

IMPLIED INTERGOVERNMENTAL IMMUNITIES (IGI)

After asking “*is Cth law valid?*”, then ask “*is it within the limits of legislative power?*”. It will arise when one Pmt’s laws seem to apply to another’s government!

LIMITS ON CTH LEGISLATIVE POWER OVER THE STATES

[STATE IMMUNITY FROM CTH LAWS]

START: Per *Engineers*, the Cth has the power to bind State govts and their instrumentalities. However, the Cth law is invalid if it exceeds the implied limitations on the Cth’s ability to regulate State activities (*State Banking Case*, reformulated by *Austin*)

- “State” means State, States and/or State instrumentalities
 - A state instrumentality is an authority brought into existence by a State to carry out public functions (*QEC*)
- *On the facts* ____ *provides* ____ *so is probably a State instrumentality*
- 1. Express Limitations:
 - Cth cannot bind State in areas where it has no HoP
 - Cth cannot exercise power in such a way that it breaches an implied/express branch of another lvl (i.e. s116 freedom of religion, s92 IFPC or SOJP)
- 2. Implied Limitations:

In *State Banking*, the ‘no immunity’ rule in *Engineers* had 2 limitations placed upon it – that Cth laws cannot discriminate against States and Cth laws cannot prevent/impede States from carrying out normal/essential functions of govt [rationale: otherwise inconsistent w/ express provisions in Const which provide for existence of Cth and States per Dixon J *State Banking*]. In *Austin*, the test was merged into a test and sub-test, instead of 2 separate tests (Maj 5:1). The 1 test being that there can be **no curtailment of a State’s capacity to function as govts**, with impermissible discrimination as a sub-test of that overriding test, rather than a decisive factor (Gleeson CJ). Despite criticisms (McHugh J in *Austin*), this decision was recently approved by another maj of HC in *Clarke*.

a. **Impairment**

- The Cth cannot enact a law that would impair the capacity of a State to function as a govt (*Austin*)
- Two circumstances where a law may impair State’s capacity to function (*AEU*)
 - i) A Cth law cannot interfere with a State’s right to choose:
 - Who to hire; or
 - Who to fire on the grounds of redundancy
 - But **not** prescription of min wages & working conditions (does not impact ‘capacity to function’)
 - ii) A Cth law cannot interfere with the terms & conditions of employments of higher echelon State employees
 - As above, plus fixing of min wages/working conditions **is** critical to ‘capacity to function’ per *Austin* (state judicial officers) ; *Clarke* (parliamentarians)
 - Perhaps promotion and transfer of employees also (*AEU*)
- NB court will read down the law so as to not impact on the above factors (*ILO*)
- The law may still impair the capacity in some other way (*Austin*)
 - Further non-decisive factors (*Clarke* per French CJ)
 - Does Cth law single out 1/more of States & impose special burden/disability on them that is not imposed on persons generally? (**discrimination**)
 - Does operation of Cth law of gen app impose burden/disability on State/s? (‘’)
 - The effect of Cth law upon capacity of States to exercise their consti pwrs? (**capacity of state to function**)
 - The effect of the Cth law upon State’s ability to exercise their functions? (‘’)
 - SM of law affecting state/s & extent to which HoP authorises its discrim? (**rational justification**)

- *Native Title Act* case- examples of what WILL amount to impairment (c.f. imposition of tax, provisions for native title)
 - Laws that affect machinery of Govt
 - Laws that impair 3 branches of Govt?
 - Laws impeding State engaging the servant its needs
 - Whether acquisition of goods/services is impaired by law?
 - Can state acquire land it needs on payment of compensation?

Melbourne Corporation v Cth (1947) → (State Banking Case) –

FACTS:

- Cth leg held no bank could do business w a State govt/authority w/o consent of Cth Treasurer
- Melbourne Corp (local council) wanted to bank w/private bank. Treasurer refused. MC sought dec that leg invalid

HELD:

- **Maj:** Leg INVALID. It fell within the banking power BUT it prevented a state from continuing to exist and function so invalid! (Rich J). The Constitution expressly provides for the continued existence of the states (Dixon J).
- Laws with an intergovernmental impact could be impliedly limited in two situations:
 - Cth cannot discriminate against states
 - Cannot fundamentally impede states from carrying out essential governmental functions

Austin v Cth (2003)

FACTS:

