

# Constitutional Law

Exam Notes

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# 0. Issue-spotting

## What to look for if you have ... a Commonwealth Act -> \$, imm, jud, pol

Is the law supported by a head of federal legislative power?

- External affairs power (s 51(xxix))
- Corporations power (s 51(xx))
- Defence power (s 51(vi))
- **Incidental power (ss 51(xxxix) + 61)**
- **Grants power (s 96)**
- **Taxation power (s 51(ii))**

Does the law violate a limitation on federal legislative power?

- Intergovernmental immunities doctrine (*Austin*)
- Separation of judicial powers doctrine (*Boilermakers*)
- Prohibition on laws dealing with taxation & non-taxation (s 55)
- Freedom of interstate trade and commerce (s 92)
- Implied freedom of political communication (*McCloy*)

## What to look for if you have ... no Commonwealth Act authorising the Commonwealth executive's action -> exec

Is there a non-statutory executive power that authorises the action?

- Power to administer government departments (Williams No 1)
- Nationhood power (Davis; Pape; Williams No 2)
- Power to contract & spend public money (Williams No 1)
- **Remember: Always need a valid appropriation to spend public money**

## What to look for if you have ... a State Act -> imm, \$, jud, pol

Does the law violate a limitation on state legislative power?

- Is the law inconsistent with a valid Commonwealth law? (s 109)
- Separation of judicial powers doctrine (*Re Wakim*)
- Kable doctrine
- Prohibition on the imposition of excise duties (s 90)
- Freedom of interstate trade and commerce (s 92)
- Implied freedom of political communication (*McCloy*)

# 1. Intergovernmental Immunities

## 1.1 Overview

Intergovernmental immunities act as a limitation on Cth legislative power

Key question: Does the Cth law restrict or burden one or more of the States in the exercise of their constitutional powers? (Gaudron, Gummow & Hayne JJ in *Austin*)

Look at 'substance and actual operation of the law in the circumstances', not just what it says (*AEU*)

### Laws that do burden

- *AEU*:
  - Restrict 'number and identity of the persons whom it wishes to employ' (232)
  - Determine 'the term of appointment of such persons'
  - Restrict 'the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds'
  - Higher employees only: 'minimum wages and working conditions'
- *Austin*:
  - Limit State's choice of high-level employees (judges, Ministers, advisors) (260)

### Laws that don't burden

- *AEU*:
  - General employees' 'minimum wages and working conditions' (232)
- *Austin*:
  - Only affect the ease with which constitutional functions are exercised -> needs to impair [146]
  - Require the State to consider more qualified people (Cf *Austin*, limit the pool)
- *Industrial Relations*:
  - Only 'prescribes a step to be taken' (521)

## 1.2 Pre-*Austin* cases

	<i>Qld Electricity Commission v Cth</i> 1985 HCA
Issues	Discrimination prong
Facts	<i>Conciliation and Arbitration (Electricity Industry) Act</i> (Cth) gave Cth Conciliation and Arbitration Commission specific powers concerning the QEC dispute: <ul style="list-style-type: none"><li>• s 6(1) applied to specific QEC dispute</li><li>• s 6(2) applied to other disputes that might arise between unions and QEC</li></ul>

	<ul style="list-style-type: none"> <li>• s 8: limit Commission's power to dismiss industrial disputes involving QEC</li> </ul> <p>Law is valid under arbitration and conciliation power (219)</p>
Held	Cth Act invalid, unable to bind State
Reasoning	<p><u>Mason J:</u></p> <p>QEC allege Cth Act invalid because of implied prohibition that Cth legislation cannot discriminate against States or the residents of States</p> <p>Implied prohibition has 2 elements: discrimination and integrity (217)</p> <p>Discrimination includes isolating a State from a general rule applicable to others</p> <ul style="list-style-type: none"> <li>• Relates to States' legislatures, executives and agencies (Stephen J in <i>Koowarta</i>)</li> <li>• A law can deprive a state of a right or privilege and not amount to discrimination: if in pursuit of equity</li> </ul> <p>Cth Act breaches the implied prohibition bc 'singles out' the electricity industry in Qld in particular for the full bench of the Commission (219)</p> <ul style="list-style-type: none"> <li>• Isolates them from the general laws in the principal Act and subjects them to a 'special disability'/ 'special procedures'</li> <li>• s 8(1) prohibits the Commission from taking an Act it is otherwise authorised to do under the principal Act -&gt; cannot abstain due to public interest</li> <li>• s 9(6) gives commission power to hear the Qld element of the dispute separately</li> <li>• 'this regime is tailored for Queensland' (220)</li> <li>• 'true effect of the law may be to isolate the State agency and the private employers from the general law' (221)</li> </ul> <p>'The entire Act is invalid as being beyond power'</p> <p><u>Brennan J (dissenting):</u></p> <p>Not all discriminatory laws are invalid, depends on the particular burden or disability placed on the state</p> <ul style="list-style-type: none"> <li>• Adverse discriminatory operation of a law prohibited, not the adverse operation of a general law</li> </ul> <p>The Cth Act imposes a burden on QEC by compulsorily subjecting it to the arbitral procedure within it</p> <p>s 6(1) target QEC based on dispute, not the governmental character</p> <ul style="list-style-type: none"> <li>• Therefore, cannot infer provisions aim to restrict or control QEC</li> </ul> <p>s 6(2) could be applied to many disputes, only criterion is relating to QEC</p> <ul style="list-style-type: none"> <li>• This is discriminatory</li> <li>• Therefore, only s 6(2) is invalid</li> </ul>
Ratio	If an Act singles out one State/agency to burden them in some way, it is discriminatory; per the implied limitation, such laws are invalid

