

LAWS2011 Federal Constitutional Law

Study Notes — Heads of Power, Inconsistency and Constitutional Limitations

Updated for Semester 1, 2026 · Law stated as at October 2026

Colour key

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd

Case names — plum, italics

s 109 of the Constitution

Legislation — navy

an excise is an inland tax on goods

Key principles — teal

Metwally has been overruled

Critical points — deep red, soft rose tint

Structure follows the LAWS2011/LAWS5011 Learning Guide (Semester 1, 2026). Prescribed casebook: Aroney, Murray et al, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (5th ed, 2022). Recommended: Stellios, Zines's *The High Court and the Constitution* (7th ed, 2022).

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Topic 1: Principles of Constitutional Interpretation and Characterisation; the Engineers Case; Trade and Commerce (s 51(i))

1.1 Introduction to Constitutional Interpretation

1. **Section 51 Constitution** vests legislative power in the Parliament with respect to a number of specific subjects. It is possible for government to enact legislation with respect to these **heads of power** (and only these had of powers) that are **concurrent** powers with the **states**, as state parliament have **plenary** legislation meaning they can make laws on anything to the **extent of inconsistency** (s 109 Constitution)
2. *Amalgamated Society of Engineers v Adelaide Steamship Company Ltd (1920) 28 CLR 129* was important as it recognised **textualism** as a form of **constitutional interpretation** method. The Court **rejected** two doctrines of previous constitutional interpretations: (1) implied immunity of governmental instrumentalities (e.g. Cth laws could not affect state government agencies and employees) and (2) doctrine of reserved state powers (Court limited Cth heads of power in order to reserve state legislative powers that were traditionally state powers).
 - (a) **Knox CJ, Isaacs, Rich and Starke JJ, delivered by Isaacs J** adopted a literal interpretation of the Constitution known as **textualism** or **legalism** (at [151]) which is the **dominant approach to interpretation**, where the court said “no Court has any right to narrow those limits by reason of any fear that the powers... maybe be abused” and “the meaning of the Constitution must be read it naturally in the light of the circumstances in which it was made.”
 - (b) Therefore policy and philosophical ideas were not used to influence the interpretation of the Constitution, though **sometimes** these considerations do come into influence
3. Other methods of interpretation include:
 - (a) **Originalism** (not adopted in Australia except in a very limited way) — interpreting the Constitution by reference to the intentions of the original framers of the Constitution, which may result in a conservative or narrow interpretation.
 - (i) **Exception** that this method was used was s 92 Constitution, where trade and commerce must be “absolutely free”. HCA permitted itself to examine the convention debates to clarify the definition to help it interpret it in the contemporary meaning, since “absolutely free” could mean either no trade barriers and customs, **OR**, laissez faire economics where everything is free
 - (b) **Living tree method** — interpreting the Constitution with reference to contemporary standards (however, this could result in judges using their own philosophical and political influences) to interpret the Constitution which should not be allowed since judges are not elected by the people.
4. Interpretation and Characterisation
 - (a) **Note:** Interpretation refers to the interpretation of the Constitution itself whereas, characterisation refers to the interpretation of the Statute that has been challenged for its constitutional validity
5. Purposive/Non-Purposive
 - (a) Most of the heads of power in **section 51 Constitution** are non-purposive, meaning that all the courts are simply concerned about is whether the law comes within the subject matter that is permitted
 - (b) **Exception** to this is the defence power, in that legislation must be exercised for the purposes of executing and maintaining the laws of the Commonwealth, not to punish political opponents, etc.
6. Reading Down and Severance
 - (a) Principle of **reading down** is to ensure that that the legislation can be read in such a way that might be within constitutional power
 - (b) The Courts prefer not to render an act invalid given that it emanates from Parliament which represents the will of the Australian people
 - (c) **Severance** refers to the idea that you cannot read it down so that it falls within the heads of power

- (i) You can sever in whole, a word or part of a provision **BUT** there are **LIMITS**:
- When reading down a statute and severing it, what is left must still mark sense and be consistent with the will of the parliament

