FEDERAL CONSTITUTIONAL LAW 2016

The University of Sydney

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INTERPRETATION & CHARACTERISATION

Interpretation

Basic Principles

i. Constitution empowers Cth to pass laws with respect to 'heads of power'.
ii. These laws are effective across the whole of Australia.
iii. Most Cth powers are **concurrent** – they can be exercised by States as well.
iv. In such a situation, the Cth laws prevail over State laws when inconsistent **s 109**.
v. The Cth has some **exclusive** powers – **s 90**. If a State tries to pass a law in such a field, it is invalid.
vi. States have their own Constitutions – recognised under **s 106**.
vii. Cth can make grants to the States to convince them to pass laws in which it does not have the power to do itself.
viii. The States may hand over or refer specific powers to the Commonwealth – **s51** (xxxvii).

The Engineers Case

The judgment saw the Court move towards a method of interpretation that would hold sway for many decades, that of **literal interpretation**.

The judgment saw the Cth assume greater power over the states through the **rejection of the reserved State powers and implied immunity doctrines**. States had previously relied upon what was known as the '*D'Emden v Pedder* [1904] rule'. This justified the States *"immunity from Commonwealth control in respect of State trading".*

Outcomes of *Engineers*

1. Literal Interpretation of the Constitution.
2. Greater Commonwealth Power (i.e. rejection of reserved State powers and implied immunity doctrines).
3. Rejection of US authorities in Australian jurisprudence.

Approaches

Originalism

The decision in *Cole v Whitfield* opened the way for an approach to Constitutional interpretation known as '**originalism'**. The HC however made clear that it would not accept 'intentional originalism' which sought to establish subjective intentions of the framers. Rather it would accept 'textual originalism' of the kind advocated by Justice Scalia of the SCOTUS. But this was stated as wrong in 2006:

"To pursue the identification of what is said to be the framers' intention, much more often than not, is to pursue a mirage" – ***Workchoices Case*** **(2006)**

Textualism

Textualism or 'textual originalism' focuses on the constitutional text with an attempt to establish the meaning that its language would have had according to the general understandings of the time. This is distinct from

'intentional originalism' which attempts to discover the subjective intentions of its authors.

Incremental Accommodation

This approach 'accommodates' later socio-economic and scientific developments, without abandoning the insistence that the language of the Constitution must be understood according to the meaning it had in 1900.

Key example of s 51(v) which authorises the power to make laws with respect to "postal, telegraphic, telephonic and other like services":

- Extended to radio, in *R v Brislan; Ex parte Williams* (1935)
- Extended to television, in *Jones v Commonwealth (No 2)* (1965)
- Extended to laws regulating the terms and conditions upon which such services are provided, in *Bayside City Council v Telstra Corporation Ltd* (2004)

Thus, "other like services" was used because the framers of the Constitution had knowledge of scientific experiments in Europe in the late 19th century, so that it was explicitly designed to accommodate future scientific developments.

Connotation and Denotation

The connotation is the central of core meaning at the time of framing; the criteria by which things can be identified; the denotation is the meaning the words may bear today; the identification of the things which come within it.

Thus, the connotation of a constitutional provision remains fixed at its 1900 meaning falling within [the] connotation come into existence or become known" – ***Street v Qld Bar*** **(1989)**

Characterisation

The process of determining whether a law falls within a head of power by ascertaining the subject matter and the purpose of the law.

This is ascertained through looking at the "Actual operation of the law in question in creating, changing, regulating or abolishing rights, duties, powers or privileges" – **Latham CJ in *Bank of NSW* (1948).**

You never base a characterisation on the act by its title or what it purports in an introduction to say it does.

"Two distinct and separate questions: 1) what is the scope of the power; and 2) is the law in truth a law with respect to the subject matter of the power, once its scope has been ascertained? Charaterisation, the name given to the process of arriving at an answer to the second question, cannot begin until the first question is answered" – ***Tasmanian Dams Case*** **(1983)**

Dual Characterisation

"Once it appears that a federal law has an actual and immediate operation within a field assigned to the Cth as a subject of legislative power, that is enough" – ***Melbourne Corporation*** **(1965)**

It is irrelevant which of these subjects is the motive behind the legislation – ***Murphyores*** **(1976)**

It doesn't matter whether you can characterise a law with respect to a subject that is beyond power (ultra vires), as long as you can also characterise the law as being with respect to a subject that is in power (intra vires).

