

WEEK 7 INCONSISTENCY BETWEEN FEDERAL AND STATE LAWS

1. ss 51, 52, 106 and 107 Constitution all allow for federal and State legislative powers (i.e. ss 106 and 107 allow for States to continue to legislate for s51)
2. s 109 Constitution states that:
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.
 - a. 'Law' includes Statutes/Acts passed by the Commonwealth parliament or a State parliament, Regulations and subordinate legislation, but not administrative orders or directions, Industrial arbitration awards (unless given force of law by statute), and common law
 - b. 'Invalidity' to the extent of the inconsistency:
 - i. only those aspects of a state law that are inconsistent are 'inoperative', the other aspects of the State law will continue to operate
 - ii. Upon repeal/constitutional invalidity of the federal law, the state law 'revives' (University of Wollongong)
3. 'Inconsistency' (apply all 3 tests – if 1 fails = inconsistent)
 - a. Direct inconsistency
 - i. Conflict of duties (PHASE 1 (1903 – 1920))
 - Arises when a state law imposes a duty, and the federal law imposes an inconsistent duty
 - Ask: Is it possible to obey both laws at once?

	<i>Australian Boot Trade Employees Federation v Whybrow (1910)</i>
Facts:	<ul style="list-style-type: none">Commonwealth industrial award (given the force of 'law' by federal statute) requiring employees in the boot trade to be paid a minimum wage of 1 shilling, 11/2 pence per hourVictorian law requiring minimum wage of 1 shilling per hour
Held:	<ul style="list-style-type: none">It is possible to obey both laws, by paying 1 shilling, 11/2 pence per hour (meeting the higher minimum wage - obeys both minimum wages)There is no 'conflict of duties' – Victorian law continues to operate (Commonwealth law operates as well)

	<i>R v Licensing Court of Brisbane; Ex parte Daniell (1920)</i>
Facts:	<ul style="list-style-type: none">Federal law prohibited the holding of a vote or referendum of voters of a State on a day appointed for voting in a federal electionQld law required a State referendum to be held on the same day as a particular federal election
Held:	<ul style="list-style-type: none">Qld electoral officials could not obey both lawsThere was a conflict of duties and therefore a direct inconsistency

- ii. Modification of rights
 - ASK: does the state law in some way disturb, alter, eradicate, inconsistent with a right conferred by the Commonwealth? State immunity from federal laws revived, and revised

WEEK 10 FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE

1. Does it impose a burden on **interstate trade and commerce**?
 - **Yes: *Cole v Whitfield* (crayfish); *Bath v Alston Holdings* (tobacco fee); *Castlemaine Tooheys* (beer bottles); *Betfair v WA* (betting); *Betfair v NSW* (fees on turnovers)**
2. Is burden **discriminatory** (i.e. singles out out-of-state products/manufactures/retails and imposes on them burden that it does not impose on G&S provided by in-state retailers/manufacturers) – compare ***Cole*** and ***Bath***
 - a. **Identify what the discrimen in the law is** (e.g. packaging)
 - b. **On the face on the law** (more likely to be struck down)
 - i. **Yes: *Bath v Alston Holdings***
 - ii. **No: *Cole v Whitfield*; *Betfair v WA*** (not on its face anyways)
 - c. **As a matter of practical operation and effect**
 - i. **Yes: *Castlemaine Tooheys*; *Betfair v WA***
3. Is it a **protectionist burden on interstate trade** (not a *particular trader*) (does it give in-state manufactures an in-state advantage)
 - **No: *Cole v Whitfield*; *Betfair v NSW***
 - **Yes: *Bath v Alston Holdings*; *Castlemaine Tooheys*; *Betfair v WA***
4. But even if all 3 are satisfied – it may be valid if it is **pursuing a legitimate objective**?
 - **Yes: *Cole v Whitfield*** (protection and conservation of an important and valuable resource); ***Castlemaine Tooheys*** (litter control + energy and resource conservation)
 - **No: *Betfair v WA*** (loss of state revenue)
 - **Whether legitimate, may depend on expert evidence**
5. in a **proportionate manner**?
 - **Yes: *Cole v Whitfield***
 - **No: *Castlemaine Tooheys*; *Betfair v WA*** (test of 'reasonable necessity')

In deciding proportionality, ***Castlemaine Tooheys*** required an analysis of suitability/rational connection and necessity (subsumed under the rubric of reasonable necessity/appropriate and adapted). There is also a sub-requirement of adequacy in the balance as a possible further step in the analysis, post-***Palmer*** (although this has not been confirmed by an absolute HCA majority – only 3 judges).

