
LAWS3700

Exam Book

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Intergovernmental Immunities

Background

Constitutional System of Autonomy

Independence and Autonomy of States/Commonwealth

It was the intentions of the framers of the **Constitution** that the States' powers were to remain intact except to the extent that was needed to make the Federal government (**Resolution 1**). **Quick & Garran** illustrate this view below:

'[T]he people of the Commonwealth, in the majority of States, will not feel inclined to interfere with the principles of local liberty, local self-government, State autonomy, and State individuality which pervade the Constitution. They will recoil from an Imperial policy of consolidation and centralization, which would swallow up, absorb, and obliterate the States.' (**Quick and Garran**)

The assumption of the mutual independence of the Commonwealth and the States was qualified in specific ways by provision for mutual interdependence and cooperation, and with Commonwealth supremacy in certain respects (**s 109**), is fundamental to the design and structure of the **Constitution**.

Interaction of the States and Commonwealth

The **Constitution** establishes both **independent** systems of government and **integrated systems** of government.

Independent systems	Integrated systems
<ul style="list-style-type: none"> The maintenance of independent legislative, executive and judicial powers (subject to ss 106 and 107 of the Constitution) was one of the fundamental presuppositions of the federal compact Commonwealth legislation cannot apply to 'State banking' or 'State insurance' except State banking or insurance that extends beyond the State (ss 51(xiii) and (xiv)). Commonwealth cannot impose a tax on State property (s 114). State cannot impose a tax on Commonwealth property (s 114). 	<ul style="list-style-type: none"> States represented in the Senate (s 7) High Court vested with general appellate jurisdiction (s 73). In that respect, State courts are integrated into a federal court hierarchy. <ul style="list-style-type: none"> Note: This is different to the legislature and executive system, whereby the Commonwealth is not at the top of the hierarchy (e.g., the State Premier is independent from the Prime Minister). State courts exercise federal jurisdiction (s 77(iii)). Commonwealth assumption over State debts (ss 105, 105A). Commonwealth laws prevail over inconsistent State laws (s 109).

Traditional Crown Immunity

The 'Crown in **right of Queensland**' or the 'Crown in **right of the Commonwealth**' is a multifaceted legal entity involving various dimensions (i.e., the Queen, the Governor-General, State governors, Government departments). The immunities and privileges enjoyed by 'the Crown' personally (i.e., the Monarch) is distinct from those enjoyed by agents of the Crown. **For example:**

- The Monarch is **immune** from civil suit (unlike **agents** who can be subject to suit)
- There is a background presumption that statutes **do not** bind the Monarch unless the legislation expressly provides (**note: The High Court has abandoned that strong presumption**).
- The Monarch enjoys a priority in the repayment of debts.

Testing Constitutional Validity

Overview

The High Court has intended to infer the relevant intergovernmental immunities principles from the federal character and structure of the **Constitution** as a whole. In determining the constitutional validity of a Commonwealth law, the following enquiries are to be had.

(6) Does the law fall within the scope of **Commonwealth legislative powers**?*

The majority agree the question of 'power' remains distinct from the question of immunity (**Dixon, Starke** and **Rich JJ** in **Melbourne Corporation case**).

For purposes of intergovernmental immunities, **no need to 'characterise' the law and determine whether it falls within a head of power.*

(7) Does the law **infringe** on the implied freedom of **State immunity**?

The **Constitution does not** contain express provisions formulating general rules about Commonwealth legislation binding the States. **Four categories of provisions** provide limited guidance.

- **Constitution prohibitions:** The Commonwealth **cannot** legislate in respect of
 - State banking or insurance (except where it extends beyond the State) (**ss 51(xiii)** and **51(xiv)**); or
 - Impose a tax on State property (**s 114**).
- **Constitution grants:** The **Constitution authorises** Commonwealth legislation which
 - Acquires property from States (**s 51(xxxi)**);
 - Invests State courts with federal jurisdiction (**s 77(iii)**);
 - Confers rights to proceed against States (**s 78**);
 - Prescribes the number of State judges to exercise federal jurisdiction (**s 79**);
 - Deals with State railways (**s 98**);
 - Prohibits State preferences (**s 102**); and
 - Regulates State compliance with State debt agreements (**s 105A**).

- **Inconsistency between Commonwealth and State laws (s 109):** The question is whether the Commonwealth is generally supreme over the States and can therefore make laws binding the State?
- **Limitation through s 106:** Does **s 106**— ‘The Constitution of each State... shall, subject to this **Constitution**, continue as at the establishment of the Commonwealth... until altered in accordance with the Constitution of the State’— be read as a **limitation on Commonwealth power**?

