Constitutional Law
Exam Notes

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Intergovernmental Immunities

- **CONSIDER WHETHER THERE IS A SAVINGS CLAUSE (*Industrial Relations Case*)!**
- **CONSIDER WHETHER A SECTION PROVIDES THAT IT 'BINDS THE COMMONWEALTH, CROWN, STATE, ETC)**

There is one limitation
Does the Commonwealth law restrict or burden one or more of the States in the exercise of their constitutional powers? (Gaudron, Gummow and Hayne JJ in *Austin v Commonwealth*)

- **The doctrine extends to government agencies (*QEC*)**
- 'The issue is one of interference; of impairment of the constitutional integrity of a State government' (Gleeson CJ in *Austin*).
- 'Disabling effect on State authority' (Gleeson CJ in *Austin*).
- Consider whether the law imposes a 'special burden' or the 'curtailment of the capacity of the States to function as governments' (Gaudron, Gummow and Hayne JJ in *Austin*).
- Focus on 'the substance and actual operation' of the law (Gaudron, Gummow and Hayne JJ in *Austin*).
- Does the law 'impair [the] capacity [of the States] to exercise [their] constitutional functions'? It cannot merely affect the 'ease with which those functions are exercised' (Gaudron, Gummow and Hayne JJ in *Austin*).
- Need to consider the 'effect of the impugned legislation on the continuing existence of the States, and whether there is an impermissible degree of impairment of the State's constitutional functions' (Kirby J in *Austin*).

Additional considerations

1. **Employment of State Employees (*Australian Education Union*)**

   Ordinary government employees
   State **must** have power to control (without Commonwealth interference):

   (a) The number and identity of the persons whom it wishes to employ;
   (b) The term of appointment; and
   (c) The number and identity of persons it wishes to dismiss with or without notice **on redundancy grounds.**

   No immunity to determine, free from Commonwealth interference, the terms and conditions of the employment itself. Terms and conditions of employment refer here to **'wages and working conditions'.**

   *Higher-level government employees ('*ministers, ministerial assistants and advisors, heads of departments and high level statutory office holders, parliamentary officers and judges'*)*
   State **must** have power to control (without Commonwealth interference):
   - **CONSIDER WHETHER THERE'S A SAVINGS CLAUSE (SEVERABILITY FOR HIGHER-LEVEL EMPLOYEES)**

   (a) The number and identity of the persons whom it wishes to employ;
   (b) The term of appointment;

(c) The number and identity of persons it wishes to dismiss with or without notice **on redundancy grounds; and**
(d) The 'terms and conditions on which those persons shall be engaged'.

2. Discrimination

- 'Discrimination is **an aspect** of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle. … It is the impairment of constitutional status, and interference with capacity to function as a government…' (Gleeson CJ in *Austin*).

- **Consider whether it's a law of general application; the 'substance and operation' of the law; and whether the basis for discrimination bears a real and rational relationship to the effect or purpose of the law — ie, is the distinction being drawn for a logical reason?**

Queensland Electricity Commission v Commonwealth (discrimination prong)

Facts

- Commonwealth Parliament passes Act, s 6(1) of which targets the specific 'industrial dispute between the Electrical Trades Union of Australia and certain authorities that was found to exist by a Commissioner on 18 April 1956'

- Section 6(2) says the Act applies to any further disputes with a Queensland electricity authority

- Section 7 required the Commonwealth Conciliation and Arbitration Commission to settle the matter 'expeditiously'

- Section 8(1) removed the power of the Commission to refrain from determining a dispute if the dispute was proper to be dealt with by a State industrial authority, or if further proceedings were not necessary or desirable in the public interest

- Section 9 required the Commission to determine the dispute as a Full Bench, which removed the right of appeal from a single member to the Full Bench

Does this Act violate the intergovernmental immunities implication (Mason J)?

- **Two-pronged implication**: (1) **discrimination** — 'placing on the States of special burdens or disabilities'; and (2) **structural integrity** — 'laws of general application which [nonetheless] operate to destroy or curtail the continued existence of the States or their capacity to function as governments'

- **Discrimination prong is satisfied, so the Act is invalid:**

> *This regime is tailored for Queensland authorities, as distinct from the authorities of other States, and, what is more important, from the general run of employers in the industry.*
>
> *Section 8(1) limitation particular significant because it prohibits the Commission from taking action which it is authorised to do under the Principal Act.*

> *It is significant that the Act applies in the first instance to the [particular] dispute found to exist on 18 April to which no private employer in Queensland is a party.*
>
> *When Parliament singles out disputes in the electricity industry to which agencies of the State of Queensland are parties and subject them to special procedures which differ from those applying under the Principal Act to the prevention and settlement of industrial disputes generally, and of industrial disputes in the electricity industry in particular, it discriminates against the agencies of the State by subjecting them to a special disability in isolating them from the general law.*

- The law is 'extreme'. It 'singled out' agencies of Queensland for 'special procedures', 'tailored for Queensland', and distinct from those applying under the general law.