- Leg re: superannuation. Cth surcharge on superfund to avoid judges evading taxes. Discriminated by imposing burden of massive tax liability that judges in other states weren't faced with. Disincentive for barristers to become judges

HELD:

- 5:1 law was INVALID. *Austin* suggests a merging of the 2 limitations in *State Banking* – discrim became a subset of the prohibition on impeding laws
- So here: “*the Cth law discriminates against State judicial officers that interferes significant w States relo with their judges, **financial arrangements** that govern terms of their offices. **Not as an incidence** of gen tax applicable to all, but a separate measure **designed to single them out & place a financial burden on them that no one else in the community incurs**” (McHugh J – use this to analogue)*
- Discrimination not a separate test – it's a wider principle (Gleeson CJ)

Clarke v Commissioner of Taxation (2009) – CONFIRMED AUSTIN DECISION

FACTS: Same leg in *Austin* – not judges but parliamentarians

HELD:

- Echoed *Austin* – law invalid bc curtailed capacities of States to function – **deprived of autonomy re: remuneration of parliamentarians**
- Also confirmed one-test principle – discrimination relevant but not decisive!
- NB: More likely to get struck down if affects high level state activity! Note six extra factors by French CJ

b. Discrimination (against States, not between States)

- *While discrimination is now viewed as a sub-test rather than a separate test (Austin and Clarke), I will consider the cases under discrimination in order to aid in the evaluation whether the overriding limitation has been violated*
- Both direct and indirect discrimination prohibited (*QEC*)
 - Direct discrimination is discrimination on the face of the law (*State Banking* – no state agency could bank w private bank w/o Cth consent)
 - Indirect discrimination arises where a rule or law is applied neutrally but impacts disproportionately and detrimentally on a certain group (*QEC* – leg applied to disputes between unions and all Qld electricity providers, indirectly discriminated against QEC as 97% of electricity produced by them)

→ Examples:

- *QEC*: Cth leg discriminatory because **singled out industrial disputes** to which authorities of a particular state were a party and then subjected those disputes to special procedures
- In *AEU*, the Cth leg provided that the C&A Commission could **dismiss a matter if proceedings were not desirable** in the public interest, but only if there was **a system of compulsory arbitration** in the state. At the time, Vic was the only State where there was no system

However, discrimination **permissible** where the discriminatory law fulfils a rational non-discriminatory purpose (*QEC*)

→ Examples:

- In *QEC*, dissentients thought s6(1) was justified. The law prescribed different procedures for the **speedy settlement of different disputes**, which is wholly consistent w a valid exercise of industrial relations HoP. These procedures were imposed by reference to the **nature of the dispute** and not by reference to the Govtl character of the authorities. However, all judges agreed s.6(2) invalid, as not reasonable to prescribe special law for all future disputes involving QLD electrical authorities, as there was no reason to believe that those disputes would require special regimes.
- In *Richardson*, the law had the purpose of **protecting potential heritage sites** which happened to be within Tas, not the purpose of singling out Tasmania. Out of necessity, Cth had to legislate on that particular area of the State, and there were **no similar sites in other States** that were **treated less restrictively**
- In *AEU*, even though events in Vic were the trigger for introducing (1A), the provision is framed in general terms and capable of applying to any State which introduces a system similar to Vic. Maj thought there was a **logical connection** between refusing to make an award in public interest under (1)(g) and the absence of a system of compulsory arbitration in a State in (1A)

→ Inherently a subjective decision, note the difference of opinions in *QEC*

STATE LEGISLATIVE POWER OVER THE CTH EXECUTIVE [CTH IMMUNITY FROM STATE LAWS]

After asking "*is State law valid?*", then ask "*Is the Cth immune from that State law?*"

