

## SEMINAR 1 – OUTLINE OF CONSTITUTIONAL DOCUMENTS AND THEIR HISTORY

- Australia became fully independent by the passing of the **Australia Act 1986**, which fully terminated the UK Parliament's power to legislate for Australia (**Sue v Hill**).
- At Federation, it was assumed the **Colonial Laws Validity Act**, which invalidated colonial legislation repugnant to British legislation applying to the colony by paramount force (doctrine of repugnancy), was still applicable.
- It was also assumed the UK Parliament could legislate for Australia, and thus Australia was merely a self governing colony of the British Empire
- The **Statute of Westminster 1931**, repealed the 'doctrine of repugnancy' applying to the Cth, and UK Parliament could only legislate for Australia upon request and consent.
  - However, the doctrine still applied to the **States** until 1986.

## SEMINAR 2 – THE CONSTITUTION, ITS STRUCTURE AND THEMES

- **1. What is a Constitution?**
- A constitution should be understood as establishing a 'fundamental law, or fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a "limited government"' (Sartori (1962))
- Hierarchically superior to other laws
- Even before the passage of the **Australia Act**, Murphy J had argued in **Bischoff v Rokov**, that the Constitution was binding because of its 'continuing acceptance' by the Australian people. For other judges, the **Australia Act** was decisive.
- **2. The source of power for a Constitution: Historical and popular sovereignty:**
- Helen Irving has argued that despite the low participation rate in the vote for the Constitution, Federation can still be regarded as a 'popular' process.
- **3. Sovereignty and Indigenous Australians:**
- Another conceptual problem is the fact that Aboriginal and Torres Strait Islander people continue to assert their own sovereignty and even independence from the Australian state.
- For reconciliation, a starting point would be to include in the Constitution, some acknowledgement of the prior occupation and dispossession of Aboriginal and Torres Strait Islander peoples in Australia and the fact that they were the "first Australians".
- Also, it is felt that **s 51(xxvi) of the Constitution** should be amended so that there is an explicit power in the Commonwealth to make laws with respect to "Aborigines and Torres Strait Islanders"
- And, the Constitutional Commission also recommended that **s 25** of the Constitution should be repealed because of its discriminatory basis, as s 25 states that where a State law causes "persons of any race" to be disqualified from voting at particular state elections, those persons will not be counted when calculating the population of the State or the Commonwealth.
- **4. Federalism:**
- Australia has a federalist system of government, where legislative power is distributed between a central government (Cth) and a number of local governments (states), which are independent of each other and cannot destroy or limit their powers.
- Federalism is reflected in the Cth 'bicameral' system of government with legislative power being held by houses of Parliament – The House of Reps & the Senate. The House is based on a national franchise pursuant to **s 24**, and States elect an equal number of Senators (12), pursuant to **s 24**. Both have equal power with respect to proposed laws, apart from the power to initiate bills that appropriate money, a power reserved to the House (**s 53**)

- **s 51** distributes certain legislative powers to the Commonwealth. Many of these powers are enjoyed concurrently by the States, with the general residue of legislative power being left to the State (*A-G (Cth) v Colonial Sugar Co*), Defined powers are granted to the Cth and the undefined residue remains with the States (*R v Phillips*)
- If there is a conflict of laws between the Cth and the States, the State law is invalid to the extent of their inconsistency with Cth law (**s 109**).
- A Commonwealth law applying to the states will be invalid if: 1) it singles out the states or its agencies for imposition of restrictions that prevent them from performing their essential functions, or, in other words, the Commonwealth law in question is discriminatory against the states or their agencies; and 2) even where the states or their agencies are not singled out, they are subjected to specific legal provisions of general application that would impede or impair their essential functions (*Melbourne Corporation v Commonwealth – State Banking Case*)
- **5. Representative and Responsible government:**
- **s 7 and s 24** of the Constitution creates a system of **representative government**, where members of the House and Senate are chosen at periodic elections (*Lange v ABC*).
  - The Constitution gives considerable discretion to alter the forms of electoral laws and the type of representative government which might exist (*McGinty v WA*)
- **Responsible government** is a system of government in which the Executive arm is responsible to the Legislature (*Brown v West*), and the members of the Legislature are in turn responsible to the people at elections (*Egan v Willis*)
  - No compulsion to act responsibly -> but will be held responsible at elections.
  - Executive power of the Commonwealth, which is exercised by the Governor- General is to be so on the initiative and advice of the Ministers (Federal Executive Council) (**s 62, 64, Lange**)
  - This is with the exception of reserve powers of the GG – power to dissolve the House and the Senate, power to remove members of the Federal Executive Council, and commander-in-chief of naval and military forces
- **6. Parliamentary Sovereignty:**
- Parliamentary sovereignty refers to the legislative supremacy of the parliament to enact legislation to the exclusion of the other organs of government.
  - In Australia at the Cth level, Dicey’s theory of parliamentary sovereignty is inapplicable. Reasons include: 1) powers of the federal parliament are not unlimited, rather they are specifically enshrined in the Cth Constitution; 2) judicial review of laws passed by parliament is recognised, and practiced; and 3) separation of powers is a feature of the constitutional system
  - In Australia, the constitutional system is best described by one that enshrines the idea of constitutional supremacy. All governmental powers including those of parliament are derived from, and their limits specified by, the Constitution.
- **7. Separation of powers:**
- Separation of powers is in theory, the total separation of the executive, legislative and judicial branches of government. In Australia, we operate under the framework of responsible government according to the Westminster model, thereby compromising the separation of legislative and executive powers
- **8. Rule of law and principle of legality:**

