

## 9. INTERGOVERNMENTAL IMMUNITIES

### STATE IMMUNITY FROM CTH LAWS

Assuming [law] falls under [Hop], court will look to constitutional limitation of intergovernmental immunities. P will argue that State is immune from [Cth law]. Historically both the States and Cth had a broad immunity from one another (*D'Emden; Railway Servant's*). Post *Engineers*, the general rule stands that **Cth can bind the States**. However per *State Banking*, there are **limitations based on the Const**, which expressly provides for the continued existence of the States (affirmed in *Tas Dams; AEU; ILO*).

#### AUSTIN TEST

The courts will apply the *Austin* test, in determining the validity of [law]: **'does the Cth law impair the capacity of the States/a State to function as gvt?**, with discrimination being an example of this. Note: McHugh J strongly criticised the majority decision in *Austin*, asking what the utility is in changing the law when "nothing of substance turns on the difference". Nevertheless, it was approved by another majority of HCA in *Clarke*.

#### EMPLOYMENT MATTERS

Per *AEU*, the regulation of several aspects of employees is critical to a capacity to function (affirmed in *ILO*). There are two rules:

1. 'Gvt's right to determine **no. and identity of the persons** whom it wishes to employ, **and terms of appointment of such persons**, and the number and identity of the **persons whom it wishes to dismiss with/without notice on redundancy grounds**

- BUT valid for Cth to prescribe
- Minimum wages
- Working conditions

2. **Cth cannot interfere w/ ability of States to determine the number and identity of 'higher echelon' (i.e. senior) employees AND the terms on which they are engaged**

- *Higher level employees* - Ministers, Ministerial assistants and advisors, head of dpt, high level statutory office holders, Pt officers and judges
- Dealing w/ high level employees, *more likely to interfere w/ state's capacity to function (Austin)*

#### **Regulation of the promotion and transfer**

- HCA in *AEU* refused to pass judgment on this issue
- Whether that type of regulation would infringe IGI, turns on *matters of degree* including character and responsibility of employee (might be diff b/n types of employee)

To be continued...