Federal and State conflict

Two kinds of federal conflict

There are two types of **federal conflict** which can arise:

- **Inconsistency between Commonwealth and State laws (s 109, *Constitution*)**
State laws vs federal laws
- **Intergovernmental immunities**
*Federal laws vs state **government (focus!)***
*State laws vs federal **government***

Early Cases of Immunity

Overview

Key terms

- **Government instrumentality:** An entity, agency, mechanism, means, or institution that is subject to the control of the Crown and performs functions on behalf of the Crown (e.g., Australia Post and its employees are immune from the States).
- **Immunity:** Immunity is the right that a law of a particular description cannot be made. There is an absence of power.

Phase I: Immunity of Instrumentalities (1903 – 1920)

Establishment

OVERALL: Immunity of Instrumentalities **established**.

The first exposition of the ‘**implied immunities of governmental instrumentalities**’ doctrine was asserted by **Griffith CJ, Barton and O’Connor JJ** in *D’Emden*: ‘where a State attempts to give its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorised by the **Constitution**, is to that extent invalid and inoperative.’ (at **111**). This immunity held by the Commonwealth was reciprocally applied to the States (*Railway Servants case*).

Ultimately, it was held the **States**, and the **Commonwealth** were to be **immune from each other’s legislation** where it affected their **government’s instrumentalities**. The immunity was justified on the ground that it gave effect to a ‘coordinate’ theory of Australian federalism in which sovereignty was ‘distributed’ into distinct spheres of operation (**Griffith CJ** in *D’Emden*).

The immunity of instrumentalities doctrine was **expressly rejected** by the Privy Council in **Webb v Outtrim** on two grounds: (1) State or Commonwealth laws acquire sovereign authority upon royal assent and therefore can only be overridden by Imperial legislation; and (2) there was no explicit prohibition within the **Constitution** that disallowed States to interfere with the Commonwealth. **Issacs** and **Higgins JJ** persistently indicated their preference for the Privy Council's approach. Though, **Griffith CJ** in **Baxter** disagreed the view of the Privy Council and likened their approach to an interpretation of 'astral intelligence... merely by aid of a dictionary.'

Application of 'Immunity of Instrumentalities'

The 'immunity of instrumentalities' principle from **D'Emden** was applied to **protect**:

- **Commonwealth from States (**D'Emden**)**
*Note: The Privy Council in **Webb v Outtrim** was in **significant opposition** to the immunity of instrumentalities doctrine*
- **States from Commonwealth (**Railway Servants case**).**

Exceptions to the doctrine

The immunities enjoyed by the Commonwealth and the States were always stated to be subject to any **specific exceptions** established by the **Constitution**. These **exceptions** especially concerned several of the legislative powers of the Commonwealth which due to their nature and scope must necessarily authorise some form of interference with the States.

Unsurprisingly, the doctrine of 'absolute sovereignty' (**Sydney Municipal Council**) began to erode as a result of these 'exceptions' (consider **Steel Rails case**; **Engine-Driver's case**; **Municipalities case**). Ultimately, the appointment of a new bench led by **Issacs J** shifted the approach (see **Phase II**).

The 'immunity of instrumentalities' principle from **D'Emden** was **not applied** in the following instances:

- States not immune from Commonwealth interference where it involved **international relations (**Steel Rails case**)**.

Steel Rails case (1908)

Reasoning: The Commonwealth could levy customs duty on steel railway lines imported by New South Wales, despite the implied immunities doctrine. This was because the Commonwealth should have power to control 'in every respect Australia's relation with the outside world', especially international trade, duties, immigration, quarantine and external affairs. Effective federal control over these matters would require the States not to be immune.

- States not immune from Commonwealth interference where it involved **trading** within Commonwealth jurisdiction (**Engine-Driver's case**).

Engine-Driver's case (1911)

Reasoning: The immunity did not protect State government instrumentalities, such as municipal corporations, insofar as they engage in trading operations and thereby bring themselves with the jurisdiction of the Commonwealth in relation to arbitration and conciliation of industrial disputes.

- Local governments are not immune from Commonwealth interference as they are not State instrumentalities (**Municipalities case**).

Municipalities case (1911) – Local governments are not immune from Commonwealth interference as they are not State instrumentalities

Reasoning: Local government bodies do not function as instrumentalities of a State insofar as they engage in 'the making, maintenance, control and lighting of public streets', and are not, therefore, immune from Commonwealth industrial arbitration legislation in that respect.