1. Scope:

- The States enjoy plenary legislative power (*Union Steamship*) and per *Engineers* dicta, the States have the power to bind the Cth
- **However**, more recently, the HC have advocated 'lopsided' immunities, that State Parliaments cannot affect the capacities and functions of the Cth govt (Dixon J dissent in *Uther; Cigamatic*) – There is a difference between general law, contents or conditions of which may incidentally affect Cth action, and the Govtl rights and pwrs belonging to the Fed Exec (E.g. when Cth acting like an ordinary citizen entering into K for sale of goods, not immune)
- The unclear *Cigamatic* doctrine was narrowed in *Henderson's* case: State parliaments cannot legislate if the law will affect capacities and functions where it:
 - Discriminates against the Cth; or
 - Affects the special rights, privileges or immunities of the Cth;
 - So cannot affect the Cth's:
 - Prerogative powers
 - Prerogative rights
 - Special rights of ownership
- However, States can bind the Cth in the exercise of those capacities (*Henderson*). How to distinguish? Maj says to **look to relationship between Cth and subjects – cannot fundamentally change the relo**
 - Where relo is one of privilege or immunity, any reduction of the privilege or immunity would alter the relo of Crown with its subjects, and this will alter its capacities
 - Where relo is one of equality, if Crown is singled out and treated differently, relo ceases to be equal, so it alters capacities
- SO: State leg that purports to MODIFY CAPACITIES is **invalid** (cth immune), BUT leg which assumes those capacities and merely seeks to REGULATE ACTIVITIES in which the Crown 'exercises those capacities' is **valid**

- However there have been strong dissents regarding this view of Cth immunity, with Gummow and McHugh JJ endorsing a broad immunity and the 'affected by' doctrine. On the other hand, Kirby J rejects the broad immunity in *Cigamatic*; and preferred to apply the *State Banking* reciprocal immunity, that the Cth only immune from laws that discriminate against it, and laws which impaired the Cth's integrity, which was in practice, a similar approach to the maj in *Hendersons*.
- Law remains quite unclear as to what capacities vs exercise of capacities means

2. Further exceptions to Cth Immunity (only if relevant on facts)

→ Following *Henderson* the exceptions still exist they were just subsumed by the broader principle

a) Limitations of s.64:

- When the Cth is party to a suit [civil proc before a court, **not** a tribunal – see *Henderson*], they **submit to the laws of the State** in regards to legal procedures, just as they would apply to any other party. Rationale: encourages commercial certainty for companies wanting to do business w Cth. (applied in *Maguire* – bank subject to Limitations Act)
- Applies only 'as nearly as possible' – words of limitation. Can be repealed by Parliament.

b) Criminal matters

- Cth servants are not immune from State criminal laws (*Pirrie; Hayden*)
- Examples:
- *Pirrie v McFarlane*: M was in the Cth RAAF and drove vehicles on Vic civilian roads w/o license. Vic laws held to apply to Cth driver
 - *Hayden*: agents of AISS were prosecuted under Vic law for offences committed during a training exercise. Agents wanted an injunction to restrain the Cth revealing their identities to the Vic police. Held: no injunction
- *Pirrie* and *Cigamatic* have been reconciled by the re-interpretation of *Cigamatic* in *Henderson*, that is, a Vic law requiring the Cth defence officer to hold a license **does not affect the capacities of the Cth**

Commonwealth v Cigamatic (1962)

FACTS:

- Leg provided that Cth got debt priority wrt Cth income tax over other creditors, but Cth wanted priority for **all of its taxes**. Cth immune from NSW leg?

HELD:

- **Held in favour of Cth** → Cth immunity- the state has no leg pwr to define and regulate the Cth's duties vis-à-vis its citizens or to define/regulate the governmental rights of the Cth.
- Narrow interpretation: Immunity confined to State laws affecting Cth prerogative pwrs or fed fiscal rights. Uniquely governmental power c.f. ordinary rights/pwrs like employing people or renting prop, then Cth not immune.
- Broad interpretation: State laws cannot bind Cth at all unless 'essential to undertaking' Dixon J

Re Residential Tenancies Tribunal of NSW; Ex Parte Defence Housing Authority (1997) – Hendersons Case

FACTS:

- DHA = Cth instrumentality. Henderson, LL of prop leased to DHA, sought to inspect premises under RTA – DHA refused saying immune to RTA – enjoyed Cth immunity to state law

HELD:

- **CTH NOT IMMUNE FROM RTA!** The leg did nothing to alter/deny capacity of housing authority, notwithstanding that it regulated activities carried out in the **exercise of their capacities**.

DISSENT:

- **McHugh & Gummow JJ**: Concerned about federalism – wanted **broader doctrine** of Cth immunity- the 'affected by' doctrine as a mode of limiting
- **Kirby J**: Wanted **narrow interpretation** of Cth immunity – nothing express/implied in Const that supports broad immunity. There should be reciprocity. *Cigamatic* should be "laid to rest" ← **clearest point**. Because practically saying same thing as maj!