In *Murphyores,* Cth passed law under the trade and commerce power to regulate sand mining on Fraser Island. Argument was that the law was in fact and environmental law and *ultra vires*. But court found that it is characterisable as a trade and commerce power, and thus was *intra vires* – despite the fact that it did have an environmental impact.

Subject v Purpose Powers

The High Court tends to divide the heads of power listed in **s 51** and **s 52** of the Constitution into two categories – ***Stenhouse v Coleman*** **(1944)**

1. Subject Matter – *Sufficient Connection Test*
2. Purpose Power – *Proportionality Test*

What this means is that the law must either have the required subject matter outlined by the head of power, or a purpose meeting the type of head of power.

Almost all heads of power are conceived as delineating a subject matter, with purpose powers being the exception. Recognised Purpose Powers are s 51(vi) 'defence' and s 51(xxix) 'external affairs'.

What is different about a **purpose power** such as defense is only that the purpose is coextensive with the power itself; that is, what the Commonwealth is authorized to do is to pursue the specified purpose > In doing so its legislation will be valid if it can be reasonably considered to be conductive to that purpose.

Subject Matter Powers: Sufficient Connection

There must be ascertainment of a sufficient connection between the law and a head of power.

> The connection must be close – ***Gibbs J*** **in** ***Lansell (1964); Russell (1976)***

McHugh J outlined two steps in this test of 'sufficient connection' – ***Dingian*** **(1995)**

1. Determination of the character of the law with reference to "the rights, powers, liabilities, duties and privileges which it creates"
2. Judgment of whether the law so characterised is connected to the head of power– "if a connection exists between the law and a s 51 head of power, the law will be 'with respect to' that head of power unless the connection is "so insubstantial, tenuous or distant" – **Dixon J in** ***Melbourne Corporation*** **(1947)**

Approach affirmed/expanded – ***Grainpool*** **(2000)**

Outlined five steps in the test of 'sufficient connection':

1. Construing the constitutional text with all the generality which the words admit

2. Determination of the character of the law with reference to "the rights, powers, liabilities, duties and privileges which it creates"
3. Examination of the practical and legal operation of the law to determine if there is a "sufficient connection" between the law and the head of power
4. It is irrelevant whether a law answers the description of two subject matters, as long as it is a law with respect to a head of power and that connection is not "so insubstantial, tenuous or distant"
5. If a "sufficient connection" with the head of power exists, that is all that is required– "the justice and wisdom of the law...are matters of legislative choice"

The Role of Purpose

The court has consistently insisted that characterization does not involves political judgments or subjective evaluations, but can be performed objectively on strict legalistic principles. "Our task is purely legal" – ***ANA Case*** **(1945)**

Purpose Power: Proportionality

The test for characterization of a law as being with respect to a purpose power is one of **proportionality** – is the law reasonably capable of being seen as appropriate and adapted to serve its purpose?

The 'defense' power in s 51(vi) and the 'external affairs' power in s 51(xix) are examples of purpose powers – **Dixon J in *Stenhouse v Coleman* (1944)**

To be characterized as a law with respect to the '**defense'** power in s 51(vi), the law must be reasonably capable of being seen as appropriate and adapted to achieve the defense of the nation. This power expands during war and contracts during peace – ***(Communist Party Case)*** **(1951)**

To be characterized as a law with respect to the '**external affairs'** power in s 51(xix) (for the purpose of the implementation of treaties), the law must be reasonably capable of being seen as appropriate and adapted to implement a treaty (or part of it).

To be characterized as a law with respect to the '**nationhood'** power in ss 61 and 51(xxxix), the law must be reasonably capable of being seen as appropriate and adapted to achieve the relevant purpose (such as holding bicentenary celebrations in *Davis v Commonwealth* (1988))

It should be noted that the test of proportionality also applies where there are limits imposed upon constitutional power:

For express limits like s 92 ('trade within the Cth to be free'), a law may still be valid if it is capable of being seen as reasonably appropriate and adapted to serve a legitimate purpose and the limitation on trade and commerce is only incidental to achieving that purpose.