- The law subjects 'agencies of the State' to a special disability under the s 51(xxxv) arbitration and conciliation power.

- The law's true effect is to 'isolate the State agency … from the general law'.

Re Australian Education Union; Ex parte Victoria

Facts

- Kennett government attempts to balance the budget by reducing expenditure on state employees.

- State Parliament enacts the *Employee Relations Act 1992* (Vic), getting rid of old system of compulsory arbitration and introducing workplace agreements. Voluntary severance packages were introduced for teachers and health workers.

- Unions such as the Australian Education Union sought protection under Commonwealth industrial relations law.

To what extent can Commonwealth law apply to State governments and their employees?

- **Under the structural integrity prong, States must have certain power to control who they employ**

> *With respect to ordinary government employees, the State must have the power to control, without Commonwealth interference, (1)* ***number and identity*** *of the persons whom it wishes* ***to employ****; (2)* ***term*** *of appointment; and (3)* ***number and identity*** *of persons it wishes to dismiss with or without notice on redundancy grounds.* ***There is no immunity from Commonwealth laws governing wages and working conditions.***
>
> *With respect to higher-level government officials, the State must be able to control, without Commonwealth interference, (1)* ***number and identity*** *of the persons whom it wishes* ***to employ****; (2)* ***term*** *of appointment; (3)* ***number and identity*** *of persons it wishes to dismiss with or without notice on redundancy grounds;* ***and*** *the* ***terms and conditions*** *on which those persons shall be engaged.*

  - So, the imposition of a federal award governing minimum wages or working conditions for **ordinary government employees** would not infringe the immunity

- Note that for **higher-level government employees**, the federal award could **not** govern minimum wages, since this would interfere with immunity to determine the **terms and conditions** of employment

- **Note that Dawson J dissents, rejecting the artificial distinction between those employed at the higher levels of government and those employed at the lower levels.**

> *If the determination of the number and identity of persons to be employed is critical to the functioning of a State, then so too will be the wages and conditions of employment, for the former cannot be determined in isolation from the latter.*

- **Amendment to the *Industrial Relations Act* denying States (like Victoria) that do not have compulsory arbitration the right to make an application to have a Commonwealth dispute dismissed since it does <u>not satisfy the discrimination prong</u>**

> *It is logical for the [Commonwealth] Parliament to conclude that a power given to the Commission to refrain from proceeding where it is in the public interest to do so should only be exercisable when an alternative system of compulsory arbitration is available.*
>
> *Further, the introduction of s 111(1A) can be supported on the ground that it eliminated or alleviated problems that would arise once State compulsory arbitration was no longer available.*

- In other words, the distinction in application is drawn for a logical reason.

Victoria v Commonwealth ('Industrial Relations Act Case')

Facts

- Amendments to the *Industrial Relations Act* (Cth) provided a safety net for State employees without compulsory industrial arbitration.

  - **Section 170DB** prescribed steps to be taken in cases of termination without notice.
  - **Section 170DC** prohibited termination for reasons related to conduct or performance *unless* the employee had first been given a chance to defend himself against all allegations made
  - **Section 170DE(1)** prohibited termination other than for a valid reason connected with the employee's capacity or conduct, or the employer's operational requirements
  - **Section 170DF** prohibited termination on 'impermissible grounds' (union membership, filing a complaint against an employer, race/sex/sexual orientation, taking maternal leave)
  - **Section 170DD** required an employer who decides to terminate 15 or more employees for reasons of an economic or structural nature to give notice to the CES of reasons, numbers and categories of employees and period over which terminations are to be carried out
  - **Section 170DG** prohibited termination of employment in contravention of an order from the Commission. It allowed the Commission to order for severance pay and union consultation.

- It imposed minimum wages, equal pay, termination of employment, discrimination, parental leave (Commonwealth standards) on employers (including States).

- The law was challenged on both the discrimination and structural integrity prongs.

On the discrimination prong it, did not violate the intergovernmental immunities doctrine

- It was a law of general application. It applies to all, not just to Western Australia.
- The purpose of the legislation is to be ascertained by reference to its 'substance and actual operation'.
- **Its specific application to States without compulsory arbitration bears 'a *real and rational relationship* with the general system of wage fixation as it has developed in this country'**
    - In other words, the distinction is drawn for a logical reason.