Legitimate objectives and proportionality:

- ***Castlemaine Tooheys*: Freedom interstate trade must be balanced against the power of each State to make laws for the well-being of its people**
- States are **entitled to make laws necessary or appropriate and adapted to the protection of the people of the State** from a real danger or threat to their well-being

WEEK 11 FREEDOM OF RELIGION

1. 116. Commonwealth not to legislate in respect of religion

The Commonwealth shall not make any law for **establishing any religion**, or for **imposing any religious observance**, or for **prohibiting the free exercise of any religion**, and **no religious test** shall be required as a qualification for any office or public trust under the Commonwealth.

2. Commonwealth, states and territories?

- a. **s 116 binds the Commonwealth** (this is on its face) (law will be void, invalid, and of no operation if it does breach it)
 - i. **Legislation: shall not make 'any law'**
 - ii. **Executive and administrative action:** indirect application to executive actions: Commonwealth legislation cannot authorise executive actions that would contravene **s116: Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association (1987)**, Jackson J
- b. **s 116 does not bind the States: Grace Bible Church v Reedman (1984)**
 - i. **Constitution Act 1934 (Tas) s 46:** Not 'entrenched' – can be avoided by ordinary statute legislating in a way that contradicts the language of the Constitution
 - ii. **Human Rights Act 2019 (Qld)** (and Vic and Act Charter of Rights and Freedoms)
 - o Freedom of thought, conscience, religion and belief (**s 20**)
- c. **s 116 probably applies to territory legislation: Kruger v Commonwealth (1997)** because of **s122 Constitution** (Government of territories)

3. The High Court has defined religion in the **Scientology Case (1983)**.

- a. According to a specific criteria, **Mason ACJ** and **Brennan J** defined religion as a **belief in a supernatural being**, thing or principle and **acceptance of canons of conduct** giving effect to that belief.
 - b. According to a general indicia, **Wilson** and **Deane JJ** were of the view that religion included **belief in the supernatural**, ideas that **relate** to the nature and place of humanity, **codes of conduct** or **participation** in religious practices and **self-identified** religious group or groups.
 - c. **Murphy J** adopted a self-definition approach, wherein the definition includes any group which **claims to be religious** and offers a way to find meaning and purpose in life.
- The High Court accepted that **Jehovah's witnesses** is a religion, and Church of **Scientology** (a religious system based on the seeking of self-knowledge and spiritual fulfilment through graded courses of study and training) is a religion – hence, there is a **degree of fluidity here**

4. Freedom of religion – **Section 116 is purposive**: was the law enacted FOR (**State Aid Case**)

- a. **Establishing any religion?**
 - ✓ Establishment of a state/national church, or 'religion as a national institution' (**State Aid Case**)
 - ✓ Giving preference to one religion/church over other (**State Aid Case**)
 - o E.g. confer a 'monopoly in religious marriages in favour of one particular denomination' (**Nelson v Fish**)
 - ✗ Non-discriminatory state support/sponsor for religious organisation (**State Aid Case**)
- b. **Imposing any religious observance?**
- c. **Prohibiting the free exercise of any religion?**
 - ✗ Imposing compulsory military training with non-combatant duties (**Krygger v Williams**)
 - ✗ Deporting Imam associated with terrorists (**Lebanese Moslem Association**)
 - ✗ Allowing Cth to dissolve and confiscate property of 'subversive (rebellious) associations' had purpose of protecting the existence of the community, (**Jehovah's Witnesses**)
 - ✗ enabled the removal of Aboriginal children had purpose of protecting child welfare (**Kruger v Commonwealth**)

Seminar Question

Part A

1) What the HC has said religion is?

- We are dealing with 'religion' –
 - **Bible, Quran**, (they are recognised as religion – they believe in supernatural being)
 - but there are some strains of **Buddhism** that do not believe in a supernatural being
 - 'supernatural principle' may be satisfied in Buddhism
- **Bertrand Russell's *A Free Man's Worship*** (atheist) – his book suggests a quasi-religious nature of his thinking (anti-religion)
 - To the extent **s116** protects the freedom of religion, does it protect Dr Hugh Manest?
 - Borderline
- HC accepted **Jehovah's witnesses** is a religion, and Church of **Scientology** (a religious system based on the seeking of self-knowledge and spiritual fulfilment through graded courses of study and training) is a religion
- There is a **degree of fluidity here** – apply those definitions by the judges in **Scientology Case**

2) What has the court said about the free exercise of religion, establishment of religion:

Establishment of religion

Is the ASED and ABC establishing religion?

