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## Week 1

Constitution not entrenched

Written v unwritten constitution

## 1. Parliamentary supremacy/sovereignty

- Anything Parliament do, it can undo, no Parliament can bind a future Parliament, no body is above Parliament or can invalidate a Parliamentary law (UK History)(Dicey)
- Doesn't apply fully in Australia, still it still carries some weight

## 2. Judicial Review

- Power of judges to interpret the constitution and invalidate legislation that conflicts with it
- High court has the port/authority to invalidate legislation that conflicts with the Australian Constitution
- Judicial Restraint vs Judicial Activism

### 1- Separation of Powers

- Legislative, executive, and Judicial (horizontal separation of powers)
- Check and balances
- Although there is Clear separation of judicial branch in Australia, melding of the legislative and executive branches (crown).
- Vertical separation of power : different levels of government should be given different power

### 2- Federalism

- Allocation of power between the federal (cth) government and the States.

### 3- Rule of Law

- Formal: 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
- Substantive: 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.

--Laws can be enacted and changed only according to specific procedures

--No one is above 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)**

## 6. Representative and Responsible Government

- Representative government is the idea that the people elect the decision makers
- Responsible government is the idea that the ministers are responsible to the parliament as a whole for the decisions they make (for the actions of their portfolio or the department they control), if they lost the confidence of Parliament, they must step down.

## 6. Constitution Conventions

- idea that rules of a fundamental nature might not be written down, but instead may be dictated by custom, practice, and necessity.
- Constitution convention are operative in Australia

Definition of what constitutional Convention means:

"a convention operated when: 1) In general, people act in conformity to the rule, 2) When so acting, the rule forms part of the casual explanation for conduct, 3) A portion, at least, of political community accepts the rule as a valid standard for conduct", 4) Rule is constitutional in nature

- Conventions are not normally legally enforceable, and sometimes their content is disputed.

## 8. Rights

- Australian Constitution does not have a bill of rights.

"Washminster Mutation (Washminster Constitution)

It's a description of the Australian Constitution as comprising elements of American Constitution (Washington) and the British political system (Westminster). Australian constitution contains features of both systems:

- From US Constitution: Federalism, Judicial Review, Separation of Powers
- From British system: Parliamentary system (combination of executive and legislative powers), no Bill of Rights, Formal Monarchy, Importance of Convention.

## Week 2 – Trade & Protectionism

### Head of Power & Characterisation

- Constitution gives Cth Parliament limited and specific (enumerated) powers: that means that every piece of legislation passed by Parliament must be tied back to specific head of power

--Parliament can't pass legislation outside of these powers (you can find most of them in s 51)

### Characterisation

Characterisation is the process of determining whether a head of power supports a statute. (Correspondence between subject matter of the law and head of power). Most of time we are not concerned with the purpose of statute (we are concerned why the parliament passed the statutes it passed (purpose) but we are concerned about subject matter). (Most of the time: Subject matter, not purpose)

*Murphyores*: environmental regulation through regulation of trade and commerce

This process of finding a head of power and characterising whether a statute has the subject matter that falls within the head of power is crucial when you think about constitutionality of a Commonwealth statute. The first thing you should always do is to ask "is it supported by head of power?" and the second step is "Is it prohibited by something in constitution?"

### *s 51(39): incidental power*

It is power to legislate for things that are incidental to exercise of another head of power. It is judgment call by the High Court.

### Contrast with the States

The crucial distinction is that Constitution gives Cth Parliament limited and specific (enumerated) powers and we contrast that with the state. States have plenary legislative power (they can pass legislation on any topic whatsoever unless specifically prohibited by the Constitution)

**\*\*In an exam:** if question is asked about Cth legislation, student must find if it is supported by head of power but if it relates to State legislation, no need to find a head of power in Constitution. States do not need heads of power. As long as it is not prohibited by Constitution or is not inconsistent by valid Cth law that State law is going to be valid.

- Inconsistency State law and Cth Law then, Cth law will be valid to the extent of inconsistency

### Reserved Powers Doctrine (Discredited/invalid)

- Concept that Cth power had to be interpreted narrowly for the benefit of the States
- Overturned and discarded in *Engineer's case (1920)* – the High Court decided to interpret each head of power in its own terms and not pay attention that interpretation for that head of power is going to create problem to States. (not going to be worried about State's rights when we are interpreting the head of power in the Constitution)

### Trade and Commerce Power

S 51(1) which gives Cth power over "trade and commerce with other countries, and among the States"

We first ask what trade and commerce mean?

## Trade and Commerce meaning

In *W and A McArthur v Queensland (1920)* Broadly interpreted:

*all the commercial arrangements of which transportation is the direct and necessary result form part of 'trade and commerce'. The mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, part of that class of relations between mankind which the world calls trade and commerce*

What about production and Manufacture? What about working conditions?