On the structural integrity prong

- The provisions don't limit the number and identity of those the state **wishes to employ**
- The provisions are concerned with termination for reasons **unconnected with the term of employment**
- **Section 170DE(1)** violates the immunity to determine the number and identity of persons the State wishes to dismiss with or without notice on redundancy grounds — by requiring '*a valid reason for termination connected with operational requirements, [it] would operate to prevent a State from determining the number and identity of those to be made redundant*'
- All provisions must be **read down** to not apply to **higher level employees**, since States retain the right to set the 'terms and conditions' of their employment

On the redundancy provisions (ss 170DD, DG), considered under the structural integrity prong

- **Section 170DD** was valid **(in its application to ordinary employees)** because 'it merely prescribes a step to be taken if more than fifteen employees are to be made redundant. It 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 with or without notice … on redundancy grounds'
- **Section 170DG** was read down **(in its application to ordinary employees)** because:

> *An order for the payment of severance pay and orders requiring union consultation clearly impair a State's right to 'determine the number and identity of (those) whom it wishes to dismiss ... on redundancy grounds.' However, the effect of the reading down of s 6 is that s 170FA does not apply to the States. It follows that the prohibition in s 170DG has no operation with respect to the States."*

- **Both provisions** read down to not apply to **higher level employees** since they both govern terms and conditions of employment.

Austin v Commonwealth ('Judges' Superannuation Case')

Facts

- New Commonwealth superannuation tax introduced
- It creates a special surcharge for members of 'constitutionally protected funds' (ie, State employees, including judges)
- Effect: on retirement, a member of a constitutionally protected scheme would face a substantial lump sum liability

Gleeson CJ reformulates the intergovernmental immunities doctrine

> *Discrimination is an aspect of a wider principle; and what constitutes relevant and impermissible discrimination is determined by that wider principle. … it is the* ***impairment of constitutional status****, and* ***interference with capacity to function as a government****, rather than the imposition of a financial burden, that is at the heart of the matter.*

The Court then applies this doctrine to the law

- It is critical to a State's capacity to function as a government that it have the capacity to regulate employment of State employees in the way articulated in *Australian Education Union* (Gaudron, Gummow and Hayne JJ)

> *It is for the States to determine the* ***terms and conditions*** *upon which they appoint and remunerate judges of their courts* (Gaudron, Gummow and Hayne JJ).

- The law supplies a **disincentive** to judges to meet the public interest of the State in retaining their judicial services for the maximum possible term (Gaudron, Gummow and Hayne JJ).

> *The provision of secure judicial remuneration at significant levels serves to advantage and protect the interest of the body politic.* It *encourages persons learned in the law* to *'quit the lucrative pursuits of private business, for the duties of that important station'*.
>
> It also '*assists the attraction to office of persons without independent wealth and those who have practised in less well paid areas*'.
>
> The federal law here *treats State judges differently from the general run of high income earners and federal judges. The practical manifestation of this law is to affect recruitment and retention of judges to perform an* ***essential constitutional function of the State*****.**

Kirby J dissents, contesting the proposition that imposition of such a tax has a significant and detrimental effect on the power of a State to determine the terms and conditions affecting the remuneration of its judges

Executive Power

RULE 1: ALL GOVERNMENT SPENDING REQUIRES A VALID APPROPRIATION UNDER S 83 (NECESSARY, BUT INSUFFICIENT CONDITION)

RULE 2: GENERAL APPROPRIATION DOES NOT CONSTITUTE STATUTORY AUTHORISATION TO SPEND (*PAPE*)

RULE 3: WITHOUT STATUTORY AUTHORISATION (EITHER EXPRESS, OR INCIDENTAL (S 61)) TO SPEND, THERE IS NO GENERAL POWER TO CONTRACT AND SPEND (*Williams (No 1)*), EXCEPT IN: (1) OASG; (2) NATIONHOOD; (3) PREROGATIVE

The Commonwealth executive can spend where (a) it is 'necessary or reasonably incidental to the execution or maintenance of a statute'[1] (s 61); (b) it is in the ordinary annual services of government; (c) the nationhood power in s 61 is enlivened; or (d) where the prerogative aspect of executive power is enlivened (*Williams (No 1)*, French CJ).

Step 1: Is there a Commonwealth Act supporting the exercise of the executive power?

In *Pape*, it was held that no substantive power to spend is contained in ss 81 and 83 of the Constitution. Instead, it is part of the executive power of the Commonwealth referred to in s 61. The executive may therefore spend, inter alia, when supported by statute, through its power to 'execute and maintain' the 'laws of the Commonwealth' (s 61, *Constitution*).

Step 1(a): Is the law supported by a head of federal legislative power, including the <u>incidental power</u> in s 51(xxxix) (*Pape*-style question)? (CAN'T MAKE COERCIVE LAWS UNDER INCIDENTAL POWER)

Section 51(xxxix) permits Parliament to legislate with respect to matters incidental to the execution of any power vested in, inter alia, any department or officer of the Commonwealth (ie, the executive).

