade the Cth can regulate everything but if there is economic affect of intrastate trade that may affect interstate trade the HC did not allow the Cth to regulate the intrastate trade.

In *Airline of NSW (1965)* the court held the Cth could regulate the licensing scheme of interstate flights since Cth interest in interstate air safety is affected by intrastate air travel. The focus was on physical inference with Cth interest. However in *Western Australia Airlines Case* the majority of court rejects the idea that economic

concerns of how intrastate trade affects interstate trade is enough to give the Cth the ability to act; only physical interference of intrastate trade with interstate trade is sufficient.

Here, interstate and international transaction of XX(company) are interconnected. The XXX (activities) of XX(company in XX(state) are connected with interstate and international trade and commerce in the XXX(activities). The valid operation of Cth legislation under s 51(1) of the Constitution where interstate and overseas trade are interlinked was upheld by HC in O' Sullivan v Noarlunga.

Conclusion

Therefore it can be concluded that s XX of XX(act) is supported by the head of power under s 51(1) and is valid. Also according to Redfedern XX(activity) for marketing within XX(state) can be held to be inseparably linked to interstate and international trade in the product.

Introduction to Rights

First we should draw a distinction between

Civil Liberties (rights we have guaranteed by law, usually through constitutional protections)

They're political rights that protect us from the government; a key term here is called "negative" rights – they tell us what the government *can't* do to us.

vs.

Human rights (rights we have simply by being humans) (they're rights that can apply to government and other members of society) they can be negative & positive rights – they tell us what the government can't do, but also what government must do/provide for us (clean water, education, etc), requiring resource claims.

Human rights is much broader and harder to implement because they require resource claims ([right to education that means certain amount of government budget has to be allocated and how much government budget has to be allocated...etc](#))

For both rights we need to keep in mind that rights inevitably face limitation – through balancing the right with a legitimate government interest.

Why Australia does not have bill of right

--Australia is one of few democratic countries in the world without a constitutionally entrenched bill of rights, and, the only democratic country with at least a national statutory bill of rights.

The reason why Australia does not have bill of right is that framers of Constitution did not come of age in environment where government was seen as the problem (unlike other countries Australia constitution was not a result of great political struggle), the framers did not see the government as threats which they abuse their powers and invade the human rights and civil liberties. Instead framers implemented the idea of doctrine of Parliamentary supremacy inherited from England and they gave great faith in democracy and common law to protect rights. Framers saw Constitution primarily as Federal-State compact. A way to set good government.

The reason that the current adoption of a bill of rights is controversial is that there is still a lot of trust given to Parliament and there is still the idea of Parliamentary sovereignty & more importantly there is a lot of fears of judicial activism (the idea is that every political issue turns into legal issue and the decision makers are judges and they make all the important decision and it will take power from parliament and democracy). Parliamentary supremacy & judicial activism are 2 reasons that conservatives argue that Australia should not have Bill of Rights.

What is special about Australia that the rights are not necessary? is it because there is trust in parliament? Maybe because people don't feel unprotected?

There was prior attempts to introduce some rights through referenda either failed in Parliament or at the polls; [yet in 2009, government consultation received 87% in favour of at least a national statutory charter of rights.](#)

ACT and Victoria have, in the past decade, passed statutory charters of rights. The Statutory Charters are not entrenched compare to constitutional bill of rights which are entrenched. (Entrenched means is not easily changed, and can't be changed through ordinary legislation).

ACT & Victoria have passed statutory charters of right which are **not entrenched**. Statutory Charters which are not entrenched vs constitutional bill of rights which are entrenched (entrenched: not easily changed, and can't be changed through ordinary legislation)

The **statutory charters functions** are 1) instruct judges to interpret legislation, when plausible consistent with the rights listed; 2) if interpretive solution isn't available, court can issue "declaration of incompatibility" (does not invalidate the law. The judges say that we think the law is incompatible with human rights for example). (Then Attorney-General is required to respond to Parliament within six months, and then Parliament can take action if it wishes). We might call this a weak or diluted idea of judicial review. Does not give court the ability to invalidate legislation at all but it does ask the court opinion of if the law violate the human right and give parliament the chance to respond and if they wish do sth about it(it is dialogue theory (dialogue between the court and parliament)).

Nationally Parliament has since 2011, a requirement that every bill be accompanied by a "statement of compatibility" with civil liberties and it must be written by its sponsor. It weaker than ACT& Victoria