LAW5004: Principles of Public Law & Statutory Interpretation

EXAM NOTES
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Introduction to Public Law

Fundamental Concepts and Illustrations

Public law studies a wide ranging selection of concepts, including administrative, constitutional and human right law, and how the government, Parliament, executive, judiciary and the people are each related.

Australia has a federalism-based system of government. As such, there are federal and state levels of functioning government, which are independent but interconnected.

There is also a distinction between federal and state jurisdiction, but again a degree of connectedness between the courts to form a national judiciary. Jurisdiction is conferred by state law or the constitution upon the state supreme and other courts, while federal law and the constitution confers jurisdiction upon other federal courts and the High Court.

The rule of law is the principle that the law should govern a nation and its people instead of being governed by the arbitrary decisions of a party or person in power. It is said that the ‘Australian Constitution is framed upon the assumption of the rule of law’ (Plaintiff S157/2002 v Commonwealth), indicating that the rule of law should guide the interpretation of statutes and explain the purpose or value of certain constitutional principles. However, the place of the rule of law in Australian constitutional law remains unclear. The rule of law is a useful tool for assessing whether our laws are inherently ‘good’.

The doctrine of Parliamentary sovereignty allows for an unrestricted discretion in the drafting and enacting of any law the Parliament should see fit. It tends to the rule of law as Parliament can create laws which regulate the social and legal consequences for Australian citizens. Although the Parliament has this power, it is representative in that constituents elect members of Parliament through regular elections and can be dismissed by the people, which, in theory, leads to Parliament acting in the interests of the people. Likewise, government conduct is responsible to the Parliament and may be dismissed by the legislature.

A democratic system of government is complex, but ideally grants power to the people to a fair and even vote when electing members of government. It also applies within Parliament itself, as parties and houses vote, for example, for/against particular legislation.
The Australian judiciary is composed of a two-tiered system, which is conferred on the federal and state levels. Judicial power is often described in shorthand as the power 'to interpret' the laws. The judicial function involves the resolution of disputes by the ascertainment of the factual circumstances and the interpretation and application of the law, followed by the making of a binding and authoritative order.

### Chapter III, Constitution

**What/who is the federal judiciary and where do its powers come from?**

<table>
<thead>
<tr>
<th>Federal courts</th>
<th>State courts</th>
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| **High Court of Australia**  
Created and vested with jurisdiction by Ch III Constitution  
Acts as general COA across entire judiciary and able to resolve all issues of law  
Only HCA’s jurisdiction guaranteed to any degree | **Consitution ss 71, 77(iii)**  
(71) The judicial power of the CTH is vested in the HCA, and gives Parliament authority to create other inferior courts on both federal and state level  
(77) Gives Parliament power to define jurisdiction by statute |
| **Federal Court of Australia**  
*Federal Court of Australia Act 1976 (Cth) s.5* | **Consitution s 122**  
Parliament may make laws for the government of any territory surrendered by any State to and accepted by the CTH |
| **Federal Circuit Court**  
*Federal Circuit Court of Australia Act 1999 (Cth) ss 3, 4, 8* | |
| **Family Court of Australia**  
*Family Law Act 1975 (Cth) s. 21* | |

Today, the Australian Constitution, specifically Chapter III, provides a number of safeguards that separate and protect the judiciary and the exercise of judicial power from the influence and corruption of the other branches of government.
• The HCA acts as a general court of appeal across the entire Judiciary – State and federal – and is able to finally resolve all issues of law – including in the areas of constitutional, administrative, criminal and private law
• The HCA does not operate as a purely constitutional court, but must grapple with questions of the common law and statutory interpretation

Federal Courts: Jurisdiction
• Ch III empowers the federal Legislature to create new federal courts, regulate and prescribe their jurisdiction and procedures, and add to the jurisdiction of the High Court
  o Therefore, only the HCA’s jurisdiction is guaranteed to any degree
  o Other courts, other than HCA, can be abolished and can have their jurisdiction altered
• s. 71: The judicial power of the Commonwealth is vested in the HCA, and gives Parliament authority to create other inferior courts on both a federal and state level
  o For example: Federal Court, Family Court, Industrial Relations Court of Australia and Federal Circuit Court (previously the Federal Magistrates Court)
• s. 76(i): empowers Parliament to make laws conferring to jurisdictions; such as HCA and constitutional jurisdiction
• s. 72: Covers method of appointment, tenure and remuneration of HCA Justices
• ss. 73 and 75: Outlines both appellate and original jurisdiction of the HCA
  o ie, In certain circumstances, can appeal to HCA from SCs, or be heard at HCA
  o s. 75(v): guarantees HCA’s jurisdiction in all matters ‘in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party’.
  o Because s. 75(v) is entrenched no Act of parliament can remove the jurisdiction of the HCA
• s. 77: Gives Parliament power to define jurisdiction by statute (and vest federal jurisdiction in state courts – practically useful when there is a potential breach of both state and federal law)

