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Topic A: Introduction, Constitutional Interpretation and Trade & Commerce Power

Constitutional Interpretation

Amalgamated Society of Engineers v Adelaide Steamship 1920	
Facts	• Sawmill in WA was run by the WA government, and employed Engineers. • Cth has head of power to make laws with respect to 'conciliation and arbitration.' Passed the *Commonwealth Conciliation and Arbitration Act 1904* including minimum employment Awards. • A dispute arose between WA Minister for Trade and an Engineers Union. Union lodged a claim against WA Minister, seeking to apply the Commonwealth law against WA State
Question	Did the conciliation and arbitration power allow the Commonwealth to pass legislation giving them the ability to bind States as parties in disputes?

Held	**Held:** Yes, the Act and award could bind States.
	
	Legalism
	• **Main principle**: Constitution should be read naturally in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law and the statute which preceded it
	• Therefore, in system of political accountability, judges are subject to the law of the Constitution and must apply the ordinary and natural meaning of the text.
	  ○ Cannot read text by reference to considerations that do not have a basis in the text and structure of the Constitution
	
	• Here, the term 'industrial disputes' in the Constitution is broad and there is no express exception made for when States are parties. No prohibition on Cth power regarding States should be implied by judges.
	
	Constitutional System
	• When interpreting the Constitution, we should consider its operation within the Constitutional system as a whole
	• 2 core features of Constitutional system should frame interpretation:
	  1. Australia is an indivisible Federation, and the Commonwealth Parliament is the sovereign of all Australian people.
	  2. Principles of responsible government – the Constitution was created to protect from the misuse of power by ensuring ministers are responsible to the parliament
	
	• In this system, the national parliament represents the people and political accountability provides the ordinary constitutional means of constraining

Clyde Engineering Co ltd v Cowburn 1926	

Facts	• **Commonwealth Award:**
	  ○ Stipulated that the ordinary working week (ie full time work) is 48 hours
	  ○ Any person who works under 48 hours should lose part of their wages for non-attendance
	• **NSW Legislation:** *Forty-Four Hours Week Act 1925 (NSW):*
	  ○ Ordinary working hours should not exceed 44 hours a week
	  ○ Stipulated that workers under the Commonwealth award should be given full wages when they work for 44 hours
	• Cowburn worked 44 hours a week. His employer, Clyde Engineering, deducted an amount of his wages (following the Commonwealth Award). Cowburn claimed that this was a violation of his rights under the State law.

Question	Was the NSW law inconsistent?

Held	**Held:** Yes
	
	Knox CJ and Gavan J: Denial of Rights
	• The impossibility of obedience test is not sufficient or appropriate in every case – there are instances where two enactments may be inconsistent even though obedience with both is possible
	• Statutes do not only create obligations, they can also confer rights
	• <u>Principle:</u> One statute is inconsistent with another when it takes away a right conferred by the other, even though the right can be abandoned without disobeying the statute which conferred it
	• Here, the Commonwealth law did not prohibit employers from paying full wages for 44-hour weeks. It was therefore possible to follow both laws (by employers choosing not to deduct wages for workers who only worked 44 hours).
	  ○ However, to follow both laws like this would interfere with the operation of rights of employers under the Commonwealth law
	  ○ Was therefore inconsistent
	
	Isaacs J: Indirect Inconsistency
	• The idea that inconsistency requires impossibility of following both laws does not make sense, as one can simply not act on what is declared to be unlawful (ie following the act which prohibits rather than allows the act).
	• Vital question should be: Was the second Act (on its true construction) intended to cover the whole ground, and therefore to supersede the first?
	  ○ If so, giving any operative effect to the first Act would be inconsistent with the intention of the second Act, which is to entirely exclude the first
	• <u>Principle:</u> Thus if a legislature expressly or impliedly evinces an intention to cover the whole field, this is conclusive of inconsistency where another legislature assumed to enter to any extent upon that same field

