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Concise Hypo Structures

***These are expanded below under each topic

Intergovernmental Immunities:

1. Austin Test
 - a. Structural Integrity
 - i. Employment
 - ii. Sub-test – Discrimination
 - b. Exception –
 - i. Rational Purpose

Executive Power:

1. Appropriation
2. What is the source of the executive power to spend
 - a. Prerogative powers
 - b. Operation and administration of government departments

- c. Statute + HoP – incl delegated legislation
- d. Nationhood Power

Federal Judiciary:

1. Is it JP or Non-JP?
2. Is it a CH III court?
3. Which BM Limb?
 - a. First Limb – Only Ch III court's can exercise JP
 - i. Ch III + JP = Valid
 - ii. Non-Ch III + JP = invalid
 1. Exceptions:
 - a. Delegation to court registrars
 - b. Parliament punish contempt
 - c. Military Tribunals
 - iii. Example: Executive Detention
 - b. Second Limb – Ch III can only exercise judicial power
 - i. Wakim – only exercise federal judicial power
 - ii. Non-JP + non-Ch III = valid
 - iii. Non-JP + Ch III = invalid
 1. Exceptions :
 - a. Incidental power
 - b. Persona Designata
 - i. Consent
 - ii. Compatibility
 1. Integral
 2. Independence
 3. Discretion/policy

State Judicial Power :

1. Is it JP or non-JP?
 - a. JP = valid
 - b. Non-JP = further analysis
2. Who is it conferred upon?
 - a. Exercised by court?
 - i. Invalid if it undermines institutional integrity
 - b. Exercised by person
 - i. Invalid if it is incompatible
 1. Integral
 2. Independence
 3. Discretion/policy

Grants:

1. Appropriation
2. Terms and conditions

- a. What types of terms and conditions
- b. Can't circumvent the Constitution

Taxation:

1. Is the fee a tax?
 - a. Positive attributes
 - i. Compulsory
 - ii. Enforceable by law
 - iii. Public authority
 - iv. Public purpose
 - b. Negative attributes
 - i. E.g. fee for service, fee for privilege
2. Restrictions on law
 - a. Discrimination
 - b. Senate restrictions
 - c. Single subject
 - d. CRF
 - e. Preferencing

Excise Duties:

1. Is it a tax?
2. What is an excise?
3. Does it burden goods
 - a. Relation/activity
 - b. Integral step
4. Burden must be prior to consumption

Freedom of Trade and Commerce and Interstate

1. Burden on TCI?
2. Discriminatory?
3. Protectionist?
 - a. Not relevant for intercourse
4. Can the law be saved?
 - a. Is there a rational purpose?
 - i. Structured proportionality
 1. Suitability
 2. Necessity
 3. Adequacy in balance

Implied freedom of Political Communication

1. Burden?
2. Is there a legitimate purpose that is compatible with representative and responsible government?

3. Reasonably appropriate and adapted?
 - a. Structured Proportionality?
 - i. Suitability
 - ii. Necessity
 - iii. Adequacy

Voting Rights:

1. Default Position = voting for everyone
2. Limit this = substantial reason
 - a. Rational connection
 - i. Consistent and compatible
 - ii. Proportionate

Characterisation Steps

1. Identify the head of power – “with all the generality which the words used admit” (*Grain Pool of WA v Commonwealth*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
 - a. Post *Engineers*, principle
 - b. “Read the language of the statute in what seems to be its natural sense” (Knox CJ, Isaacs, Rich and Starke JJ)
2. Identify the character of the law in question
 - a. look at the **rights, duties, powers, privileges and liabilities** that it creates, changes, regulates or abolishes (*Fairfax v Federal Commissioner of Taxation*, Kitto J)
3. Is the law with respect to the head of power?
 - a. Subject matter = Is there a sufficient connection between the two? (*Grain Pool*)
 - b. Purpose = Is it appropriate and adapted?
 - c. Consider whether it is within the incidental or core scope of the head of power
4. Dual Characterisation OK even IF no independent connection between the two subject-matters. (*Grain Pool*)
5. The justice and wisdom of the law, are matters of legislative choice.