Phase II: Commonwealth Parliamentary Supremacy (1920 – 1947)

Rejection

OVERALL: State immunity from Federal laws was **rejected**, and Federal protection was **afforded** on the basis of Commonwealth supremacy through the operation of **s 109**.

The doctrine of ‘**implied immunities doctrine**’ was **refashioned** in *Engineers*.

The judgment in *Engineers* delivered by **Issacs J**, focussed on constitutional principles and canons of construction. It was held the Crown ‘is one and indivisible throughout the Empire’, then it seems to follow that the Crown will always be bound by a law enacted under the authority of the **Constitution**, even if the law is enacted by the Commonwealth and purports to bind the Crown in right of the States. The federal interrelationship between the Commonwealth and the States did not matter; the **Constitution** was passed ‘for the express purpose of regulating the royal exercise of legislative, executive and judicial power throughout Australia’ and is therefore ‘by its own inherent force binding on the Crown to the extent of its operation’ (at **152-153**).

The **new formulated approach**—the ‘Commonwealth Parliamentary Supremacy’ principle—can be summarised as follows: States **were not** to be immune from Commonwealth interference; the principle articulated in *D’Emden* was reinterpreted by the *Engineers*’ court, whereby the Commonwealth would be immune from interference through the operation of **s 109** (i.e., inconsistency).

The **consequence** of *Engineers* was that the **Constitution** was to be interpreted **textually** and read as an Imperial statute (Privy Council reasoning in *Webb v Outtrim*; preferred view of **Issacs** and **Higgins JJ**). Further, a systemic bias was awarded to the Commonwealth by enhancing their legislative powers and supremacy through the protection of **s 109**.

Application of ‘Commonwealth Parliamentary Supremacy’

The ‘**Commonwealth Parliamentary Supremacy**’ was **qualified** in numerous cases following the *Engineers* decision:

- Commonwealth agents **were not** entirely immune* from State interference and therefore still needed to comply with **valid State laws** (*Pirrie v McFarlane*; *West*)
***Note: The Commonwealth could be immune from State interference where it affects its ‘exclusive powers’ (distinguishing factor from *Engineers* which dealt specifically with the Commonwealth’s concurrent powers) (Issacs J, *Pirrie*; Latham CJ, *West*).**
 - Royal Australian Air Force Officer still required a valid State driver’s licence (*Pirrie v McFarlane*).
 - Retired Commonwealth officer’s pension could still be taxed under State law (*West v Commissioner of Taxation*).
- There were **incidental limits** placed on the States in respect of their capacity to interfere with the Commonwealth because of the very nature of the federal system (i.e., the view of **Dixon J**—who notably did not appreciate the view expressed in *Engineers*).

Australian Railways Union

Dixon J at 390 in *Australian Railways Union* (as well as in *West*) suggested that every grant of power to the Commonwealth should be interpreted as authorising the **Commonwealth Parliament to make laws affecting State instrumentalities**, so long as the Commonwealth does not **'discriminate'** against the States (the High Court in *Garnishee* agreed with this general statement of principle).

Federal Commissioner of Taxation v Official Liquidator of E O Farley Ltd (1940)

Dixon J considered the extent of the power of the Commonwealth and the States to make laws binding on each other.

- A State simply does not have power to postpone the rights of the Commonwealth to those of the State, as this would be to 'destroy or impair a governmental or fiscal right of the Commonwealth' which inheres in 'the Federal executive as such'.
- Further, while he considered that the Commonwealth and the States stand on an equal footing within the federal system as independently established governments, he also affirmed the principle in *Engineers'* that the legislative powers of the Commonwealth will ordinarily authorise laws that are binding on the States unless there is some specific constitutional reason against this.
- **Dixon J** noted the Commonwealth often exercises powers and makes payments of money pursuant to powers conferred upon the Executive directly by the **Constitution**. He suggested that it was surely 'implicit' in these powers that the 'incidents and consequence of its exercise shall not be made the subject of special liabilities or burdens under State law' (at 681).

Phase III: Federal Compact (1947 – present)

Revived (*Melbourne Corporation*)

OVERALL: Immunity of Instrumentalities was **revived**.

The *Melbourne Corporation* case was the first to **revisit** the immunity. The case was concerned with the constitutionality of a law that disallowed banks from undertaking conduct on behalf of a State. The majority (with **McTiernan J** in **dissent**) held the impugned provision was unconstitutional on **three grounds**: the law—using **'pith and substance'**—could not be **characterised** as a law with respect to banking (**Latham CJ** at 61); the law—using a **'multiple characterisation'**—**unduly interfered** with the constitutional functions of the States as it imposed a **duty on banks** (**Dixon, Starke** and **Rich JJ**); and the Commonwealth law breached an implied prohibition contained in the **Constitution** on account of the federal system as it **discriminated** against the States in the exercise of those functions (**Dixon** and **Rich JJ**; note **Starke J** suggested discrimination was not decisive).

