

INTERGOVERNMENTAL IMMUNITIES

The High Court's intergovernmental immunities doctrine has evolved through three phases. The early "federal compact" era (Phase I) implied mutual immunity of State and Commonwealth instrumentalities (D'Emden, Railway Servants'), but this was rejected in Engineers (Phase II) in favour of literalism. The modern doctrine began in Melbourne Corporation, where Dixon, Starke and Williams JJ held that a Commonwealth law is invalid if it either (1) discriminates against the States or (2) impairs their constitutional functions. Mason J in QEC, the Court affirmed both limbs and clarified that discrimination can be general or State-specific. In Austin, the Court reformulated the doctrine into a single test: the Commonwealth must not substantially impair a State's capacity to function as an independent government and exercise their constitutional powers. Discrimination remains relevant but is not determinative (Clarke).

(1) Identify the Commonwealth burden / measure

Identify the Cth law and its application to the States

- Does the law explicitly target a State (e.g. naming a State or its institutions)?
 - QEC: law directed at a single Queensland dispute.
 - Note: In the *Native Title Act* case, the HCA affirmed that if a law expressly addressed to States' generally but has some differential effect on one particular State it is not in itself unconstitutional.
- Does the law apply generally but has a disproportionate or unique impact on States.
 - *Melbourne Corporation*: ban on private banks dealing with States
- Ask: Does the law impose an obligation or constraint on a State's institutions, assets, officers, or decision-making?
- Thus, it is discriminatory, but this is not enough (*Austin*).

(2) Does the burden impair the State's ability to function as an independent government?

1. State institutional integrity
 - Laws that alter or abolish a State institution (e.g. Parliament, judiciary) impair its existence as a polity.
 - Rare but extreme. Hypo: A law mandating abolition of a State's upper house.
2. Machinery of Government
 - Focus is on the internal organisation and structure of the State government and how the States do things, not what it decides to do
 - Ask:
 - i. Does the law affect how the State hires/fires?
 - ii. Does it restrict how the State structures agencies or runs internal functions?
 - iii. Is it telling the State how to organise its own operations?
 - Interference with the State's capacity to organise and control its public sector or agencies.
 - Re AEU: invalid – law regulated redundancy and hiring of senior officials. → This restructured how the State operated its executive branch and public service.
 - IR Act Case: invalid – interfered with State workforce governance.
 - Ask: does the law dictate how State agencies must operate, who they appoint or dismiss, what policies it must adopt
 - Use this category when the law affects how the State configures or runs its public administration.

- i. Emphasis is on organisational control and institutional configuration — e.g., who the State hires, how it structures departments, internal governance rules.
- ii. Impairment often occurs when a law dictates internal processes or staffing frameworks.

Case	Key Facts	Evaluative Insight
Re AEU (1995)	Cth law regulated redundancy/appointment of senior State employees.	Burden was significant due to targeting of senior roles and internal structures — higher constitutional value.
IR Act Case (2023)	Federal law interfered with State redundancy and internal restructuring.	Compared to <i>AEU</i> , burden less targeted but still affected structural autonomy — significance depends on the role affected.
Clarke v FCT (2009)	Cth tax law affected State decisions over managing retirement funds.	Not directly about structure, but the law indirectly burdened how States organised financial administration.
Re AEU (No 2) [2022]	Confirmed protection of State power over senior staff decisions.	Reinforces that burden on high-level employment structures triggers invalidity — analogue where leadership roles are affected.

3. Powers and discretion

- Focus is on the ability of the State to make and implement independent decisions (legislative or executive) and **what the State chooses to do**
- Ask:
 - i. Does the law compel the State to follow a federal policy or outcome?
 - ii. Does it leave no room for independent decision-making?
 - iii. Does it override the State's policy discretion, even if the machinery remains intact?
- Does the law override, compel, or hollow out the State's executive or legislative discretion?
- Austin: Surcharge law constrained how States could remunerate judges — impairing financial discretion, not organisational structure → didn't change how judges were appointed or the court's structure, but it hollowed out the State's power to set judicial remuneration — a core State power.
- Clarke: A Commonwealth tax affected how the State could allocate retirement benefits, undermining its fiscal discretion.
- Ask: Does the law prevent the State from deciding policy, allocating funds, or staffing key roles?
- Use this category when the law doesn't change how a State is organised, but deprives it of meaningful freedom to govern
 - i. Emphasis is on autonomy in decision-making — even if the State retains formal control over institutions.
 - ii. Impairment occurs when the law compels outcomes or eliminates discretion (even without restructuring the State's machinery).

Case	Key Facts	Evaluative Insight
Austin v Commonwealth (2003)	Cth law impaired States' control over judicial remuneration via surcharge.	Judicial pay control was critical due to constitutional role of courts — distinguish from ordinary employment cases.

Clarke v FCT (2009)	Cth scheme created compliance burdens limiting fund allocation discretion.	Burden may be less severe than <i>Austin</i> , but still relevant if financial discretion is significantly constrained.
Re AEU (1995)	Removed State discretion over senior employment terms.	Overlaps with machinery — evaluative weight increases where policy freedom is also removed.

4. Essential personnel, property or services

- Focus is on the practical inputs or infrastructure necessary for the State to operate effectively
- Ask:
 - i. Does the law deny the State key people, like judges or senior officials?
 - ii. Does it deny access to services, like banks, electricity, communication, or IT?
 - iii. Does it affect property critical to administration?
- Personnel: Restrictions on appointments, especially senior officers or judges (*Re AEU*, *Austin* → Also affected personnel (judges), who are constitutionally entrenched and essential to a functioning judiciary).
- Property: Denial or restriction of property access (*Melbourne Corporation* – denial of private banking access → Didn't interfere with powers or machinery — but the practical effect was to cripple financial operations).
- Services: Interference with access to utilities, financial systems, or logistics critical to governance.
- Ask: Does the law deprive the State of key resources — like officials, assets, or basic services — necessary for governing?
- Use this category when the law blocks or burdens the State's ability to acquire or retain the human and material resources it needs
 - i. Emphasis is on material support for governance, rather than formal powers or structures.
 - ii. Impairment arises from denying access to people (e.g. judges), property (e.g. office space), or services (e.g. banking, electricity).

Case	Key Facts	Evaluative Insight
Melbourne Corporation (1947)	Cth law denied States access to private banking services.	Clear example of operational burden — where denial of services made governance practically impossible.
Austin v Commonwealth (2003)	Judicial pay was materially reduced, undermining judicial independence.	Analogise only where personnel are constitutionally entrenched or critical to institutional function.
Re AEU (1995)	Restricted State ability to employ essential senior staff.	Best used when law impacts State's ability to staff vital departments — shows both structural and operational burden.

(3) Is the burden significant?

Although the identification of a burden and discrimination are useful, The HCA now focuses on the 'wider principle', with the burden or discrimination on States being one relevant aspect to consider in the analysis (*Austin*) and it is better to consider French CJ's multifactorial test developed in *Clarke* to be determined on the balance of factors.

1. Does the law single out one or more States and impose a special burden or disability?