

# Commonwealth Constitutional Law - LAWS2202

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**Note to reader:** Please read the note at the top of my exam notes first. These notes are my full lecture notes. I.e. my general semester notes and are not as wellstructured for answering exam questions. The other file is what I made for my exam summary. So, I would suggest that you use my exam notes first. And if I have summarised poorly, done something confusing, or gotten something wrong (**highly likely**), you could then use these notes to try and decipher what I did. Good luck out there.

## Essay Things

- What real-world consequences depend on whether a state or the Commonwealth is permitted to wield a given power? We will see the significance of constitutional questions, for instance, to vital questions concerning social justice, rights, economic efficiency and democracy
- Must respond to a set question, developing an argument which is logical, well-reasoned and supported by the cases and other materials considered in this course
  - The course material required to answer this essay-style question will come from weeks 7-12. Note that the thematic overview provided early in Term 2 will greatly help you in approaching the essay.
- Essay Tips:
  - (iv) **Never use the passive where you can use the active.** [The [active voice](#) uses fewer words, is more precise and often reads better. – RL]
  - (vii) **Never run on:** write no sentence longer than 2.5 lines (unless it contains a list).
  - (viii) **Structure clearly:** eg:
    - In the introduction, outline the *central argument(s)* and the *structure according to which you will defend the central argument(s)*;
    - throughout the paper, show clearly how different ideas relate to each other (eg, 'First...', 'However...', 'In addition...');
    - use clear headings for sections.
  - (ix) **Never rely on conclusory claims, which ask others to agree with you without explaining why:** give precise reasons and examples; don't just say 'I believe X'.
  - (x) **Define any term that is important to your essay and generally unknown to a non-specialist audience.**
  -

## Immunities

### Problem solving-steps

- a. When faced with a Cth law, ask:
  - i. Statutory interpretation question (*Bropho*)
  - ii. Constitutional question (*Austin & Clarke*): Applying the *Austin* formulation, informed by French CJ's 6 factors from *Clarke*. Utilise cases as analogies.
- b. **The preliminary question in State immunity cases: does the Cth statute bind the State?**

- i. As a matter of statutory interpretation, the State Crown is presumptively immune from burdensome Commonwealth legislation unless the Commonwealth legislation shows a contrary **intention** either expressly or by necessary implication. Intention is demonstrated through the language of the statute and ‘contextual’ factors. (*Bropho v Western Australia* (1990) 171 CLR 1).

## State Immunities

2. This doctrine is an implied constitutional limitation on **Commonwealth** legislative power. The definition and scope of the constitutional limitation has varied over time. We will look at its development through three broad stages:
  - a. early approaches;
  - b. Mason J’s two limbed principle (in *QEC*); and
  - c. the contemporary reformulation in *Austin v Commonwealth*, and its application in *Clarke v Commissioner of Taxation*.
3. While each of these stages is important, it is the contemporary reformulation that provides the framework for problem-solving in this topic.
4. Three Stages:
  - a. 1. Early Approaches
    - i. (a) the *Engineers’ Case* (1920) 28 CLR 129 (**Hanks 6.2.21C**)
      1. Did the *Engineers’ Case* completely close the door on implied State immunity?
      2. On constitutional implications?
    - ii. *Melbourne Corporation* (1947) 74 CLR 31 (the ‘*State Banking Case*’) (**Hanks 6.2.30C**)
      1. Did *Melbourne Corporation* revert to the pre-*Engineers’ Case* doctrine of implied immunities?

## 2. Mason J’s two-limbed principle in *QEC* (**Hanks 6.2.38C**)

- iii. (a) *QEC* (1985) 159 CLR 192 – the ‘classic’ Mason J statement of principle
  1. The Queensland Electricity Commission (a state authority) sought a declaration that the *Conciliation and Arbitration (Electricity Industry) Act 1985* (Cth) was invalid. The Act was designed to expedite the resolution of an industrial dispute involving the Queensland electricity industry, including the QEC, and applied a special regime to this particular dispute. Chief Justice Gibbs, Mason, Wilson and Dawson JJ found the Act wholly invalid. Deane and Brennan JJ found that parts of the Act were invalid.

2. Mason J's statement of the principle 'consists of two elements'

a. (1) The prohibition against discrimination which involves the placing on the States of special burdens or disabilities;

a. OR

b. (2) The prohibition against laws of general application which operate to destroy or curtail the continued existence of the States or their capacity to function as governments. (at CLR 217)

3. A Commonwealth law which breaches **either** element will be invalid in its operation to the State.

iv. (b) *Re Australian Education Union* (1995) 184 CLR 188 – interference with Executive function (**Hanks 6.2.42C**)

1. Unions in Victoria sought to bring an industrial dispute concerning the Victorian government within the federal industrial relations system. Victoria challenged the validity of interim federal awards applying to State government public servants, arguing State immunity. Chief Justice Mason, Brennan, Deane, Toohey, Gaudron and McHugh JJ (in a joint judgment) found that Commonwealth awards could, generally, apply to state public servants. However, the first limb of the immunity principle ('capacity of a State to function as a government') protected the following from Commonwealth interference:

a. The number and identity of the persons it wishes to employ or dismiss, and their term of appointment; and  
b. The number, identity and conditions of employment of persons engaged at the 'higher levels of government' (at CLR 232-3)

c. **QN:** why were these categories exempted? What was the basis of Dawson J's dissent on this point?

