

TOPIC 9: INCONSISTENCY AND INTERGOVERNMENTAL IMMUNITIES

s 109: When State law inconsistent with Cth law, Cth law prevails and State law invalid **to extent of the inconsistency**

1. Elements of s 109

1.1 'Law'

- Acts & subordinate legislation (eg. regulations aren't law but under statute has force of law: **Jemena v Coinvest**)
- CF admin orders aren't laws for purpose of s 109 and won't override State laws: **Airline v NSW**

1.2 'To the extent of the inconsistency'

- Only inconsistent provisions in State Act severed/invalidated
- If severance impossible, entire act deemed inoperative from date of inconsistency
- If Cth Act repealed; invalid sections of state act becomes operative again

1.3 'Invalid'

- Both Cth & State Act must be valid (**Bayside v Tesltra**) and operative (**Butler v A-G**) prior to challenge
- Irrelevant if State Act enacted before/after Cth Act
- If either Cth/State Act invalid (reasons other than s 109) – no need to test for inconsistency

2. Principle tests regarding inconsistency

2.1 DIRECT INCONSISTENCY: Simultaneous Obedience

- **Telstra v Worthing**: where impossible to obey 2 laws – 1 law requires what the other forbids
- **R v Licensing**: State Act required referendum whereas Cth prohibited referendum on liquor licensing to be held on same day as Senate elections; State Act invalid
- **McBain v Victoria**: State Act compelled discrimination whereas Cth prohibited discrimination in fertility treatments on basis of marriage; State Act invalid
- **CF Australian v Whybrow**: State Act required minimum wages to be 1 shilling p/h, Cth Act required 1.5 shilling p/h; additional NOT inconsistency duty as possible to obey both laws by just paying higher amount

2.2 DIRECT INCONSISTENCY: Conferral of Rights Inconsistency

- **Knox CJ & Gavan Duffy J** in **Clyde Engineering**: where State takes away a right, privilege or entitlement conferred by Cth even though the right may be waived/abandoned without disobeying the Cth statute
- **Dixon J** in **Victoria v Cth**: when a valid State law would alter/impair/detract from operation of Cth law

Clyde Engineering

- **State Act**: workers ordinary hours shouldn't exceed 44 hours a week
- **Cth Act**: workers covered by award are paid fixed wage for working week of 48 hours; deductions if less
- **Held**: State Act *diminishing the rights* conferred by Cth law; invalid

Ansett v Wardley

- **State Act**: prohibit discrimination re sex/marital status
- **Cth Act**: gave employers unlimited right to sack employees before they'd worked 12 months
- **Held**: no Cth intention to confer *absolute right to dismiss*; it was subject to requirements of general law
 - **Eg.** if sack before 12 months; cannot be on basis of sex/marital status

EXCEPTION re INDIRECT INCONSISTENCY (see below): expression of Cth intention *not to cover field* doesn't save State Law from invalidity if provisions are **directly inconsistent** with Cth law; only applies to **indirect inconsistency**

2.3 INDIRECT INCONSISTENCY: Cover the Field

- **Dixon J in *Ex Parte McLean***: inconsistency depends on **intention of Cth** to express by its enactment, completely/exhaustively/exclusively, what shall be the law governing the particular conduct/matter
 - Where Cth statute discloses this intention, inconsistent if State statute governs same conduct/matter

2.3.1 Identify the field

- subject matter of legislative scheme
- eg. slaughtering stock for export: ***O'Sullivan v Noarlunga***

2.3.2 Did Cth intend to cover the field

- no inconsistency unless Cth intends to regulate area exhaustively
- may be express/implication: ***Native Title Act case***
 - **Express**: provision in statute ousts operation of State law or Cth may have express intention to leave field open for complementary State laws: ***Native Title Act case***
 - **Implication**: if terms are extremely detailed shows intention to cover field, or where subject matter requires a uniform/nationwide system: ***O'Sullivan***
 - **Eg.** fulfillment of international treaty obligations: ***Viskauskas v Niland***
 - **Eg.** prevention of collisions at sea: ***Hume v Palmer***
 - **Eg.** fields of employment preferences for discharged military: ***Wenn v A-G***
 - **Eg.** protection of Cth property from destruction: ***R v Lowenthal***

2.3.3 Has State encroached on Cth's field

- if broad, likely to overlap, if narrow, unlikely
- eg. State re discrimination re race/religion and Cth re industrial consideration no overlap; silent to matter of discrimination because general irrelevance to subject matter: ***Ansett v Wardley (see facts in 2.2 above)***

2.3.4 Case examples

Kakariki Case

- **State Act**: power to remove of shipwrecks in any VIC port
- **Cth Act**: power to order removal of shipwrecks in waters used for international/interstate trade
- **Held**: no reason to treat Cth Act as being *exhaustive/exclusive* statement; removal of ships compatible with/aided by coexistence of other powers – not inconsistent
 - **Exercise** of power intended to be exclusive, **not existence** of power
 - When power **exercised** by Cth; Cth may remove shipwrecks regardless of State power