Attempts to clarify

The *Melbourne Corporation* did not stand for a clear principle, other than there existed some limit on the Commonwealth's powers to affect the States.

In the years proceeding, an implied immunity consisting of **two distinct limbs** came to be generally accepted by members of the Court in *Payroll Tax*, *Tasmanian Dam case* and more affirmatively in *Queensland Electricity Commission* case. **Mason J's** formulation was often cited: **(1)** the prohibition against discrimination which involves the placing on the States of special burdens or disabilities; and **(2)** the prohibition against laws of general application which operate to destroy or curtail the continued existence of States or their capacity to function as governments (at 217; see also **Gibbs CJ** at 206, **Wilson J** at 226, and **Brennan J** at 231-236).

In the cases that followed *Queensland Electricity Commission*, much turned on the nature and degree of the necessary discrimination, and the possibility the very nature of a Commonwealth head of legislative power might authorise interference with State functions (see *Re Australian Education Union*, *Native Title Act case* and *Industrial Relations Act case*).

Current Application of State Immunity

Overview

The main issue relates to the implied state immunity from the federal government.

In *Melbourne Corporation*, **Dixon, Starke** and **Williams JJ** stated a Commonwealth law is unconstitutional if it either unduly interferes with the constitutional functions of the States or if it discriminates against the States in the exercise of those functions. In *Queensland Electricity Commission*, the High Court adopted **Mason J's** two-limbed dictum and determined the discrimination limb included discrimination against the States generally or against a particular State.

In *Austin*, **Gaudron, Gummow** and **Hayne JJ** rejected **Mason J's** formulation and sought to renounce the significance of the 'discrimination' stand of State immunity. Their Honours held the strand was inconsistent with underlying constitutional principles and an improper invocation of the legal concept of discrimination (relying on **Starke J's** previously cited view in *Melbourne Corporation*)

In summary, the majority on this point in *Austin* (**Gleeson CJ, Gaudron, Gummow, Hayne** and **Kirby JJ; McHugh J** in dissent) conceived the *Melbourne Corporation* as one principle: 'The Commonwealth cannot, by the exercise of its legislative power, significantly impair, curtail or weaken the capacity of the States to exercise their constitutional powers and functions ... or significantly impair, curtail or weaken the actual exercise of those powers or functions' (per **French CJ** at [32] in *Clarke*; drawing upon *Melbourne Corporation*; *Queensland Electricity Commission*; *Re Australian Education Union*; *Austin v Commonwealth*).

The current application of the **implied immunity** in respect of States is as follows:

(1) Commonwealth law imposes a burden or measure

In determining whether the [Commonwealth Act] violates the implied state immunity by impairing [the State's] capacity to function as an independent government, one of the significant factors is to see whether these provisions discriminate against the States generally or [the particular State] in particular.

Note: It is irrelevant that the law is a 'regulation', given regulations are often made by the Governor-General under the authority of a statute (i.e., delegated legislation).

Application

Consider the provisions **targeting States**:

- **Discriminates/Burdens (Dixon J, *Melbourne Corporation*):**
 - **Treating States differently** to other legal entities.
 - **Example:** Impugned law **prohibiting** banks from banking with a State authority, forcing States to conduct business solely with the federal bank (*Melbourne Corporation*).
 - **Restricting or impairing State functions or powers.**
 - **Controlling, interfering or restricting with State constitutional powers.**
 - Undermining State independence or capacity to govern.
 - **Singling out** States with special limitations or obligations.
- **No express mention of 'State'?** The common law presumption that 'no statute binds the Crown unless the Crown is expressly named therein or unless there is a

necessary implication that [the Crown] was intended to be bound' has become more flexible and less stringent (***Bradken Consolidated***; see also ***Industrial Relations case*** and ***Residential Tenancies Act***). Therefore, a provision **may discriminate** against States even where it is not expressed.

- **Discrimination against a specific State:** Even if not all States are affected equally, it may still be discriminatory (e.g., ***Native Title Act*** had a differential effect).
- **'Read down' provisions (s 15A, *Acts Interpretation Act*):** Where subject matters have been limited, it may be necessary to read the provision down as to **not bind** the States in order for the law to remain constitutionally valid.