Koowarta v Bjelke-Peterson 1982	
Facts	• Minister for Lands in Queensland refused to grant consent for the transfer of a lease of land to the Aboriginal Land Fund Commission, despite the owners of the land having already entered into a contract with the Commission. • Koowarta (on behalf of Commission) sought to invoke *Racial Discrimination Act (Cth)*, which prohibited racial discrimination of any form • Queensland challenged the validity of the Commonwealth Act
Question	Does a treaty need to be on a matter of international concern to enliven the External Affairs power?
Held	**Held:** Majority held legislation was valid under External Affairs power (narrow – 4:3) • There is technically no majority position re the law, but Stephen's is closest to ratio (because he is only one who was in majority re both law and outcome) • **Broad Approach: Mason, Murphy and Brennan** o Commonwealth has competence to legislate in order to implement treaties into domestic law, whether or not the subject of the treaty was a matter of international significance, so long as it was a bona fide treaty o The existence of the treaty itself satisfies requirements for external affairs power – treaties are agreements with other nationals and are therefore necessarily of international concern. There is no additional requirement for the subject of the treaty to be of international concern. • **Narrow Approach: Gibbs, Wilson and Aickin** o Test: A treaty can only be implemented (under external affairs power) where the subject matter being implemented was itself an external affair (ie concerned extra-territorial matters or relations with other States) o Existence of a treaty not enough. Provisions of treaty themselves must themselves have the character of an external affair. o *RDA* was therefore invalid – while a treaty existed, the subject matter of the treaty (race) was a matter of purely domestic concern. o Provisions operated entirely within Australia. Law designed to forbid discrimination by Australians against other Australians within Australia does not have required international character. • **Intermediate Approach: Stephen** o Agreed that there are some qualifications re the subject matter of the treaty (but applied lower threshold) o Test: Subject of treaty does not have to be a matter which is itself an 'external affair', but must be on a matter of international concern o Applied a lower threshold of what is to be considered as of sufficient international significance. ▪ Only requires that the matter "possesses the *capacity* to affect relations with other countries" ▪ What is of 'international concern' will depend what is generally regarded as part of the external affairs of a nation at any time – will ▪

Topic H: Freedom of Interstate Trade and Intercourse

Cole v Whitfield 1988	
Facts	• *Tasmanian Sea Fisheries Regulations* – set that crayfish could not be sold in Tasmania unless it was of a certain weight • The minimum weight requirement in Tasmania was higher than in South Australia (because it was harder for crayfish to repopulate in colder Tas waters and were thus at greater risk over over-fishing) • Mr Whitfield ran a business in Tasmania purchasing and selling crayfish. He sold crayfish which had been legally caught in South Australia, but were under the minimum weight requirements in Tasmania. He was prosecuted. • He challenged the regulations on the basis that they breached s 92
Question	Did the regulations breach s 92?

Held	**Held:** No
	
	• **Discussion of s 92**
	  ○ While it was clear that the framers of the Constitution wanted to establish free trade between states, this does not mean that they intended for there to never be any legislation which burdens this freedom
	  ○ There may be situations where it is necessary for there to be limitations placed on trade – in these situations, such laws will not violate s 92
	  ○ S 92 should be construed as concerned with precluding <u>particular types of burdens</u> – ie burdens which are discriminatory and protectionist
	
	• **Test:** A law will only be in breach of s 92 if it is:
	  a. Discriminatory: Laws which discriminates against interstate trade by subjecting that trade to a disability or disadvantage (either by legal effect or practical operation), <u>and</u>
	  b. Protectionist: Does so in order to provide an advantage to intrastate trade/markets (either in purpose or effect)
	
	• A law which has a discriminatory effect but does so for the real object of a norm of commercial conduct (ie to facilitate commerce) will not ordinarily be grounded in protectionism and will not be prohibited by s 92
	
	• **The regulation did not breach s 92**
	  ○ **Does create a burden**
	  ▪ While the terms of the regulation does not discriminate between local and inter-state trade, in effect it does burden inter-state trade
	  ▪ Limits the size of crayfish which could be sold or possessed in Tasmania – burdens the interstate trade of crayfish caught in South Australia
	  ○ **However, not discriminatory or protectionist**
	  ▪ Prohibition applied to crayfish caught in both Tasmania and South Australia equally
	  ▪ The purpose of this was to protect an important and valuable natural resource in Tasmania – not trying to get a competitive advantage
	  ▪ It was impossible to tell whether crayfish being sold was from Tasmania or South Australia – so needed to have general limitations on all crayfish being sold in Tas in order to enforce the prohibition. Was necessary for legitimate purpose.