For implied limits like the implied freedom of political communication, a law may still be valid if it is capable of being seen as reasonably appropriate/adapted to serve legitimate purpose in a manner compatible with constitutionally prescribed system of representative and responsible government.

Incidental Power

The Commonwealth's 'incidental powers' are provided by **s 51(xxxix)**.

s 51(xxxix) authorizes Cth to legislate with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament...or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth" (so it applies to all legislative, executive and judicial powers in the Commonwealth).

Implied Incidental Power

Further to this, the Court has found that each head of power contains an 'implied incidental power'.

"Where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor...every power and every control the denial of which would render the grant itself effective" – ***D'Emden v Pedder*** **(1904)**

For instance, the 'trade and commerce' power in s 51(i) includes an implied incidental power to regulate matters "the control of which is found necessary to effectuate its main purpose" – ***Grannall v Marrickville Margarine*** **(1955)**

Reading Down and Severance

There is a general statutory directive for reading down and severance in s 15A of the *Acts Interpretation Act 1901* (Cth)– "every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power".

Reading Down

So far as reasonably possible to do so, legislation should be construed as being within power.

'Reading down' involves the HC preserving the validity of a provision by reading it down from a broad application so that it does not apply where it cannot validly do so. But there is no reading down where:

- There is a contrary intention expressed in the legislation
- It would involve changing the text

Severance:

Where it cannot validly read down a provision, the HC will 'sever' the offending parts of an Act so that the remainder operates validly

But there is no severance where:

- To make sense of the provision, a court would have to substitute words rather than merely excise them
- The legal effect of the law is changed
- The legislature did not intend for the Act to be enacted following that severance

HC is unable to "substantially alter appearance of the law, presenting a law that looks quite different from that which was made by the Parliament", because it "cannot be required to perform a feat that is, in essence, legislative and not judicial" – ***(Work Choices Case)*** **(2006)**

There have been legislative devices employed to ensure severability – but these are often of limited effect: "Parliament cannot direct courts to reconstruct out of the ruins of one invalid law of general application a number of valid laws of particular application" – ***Strickland v Rocla*** **(1971)**

CASES

INCONSISTENCY: S 109

"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**"

PRINCIPLES

Where powers are concurrent, Commonwealth law will prevail and the State law will be invalid.

i. Analogous to the Supremacy Clause in the United States Constitution.

ii. Covering clause 5 might fulfill same function – states that Commonwealth laws are binding on *'courts judges and people… of every part of the Commonwealth*'.

iii. "Invalid" does not mean that a State law is invalid in the positivist sense that the State Parliament lacks power to pass it. The State law, though enacted with full validity, merely ceases to operate. Hence, in order for s. 109 to come into operation at all, there must be a valid State law and a valid Commonwealth law – ***Carter v Egg & Egg Pulp Marketing Board*** [1942]

iv. If the Commonwealth law later loses effect, the State law will be reactivated – ***Butler v AG (Vic)*** (1961); ***WA V Cth (Native Title Case)*** (1995)

Three Types of Inconsistency

1. 'Impossibility of obedience'– ***Ex parte Daniell*** (1920)
2. One law confers a right which other purports to remove – ***Colvin v Bradley Bros*** (1943)
3. Covering the field – ***Ex parte McLean*** (1930)

– *"In a given case more than one test is capable of being applied so as to establish inconsistency"* – ***Ansett v Wardley*** (1980)

– Direct inconsistency should be examined first, then indirect inconsistency – ***Telstra Corporation Ltd v Worthing*** (1997).

1. 'Impossibility of obedience' – Direct

For example, where a Commonwealth law prohibits the doing of X and a State law requires the doing of X.

A State law fixed a State referendum on liquor trading hours on the same day as a federal Senate election, while the *Commonwealth Electoral Act 1918* (Cth) prohibited the holding of State referenda on the same day as a federal election – ***Ex parte Daniel*** (1920).

2. 'Denial of rights' – Direct

Where one law purports to confer a legal right, while the other law purports to take away or diminish that legal right.

Commonwealth law permitted employers to employ women to work on milling machines, while the State law made it an offence – ***Colvin v Bradley Brothers*** (1943)

3. 'Cover the field' – Indirect

"A competent legislature expressly or impliedly evidences its intention to cover the whole field", so that there is no room for a State to legislate on the subject" – **Clyde Engineering v Cowburn (1926)**; ***Ex parte McLean*** (1930)

Covering the field: Test

1. Is the Commonwealth law intended to be exclusive, i.e. the only law on the topic?
2. Does the State law operate in the same field as the Commonwealth law?