	<i>Australian Education Union 1995 HCA</i>
Issues	Discrimination AND structural integrity prongs
Facts	<p><b>Structural integrity</b></p> <p>Victorian Parliament removed State awards for public sector employees Unions responded by seeking federal awards to apply to them</p> <ul style="list-style-type: none"> <li>• Needed Australian Industrial Relations Commission to declare that there is an industrial dispute per s 51 xxxv, therefore the federal award would apply to Victorian government employees</li> </ul> <p><u>Previously, 'industrial disputes' per 51 xxxv was interpreted to only apply to productive industries or organised businesses carried on for the purpose of profit-making</u></p> <ul style="list-style-type: none"> <li>• This meant that Cth legislation could only operate in a State's commercial or trading enterprises</li> <li>• Issue is whether this means that State public servants performing non-commercial functions fall within the scope of this power</li> </ul> <p><b>Discrimination</b></p> <p><i>Industrial Relations Act</i> amended so that states that do not have compulsory arbitration lose the right to make an application to have a Cth industrial dispute dismissed</p> <p>Thereby discriminates against Victoria bc provisions target it as the only state without compulsory arbitration</p>
Held	<p>Cth can legislate on States' employment issues in relation to minimum wages and conditions to an extent</p> <p>Cth cannot legislate on:</p> <ul style="list-style-type: none"> <li>• Employment qualifications, eligibility, appointment and termination</li> <li>• Employment terms of State Ministers, ministerial assistants and advisers, departmental chief executive officers, senior office holders, State parliamentary officers and State judges.</li> </ul>
Reasoning	<p><u>Majority:</u></p> <p><b>Structural integrity</b></p> <p>'The existence of the States and their Constitutions and their capacity to function as governments would not be impaired by federal awards relating to minimum wages and working conditions <b>made in respect of the <u>vast majority of the employees</u></b>' (230)</p> <ul style="list-style-type: none"> <li>• It would restrict States' freedoms in this area, but that is Constitutionally valid</li> </ul> <p>State must have power to determine the following for ordinary government employees: (232)</p> <ul style="list-style-type: none"> <li>• The <b>number and identity</b> of the persons whom it wishes to <b>employ</b></li> <li>• The <b>term</b> of appointment of such persons</li> <li>• The <b>number and identity</b> of the persons whom it wishes to <b>dismiss</b> with or without notice from its employment <b><u>on redundancy grounds</u></b></li> </ul>

	<p>^ If the Cth intruded on these, that would constitute an infringement of the implied limitation</p> <p>State must have power to determine the following for higher-level government officials: (232-233)</p> <ul style="list-style-type: none"> <li>• The number and identity of the persons whom it wishes to employ</li> <li>• The term of appointment of such persons</li> <li>• The number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds</li> <li>• <b>AND</b> the terms and conditions on which those persons shall be engaged <ul style="list-style-type: none"> <li>◦ <i>Incl minimum wages</i></li> </ul> </li> </ul> <p><b>Discrimination</b></p> <p>Look at substance and operation rather than legislators' subjective intent (239)</p> <p>Just because 'Victoria is the only State presently affected by s 111(1A) is not a compelling consideration, though it could conceivably be is <b>in the absence of a rational and relevant connection</b> between the basis on which that provision denies access' and the exercise of the power</p> <ul style="list-style-type: none"> <li>• Court finds such a connection, the distinction IS drawn for a logical reason (240)</li> </ul> <p><u>Dawson J (dissenting):</u></p> <p>Constitutional source of implied limitation:</p> <ul style="list-style-type: none"> <li>• The foundation of the Constitution is the conception of a central government and a number of State governments separately organised. The Constitution predicates their continued existence as independent entities. (Dixon J in <i>Melbourne v Commonwealth</i>)</li> <li>• ^ protects, but does not create, the States as independent units within the federation <ul style="list-style-type: none"> <li>◦ Creation is through the Constitution itself</li> </ul> </li> </ul> <p><b>It is artificial to draw a line between those employed at higher and lower levels of State government (249)</b></p> <ul style="list-style-type: none"> <li>• <b>Function of a State depends on all employees</b></li> </ul> <p>No readily discernible line between those aspects of the relationship between a State and its employees which may be externally regulated without interference with the capacity of the State to function independently and those which may not</p>
Ratio	<p>Industrial relations power (s 51 xxxv) empowers the Cth to legislate on States' public sector employment laws</p> <p>However, this Cth power is subject to some limitations so as to ensure States' functionality and existence as governments</p> <p>If discrimination is for a logical reason, then not invalid</p>