

WEEK ONE: BASIC CONCEPTS

Constitutional Law:

- Branch of law that regulates the three arms of government
 - Executive → administers laws or puts them into practice
 - Legislature → enacts laws
 - Judiciary → interprets and applies the law
- The source and authority for the exercise of public power, and circumscribes the limits of that power
- In Australia, constitutional law also governs the relationship and demarcation of power between the two levels of Australian government

Parliamentary sovereignty

- Limited by Australia's Constitution
- Parliament has ultimate law-making power and ability to override common law, however, no pure parliamentary sovereignty exists because of the Constitution
- Judges will only strike down statutes in Australia if there is constitutional authority for such disallowance (*Union Steamship v King* (1988))
- Absolute parliamentary sovereignty can be criticised for its failure to incorporate checks and balances
- UK and AUs Parliament are free to pass legislation in disregard of basic human rights (because of lack of Bill of Rights)

Rule of law (as per Dicey)

1. 'The supremacy of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.'
2. There should be 'equality before the law' as between the governors and the governed
3. 'With [Englishmen] the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code are not the source, but the consequence of the rights of individuals, as defined and enforced by the courts.'

Constitutional conventions

- Unwritten rules of the constitution
- Not legally enforceable

Bicameralism

- This is where you have two houses of parliament
 - Lower house → the house of representatives
 - Upper house → the senate (at Cth level)

Representative government

- The legislature directly represents the interest of the constituency
- ss 7 and 24 - "directly chosen by the people"

- Composition of the lower house of Parliament - preferential voting system, democratically elected

Responsible government

- Under this doctrine the executive is responsible to the legislature
- The Crown (represented by the GG) acts on the advice of its ministers
- Executive government is responsible to the lower house, which is responsible to the electorate

Parliamentary control of supply

- Supply (the budget for the ordinary annual services of government) must be authorised by government
- Authority to spend money must go through both Houses of Parliament

Separation of powers

- Reflected in chapter design of Constitution
- Justification: to prevent the concentration of too much power in, and consequent abuse of power by, a single arm of government
- Three arms operate as checks and balances upon each other
- Blurred distinction: MPs also head of departments (so a part of Legislature and Executive), judicial appointments by GG under s 72, delegated legislation

Federalism

- Constitutional power is shared between two levels of government
- 7 autonomous governments:
 - Federal government
 - 6 regional state governments
- Constitution presupposes the continued independence existence of all 7 governments
- Australia is a federation because:
 - Brought the self governing colonies together
 - Decentralisation of power
 - Means of preserving the rights and preferences of local communities/minorities
- The heads of power → specific authorisations for federal power
- Cth and States have concurrent powers in s 51 of the Constitution
- Residual powers → those that aren't expressly or implicitly conferred on the Cth, the state retains exclusive authority over

Colonisation to federation

- The First Settlement - 1788, terra nullius
- Doctrine of Reception - common law received into colony
- *Australian Courts Act 1828* (Imp) asserted Doctrine of Reception - UK can make new laws for colonies as well
- *Australian Constitutions Act (No 2) 1850* (Imp) authorised the colonial Parliaments to draft constitutions for their respective colonies (i.e. States)

- NSW adopted system of responsible government in 1855
- *Colonial Laws Validity Act* 1865 (Imp) - the colonies could not pass any law which was repugnant to a law of the UK Parliament
- Presumed to not be able to enact extraterritorial legislation: *McLeod v AG (NSW)* [1891]
- Colonial Parliaments had total competence to pass whatever law they wished: *R v Burah* (1878)
- Draft Constitution approved in referenda in all colonies except WA in 1899
- Passed the *Commonwealth of Australia Constitution Act* 1900
- *Constitution Act* came into force 1 January 1901
- Three main reasons for federation:
 - Commerce
 - Defence
 - Nationalism/patriotism
- *Statute of Westminster* 1931 - declared that the *Colonial Laws Validity Act* 1865 (Imp) would not apply to any law of the Cth after the date of its adoption
- *Australia Act* 1986 (Cth) - States no longer legally subservient to the UK (the relevant head of power was s 51(xxxviii))
- *Australia Act* 1986 (UK) - virtually identical terms as Cth Act