Native Title Act case

- **State Act**: rid of any native title that existed and replace it with statutory title
- **Cth Act (*Native Title Act*)**: set up process for Indigenous to make native title claims
- **Cth Act (*Racial Discrimination Act*)**: prohibited discrimination on basis of gender/race/religion
- **Issue**: WA claimed that *Native Title Act* invalid as it excluded a state from legislating on a particular matter
 - **Held**: NTA valid; if application of a State Act to a subject matter it excluded by a valid Cth Act, a State law which is expressed to apply to that subject matter is invalid
 - **Held**: State Act invalid as inconsistent with RDA: State Act discriminatory

Ex Parte McLean: where Cth Act prohibits certain conduct, State Act prohibiting same conduct inconsistent where penalties differ

3. Commonwealth's ability to make laws for the States

Engineer's Case

- **Cth ability to bind states:** clearly authorised Cth to pass legislation which **binds State govt instrumentality** (give heads of power plain/natural meaning – don't read down based on impact to State power)
- **State ability to bind states (obiter):** above principle also applies to states; respective acts of legislation are in full operation within their respective areas, but if conflict Cth prevails: **s 109**

Dixon J in *Commissioner of Taxation v Official*: whenever Consti refers a power to make laws in respect to a specific subject matter, it's to be understood as enabling Cth Parl to make laws affecting operations of States & their agencies

3.1 Limitations on ability of Cth to bind states

3.1.1 Early view: *Melbourne Corporation v Cth*

- (a) Cth may not discriminate against states – no longer relevant (*see Austin below*)
- (b) Cth may not pass laws of general application *fundamentally impeding States from carrying out essential govt functions* (eg. VicPO)
 - **Facts:** Cth Act provided that a bank cannot conduct banking business for a State
 - **Held:** not a valid exercise of banking power under **s 51(xiii)** as Consti impliedly prohibited discriminatory inference with a State by Cth
 - **Dixon J:** federal system itself imposed a restraint on power to control States

3.1.2 Current view: *Austin v Cth* developed *Melbourne Corporation*

- Only one limitation (b) is relevant now; combined (a) & (b) in theory as discrimination against State is an indication of fundamentally impeding States
 - **Facts:** Cth Act imposed tax resulting in a substantial lump sum liability when judges retired
 - **Issue:** P argued this treatment was contrary to (a) of *Melbourne Corp*
 - **Held:** (a) discarded; it favoured **form over substance** by fixing separately on laws that impose a special burden on one hand and laws of general application on the other - discrimination **not determinative**

3.1.3 Six factors regarding (b): *Clarke v Commissioner of Taxation*

1. Does Cth law **single out** a State/s and impose a **special burden/disability which isn't imposed generally**
2. Does Cth law of **general application** impose a **particular burden/disability on states**
3. What's the effect of Cth law upon the **capacity of States to exercise their constitutional powers**
4. What's the effect of Cth law upon the **exercise of their functions by the States?**
5. What is the **nature** of the capacity/functions affected?
6. What's the **subject matter** of the law affected the State/s?

3.1.4 What are 'essential govt functions'

Melbourne Corporation v Cth

- **Latham CJ:** raising money by tax, borrowing money and providing for expenditure of loan moneys
- **Rich J:** power to freely use facilities provided by banks; essential to efficient working of business of govt
- **Starke J:** management & control by the States & by local governing authorities of their revenue

Native Title Act case

- **Facts:** argued NTA impeded State's capacity to control use of land/deprived States from source of income
- **Held:** rejected this; Act needs to affect core govt institutions; merely legislating use of Crown land valid
 - **Core govt institutions:** constitution of 3 branches of govt, capacity of state to engage servants, acquisition of G/S, acquiring land needed to discharge of essential functions of State

Re Australian Education Union; Ex Parte Victoria

- **All state public servants:** Cth cannot interfere with State's right to choose who to hire/fire
- **Higher level public servants (MP, heads of dpts, judges):** who to hire/fire, T&C of employment

4. State's ability to make laws for the Commonwealth

Pirrie v McFarlane

- **Facts:** Cth officer bound by State traffic legislation whilst driving State road in exercise of duties
- **Held:** Cth officer had to comply with VIC traffic laws unless inconsistency under **s 109**

Re Residential Tenancies Tribunal & Henderson

- **Facts:** DHA was a Cth instrumentality providing housing for defence force
 - **s 24:** gave power to landlords to enter & inspect leased premises; took this to state tribunal
- **Issue:** could State law bind Cth instrumentality; can Cth choose whether or not to subject itself to State law
- **Held:** yes; State law applied of its own force to DHA
 - **State's CAN'T interfere with capacities:** nature of executive power vested in Crown
 - State law that affects executive powers of Cth/singles out Cth for special treatment
 - **Brennen CJ:** if burden on enjoyment of **Cth prerogative**, it's invalid under **s 61**, if during on enjoyment of **statutory power**, it'd be invalid under **s 109**

States CAN interfere with exercise of those capacities: legislation which assumes those capacities and merely seeks to regulate activities in which Crown may choose to engage in exercise of those powers