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## State Immunity

**Engineers:** Removed blanket state immunity.

**Melbourne Corp (state Banking case):** CW wanted to nationalize banking and wanted states and their authorities to bank exclusively with CW bank. So they made it so that private banks cannot deal with states, because CW cannot say no state can bank with a private bank.

**Latham, Rich, Stark, Dixon and Williams:** Held to be invalid because it was discriminatory legislation aimed at interfering with an essential government function. Legislation cannot discriminate against states or places a burden/disability on the operation of the state and their continuing existence.

**Dixon J:** The control of money for their day to day function is a key constitutional function, important part of the executive function of the states for them to be able to independently manage their money and capacity to control their budget. Therefore, by singling them out and depriving them the choice of where to bank, rules of withdrawing money is an invalid law.

**Starke:** thought Dixon was spouting nonsense in regards to discrimination function. Discrimination is not vital, but ask does it affect core constitutional functioning?

**QEC: Queensland Electricity Commission:** There was a strike which was disruptive in the QLD, so CW wanted to make a special law that applied a special streamlined complaint procedure to this one dispute.

Held to be invalid because it targeted a specific dispute, a particular government authority. This was discriminatory. There was also less beneficial terms.

**Mason's principle:** CW law is invalid if it 1) discriminates and places a special burden on the states or 2) a general law but the effects of the law is to destroy or curtail the continued existence of the states or their capacity to function as governments.

**TDC:** NO interference with the 3 arms of government doing their jobs because the concerned land was just wasteland. Mason's principle was held to be invalid, if the issue is in regard to land use, it must directly interfere with the government departments, legislature or courts.

**Native title act case:** Law does not affect the machinery of the government of the state, thus Mason's principle is not applicable. Gov buildings not subject to the native title claims so not applicable.

**Australian Education Union Case:** CW wanted to put state public servants under a federal regime. Vic argues state immunity and that CW cannot touch state employment practices in this way. Court rejected this argument and said there is no general immunity for a state public servant, no ban on the CW to regulate aspects of state employment with its public servants. But the 'capacity to function test' from Mason meant there were some aspects the CW could not regulate. This fell into two categories 1) the number and identity of the persons it wishes to employ or dismiss and their term of appointment, 2) the number, identity and conditions of employment of persons engaged at the 'higher levels of government' these are matters essential to the continued existence of the state. But CW can legislate on ordinary servants things like minimum wage, leave entitlements and training entitlement.

**Austin:** The CW made a law imposing a heavy tax on state government officers, the tax was so heavy that the states had to change their laws around superannuation so that the officers could access their pension to pay the tax.

Austin (a NSW judge) challenged this tax, saying it was inapplicable on state immunity grounds because it affected the continued existence of the state and its capacity to function. Austin won 5-1.

How did this affect state's capacity to function? It has an impact on judges when they retire and consequently how states would find a new pool of judges. Judges are important to the effective operations of the core constitutional functioning. This was singling out judges because they had to pay a different regime. Furthermore, because this was affecting judges personally and it was reducing the buying power of their pension fund. They were guaranteed this pension yet they had to tap into it to pay CW tax. Therefore, affecting capacity of the states' to function.

**Principle:** One limitation - special burden and curtailment of capacity of the states to function as government. The function is about the core constitutional functioning as opposed to how well they can perform their jobs. It looks as if the fundamental constitutional functions are intact.

In this case, the law affected state's capacity to function because they states need to be able to exclusively set judge's terms and conditions to attract and recruit high quality people. And the pension is particularly attractive and the problem isn't a tax, but rather the size of the tax that required the states to alter their laws to adapt to the CW law.

The state had to create special state laws to allow the judges to be able to pay out this tax burden, this was considered a special burden because the states had to create a special arrangements to help the judges pay the tax. This was both proof of the special burden and proof that it interferes with the core functioning of the states.

Have to consider more than just discrimination, no longer a free standing limb for state immunity principles.

**Clarke v Commissioner of taxation (2009):** Endorsed Austin principle

1. Existence of the implied limitation of CW legislative power
2. Constitution assumes continued existence of the states
3. French's factors (how to apply Austin principle)
  1. Whether the law in question singles out one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.
  2. Whether the operation of a law of general application imposes a particular burden or disability on the States.
  3. The effect of the law upon the capacity of the States to exercise their constitutional powers.
  4. The effect of the law upon the exercise of their functions by the States.
  5. The nature of the capacity or functions affected.

6. The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.

Discrimination is not a freestanding category, discrimination is relevant but it may not necessarily be enough. The discriminatory act has to be able to be traced to a core constitutional functioning.

Court concluded that here the legislation breached the immunity. It was targeting politicians of a state and the state had to pass remedial legislation so that the politicians can pay the tax.

## Commonwealth Immunity

**Pirrie v McFarlane (1925)**: RAAF officer driving without a license, did the Vic act apply? Majority held that law did apply. General road traffic laws apply equally to cw officers as they do to Australian citizens. General state public safety law will apply to cw officer, there was no clash of laws.

**Uther's Case (1947)**: Company was dissolved under NSW act and there was not enough money to pay all creditors. CW was a creditor but according to the NSW act they were on a lower priority, CW claimed immunity so NSW act didn't apply so they could get money first. Court rejected claim and said cw had to use s109 for immunity.

**Latham**: There is implied immunity where it makes sense for them to have that immunity, e.g. governor generals to dissolve parliament, this power should be immune from state law. Court found this case was not on the same level no implied immunity.

**Dixon dissent** : states cannot define or regulate the rights, privileges, duties or disabilities of Cth citizens.

Democratic accountability, states parliament is elected by NSW citizens but commonwealth parliament is elected by commonwealth citizens, so he thinks there's an issue with parliament in NSW should not affect how the commonwealth or people in the nation as it is not appropriate. States however, could bind the commonwealth in general laws where the CW has chosen to enter into a specific transaction.

1) States cannot define or regulate the rights privileges duties or disabilities of Cth citizens

2) states can affix legal consequences to transactions via general laws

## **Cth v Cigamatic (1962)**

Dixon continued on his argument from Uther. Company law did not apply to cw, states cannot influence the relationship between CW and subject.

## **Henderson's case**

Defence housing authority (CW statutory authority) leased a house from Henderson who wanted to inspect the house using NSW residential tenancy act but the DHA refused. So was DHA bound by NSW residential tenancy act? Majority said DHA was bound (Brennan, Gummow, McHugh, Dawson, Toohey and Gaudron)