(2) The burden significantly restricts a State in its capacity to function

It can be said [the provisions] are discriminatory. Although discrimination remains a valid consideration, the case of ***Austin*** turned away from its earlier importance. Ultimately, the fact [the provisions] single out States for a special burden might be suggestive of unconstitutionality though it is **not determinative** (***Austin***; ***Clarke***; **Professor Blackshield**).

Therefore, the question turns to whether [the provisions] **restrict** a State in its capacity to function as an independent government in the exercise of its powers. This enquiry lends to the substance and degree of the burden in respect of its actual operation, and interference with State functions (***Gummow***, ***Heydon***, ***Kiefel*** and ***Bell JJ***, ***Clarke***).

The burden must be **significant** (***Fortescue v Commonwealth***).

French CJ's six elements articulated in ***Clarke*** become persuasive. His Honour noted that no one factor is determinative, though 'the fact that a law is of general application may make it more difficult to demonstrate, absent operational discrimination in its impact upon the States, that it transgresses the limitation'.

(a) Examples (if any analogies)

- **Commonwealth could not:**
 - Prevent States from **banking with institutions other than federal banks** without approval (***Melbourne Corporation***).

Melbourne Corporation: The High Court determined the Commonwealth **cannot** prevent States from banking with institutions other than the Commonwealth Bank, as this impaired their capacity to function as independent governments.

- Regulate **State industrial disputes** (***Queensland Electricity Commission***).

Queensland Electricity Commission: The High Court determined the Commonwealth **cannot** create a special arbitration process that overrides usual State-based industrial dispute resolution mechanisms (***Mason J*** at **218-219**).

- Regulate **State employment relationships/redundancy packages** (***Re Australian Education Union***; ***Industrial Relations Act***).

Australian Education Union: The High Court determined the Commonwealth **cannot** regulate the number, identity, or qualifications of employment for **all State employees** (and **any aspect** of employment for higher-level employees), as doing so would substantially impair the States' capacity to function as independent governments.

Note: it **could** regulate minimum wages and working conditions for lower-level employees.

Industrial Relations Act: The High Court determined the Commonwealth **cannot** impose employment termination provisions on senior State public servants, as this would interfere with the States' capacity to manage their internal administration and executive functions.

- Impose a **superannuation charge** on **State judges' pensions** (**Austin**).

Austin: The High Court determined the Commonwealth **cannot** impose a law that places a significant financial burden **on State judges**, as this interferes with the States' ability to manage their judiciary and impairs their capacity to function as independent governments.

- **Commonwealth could:**

- Require States to pay **a tax on mining profits** (**Fortescue**).

Fortescue: The High Court determined the Commonwealth **could** impose a mining profits tax like the MRRT, as it did not burden or impair the States' constitutional functions, including their ability to see mining royalties.

- Require States to pay **compensation for extinguishment of native title** (**Native Title Act**).

Native Title Act: The High Court determined the Commonwealth **could** legislate to protect and recognise native title, including providing compensation for its extinguishment, as this falls within the scope of the **race power** and **does not** impair the States' capacity to function.

(b) French CJ's six elements (choose only the most **relevant**)

- (i)** — Whether the law in question **single out** one or more of the States and imposes a special burden or disability on them which is not imposed on persons generally.

Satisfied above.

- (ii)** Whether the **operation of a law** of general application imposes a particular burden or disability on the States.

- **Acquisition of goods or services:** A law that affects the machinery of the State by impairing the **three branches of state government** by impeding the **acquisition of goods and services** is deemed to impair the capacity of the States to function as independent governments (**Native Title Act**).
 - **Debate:** Could the State acquire goods or services **elsewhere**? If so, the Court may decide the State's capacity is not impaired as such.

- (iii)** The effect of the law upon the capacity of the States to exercise their **constitutional powers**.

- **Constitutional powers:** Powers not reserved/assigned to the Federal Government, such as law-making authority in areas for **schools, hospitals, roads** and **public transport**, as well as managing electricity, water and gas.

- (iv)** The effect of the law upon the exercise of their **functions by the States**.

- **Capacity to function as a government**

Note: The immunity protects each State's 'capacity to **function as a government**', **not** 'any impairment of capacity to **exercise** government functions' (**Re Australian Education Union**)

- The 'existence and nature' of the State body politic.
- The 'machinery of government' of States.
- The capacity of State government organs to exercise its powers

- The 'personnel, property, goods and services' which the State requires to exercise its powers.
 - **Discrimination against a specific State:** Even if not all States are affected equally, it may still be discriminatory (e.g., *Native Title Act* had a differential effect).
- (v)** The nature of the capacity or functions affected.
- Is the law very **general** in its application (**French CJ**)?
- (ii)** The subject matter of the law affecting the State or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application.