

Constitutional Law Hypo Notes

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1. Issue Spotting Table/ Tackling a Hypo table CHOOSE AN OPTION OR TWO, DON'T SKIP

What to look for if you have... a **Commonwealth Act** (assessing its validity) **[including an action of the Commonwealth executive e.g. spend money, build bridge, employ person, that is directly authorised by a Commonwealth Act.]**

- 1) Is the law/ executive action supported by a valid **head of federal legislative power?**
(crossed out = non-examinable)
 - a. ~~Race (s51(xxix))~~
 - b. ~~External Affairs (xxix)~~
 - c. ~~Corporations (xx)~~
 - d. ~~Defence (vi)~~
 - e. Incidental Power (ss51(xxxix) + 61): Matters incidental to the exercise of executive power (power to administer government departments; nationhood power); cannot enact coercive laws under s51(xxxix) -> THIS FORMS THE NATIONHOOD POWER UNDER NON STATUTORY EXECUTIVE POWER
 - f. Grants Power (s96): Terms and conditions can be on **any** subject; States can't be compelled to accept the grant; terms and conditions can require states to pay money to a third party; cannot be used to circumvent constitutional limitations on federal legislative power (ss51(ii), s51(xxxi))
 - g. Taxation power (s51(ii)): Compulsory exaction of money + raised by a public authority for public purposes + enforceable by law + not a fee/ payment for services rendered
 - h. Trade and Commerce s51(i) -> DON'T USE THIS AS A HEAD OF POWER
- 2) Does the law/ executive action violate a **limitation on federal legislative power?**
 - a. Intergovernmental Immunities Doctrine (*Austin v Commonwealth*): Does the law restrict or burden 1 or more of the states in the exercise of their constitutional powers (to be a government).
 - b. Separation of judicial powers doctrine (*Boilermakers*)
 - i. First limb: Commonwealth parliament mustn't vest judicial power in bodies or persons that aren't ChIII Courts
 - a) Is the executive exercising judicial power (detention)?
 - b) is parliament interfering with the exercise of judicial power?
 - ii. Second limb: Commonwealth Parliament mustn't vest non-judicial power in federal courts (allowed to vest non-judicial power compatible with judicial power exercise in federal judges as *persona designate*).
 - c. Prohibition on laws dealing with taxation & non-taxation (s55)
 - d. Freedom of interstate trade and commerce (s92): Discriminatory burden of protectionist kind (market advantage) that isn't reasonably necessary to attain legitimate, non-protectionist objective
 - e. Implied freedom of political communication (*McCloy*): Burden on political communication + legitimate purpose + structured proportionality analysis (rational connection to purpose + no alternative, less restrictive means + importance of purpose outweighs the extent of the burden.)
 - f. Right to vote (*Roach*): cannot limit right to vote without substantial reason. GO TO WEEK 12 SLIDES, NO REAL NOTES ON IT HERE.

What to look for if you have... **no (valid) Commonwealth Act authorising the Commonwealth's executive action** (i.e. invalid spending of money, building of bridge etc due to failure of above requirements).

- 1) Is there a category of non- statutory executive power that authorises the action?
 - a. Power to administer government departments (*Williams No 1*)
 - b. Nationhood power (*Davis; Pape; Williams No 2*)
 - c. Power to contract & spend public money (*Williams No 1*)
 - i. Ordinary & well recognised functions of government/ administration of government departments
 - ii. Matters incidental to the execution of a commonwealth statute

- iii. Activities within the Cth executive's prerogative powers (don't think these are examinable)
- iv. always need a valid appropriation act accompanying the authorisation for the executive to be able to spend public money (s83)

What to look for to determine the constitutional validity of... a **State Act**?

- 1) **No** head of power needed, move straight to 2).
- 2) Does the law violate a **limitation on state legislative power**?
 - a. Is the law **inconsistent with a valid Commonwealth law?** (s109)
 - b. **Separation of judicial powers** doctrine
 - i. Second Limb: State Parliament must not vest state judicial power in federal courts (*Re Wakim*)
 - c. **Kable** Doctrine
 - i. State Parliaments mustn't undermine the defining characteristics of State courts as follows:
 1. Independence
 2. Impartiality
 3. Fairness
 4. Adherence to the open-court principle
 - ii. State Parliaments mustn't vest State courts with functions incompatible with the exercise of federal judicial power
 - d. Prohibition on the imposition of excise duties (s90): tax on the production/ manufacture/ sale/ distribution of goods that isn't a licence fee
 - e. Freedom of interstate trade and commerce (s92): discriminatory burden of a protectionist kind that isn't reasonably necessary to attain a legitimate, non-protectionist objective
 - f. Implied freedom of political communication (*McCloy*): burden on political communication + legitimate purpose + structured proportionality analysis (rational connection to the purpose + no alternative, less restrictive means + importance of purpose outweighs extent of burden).