Overview of the constitution

- Parliament → Part I general matters relating to the Parliament
- House of representatives → Part III
- Senate → Part II
- Relative powers of each house of parliament → Part V
- Powers of the Cth Parliament → Part V
- Ch II: the executive
- Ch III: the judiciary
- Ch IV: Finance and trade
- Ch V: the transformation
- Ch VI: New States and the Territories
- Ch VII: Miscellaneous
- Ch VIII: Amendment of the Constitution
- Appraisal of the constitution

Cutting the apron strings: from Federation to the Australia Acts

- *Statute of Westminster* 1931 → UK laws don't apply
- *Australia Act* 1986 (Cth) → cutting ties with the UK

WEEK TWO: CHARACTERISATION OF LEGISLATION

The Consequences of Invalidity

- When pronounced invalid, act or decision is treated *void ab initio* (from the beginning, not from point of time invalidity found)
- Numerous qualifications that exist to this strict rule:
 - One technique is to read-down: 'If the impugned statute is capable of two meanings, one which would render it invalid and the other which would render it valid, the latter is to be preferred' (*Public Service Association of SA v Industrial Relations Commission of SA* [2012])
 - Another technique is to sever a law: the remaining provisions can continue to operate if the offending provision can be severed - must not fundamentally change the whole act or render it inoperable

Reserved powers doctrine

- Reserved powers → powers specifically reserved for the states
- *R v Barger*
 - View that certain legislative areas were reserved for the states
 - If a Cth law impinged on an area of reserved power, it was found to be invalid
 - Cth laws were incapable of 'dual characterisation'
 - Imposed limitations on the scope of Cth power
- *Amalgamated Society of Engineers v Adelaide Steamship*
 - *Barger* → majority decision is no longer good law
 - Signalled the demise of the reserved powers doctrine and paved the way for a new modern approach to characterisation of Cth laws
 - Radically reduce the application of State laws
- Note: post-*Engineers* judgments have echoed the reserved powers doctrine
 - *Cth v Tasmania (Tasmanian Dam Case)*

Direct Characterisation

- *Can the law be directly characterised under a head of power in s 51?*
- *Fairfax v Federal Commissioner of Taxation* (1965)
 - Process of characterisation → "is it in its real substance a law upon, "with respect to", one or more of the enumerated [heads of power]"
- Consider the direct rather than consequential effect of laws *Murphyores* 1976

Proportionality

- *Is the law reasonably appropriate and adapted to a purposive head of power?*
- Proportionality → "there should be a reasonable relationship or balance between an end and the means used to achieve that end"
- Inquiry into the proportionality of law involves a value judgment into its reasonableness and appropriateness
- Purposive powers
 - *Leask v Cth* (1996)

- “To determine the validity of a law said to be supported by a purposive power, a court must ask whether it is a law for the specific purpose, and the court may have to inquire into whether the law goes further than is necessary.”
- Cth heads of power have been found to be “purposive” in that they describe a specific purpose
- Most describe something such as an activity, a type of person, a recognised category of legislation or an object
- Sections with purposive elements:
 - Section 51(xxix) - the external affairs power
 - Section 51(vi) - the defence power
 - Sections 61 and 51(xxxix) - the nationhood power
 - Section 51(xxvi) - the race power
- Proportionality and incidental power
 - Various justices explicitly used proportionality as the touchstone for establishing an incidental connection between a law and a subject matter
 - *Leask* → “Proportionality is one of several consideration that may be taken into account in determining whether a law is relevantly connected with a particular subject or with a head of constitutional power.”

Incidental Characterisation

- *If cannot be directly characterised or is not reasonably appropriate and adapted to a purposive head of power, can the law be characterised as incidental to the head of power?*
- If a law cannot be characterised as being directly relevant to a subject matter under a Head of Power (s 51), then it may be characterised as an *incidental* exercise of that power if its subject matter is reasonably connected
- Section 51 (xxxix) expressly confers legislative power “with respect to... matters incidental to the execution of any power vested by the Constitution in the Parliament”
- HC has found that each head of power under s 51 has an *implied* incidental power (*Grannall v Marrickville Margarine* (1955))
- For specifics on S 51(i) (trade and commerce with other countries) and S 51(ii) (taxation) - see notes
- Tests for Incidental Characterisation:
 - Is it *reasonably connected* to the head of power?
 - Directly affects?
 - Conducive to?
 - An appropriate means?
 - Reasonably necessary?
 - Inexact and flexible test as seen through judicial split in *Actors and Announcers Equity v Fontana Films* (1982)