Separation of Judicial Power: The *Boilermakers* Principles
• There is a strict separation of power between the judiciary and other branches of government (however, not so much a separation between legislation and executive branches of government).
• The seminal case in this area is *R v Kirby; Ex parte Boilermaker’s Society of Australia*, which established a two-limbed test for determining when the separation of powers implied from the Australian Constitution will be breached.

Background context:

*NSW v Commonwealth* (‘Wheat Case’)
• The HCA held invalid a law that conferred judicial power on the Inter-State Commission
• The law was said to infringe Ch III by conferring judicial power upon an executive body
Statutory Interpretation

Where issues arise (Why laws can be ambiguous)

Language

1. Spectrum of meaning: meaning is not black or white
   - For example: when is a ‘public place’ no longer ‘public’?
2. There are ‘cluster’ terms: the words have no essence but are made up of a set of smaller criteria
   - For example: ‘religion’ is defined best by a set of qualities, rules, customs
3. Concepts are ‘contested’: reasonable people naturally disagree on these
   - For example: ‘public interest’ or ‘justice’ – what is in the ‘public interest’?
4. Provisions are over-or under-inclusive: provisions include too much or too little information
   - For example: is the fly ‘contained’ in the cake if it is in the icing?
5. Grammar: sentence structure can create ambiguity
6. Words may have several meanings
   - For example: ‘run’, ‘set’ or ‘take’
7. Words are omitted or assumed
   - For example: ‘stay home and finish your homework’ – what if there is a fire?
   - For example: ‘I want a hamburger’ – no need to explicitly explain the details of making a burger

Changes

1. Technological changes
   - For example: ‘Postal, telegraphic, telephonic, and other like services (s. 51(v) Constitution) [Constitution]
Process of Interpretation

‘The duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.’: Project Blue Sky Inc v ABA

Examination matters

- You will be asked to ‘advise x’ about how a statute should be interpreted
  - This means you have to identify which section or sections affect your client, and then explain to your client how those sections may be interpreted by a court
  - State and then apply the principles of statutory interpretation which we have learned. You MUST go beyond telling me what you think the provisions mean, and actually apply the principles (text, context, purpose, presumptions etc)
  - Anticipate arguments on both sides. Comment (where appropriate) on what you think the best interpretation is
  - Use the cases and principles which we have covered as support for your argument
  - State some conclusions. What, then, are the likely consequences for your client?

- Essay question:
  - Good answers answer the question
  - Demonstrate knowledge and understanding of the principles and materials
    - Refer to statutory provisions/constitutional provisions, cases, articles in order to support your argument
  - Engage in critical analysis
    - Do not just state/summarise the law

- General comments:
  - Do not just write out passages from slides, cases, etc
  - To get a good mark, you need to show that you understand them
  - Cite all your cases/articles etc
Can you draw an analogy or distinction with any cases?

- *Thomas v Mowbray* – public interest and exclusion orders
- *Coco v The Queen* – Surveillance devices and right to privacy
- *Taylor v Owners* – Drafting errors, issues with wording
- *He Law The* – Mental element in criminal offences (ALWAYS consider when there is a penalty in the statute)

1. The ultimate goal is that a statute is to be interpreted according to the intention of Parliament (*Project Blue Sky; Cooper Brookes; Amalgamated Society of Engineers*)

2. Note the appropriate interpretation legislation and that these sections are not particularly substantive as the common law directs a broader approach in line with these provisions:
   - *Interpretation of Legislation Act 1984* (Vic), s. 35
   - *Acts Interpretation Act 1901* (Cth), ss. 15AA, 15AB

3. **Starting point:** Consider the **ordinary grammatical meaning of the text itself** (*Project Blue Sky*)
   - That is, directly apply the facts of the scenario to the given provisions of the text
   - ‘This is the least contentious source of meaning’ (*Cooper Brookes*)
   - ‘And’ means ‘and’, not ‘or’ when the words are so close in nature (*VCB v Brown*)