Key factors to consider regarding the 'cover the field' test for indirect inconsistency:

- Is the Commonwealth law so detailed that its clearly intended to cover the entire subject to the exclusion of State laws? – ***O'Sullivan v Noarlunga Meat Ltd* (1954).**

Manufacturing Inconsistency – Old Idea

Is a limitation on 'covering the field', Commonwealth legislation cannot be permitted to 'create' or 'manufacture' an inconsistency – *West v Taxation* (1937)

- Commonwealth cannot legislate to prohibit a State from enacting a law or to provide that the State has no power to enact a law.
- If the Cth has the power and it is valid then there is no issue – *Workchoices Case* (2006)

Manufacturing Consistency: Clearing the Field

The effect of 'clearing the field' is that concurrent State laws will continue to operate, rather than be found inconsistent according to the 'cover the field' test of indirect inconsistency.

- Cannot clear the field retrospectively – *Metwally* (1984)

TEST

1. Are the Commonwealth and State laws both valid within their own right?
2. Identify the type of inconsistency.
3. Is there an actual operational inconsistency? – *Cth v WA (1999) (Mining Act Case)*
4. Is the field actually covered?
5. Has the Cth cleared the field?

CONNECTIONS

s 51 – Operates where powers are concurrent.

s 5 – *Commonwealth of Australia Constitution Act 1900* is operationally similar.

CASES

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Ex parte McLean (1930)	49;64	*Western Australia v Commonwealth* (1995)	63
Ansett v Wardley (1980)	49	*APLA v Legal Services (NSW)* (2005)	63
Telstra v Worthing (1997)	49	*Wenn v Attorney-General (Vic)* (1948)	66
Botany Council v Airport (1992)	50	*Bayside Council v Telstra* (2004)	64
Viskauskas v Niland (1983)	50	*Momcilovic v The Queen (2011)*	65
Clyde Engineering v Cowburn (1926)	51	*Radio Coffs Harbour v Fuller (1986)*	65
O'Sullivan v Noarlunga Meat Ltd (1954)	51		

TRADE & COMMERCE: S 51(I)

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to – **trade** and **commerce** with other countries, and among the States"

PRINCIPLES

Broadly construed – "All the commercial arrangements of which transportation is the direct and necessary result form part of "trade and commerce." The mutual communings, the negotiations, verbal and by correspondence, the bargain, the transport and the delivery are all, but not exclusively, parts of that class of relations between mankind which the world calls "trade and commerce" – *W&A McArthur v Queensland.*

Held to include

- Financial transactions – *Commonwealth v Bank of New South Wales.*
- Federal participation in trade and commerce – *Australian National Airways Pty Ltd v Commonwealth.*
- peripheral matters, such as the employment conditions of workers involved in such activity – *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd.*
- the absolution prohibition of a specific trade – *Murphyores v Commonwealth.*

Enables the Commonwealth to both regulate and participate in trade and commerce with other countries and among the States.
Parliament can validly regulate the conduct of persons employed in those activities which form part of trade and commerce with other countries and among the States" – *Ex Parte CSL (2003).*

Three key limitations

1. The Commonwealth cannot encroach upon trade and commerce within a State, because s 51(i) provides for "trade and commerce with other countries [overseas trade], and among the States [inter-State trade]", but not within the States [intra-State trade] – *AG (WA) v Australian National Airlines Commission (1976).*

2. The Commonwealth cannot contravene s 92 (as like all heads of power in s 51, s 51(i) is "subject to this Constitution" [including s 92]– this provides that "trade, commerce and intercourse among the States...shall be absolutely free" – *(ANA Case) (1945).*

3. There is no 'commingling' doctrine as in the United States, where inter-State and intra-State trade and commerce are deemed to be so commercially interdependent that congressional power to regulate the former must necessarily extend into the latter.

Incidental Aspect
The High Court has generally recognised that the Commonwealth can legislate on matters that are incidental to the subjects listed in s 51 of the Constitution.