1.2 Interpretation and Characterisation

1. Determine whether the relevant legislation is Commonwealth legislation, or it is NSW legislation
 - (a) If NSW legislation, then can it be invalidated through constitutional inconsistency (s 109)?
 - (b) If Cth legislation, then is it **within** the heads of power **OR incidental** to the heads of power?
2. Section **X of X legislation** purports to regulate **X** (contracts for the purchase or sale of / production of... etc.), applying characterisation methods as per *Kitto J in Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at para [6], by determining the **rights, duties, powers and privileges** which it changes, regulates or abolishes, whilst taking into account both the practical and legal applications of the law (*The Grain Pool of WA v The Commonwealth* [2000] HCA 14 at para 16 per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

1.3 Trade and Commerce (Intrastate) — Implied Incidental Power to Validate Legislation (Scenario A)

1. The subject matter here, **X Apply** which is relating to trade and commerce, comes within the terms of “**trade and commerce**” in s 51(i) *Constitution* which has been interpreted to include, but not limited to the “mutual communing, the negotiations, verbal and by correspondence, the bargain, the transport and... delivery.” (per Knox CJ, Isaacs and Stake JJ at 547 in *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530) **X Facts, argue how it is trade and commerce**
 - (a) *Dixon J in Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 381-382 defined trade and commerce as, “it covers intangibles as well as the movement of goods and persons. The supply of gas... covers communication... broadcasting... transportation, traffic, movement, transfer, interchange.”
2. As s 51(i) is a non-purposive power, the validity of the legislation, **X section of X legislation** does not depend on characterising its purposes in order to conform to any constitutional purpose (per *Dixon J in Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492 at 515-516; *Mason J in Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1 at 19-20). In this case, **X law** is seeking to **prohibit/regulate Apply facts** which falls within the power of the Commonwealth to prohibit and regulate **the subject of trade and commerce** and hence is within power (per *Mason J in Murphyores* at [19]).
 - (a) The court adopted a **dual characterisation** approach that as long as one of the characterisations of the statute comes within power, **even if it has little or no apparent relevant to trade and commerce**.
 - (i) **Facts:** In *Murphyores*, it was irrelevant that the Cth was concerned with mainly environmental factors when regulating the export of mining on Fraser Island, given that the trade and commerce head of power is non-purposive. *Murphyores* held mining leases granted by the state of Queensland. They sought permissions from the Cth minister for minerals to export minerals extracted from the sand that was mined off Fraser Island which was off the coast of Qld. Because written approval was required, the minister examined the case and informed the plaintiff that it would not make a decision on whether they could export decisions, until the minister had considered the outcome of an environmental enquiry.
3. The difficulty however here is that **X section** applies to **X facts** relating to **intrastate** trade. Intrastate trade does not directly fall within the Commonwealth legislative powers under section 51(i) of the Constitution.
4. However, the High Court has permitted the **implied incidental power** to section 51(i) to apply to intrastate aspects in very limited circumstances where it is necessary or appropriate in order to protect the interstates or export trade from **physical interference** (*Kitto J at 117 in Airlines of NSW Pty Ltd v New South Wales (No 2)* (1965) 113 CLR 54; see *Mason J in Nationwide News* regarding appropriateness), but **not** where it may

