

Exam Notes

Friday, 2 October 2020 11:16 AM

Commonwealth Act

- **Supported by head of power?**
 - External affairs power-s51(xxix)
 - Corporations power-s51(xx)
 - Defence power-s51(vi)
 - Incidental power-s51xxxix + s61
- **Violation of limitations?**
 - Intergovernmental immunities doctrine
 - Based on substance and actual operation of law (*Australian Education, Industrial Relations, Austin*)
 - Originally two limbs
 - *Melbourne Corp*
 - ◆ Cannot discriminate against states (Dixon & Latham)
 - ◆ Cannot prevent a state from functioning as a government (Rich & Starke)
 - Discrimination
 - ◆ *QC Case*
 - ◇ Conciliation and Arbitration Act- regulating particular industrial dispute in Qld
 - ▶ S8 removes power of commission to refrain from determining dispute
 - ▶ S9 requires full bench commission
 - ◇ Discrimination= prohibition against particular state as well as against states generally (Mason)
 - ▶ Including legislature/executive, agencies of state
 - ▶ Singles out/subjects them to special procedures as separate from the general law
 - True effect of law may be to isolate the state agency and private employers from general law
 - ▶ "Does not matter that other parties are subject to same procedures...regime tailored for Queensland" (eg. s8(1), 9)
 - ◇ NOTE: Still good law because it fails nonetheless under *Austin* test (*Austin-Gleeson*)
 - ◆ *Australian Education*
 - ◇ Fact that Victoria is the only state presently affected is not a compelling consideration but it could be a rational and relevant connection between the basis [of discrimination and exercise of powers]
 - ▶ Can be discriminatory as long as it is logical
 - ◇ Discrimination to be determined to the purpose of the enactment...ascertained by the reference to the substance and actual operation of the law in the circumstances to which it applies
 - ◆ *Industrial Relations Case*
 - ◇ Law of general application
 - ◇ Purpose of legislation ascertained by substance and actual operation
 - ▶ Lack of compulsory arbitration bears a real and rational relationship with general system of wage fixation

- Functioning as government
 - ◆ *Australian Education*
 - ◇ Their capacity to function as governments would not be impaired by the operation of federal awards if confined:
 - ▶ State must have power to control
 - Number and identity of those to employ
 - Term of appointment
 - Number and identity of persons it wishes to dismiss with or without notice on redundancy grounds
 - ▶ Higher level employees, above plus terms and conditions on which persons are engaged
 - Exercise of constitutional capacities- choice over those who serves core constitutional functions eg. alignment with state govern policy, budgetary reasons
 - Higher level employees: Ministers, Ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges
 - ▶ Dawson (dissent)
 - No distinction between number and identity and wages/conditions
 - ◆ If only because of budgetary considerations which constrain any government
 - Similar artificial line between higher and lower levels
 - ◆ *Industrial relations case*
 - ◇ Number and identity to be employed (provisions apply to current employees)
 - ◇ Term of appointment (prohibitions are concerned with termination for reasons unconnected with term of employment)
 - ◇ Number and identity of persons it wishes to dismiss based on redundancy grounds
 - ▶ S170DE(1) (read down to apply only to non-State employers) requires that there be a valid reason for termination would restrict number/identity of persons to be dismissed on redundancy grounds
 - ▶ S170DD (valid)- merely prescribes that a step be taken if more than 15 employees made redundant
 - Has to be a significant interference
 - ◆ Same for s170DB (prescribing steps to take before termination)
 - ▶ S170DG (read down to apply only to non-State employers)- ordering severance pay
 - ◇ Higher employees: all provisions are read down, not applicable
- *Austin*
 - No more discrimination prong
 - ◆ One limitation: "whether the law restricts or burdens one or more states in the exercise of their constitutional powers"
 - ◇ Discrimination is a wider principle; and what constitutes relevant and impermissible discrimination is determined by wider principle (impairment of constitutional functions)
 - ▶ Fact that state judges subjected to differently to federal judges/high income earners (Gleeson)