Intergovernmental Immunities – implied limitation on power

INTRODUCTION:

Post-Engineers:

- The Constitution should be read according to the word's "natural sense" (*Engineers*, Knox CJ, Isaacs, Rich and Starke JJ)
 - Constitution should be read with "all the generality which the words used admit" (*Grain Pool of WA v Commonwealth*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
- Implied immunities should not be invented. Only exist if they can be found in the words of the text
- However, later cases still draw implications from the federal balance represented in the structure of the Constitution
- When can Cth not bind the States?
 - If there is no head of power to support the law
 - Breaches an express or implied prohibition (e.g. s 116, freedom of political communication)

The HCA has recognised structural limits though. These limits were extrapolated/extended in *The State Banking Case*.

- This case created two limitation limbs on the Cth power to enact laws to bind States.
 - NOTE – *Austin* changed the procedure

The State Banking case:

- S 48 = No bank could do business with a State government or government authority without the consent of the federal Treasurer (who was also the PM).
 - Effect: States were forced to move their accounts to the Commonwealth Bank (federally owned)
 - The Treasurer did not grant permission for the Melbourne City Council to bank with NAB (private bank)
- HCA held – law was unconstitutional
 - It **discriminated** against States -imposed special burdens on them not faced by private citizens or corporations.
 - Singled out the States for special disadvantage by restricting their banking activities. In contrast, no other entity was affected (e.g. individuals, corporations)
 - It **impaired the ability of States** to function by restricting their control over their own banking arrangements
- Basically – the Commonwealth cannot destroy the States as meaningful governments. Federalism requires some limits.

Austin: (majority)

- The Court held that there was only "one limitation" (*Austin*, Gaudron, Gummow and Hayne JJ, supported by the other judges in their judgments as well) – a single prohibition – the capacity to function principle.
- The test of discrimination was found not to be a separate test of immunity. Rather it is an example of when a law might breach the capacity to function immunity.

- Note – while all the judges agreed on the outcome in *Austin*, they each took slightly different steps.

Things to consider when applying:

- “The validity of the Act is to be determined at the time of their enactment” (*Austin*, Gleeson CJ).
- Look to the form of the law, and the “substance and actual operation”. This requires evaluation and “degree” and of “constitutional facts” (*Austin*, Gaudron, Gummow and Hayne JJ)

MAIN TEST – CAPACITY TO FUNCTION

Test: The law must not “[impair] or [curtail] ... the capacity of a State to function as a government” (*Australian Education Union* (‘*AEU*’), Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)

- NOTE – not every law that burdens States is invalid (*Native Title Act Case*). A simple burden is not sufficient.
 - It must threaten the “structural integrity” of the State government machinery (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ, reaffirmed in *Austin*)
 - Does it undermine the machinery of government itself? Does it interfere with the essential operation of State institutions?

Even if a law does not fall within the below options, it will still be invalid if it impairs a State’s capacity to function in a different way (*Austin*)

Function 1 – Discrimination? (*Austin*)

- See [Subtest](#)

Function 2 – Judicial independence

- This is a core function

Function 3 - Employment:

- What can Cth regulate:
 - Ordinary State employees (e.g. clerks, junior staff) (implied from *AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - “the prescription by a federal award of minimum wages and working conditions would not infringe the implied limitation, at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question.” (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - Unfair dismissal laws are valid (*Industrial Relations Act case*, Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ)
 - Does not prevent States from terminating employment, just requires it to be for a genuine reason.
 - It regulates the termination process rather than the State’s decision making or right to downsize its workforce.

- What can't Cth regulate:
 - "functions which are critical to [a State's] capacity to function as a government" (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - This includes: (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - The ability to hire and fire employees
 - Including qualifications and eligibility
 - The terms and conditions of the appointment of high-level employees (e.g. those directly involved in policy, budgeting, governance).
 - High level employees = "Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges" (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - Judges are an essential branch of State government, and its independence is critical. (*Austin*, Gaudron, Gummow, and Hayne JJ)
- Undecided yet:
 - Majority did not decide regarding: "an award regulating promotion and transfer would amount to an infringement" (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
 - "the answer would turn on matters of degree, including the character and responsibilities of the employee." (*AEU*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ)
- Why?
 - If the Commonwealth could mandate who States could employ at senior levels, then this would undermine the capacity of the State's to function as "independent entities" (*AEC*, Mason CJ, Brennan, Deane, Toohey, Gaudron, McHugh JJ).
- Possible outcomes:
 - In the *Industrial Relations Act* case, the provisions containing termination for employment, were read down to preclude senior officials (Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ)

Native Title Act case provided further indications of what sort of law would breach the immunity: (narrowed the scope of 'capacity to function')

- Laws that affect the **make-up of the three arms of government** (legislature, executive, judiciary).
- Laws that interfere with a State's **capacity to employ its servants** (especially senior officials).