The distinction between inter-State and intra-State trade cannot be 'obliterated' by the incidental power, despite its inconvenience – ***Wragg v NSW*** **(1954).**

But laws relating to overseas trade and commerce with other countries are less likely to impinge upon intra-State trade than inter-State trade, so the scope for the incidental power with laws relating to overseas trade and commerce is correspondingly greater– *Noarlunga Meat* (1954)

Some aspects of intra-State trade might have a "**sufficiently proximate relationship**" to inter-State trade, so Commonwealth can legislate with respect to it – ***(Second Airlines Case 19) (1965)***

CONNECTIONS

s 92 – "*We are definitely of opinion that sec. 92 lays down a general rule of economic freedom, and necessarily binds all parties and authorities within the Commonwealth, including the Commonwealth itself, because, as was pointed out by the Privy Council itself, it establishes a "system based on the absolute freedom of trade among the States".*

s 99 – *"the constraints imposed by ss. 51(ii) and 99 of the Constitution serve a federal purpose — the economic unity of the Commonwealth and the formal equality in the Federation of the States inter se and their people"* – *Fortescue v Cth (2013)*

TEST

1. **Characterisation:** Is the subject of the law actually on trade and commerce? – *Bank of NSW* (1948)
   - This is a subject matter power, requiring a sufficient connection to the HOP. A broad approach is taken in determining connection – *Grain Pool* (2000)
2. **Head of Power:** Does the law, as characterised, come under a head of power?
3. **Interpretation:** What does the head of power permit? Its scope?
4. **Prohibitions:** Does the law breach a prohibition on the exercise of power?

CASES

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EXTERNAL AFFAIRS: S 51(XXIX)

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to – **external affairs**"

PRINCIPLES

Related 'to matters or things geographically situated outside – Mason J

Geographic Externality

'Geographic externality'– the Commonwealth Parliament can make laws with respect to relations with foreign countries or actions that occur outside Australia or things that are physically outside Australia – *Seas and Submerged Lands Case*

The Commonwealth can implement treaties– even if they involve matters wholly within Australia – *(Tasmanian Dam Case)* (1983)

"Any law which can properly be characterised as a law with respect to any matter, thing or person occurring or situated outside Australia is a law with respect to 'external affairs" – *(War Crimes Act Case) (1991)*

Geographic Externality Limitations

Deportation of an Australian citizen from Australia cannot be supported – *Ex parte Taylor* (2001)

Legislation making offence for Australians to have sex with minors in foreign countries was deemed valid; mere geographic externality sufficient – *XYZ v Commonwealth* (2006)

Implementing Treaties

Provides the power to implement international treaty – *R v Burgess; Ex parte Henry* (1936)

Even if the legislation in implementing the provisions of an international treaty involves matters wholly within Australia – *(Tasmanian Dam Case)* (1983)

Must be reasonably capable of being viewed as appropriate and adapted to implement a treaty (or part of it).

(Tasmanian Dam Case) (1983)

High Court considered Stephen J's intermediate test of "international concern" in *Koowarta v Bjelke-Petersen* (1982) was too uncertain, so asserted that the very fact that an international treaty is made about a subject means that it is within the field of international relations and thus the 'external affairs' of Australia, as long as it is *bona fide.*

Murphy J had the broadest view and considered that s 51(xxix) covers:

- The implementation of international law.
- The implementation of international treaties or international conventions.
- The implementation of recommendations or request of the United Nations or its subsidiary organisations.

CASE SUMMARIES

D'Emden v Pedder (1904)

Interpretation: Intergovernmental Immunity
The case is significant as the first decided by the High Court involving the interpretation of the Constitution.

Facts: Concerned the question of whether salary receipts of federal government employees were subject to state stamp duty, but it touched on the broader issue within Australian constitutional law of the degree to which the two levels of Australian government were subject to each other's laws.

Held: First of several cases to apply implied intergovernmental immunities doctrine, relying on SCOTUS case *McCulloch v. Maryland*, which held that the state and Commonwealth governments were normally immune from each other's laws. This was rejected in the Engineers' case in 1920.

Carter v Egg and Egg (1942)

Inconsistency: s 109 only applies when there is 2 valid laws, one of the Commonwealth and one of the States- both the Commonwealth law and the State law must be valid for it to operate.