2.5 Indirect: Cover the Field

1. **General:** The mere entering of the field by the state legislation is where the inconsistency arises, where the Cth has evinced its intention, expressly or impliedly, to cover a field, that is a conclusive test of inconsistency with respect to the particular subject matter (per Isaacs J at [489] in *Clyde Engineering v Cowburn* (1926) 37 CLR 466)
 - (a) Also: "If it appears from the **terms, the nature or the subject matter** of a Federal enactment that it **was intended as a complete statement of the law** governing a particular **matter or set of rights and duties**, then for a State law to regulate or apply the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so is inconsistent." (Dixon J in *Kakariki*)
2. **Test:** 3-tier approach (*McLean*)
 - (a) **The determination of the subject matter or field regulated by the Cth, by characterisation of the legislation**
 - (i) What are the rights, duties, powers and privileges that the Cth law seeks to change, regulate or abolishes (*Fairfax Case*)
 - (ii) **Unique Case:** *Ansett v Wardley* (1980)
 - Wardley highlights the difficulties involved especially in situations where there is qualitative difference between the two laws; that is, when one law is, for example, a straightforward regulation of a particular subject matter and the other law relates to **social policy issues** such as discrimination and civil rights, which nevertheless **affect the way the former law may be applied** **OR** which may indeed be **directly inconsistent with it**.
 - **Facts:** Wardley was a woman and wanted to become the first female pilot for Ansett Airlines. But she was refused to be employed as a pilot by Ansett even though she had been employed as a pilot. She took her case to the Victorian Equal Opportunity Board which was set up under the Victorian Opportunity Act. It was found by the Board that she had been discriminated against because she was a woman, in her application to be a pilot with Ansett. The Equal Opportunity Board argued that she be so employed. Ansett was not happy with this and wanted this to be overturned. They thought the only way for this order to be overturned would be to seek to have the act that set up the equal opportunity board, to be inconsistent with the Cth airlines pilot agreement.
 - **Does it enter the field?:** Prima facie, yes, because if the Cth law is concerned with the employment and dismissal of pilot, and the state law prohibits sex discrimination, then it does enter the field of industrial relations in the sense of who can be employed and dismissed as a pilot
 - **Held by majority:** There was no inconsistency between the airlines pilots agreement and the equal opportunity act of Victoria. The majority of judges found that the **airlines agreement was not intended to cover the field** or exclude the operations of state, social policy legislation. Legislation that relates to rights and anti-discrimination so that therefore if there was a Victorian statute that dealt with matters of sex Discrimination, that was not to be held to be entering the Cth field **because it dealt with a QUALITATIVELY DIFFERENT FIELD** even though it did PRIMA FACIE entered the field (*Stephens J* ta 249)
 - (iii) **Silence** can also indicate a general irrelevance to the subject matter of that Act (*Stephen J* at 250)
 - If this is the case then there is no inconsistency
 - (b) **The determination of whether the State act intrudes into this field**
 - (i) On the facts, yes or no
 - (ii) It is not possible to determine by way of precise formula how the Court will characterise legislation, whether it will characterise it **broadly or narrowly**

- In *Noarlunga*, Fullagar J (with Dixon CJ and Kitto J agreeing) indicated that **the same subject matter** - use of premises for slaughtering stock for export — was **regulated** by Commonwealth and State legislation; that the Cth Act **intended to cover that field impliedly**; that the State Act attempted to enter that field; and, therefore the laws were inconsistent and the State Act was invalid
- (c) **The determination of whether it is possible to evince from the Cth act an intention to ‘cover the field’**
- (i) **No express intention to cover the field — implied**
- **Detailed and Comprehensive**
 - Detailed and comprehensive provisions may be one indicator of an intention to cover the field (*O’Sullivan v Noarlunga Meat*)
 - **Facts:** The extremely elaborate and detailed set of requirements relate to site, materials of construction, arrangement, dimensions, etc.
 - Similarly in *ABC v Industrial Court (SA)*, the Cth legislation was very detailed in that it dealt with all aspects of employment such as dismissal, conditions, rights and obligations
 - **Nature of the Field**
 - **“Safety, regularity and efficiency of air navigation”:** *Airlines of NSW v NSW (No 2)* (1965)
 - You could draw the conclusion that if the licensing regime in the case is concerned with the safety, regularity and efficiency of air navigation, you **could infer from that**, that you could almost suggest that you **NEED** one set of laws to which pilots and others that operate air services are subject to. There would **great risks** that would arise if there were different laws that applied to interstate and overseas flights compared to state laws
 - Dangers arise through the existence of two sets of regulations that it is suggestive that Cth intends to cover the field
 - **“Implementation of international treaty”:** *Viskauskas v Niland*
 - **Facts:** Commonwealth in its legislation was seeking to implement an international treaty. Due to the nature of this subject matter affects Australia's international obligations and relations, it is suggestive of the fact that when the Cth passes the law, it is intending to cover the field.
 - **Exception:** Go back to *Wardley* and **argue** whether there is an **implied intention to cover social policy issues**
 - If it is dealing with social issue that is qualitatively different subject matter, then it can be said that there is no inconsistency that arises (*Wardley*)
 - **Exception to the Exception:** Certain Cth act have implied intention to cover the field over some social policy laws like the Anti-Discrimination Act: *AMP v Goulden* (1986)
 - **Facts:** Anti-Discrimination Act 1977 (NSW) made it unlawful, when providing goods or services, “to discriminate against a physically handicapped person on the grounds of physical impairment... by refusing to provide them.” However the Cth *Life Insurance Act 1945* permitted registered life insurance companies to classify risk and fix premiums based on their own judgment and thus charge premiums based on people’s disabilities to price their risk
 - What is the field of the law?
 - It is life insurance and the determination of premiums on the basis of physical disabilities and health, **in order to determine risk for insurance purposes!**