## Other countries

exports & imports

## "among the States"

Not trade within the States (**intrastate** trade): the power only applies to trade between states (**interstate** trade) (*R v Burgess*)

## What counts as "trade and commerce"?

- Includes purely financial transactions where no tangible goods are bought or sold: *Commonwealth v Bank of NSW (1949)*
- Cth has ability to enter into business itself (by creating companies and business, etc: *ANA Pty Ltd v Commonwealth*)
- Some specific aspects of what could be trade and commerce are covered elsewhere in the Constitution

## 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

Cth has ability and can regulate working condition: (*Re Maritime Union*) (incidental power + trade and commerce power)

## O' Sullivan

This case is an example of Cth statute says one thing and state's status says another thing which that is going to raise ultimately the question of inconsistency but we can't get into inconsistency question until we first determine whether Cth law is valid at all and if the Cth law cannot be traced to the head of power in Constitution then it is not valid and we will not worried about inconsistency.

So the first question is always to ask is does the Commonwealth have the valid law? When we deal with this question we first need to know why Commonwealth passed the statue

Fact of the case:

- Cth required license to slaughter for export; so did State
- Noralunga had Cth License, but not State license
- They argued that State law was inconsistent with Cth Law
- Before we can reach doctrine of inconsistency, we first must determine whether the Cth is supported by a valid head of power
- *In litigation the Cth says: supported by trade and commerce power because meat is destined for export.*
- *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*

Difficult to ascertain is when production is done for the purposes of interstate trade or export, as oppose to purely intrastate trade

If interstate and intrastate trade are "inextricably mixed" then the Cth has the power to regulate all of it (*Redfedern v Dunlop Rubber*)

## What counts as “among the States” (what counts as “interstate”)

### *Airline of NSW (1965)*

- Two sets of licensing regimes for air travel in NSW (Cth law and a State law)
- Cth law license based on safety; NSW license based on competitiveness & needs of State
- Plaintiff had Cth license but did not have NSW license
- Flights were purely within NSW
- This raises issue of inconsistency but again we can't reach inconsistency issue until we determine Cth licensing power is valid at all.
- Could the Cth licensing scheme apply to purely interstate flights in NSW

*Here the court says yes. Cth interest in interstate air safety is affected by intrastate air travel. The focus was on physical inference with Cth interest.*

### *AG (WA) v Australian National Airlines Commission (“Western Australia Airlines Case”)*

- S 122 Cth head of power over territories

-In 1973, Act amended to allow Cth to fly within a state (intrastate fly) if necessary “for the purpose of the efficient, competitive, and profitable conduct of the business of the Commonwealth”

-Argument is that intrastate flights were necessary in order to make interstate (or state and territory flights) economically feasible

*Stephen J: trade & commerce power does not support this; but the territories power (s. 122) does allow if the link is to a flight to a territory*

*Bottom line is: Cth can use intrastate flight to bolster the profitability of state-territory flights, but cannot use intrastate flights to bolster the profitability of interstate flights*

***Clear 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.***

HC is conscious not to allow trade and commerce power to be interpreted so broadly that is effectively gives Cth unlimited power over economy.

## Protectionism

**S. 92: “trade, commerce, and intercourse among the States....shall be absolutely free”**

- applies to interstate trade only (not interstate trade)

--didn't want: border tariffs, frequent quarantines, quotes, etc.

--framers didn't want protectionism, they didn't want states to try to protect local industries by making goods from other states more expensive or more difficult to obtain

-s. 92 restrains both Cth and States, but most of the cases we'll see are in relation to States

### *Cole v Whitfield (1988)*

- Tasmanian regulation setting minimum size for harvesting crayfish
- Whitfield imports crayfish from South Australia that are above minimum size regulated in Tasmania
- Do the Tasmanian regulations constitute a violation of s. 92?

**This test applies to both former terms of a law and to its practical effects**

- **Two part test**

**1) Does the law impose a discriminatory burden on interstate trade?**

--not just discrimination or just a burden; it's a discriminatory burden

--differential treatment between interstate and intrastate trade that causes the interstate trade to suffer (be burdened). It had to treat intrastate and interstate trade differently and burden the interstate trade.

**2) Does the law have a protectionist character?(can be discerned by the law's purpose or effects)**

### **If both questions are answered “Yes”, the law is invalid under s.92**

Concludes that the Tasmanian regulations are not protectionist in nature and therefore Mr. Withfield will lose its case.

#### *Bath v Alston Holdings (1988)*

- 1- Legislation says wholesalers in Victoria have to pay 25% of total sales as a fee in order to get a license
- 2- Retailers are able to get a license for only a small flat fee if they only sell to customers tobacco which they purchased from a Victorian wholesaler, but if they sell tobacco from a non-Victorian wholesaler, then the retailer has to pay 25% in order to get a license
- 3- Wholesalers out of state pay nothing special

Plaintiff is retailer tobacco that travels to QLD and buys tobacco from QLD wholesaler to sell it in Victoria but he doesn't want to pay 25% of his sale to get license. The question is does it impose discriminatory burden on interstate trade done for protectionist effects or is it legitimate regulations? (high court 4 to 3)