Where both a Commonwealth and a State law are valid but inconsistent, the effect of s 109 is that the State law ceases to operate and is rendered inoperative- so it is not 'invalid'

Butler v AG (Vic) (1961)

Inconsistency: State Act will once again be active when prevailing Commonwealth Act has expired.

Ex parte Daniel (1920)

Direct Inconsistency: State law fixed a State referendum on liquor trading hours on the same day as a federal Senate election, while the *Commonwealth Electoral Act 1918* (Cth) prohibited the holding of State referenda on the same day as a federal election.

This is an example of The '**impossibility of obedience'** test operates where it is logically impossible to obey both laws.

Colvin v Bradley Bros (1943)

Direct Inconsistency: Commonwealth law permitted employers to employ women to work on milling machines, while the State law made that an offence.

The '**denial of rights'** test operates where one law purports to confer a legal right, privilege or entitlement, while the other law purports to take away or diminish that legal right, privilege or entitlement.

Ex parte McLean (1930)

Indirect Inconsistency: Different penal sanctions for the same acts or omissions:

- Cth law provided that person in breach of award was liable to a penalty not exceeding a maximum to be fixed by the Court of Conciliation and Arbitration or by a Conciliation Commissioner
- NSW law provided that any person who "absents himself" or "neglects to fulfil" a contract of service was liable to a penalty not exceeding £10.

Facts: Consequently, Frederick Firth, a grazier, alleged that McLean, a shearer, had 'neglected to fulfil' his contract through incompetence

McLean successfully argued that the State law was rendered inoperative by indirect inconsistency with the 'cover the field' test, as the same acts or omissions were "made subject to the penal sanctions of the Federal enactment and the somewhat different penal sanctions of the State enactment".

Ansett v Wardley (1980)

"In a given case more than one test is capable of being applied so as to establish inconsistency"

Facts: Deborah Wardley sought to become Australia's first female commercial airline pilot– but the Manager of Ansett Airlines announced that the decision not to employ her was due to its policy of only employing men as pilots**.**

Victorian Act made sex discrimination in employment or dismissal unlawful – Ansett argued this was inconsistent with Pilots Agreement (which had force of Commonwealth law), which provided that Ansett could dismiss pilots of less than six months' service with seven days' notice.

Held: The High Court found no inconsistency:

- No direct inconsistency with the 'impossibility of obedience' or 'denial of rights' tests– as the right of termination in Pilots Agreement was a qualified right.
- No indirect inconsistency with the 'cover the field' test– the laws were on different subjects (Commonwealth: discrimination; State: industrial relations), while the Airline Pilots Agreement was intended to operate in the context of the applicable general law, which included anti-discrimination law (Stephen J)

Telstra v Worthing (1997)

Direct inconsistency should be examined first, then indirect inconsistency – it is possible to have indirect inconsistency even where there is no direct inconsistency.

Facts: Worthing made claim under Workers Compensation Act 1987 (NSW) in relation to injuries he sustained while working as a Telecom linesman – Cth Act8uk provided that Telecom and its successors were not subject to any obligation or liability under a law of a State to which the Commonwealth was not subject.

Botany Council v Airport (1992)

Manufacturing Inconsistency

Facts: Two councils sought injunction on construction of a third runway at Sydney Airport under *Environmental Planning and Assessment Act 1979* (NSW). But the Commonwealth made regulations under the *Federal Airports Corporation Act 1986* (Cth) with an intention to 'cover the field', including the provision that "a licensee is authorised to carry out the part of the works...referred to in the licence in spite of a law, or a provision of a law, of the State of New South Wales".

Held: The High Court stated that "there can be no objection to a Commonwealth law on a subject which falls within a head of Commonwealth legislative power providing that a person is authorised to undertake an activity despite a State law prohibiting, restricting, qualifying or regulating that activity". Cth regulations can evince intention to cover field. Expressly excluding State law.

Viskauskas v Niland (1983)

Inconsistency and Retrospective Laws

Facts: George and Stella Viskauskas owned NSW hotel–Aboriginals claimed they had been refused service due to race. Consequently, two inquiries were commenced under both the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Held: The owners of the hotel successfully argued that the NSW Act was rendered inoperative due to indirect inconsistency. Cth Act covered the field because it gave effect to international convention.