Topic 3: External Affairs (s 51(xxix))

3.1 Interpretation and Characterisation

1. Section **X of X legislation** purports to regulate **X** (i.e. explain subject matter that it purports to regulate via external affair power etc.), applying characterisation methods as per **Kitto J** in *Fairfax v Federal Commissioner of Taxation* (1965) at [6], by determining the **rights, duties, powers and privileges** which it changes, regulates or abolishes, whilst taking into account both the practical and legal applications of the law (*Grain Pool of WA v Commonwealth* [2000] at [16]).

3.2 Transformation Principle

1. Pursuant to the external affairs power in s 51(xxix) *Constitution*, the Commonwealth has legislative competence to make law in order to implement international law through the “**transformation**” theory. This means that international law developments will only have a direct effect only in Australia when Parliament **incorporates the law into domestic law through legislation** (**Mason CJ and Deane J** in *Teoh* at 286-287; **Gibbs CJ** in *Koowarta v Bjelke-Petersen* at 193).
2. As s 51(xxix) is a non-purposive power, the validity of the legislation, **X section of X legislation** does not depend on characterising its purposes in order to conform to any constitutional purpose in order to be valid (at 487 in *Industrial Relations Act Case*).

3.3 Legislation based on International Relations and Geographical Externality

1. **Any external/foreign is ok:** The Commonwealth may validly enact legislation under the external affairs power if the matter concerns, “**places, persons, matters or things physically external to Australia...**” (**Dawson J** in *Polyukovich v Commonwealth (the War Crimes Act Case)* at 632)
 - (a) External = precise and unqualified; Affairs = imprecise, **BUT** over places, persons, matter etc.
2. **Despite uncertainty, Reiterated by Industrial Relations:** Despite the uncertainty from Brennan and Toohey JJ dissenting judgments (at 550-551, 654 in *the War Crimes Act Case*) and the doubts entertained by Kirby J, Callinan and Heydon JJ in *XYZ v Commonwealth* emphasising a requirement for a “nexus”, the **broader view prevails** as per the *Industrial Relations Act Case* (at 485) and in *Horta v Commonwealth* (at 194-195) meaning that **all matters affecting or touching Australia are prima facie** within the external affairs power. **X Apply.**
 - (a) **Even international legal persons:** Brennan J in *Koowarta v Bjelke-Petersen* (1982) adopted this approach, though provided an extension to the *Sharkey* principle to include relations with “international persons” such as the UN and other international governmental organisations.
3. **Example cases:**
 - (a) *XYZ v Commonwealth*: Legislation rendering an offence for an Australian citizen or resident, while outside Australia, to engage (or attempt to) in sexual intercourse with minors **held to be valid law**.
 - (b) *Polyukovich v Commonwealth (the War Crimes Act Case)*: Legislation provided for trial and punishment of Australian citizens or residents whom have committed “war crimes” during WWII was **held to be valid**.
 - (c) *Horta v Commonwealth*: Seabed was external to Australia and hence legislation enacted pursuant to bilateral treaty between Australia and Indonesia **was valid**.
 - (d) In *Plaintiff M47/2012*, Gummow J stated that the external affairs power **supported a law** dealing with the **movement of persons between Australia and places physically external to Australia** and this was the case independently on the implementation of any treaty by an Australian law imposing obligations upon Australia with respect to non-citizens.