- the ABC in the **broadcasting** and ASED in **relaying** these statements, is **analogous to funding a religious organisation** (**State Aid Case**) (by providing support to broadcast astronauts' statement) – which is **not unconstitutional**
- **Not unconstitutional for merely relaying some event that has some religious content**
 - But the astronauts chose that particular text from that particular religion – this is a weak argument that there is a preference to give rise to establishment of religion
 - (I think) they did not give preference to one religion over another (which could constitute establishing religion and hence unconstitutional - **Stephen J**)
 - **Plus, there are 2 different texts read from 2 different religions**
- **Unlikely that** ASED and ABC, in relaying and broadcasting, did it for the purpose of establishing a religion

3) recognise whether statutes and executive action authorised by statute is constitutional

- Nothing that suggests the statutes themselves are for establishing religion

Part B

Legislation

Section 6 of the Act provides that a **Commonwealth officer or employee must not, while performing their duties, communicate any matter that advocates a political opinion or policy (other than official government policy), religious belief or personal opinion.**

- **Limited to when they are performing their duties** (more arguable that it is not interfering with religion)
- Can argue that the Act is probably constitutional (does not breach **s116**) because of this limitation, and covers **political, religious and personal opinions**
- It would be very different if the Act controlled when the employees can do in their own time

It must be the purpose of the law to establish religion

- However, **Gaudron J in *Kruger v Commonwealth*** does say that a law can harbour more than 1 purpose, and it is sufficient if the practical effect of the law prevents the exercise of the practise

WEEK 12 IMPLIED FREEDOM OF POLITICAL COMMUNICATION

Key questions

1. What is the **basis** for the **implied freedom of political communication**?
 - i. **representative government**, based only on the **text and structure of the Constitution** (**Lange**; **McHugh J in Coleman v Power**)
2. What is the **scope** of the freedom?
 - i. **Binds all levels of government: Commonwealth, States & Territories** (**Lange**)
 - ii. **Applies to the discussion of politics at all levels of government**, including **international politics** (**Lange**)
 - a. **What is protected?**
 - b. Political vs non-political speech? (**Levy v Victoria**; **Unions NSW** – needs relationship to federal political matters when at State level)
 - c. Use of words or use of symbolic actions? (**Levy v Victoria**)
3. When can the freedom be **limited**?
 - d. No right can be absolute – the court has to develop ways of working out how to determine the limits
 - e. What guidance does the **Constitution** give to determine where to draw the line, particularly where this freedom is only an inference?
4. Does freedom of political communication **mean a right to free speech**?
 - a. Is it a right that individual has, or to maintain a system where people can elect with information necessary?
5. How does the freedom relate to **other possible freedoms or rights**?
 - b. Does it imply other rights like freedom of assembly, association, etc.?

0. Was there political communication? NO & YES

Clubb v Edwards (2019)	Preston v Avery (2019)
<ul style="list-style-type: none"> Clubb did not engage in political communication (she was offering support) <ul style="list-style-type: none"> The implied freedom could not protect her Minority (Gageler, Gordon, Edelman JJ): inappropriate to consider whether the law contravened the implied freedom Majority (Keifel CJ, Bell & Keane JJ, Nettle J): it is appropriate to assess whether the law contravened the implied freedom (even if it could not help Clubb) 	<ul style="list-style-type: none"> Preston did engage in political communication Protesting by its nature is political communication <p>Plurality: Keifel CJ, Bell & Keane JJ</p> <p><i>It might be said that (1) the case ... [against the Tasmanian law] is stronger ... because [it] is directed squarely at what is a familiar form of political communication (protesting), ... (2) [it] does not articulate the objects that justify its intrusion on the implied freedom, and ... (3) [it] does not require a potential to cause distress or anxiety. (4) It might ... be said that the Victorian legislation is an example of an obvious and compelling alternative measure less intrusive upon the implied freedom</i></p>

1. Does the law **effectively burden** the freedom in its **terms, operation or effect**? YES

Clubb v Edwards (2019)	Preston v Avery (2019)
<ul style="list-style-type: none"> The law burdened political communication because it prohibited communication about abortion, some of which will be political Even though Clubb's own communication was not political, the law will have the same effect of burden as someone else who would have a political message to convey 	<ul style="list-style-type: none"> The law burdened political communication because it was directed at protesting