- An example is the *Tax Bonus for Working Australians Act* in *Pape*, which was supported by the incidental power.
    - This stemmed from the executive act (through nationhood power) of 'determining that there is the need for an immediate fiscal stimulus to the national economy'.[2]
    - Note that following *Williams (No 1)* you probably didn't need this statute in *Pape* to support the spending **(since the nationhood power was invoked)**

[1] *Constitution*, s 61. See also *Williams (No 2)* (French CJ).
[2] Gummow, Crennan, and Bell JJ in *Pape*.

Step 1(b): If the authorising Act is supported by a head of power, ask whether it violates any limitations on legislative power. Consider the intergovernmental immunities doctrine.

Step 1(c): Is the executive's spending directly authorised by, or reasonably necessary for the purpose of executing the statute?

Step 2: If there is no statute expressly supporting the exercise of the executive power, is there a valid exercise of non-statutory executive power?

(a) Is the law necessary or reasonably incidental to a statute (s 61)?

If no to (a):
Where unsupported by statute, executive spending must either occur (a) in the ordinary annual services of government; (b) through exercise of prerogative executive powers; or (c) through the nationhood power.

(b) Power to administer government departments (*Williams No 1*)

Due to s 64 of the *Constitution*, the executive can, without statutory support, contract and spend in circumstances involving the 'ordinary annual services of government'[3] or 'the administration of a department of State'.[4]

'Ordinary well-recognised functions' of government (*Williams (No 1)*)

- Is it a major new program? Whole new policy? Big changes needed to be implemented? All point away from OASG.

(c) Nationhood power (*Davis; Pape; Williams No 2*)

The nationhood power covers '**enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'**.[5] This power is limited by federalism, so is clearest when there is 'no real competition with state executive or legislative competence' (*Pape*).[6]

- Ask whether there are other ways in which the objective could be achieved (eg by the states, local councils, etc)!
- Extends to some **emergencies/crises** (*Pape*)
- **In *Pape*, French CJ confined the validity of the exercise of the nationhood power to the facts of the case**, explaining that it was valid because they were '**short-term fiscal measures'** addressing a '**national economic crisis**'.
    - **Ask whether the issue is long-term as well!**
    - This is **not a 'general power to manage the economy'**.[7]
- **Nationhood power =** power to **respond to crises**, whether war, natural disaster or financial crises on large scale **according to Gummow, Crennan and Bell in**

[3] *Williams (No 1)* (Crennan J).
[4] *Williams (No 1)* (French CJ).
[5] *Pape*, approving *AAP Case* (Mason J).
[6] *Pape* (French CJ), approving *Davis* (Mason CJ, Deane and Gaudron JJ).
[7] *Pape* (French CJ).

Pape. Fiscal measures were '**on their face peculiarly within the capacity and resources of the Commonwealth' (Gummow, Crennan and Bell JJ)**.[8]
Note that the Commonwealth/anyone else cannot **recite a non-crisis into being a crisis** (ie stating that there is a crisis doesn't meant there is one).[9]

- Something is not in the national interest merely because parliament says it is (*Williams (No 2)*)

- Is this an area of **shared responsibility** between Commonwealth and States or is it **peculiarly adapted for national** government (*Pape* = latter; *Williams (No 1)* = former)
    - **Even where there is shared responsibility**, might have **counter-argument**: only Commonwealth has the money to properly respond to the given issue

The relevant executive act in *Pape* was that of 'determining that there is the need for an immediate fiscal stimulus to the national economy'[10]

- **May be used for national organisations, symbols and celebrations (*Davis*)**
- **Cannot be used to create a new offence without a statute (*Pape*)**

(d) Prerogative power

The executive can spend without statutory support when it is validly exercising its prerogative powers.[11]

Considerations:

- A valid general appropriation act is not sufficient to confer executive spending or contracting power.[12]
- The executive does not have general power to deal with matters of mere Commonwealth legislative *competence*, absent actual statutory authorisation.[13]
- 'Consultation between the Commonwealth and States coupled with silent, even expressed, acquiescence by the States does not supply otherwise absent constitutional power to the Commonwealth.'[14]

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[8] *Pape* (French CJ). See also *Pape* (Gummow, Crennan and Bell JJ).
[9] *Pape* (Gummow, Crennan and Bell JJ).
[10] Gummow, Crennan, and Bell JJ in *Pape*.
[11] See *Williams (No 1)* (French CJ).
[12] *Williams (No 1)*.
[13] *Williams (No 1)* (French CJ). See also *Williams (No 1)* (Gummow and Bell JJ).
[14] *Williams (No 2)* (French CJ, Hayne, Kiefel, Bell and Keane JJ).