Topic 6: Taxation (ss 51(ii), 55, 90) and Grants (s 96)

6.1 Interpretation and Characterisation

1. Section X of X legislation purports to regulate X (i.e. explain subject matter and how it links to taxation power etc.), applying characterisation methods as per *Kitto J* in *Fairfax v Federal Commissioner of Taxation* (1965) at [6], by determining the rights, duties, powers and privileges which it changes, regulates or abolishes, whilst taking into account both the practical and legal applications of the law (*Grain Pool of WA v Commonwealth* [2000] at [16]).

6.2 Taxation Head of Power

1. **Head of Power:** The parliament shall, subject to this Constitution, have powers to make laws... with respect to taxation; but so as not to discriminate between States or parts of States (s 51(ii) Constitution)
 - (a) **Section 81 Constitution — Consolidated Revenue Fund:** All revenues or money raised or received by the Executive Government of the Commonwealth shall form on Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution...
 - (b) **Section 83 Constitution — Money to be Appropriated by Law:** No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.
2. **Proposed Laws only from HoR (in bill stage):** Proposed law appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate... The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government... Senate may not amend, but may request amendment or missing of items. House of Representatives may, if it thinks fit, to make just amendments (s 53 Constitution). The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal ONLY with such appropriation (s 54 Constitution).
 - (a) Purpose is saying that when budget bill is passed, there has to be nothing else that detracts from what the bill is doing. It cannot deal with anything else.

6.3 Imposition of Taxes — Tacking Issue & Resolution

1. **Imposing Tax/Tacking Issues:** Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect (s 55 Constitution).
 - (a) **Note:** Not all laws that are with respect to taxation will be laws that actually impose taxation.
 - (b) **“Laws imposing taxation”:**
 - (i) The majority in *R v Dymond* did not hold the following as ‘imposition’ of taxation, but there is uncertainty from the *Permanent Trustee Australia v Commissioner of State Revenue* where obiter indicated that the follow could be regarded as laws imposing taxation, though did not override *Dymond*.
 - Provisions for administration and machinery
 - Appointment and powers and duties of the Commissioner of taxation
 - Making of returns and assessments
 - Determination of question of laws and fact relating to liability
 - Collection and recovery of tax
 - (c) **Amending statute invalid if existing statute free:** Court took a pragmatic approach in *Air Caledonie v Commonwealth* to invalidate the amending act rather than the existing statute given that the existing statute did not have laws imposing any taxes, but solely focused on migrational issues.

- (i) It was held that the 1987 Amendment s 34A providing for a “fee for immigration cleanse” was not a fee for service but a law imposing tax.
- (ii) Irrespective of whether the amount payable was commensurate to the cost of maintaining an immigration clearance service.

6.4 Definition of Tax

1. **Definition:** “A compulsory exaction of money by a public authority for public purposes, enforceable by law, and... not a payment for services rendered.” (*Matthews v Chicory Marketing Board* (per Latham CJ at 276) quoted in *Air Caledonie v Commonwealth* (at 467))
 - (a) **Compulsory:** It has to be compulsory

Topic 7: Defence (s 51(vi)) and the Doctrine in the Communist Party Case

7.1 Interpretation and Characterisation

1. Section X of X legislation purports to regulate X (i.e. explain subject matter etc.), applying characterisation methods as per *Kitto J* in *Fairfax v Federal Commissioner of Taxation* (1965) at [6], by determining the rights, duties, powers and privileges which it changes, regulates or abolishes, whilst taking into account both the practical and legal applications of the law (*Grain Pool of WA v Commonwealth* [2000] at [16]).

7.2 Nature

1. **Nature of Power:** Under s 51(vi) Constitution, Parliament shall subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth. It is noted however that “naval” and “military” are not words of limitation and that defence means something more than the narrow interpretation of those words (at 440 per Griffith CJ in *Farey v Burvett* (1916)).

7.3 Judicial Notice of War

1. **Judicial Notice of War:** The Court can assess the seriousness of the national threat and determine the relevant “constitutional fact” about the existence and character of hostilities or threats, and accept them on judicial notice, unless there are some possible doubts. (Dixon J in *Stenhouse v Coleman* (1944) at 471; *Communist Party* at 267). X Apply the facts...