*Majority focuses on formal terms of the regulation which do prefer in-state wholesalers over out-of-state wholesalers. In Substance it is discriminatory since these provisions protect local wholesalers from competition of out of state wholesaler that their Tobacco might be cheaper.*

*Minority focuses on practical effects of the legislation that it do not constitute discrimination: they argued at the end of at some point of the distribution of Tobacco someone will have to pay 25% tax. Whether the tobacco originate from in-state or out of state the only difference is who is paying the tax. Whether Victorian wholesaler is paying the tax or the Victorian retailer is paying 25% tax. Therefore from customer perspective it does not have any effect on the price of the Tobacco in Victoria. Total economic effects will be the same.*

#### *Castlemaine Tooheys v South Australia (1990)*

SAB (South Australian Brewery)(domestic): Refillable bottles (4 cents)

Vs.

Bond (Queensland Brewery) (foreign brewery): Non- Refillable Bottles (15 cents)

State Legislature says: to reduce littering and save consumption of resources in manufacturing

Bond says: Protectionism (protect SAB from out-of-state competition)

The court concluded it is in fact discriminatory protectionism:

- **Existence of a “reasonable non-discriminatory alternative means” available to the legislature which was not chosen (Legislature could not achieve purported goal by setting amount for non-refillable bottles at 6 cents instead of 15 cents)**

#### *If you are asked whether legislation comport to s 92*

Think about and apply the existence of a non discriminatory alternative when you are asked whether legislation comport with s 92. Because if the legislature had reasonable non discriminatory alternatives means for doing what they did that is probably a clue that it is engaging in protectionism if there is a discriminatory burden of interstate trade.

#### *Betfair (2008)*

High Court found that WA law was protectionist in nature and invalid because it was not appropriate adopted to legitimate purpose because there was reasonable non discriminatory alternatives means. They said the reason for betting exchange to protect integrity races. The HC said there is no evidence that betting exchanges effected the integrity of races

- Reasonable non discriminatory alternatives means could involve a more proportional or nuanced response rather than a total ban.

#### *S 92 Intercourse*

Some restrictions are allowed *APLA Ltd v Legal Services Comm'r (2005)*: *whether the means chosen by a legislature that hinders free movement are reasonable required to achieve the object of the legislation” (object of the legislation must be legitimate. ie. Not done for a discriminatory or invidious purpose.*

#### *Conclusion*

To summarise s 92, the test in *Cole v Whitfield* is the key thing. If there no facial discrimination against interstate trade but there is effective discrimination, Ask is there a reasonable relationship to a non protectionist reason. Is

there a reason or justification for why the legislature is doing what is doing. Is the legislature acting in good faith or if there is Reasonable non discriminatory alternatives means that is probably a clue that the legislature has protectionist motives at heart and the legislation could be invalid.

## Week 3 – Equal treatment of States

### s.99

“The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.”

**Preference:** CJ Latam in *Elliott*: a preference refers to a “tangible commercial advantage”. So something real and actual that gives one state or any part thereof a benefit that another state or part thereof is not getting. We can think of preference in two different ways:

- formal (written into the terms of the statute)
- substantive (formally neutral, but having preferential effect)
- the High Court has only clearly embraced the formal sense of preference

Unless statute by its terms gives a preference or discriminate between states the HC is unlikely to find a violation of s 99.

### Formal Approach example

*James v Cth (1928)*: formal discrimination in a statute violates s. 99 even if there is little practical disadvantages

*Cameron v Federal Comm’r Taxation (1923)*: again formal discrimination violates s. 99, even if there is a practical justification for it.

*Elliott*: s. 99 requires a designation of States (or parts) by reference to State, not by reference to cities or other things associated with a State. (Formalistic approach: need names of States or names of parts of States receiving preferences)

- if we designate locales (such as ports or cities) for reasons unrelated to the State they are a part of, this doesn’t violate s.99.
- no clear evidence of preference; no clear evidence that licensed ports received commercial advantages over others.

-Substantive (practical) discrimination is probably not prohibited by s. 99.

-law generally applicable to all the states is not invalid under s. 99 because it has a differential effect (operation) in a particular state: *Fortescue Metals v Cth*: (mining company pays tax based on loyalty fees they pay and each state has different loyalty fee hence the tax on the companies would be different in each state) ***the principle of this case if that a neutral Cth law has different effects because of different State laws, the Cth law is not invalid under s 99.***

*Deputy Federal Comm’r Taxation (NSW) v Moran (1939)*: section 99 does not limit the Cth ability to give money to the state using s 96 grants power.

## Corporations

S 51(20): “foreign corporations and trading or financial corporations formed within the limits of the Commonwealth”

- the interpretation of s 51(20) has major ramifications for federal-state balanced, as a broad approach gives the Cth major control over the Australian economy.

### 1) the text itself (characterisation)

This power is to apply to:

- a) “**foreign**” corporations: corporation created outside Australia and already in existence before Cth tried to regulate it
- b) “**Trading**” corporations:
- c) “**Financial**” corporation