Metwally (1984)

Inconsistency and Retrospective Laws

Following *Viskauskas,* the Cth amended *Racial Discrimination Act 1975* (Cth) to make clear that it was intended, and was deemed never to have been intended, to exclude or limit the operation of a State law that is capable of operating concurrently with the Act.

Facts: Mohamed Metwally was an Egyptian postgraduate student at Wollongong University who made complaints against it for discrimination under the Cth Act. Cth wants State Act to prevail, amends (following *Viskauskas*) to be concurrent. Cth tries to apply this retrospectively – meaning that the State laws would have applied to Metwally claim.

Held: 'Clearing the field' works prospectively, but cannot have retrospective operation, so the Cth Act could not retrospectively apply the NSW Act- "Commonwealth statutes cannot prevail over the Constitution" (Gibbs CJ). You cannot make what was unconstitutional, constitutional.

Clyde v Cowburn (1926)

Direct Inconsistency – Denial of Rights.

Facts: State law prescribed 'ordinary working hours' of 44 hr/week, while relevant Cth award fixed 'ordinary hours of duty' 48 hr/week. Cowburn, relying on State law, worked a 44 hour week- his employer, Clyde Engineering, relying on the Commonwealth law, deducted $ from his wages.

Held: Example of direct inconsistency through 'denial of rights' test- while they acknowledged that "two enactments may be inconsistent although obedience to each of them may be possible without disobeying the other".

O'Sullivan v Noarlunga Meat Ltd (1954)

Is the Commonwealth law so detailed that its clearly intended to cover the entire subject to the exclusion of State laws?

Facts: Cth regulation which prohibited export of meat unless premises used for slaughter/treatment/storage of meat met health requirements and provided that premises used for export were to be registered, was challenged.

Held: Upheld validity of regulations, the Cth power with respect to overseas trade and commerce under s 51(i) extends to authorising legislation regulating and controlling the slaughter of meat for export. Due to **incidental** power- "it is undeniable that the power with respect to trade and commerce with other countries includes a power to make provision for the condition and quality of meat or of any other commodity to be exported", which extends to "all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia" including "packing, get-up, description, labelling, handling and anything at all that may reasonably be considered likely to affect an export market".

West v Commissioner Taxation (1937)

Cth legislation cannot be permitted to 'create' or 'manufacture' inconsistency – "attempts by the Parliament of the Commonwealth to manufacture inconsistency between its own legislation and that of the States could result in a law of the Commonwealth which is itself *ultra vires*".

Workchoices Case (2006)

Facts: WA claimed that Cth was attempting to simply exclude state laws, without regulating a relevant subject.

Held: It is difficult to find a case where there is a bare attempt for the Cth to exclude State power. **If the Cth has the power and it is valid then there is no issue.**

Mining Act Case (1999)

Facts: Grant of exploration licenses over lands, including a 'perimeter area' was authorized by WA *Act,* but this 'perimeter area' was potentially inconsistent when a defense operation or practice was authorized under Cth Act.

Held: Is there an inconsistency between how the two laws actually operate as opposed to what the laws actually say? WA law did not grant licences, only allowed the State to grant them, but none were – so there was no actual operational inconsistency. If one were to be granted, then there may be one.

Engineers v Adelaide Steamship (1920)

Facts: This case involved a claim by a union of engineers in the Commonwealth Court of Conciliation and Arbitration for an award relating to 843 employers across Australia, including three governmental employers in WA**.**

The key legal issue was whether a Commonwealth law made under the 'conciliation and arbitration' power in s 51(xxxv) could authorise the making of an award binding three governmental employers in Western Australia.

Held: The High Court held that the Commonwealth law made under the 'conciliation and arbitration' power in s 51(xxxv) could authorise the making of an award binding three governmental employers in Western Australia.

In analysing s 51(xxxv), Knox CJ, Isaacs, Rich and Starke JJ asserted that it was "in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned". Knox CJ, Isaacs, Rich and Starke JJ concluded that the States are subject to a Cth law under s 51(xxxv) "if such legislation on its true construction applies to them"

Payroll Tax Case (1971)

A case decided in the High Court of Australia regarding the scope of the Commonwealth's taxation power and the extent to which it can burden a state's structural integrity.

Facts: The Commonwealth passed the *Payroll Tax Act*, which imposed a 2.5% tax on all wages