7.4 Paramount Nature of Power

1. **Paramount nature of the power:** The power to make laws with respect to defence is a paramount power and will be superior to any reserved State rights (at 441 in *Farey v Burvett* (1916)). X Apply the facts...

7.5 Purposive Power

1. **Purposive:** The defence power is a **purposive power** and cannot be used for any other purpose than to ‘execute and maintain the laws of the Commonwealth’. The ambit of the power is thus elastic and its variable nature corresponds to the intensity of a particular state of affairs relevant to defence and national security. As national security is increasingly threatened, the scope of the power increases. As the national emergency recedes, the scope of the power similarly contracts and hence it is a power which “waxes and wanes” (*Communist Party Case*).
 - (a) **Narrowest:** Profound Peace; **Broader:** Preparation for war; **Broadest:** Actual War; **Narrowing:** Post-war period
2. **Test:** “Even in wartime, the High Court has insisted that it must be for a court to determine the relevance of legislation to the object of defence. The test is whether the measure can reasonably be regarded as a means toward attaining an object which is connected with defence: *Marcus Clark and Co Ltd v Commonwealth (the Capital Issues Case)* (1952) at 256.
3. **Not concerned with effectiveness:** The court is not concerned with the actual wisdom or effectiveness of the measure (*Marcus Clark and Co Ltd v Commonwealth (the Capital Issues Case)* (1952) at 256)

Topic 10: Intergovernmental Immunities

10.1 Preliminary

1. Establish head of power and whether it comes within power.
2. The question is whether **X Legislation Y Section** is valid? **Apply the facts.** Following the demise of the doctrine post-*Engineers*, the Commonwealth generally cannot bind the States in areas where it has no head of power. The Commonwealth can also not exercise legislative power in a way which breaches one of the express or implied prohibitions on Commonwealth power, such as s 116 *Constitution* or the implied guarantee of political communication.
 - (a) Section 99 of the Constitution refers to the situation of the Commonwealth not giving preference to any of the States.
 - (b) Section 106 of the Constitution, whereby State constitutions shall remain intact, but applies to Constitutions.

10.2 Intergovernmental Immunity Test — Breach of Structural Integrity (and Discrimination)

1. **Test:** Two major limitations on the Commonwealth Parliament's ability to enact legislation have been recognised under these two main principles, noting however that the "discrimination" prohibition has been **collapsed** into the general "structural integrity" doctrine or prohibition in both the *Austin v Commonwealth* and *State Supreme Court Judges Superannuation Case*:
 - (a) **The Maintenance of the Structural Integrity of the States:** The Commonwealth cannot validly enact a law of general application **which fundamentally impedes the States from carrying out essential government functions**, or which **prevents the State from continuing to function** as a government.
 - (i) **Examples:**
 - **YES:** In *State Supreme Court Judges Superannuation Case*: The Commonwealth Act was interfering with **remuneration** of high level state employees in a way that undermines the structural integrity of the State, its ability to function as such — it impairs the State's ability to employ the best people in the most important and high profile role of Judges. Because the Commonwealth is **interfering with the State to employ the best people and offer them the appropriate remuneration**, it is effecting the ability of the State to exercise essential functions and to operate as a government. In this respect, this leads to the **invalidity** of the legislation.
 - **YES:** In *Melbourne Corporation v Commonwealth (the State Banking Case) (1947)*, legislation under s 48 of the *Banking Act 1945* (Cth) provided that a private bank could not engage in business with a State government, or government authority, without the consent of the Federal Treasurer. This was held to severely limit **independence of states to engage** in banking, thus **severely impairing the capacity of the State to function** as a government.
 - **YES Example:** The ability of members of parliament to represent their constituency in Parliament and for Parliament to operate in the Westminster system, it is critical that MPs be able to speak in Parliament be able to enjoy the benefits of parliamentary privilege and that it is essential function of Parliament to be able to conduct itself in that way in order for the State to function as a government. Therefore, any attempt to gag a member of Parliament speaking in Parliament would be problematic for structural integrity.
 - **CONDITIONS:** In *Australian Education Union* — mandatory for IRC to her dispute from State where there was no State arbitrator: The issue was whether a Cth **resolution of State industrial disputes** under a federal award **impair the critical function of a State** in