2. Section 111(1A) of the *Industrial Relations Act 1988* (Cth) prohibited the Australian (ie Cth) Industrial Relation Commission from exercising its power to refrain from hearing a matter where a dispute could not be dealt with by a State arbitrator. Victoria argued that the section discriminated against Victoria as it was the only State that did not have an arbitral system. The majority said that discrimination in this context assessed not by reference to:

a. 'the subjective motives of the legislators; rather, it is a question of determining what was the *purpose* of the enactment, a matter which is to be ascertained by reference to the *substance* and *actual operation* of the

law in the circumstances to which it applies.’ (at CLR 240, emphasis added)

3. Applying these principles, the majority (Dawson J agreeing, at CLR 262) found that as the section was ‘framed in general terms and is capable of applying to any State which introduces a system similar to the Victoria system’, the discrimination limb was not infringed. (at CLR 239)

### 3. The contemporary reformulation in *Austin v Commonwealth*, and its application in *Clarke v Commissioner of Taxation*.

5. *Austin v Commonwealth* (2003) 215 CLR 185 – reformulation (Hanks 6.2.45C)
  - a. Challenge to Commonwealth legislation taxing the fictitious ‘surcharge able contributions’ of State officers, including State judges (and in *Clarke*, members of the legislature). (Note the significant role of s 114 of the *Constitution* for the tortuous approach of these provisions.)
  - b. Justice Austin, a Justice of the Supreme Court of NSW, challenged the validity of the Commonwealth surcharge. The Court found by majority (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne: Kirby J dissenting) that the surcharge infringed the *Melbourne Corporation* principle.
    - i. (a) Reformulating (MASON’S) the doctrine – one (not two) principles
      1. Gaudron, Gummow and Hayne JJ’s restatement of the principle:
        - a. ‘There is, in our view, **but one limitation, though the apparent expression of it varies with the form of the legislation under consideration.** The question presented by the doctrine in any given case requires assessment of the impact of particular laws by such criteria as ‘special burden’ and ‘curtailment’ of ‘capacity’ of the States ‘to function as governments.’ These criteria are to be applied by **consideration not only of the form but also ‘the substance and actual operation’** of the federal law.’ (at CLR 249)
      2. QN: what were the approaches of McHugh J and Kirby J to the principle? Why did Kirby J dissent?
    - ii. (b) Applying *Austin: Clarke v Commissioner of Taxation* (2009) 240 CLR 272 (Hanks 6.2.50C)
      1. This case was a sequel to *Austin*. The High Court unanimously held that the same Commonwealth laws in *Austin* were invalid in their application to members of State legislatures, including South Australian MP Clarke.
      2. French CJ endorsed a ‘multifactorial’ approach to ascertaining whether a law of the Commonwealth infringes the limitation (ie

a multifactorial approach to assist in applying the *Austin* test), which **identifies the following 6 factors** (at CLR 299 [34]):

1. Whether the law in question **singles** out one or more of the States and imposes a **special burden or disability** on them which is not imposed on persons generally.
  2. Whether the operation of a law of **general** application imposes a **particular burden or disability** on the States.
  3. The **effect** of the law upon the **capacity** of the States to exercise their constitutional powers.
  4. The **effect** of the law upon the **exercise** of their functions by the States.
  5. The **nature** of the capacity or functions affected.
  6. 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.
3. (NB these factors necessarily overlap, and should not be applied mechanistically. Treat them as an indicative checklist for applying *Austin* – they are illustrative of the key principles in *Austin*, not a substitution for that key test.)

## Commonwealth Immunities

1. We will examine the story of the implied limitation on **State** legislative power across the three broad stages of its development:
  - a. Early approaches;
  - b. Dixon J's triumph in *Cigamatic*; and
  - c. Current statement(s) of principle in *Henderson's Case*.
  - d. We will conclude by examining the operation of s 64 of the *Judiciary Act* (Cth).

### Problem solving steps

- Start with the statutory interpretation question (*Bropho*) – does the State Act purport to bind the Crown in right of the Cth?
- Constitutional question (*Henderson* majority judgments)
  - Helpful examples from the cases? *Cigamatic*, *Pirrie*?