2. Incidental Head of Power for Commonwealth Acts

"The **Parliament shall**, subject to this Constitution **have power to make laws... with respect to:** (xxxix) **matters incidental to the execution of any power** vested by this Constitution in the Parliament or in either House thereof, or **in the Government of the Commonwealth**"

3. Federalist Limits on Legislative Power: Intergovernmental immunities Doctrine (Classes 9/10)

3.1. Federal Limitation

Q: Does the Commonwealth law restrict or burden (discriminate against) one or more of the States in the exercise of their constitutional powers? (*Austin v Commonwealth* 2003)

EXAM: *Is the Commonwealth law invalidated by the intergovernmental immunities doctrine?*
Rule: The intergovernmental immunities doctrine limits the Commonwealth parliament from legislating in a way that "restricts or burdens... the States in the exercise of their constitutional powers... (which) requires assessment of the impact of particular laws... (specifically the) 'curtailment' of 'capacity' of the States 'to function as governments'." (*Austin v Commonwealth*, Gaudron, Gummow and Hayne JJ) Importantly in the application of these criteria, the Commonwealth law's "substance and actual operation" is a primary consideration. (*Ibid*).

Application: Answer Qs

- 1) Does the Commonwealth law restrict States?
- 2) Does the Commonwealth law restrict the state capacity to 'function as governments' in the law's form?
- 3) Does the Commonwealth law restrict the state capacity to 'function as governments' in the law's actual operation? Refer to 2.1A notes table below for analogies.

Conclusion: The intergovernmental immunities doctrine therefore does/n't invalidate the (Cth law) because it is/n't overly restrictive of states' capacity to function as governments in its form/ effect.

A. Analogies for what limitations of state capacity amounts to above:

AEU: Especially relevant for employment!!! laws of state governments

- 1) *Re Australian Education Union; Ex parte Victoria* (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ): "critical to that capacity of a State is the government's right to determine:
 - i) **the number and identity of the persons whom it wishes to employ;**
 - ii) **the term of appointment of such persons and as well;**
 - iii) **the number and identity of the persons whom it wishes to dismiss...** from its employment on redundancy grounds.
- 2) States "**capacity to function as governments would not be impaired by the operation of federal awards made in respect of the vast majority of the employees...** (such as) minimum wages and working conditions... **(but it is) critical** to a State's capacity to function as a government... not only to determine the **number and identity** of those whom it wishes to engage at the **higher levels of government**, but also to determine the **terms and conditions on which those persons** shall be engaged... The implied limitation would protect the States from the exercise by the Commission of power to fix minimum wages and working conditions in respect of such persons" -> Cth government can't legislate with respect to higher level government employees such as "Ministers, ministerial assistants, advisers, heads of departments, high level statutory office holders, parliamentary officers and judges"
- 3) *Austin* (Gaudron, Gummow and Hayne JJ): The Intergovernmental Immunities Doctrine distinguishes between "a federal law which **impaired** capacity to exercise constitutional functions and one which **merely affected 'the ease** with which those functions are exercised" -> Must essentially prevent the capacity of states to exercise their governmental capacities, not just make it more difficult.
- 4) *Austin v Commonwealth* (Gaudron, Gummow and Hayne JJ): "It is **for the... states to determine the terms and conditions upon which it appoints and remunerates the judges of its courts**. The concept of remuneration includes provision of retirement and like benefits to judges, spouses, and other dependents." -> IID prevents Cth legislating for state judgments.
- 5) *Industrial Relations Case* (Brennan CJ, Gaudron, McHugh and Gummow JJ): "(the sections prohibiting certain reasoning for the termination of employees) **apply only to employees already in employment**. They thus do not prevent the States from determining 'the number and identity of the persons whom (they wish) to employ."
 - a. *Ibid* "none is concerned with termination on redundancy grounds."
 - b. *Ibid* "the prohibitions are concerned with termination for reasons unconnected with the term of employment"
 - c. *Ibid* "with respect to those employed at the higher levels of government..."
- 6) *Ibid* s170DD/DG: requires employer deciding to terminate 15/ more employees for structural reasons to provide notice to a Cth body and prohibits termination of employment in contravention of the statute's requirements
 - a. *Ibid* "s170DD **merely prescribes a step to be taken (and) does not in any way impair the right of the states to determine 'the number and identity of the persons whom they wish to dismiss'.**"