Rule of law is the principle that no one is above the law, regardless of its status. The law must be transparent, and citizens must be aware of the law. Everyone is

## SEMINAR 11 – MATTERS AND STANDING

### A. MATTER

- There must be some immediate right, duty or liability to be established by a determination of the court (*In Re Judiciary and Navigation Act*) **CONTRA:** An abstract question of law not involving the right or duty of any body or person; the making of a declaration of law divorced or dissociated from any attempt to administer it (*Mellifont*)
- An alleged violation of some positive law to which parties are alike subject, and which therefore governs their relations, and constitutes the measure of their rights and duties (*Boundaries Case*)
- A state court exercising federal jurisdiction cannot give advisory opinions (*Queen of Queensland Case*)
- Can be a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be. (*Croome v Tasmania*)
- There must be an enforceable legal remedy for a wrong; the person must have sufficient interest in enforcing the right, duty or liability. (*Abebe*) **CONTRA:** Absent the availability of relief, there is no immediate right duty or liability. If there is no available remedy, there is no administration of the relevant law. (*Truth About Motorways*)
- The courts may embrace the whole controversy, or part of it. They may provide limited remedies or every remedy available necessary to do justice between the parties. (*Abebe*)

### B. STANDING

- Without the AG's fiat to bring a relator action (compelling Commonwealth to observe the fundamental law of the constitution, an action in public law), a person must satisfy they hold a sufficiently 'special' interest in the issue. (*DOGS Case*)
- Distinct from a mere intellectual or emotional concern that the law should be observed, or particular conduct prevented. (*Australian Conservation Foundation Inc v Cth*)
  - Should be enabling, rather than restrictive (*Bateman's Bay Local Aboriginal Land Council*)
  - Sufficient they wish to engage in conduct as part of their ordinary business practice...wishes to engage in conduct that would be impermissible under regulation...**CONTRA:** may be refused if the effect would be too remote or theoretical, *de minimus* principle should apply (*APLA Ltd v Legal Services Commissioner NSW*)
- Provided there is a remedy available for the plaintiff there is nothing in Ch3 preventing Parliament from modifying the general rule that only the AG may bring proceedings with respect to a public wrong. A declaration cannot be made if it will produce no foreseeable consequence for the parties (*Truth About Motorways*)
- Where the issue is whether federal jurisdiction has been invoked with respect to a 'matter', questions of 'standing' are subsumed within that issue. (*Croome v Tasmania*)
- If an act is void in relation to the plaintiff, it must be void for all similarly placed upon whom an entitlement is conferred. (*Pape*)
- Special interests are not limited to material interests – can be points of conscience (*Williams*)
- A plaintiff has standing where its interest was "as a matter of practical reality...immediate, significant and peculiar to [it]" (*Bateman's Bay Local Aboriginal Land Council*)
- The outcome must materially advantage his legal position (*Kuczborski*)
- Must be likely to gain some advantage...other than satisfaction of a wrong, winning of a contest...to suffer a disadvantage other than grievance/costs...a belief the law generally be observed, or conduct prevented does not suffice locus standi. (*Aus Conservation Foundation v Cth*)

## SEMINAR 12 – THE EXECUTIVE

### A. The Executive

- The Crown = depersonalised symbol of the monarch. The Executive government = The Crown. Being the executive, distinct from legislative branch of Govt. A distinct legal person with the attributes of a legal personality. Each of the Cth, 6 States and territories is a separate public body. Independent sovereign nation of Aus is a single Crown.
- “Once it is accepted that the divisibility of the Crown is implicit in the Constitution and that the Constitution acknowledges the possibility of change in the relationship between the UK and the Commonwealth, it is impossible to treat the UK as permanently excluded from the concept of foreign power under s 44(i)” (*Sue v Hill*)

### B. The Governor General/Governor

- **s2:** The GG “shall have any may exercise in the Cth during the Queen’s pleasure, but subject to this Constitution, such powers and function of the Queen as Her Majesty may be pleased to assign to him.
- No prescribed job description. GG cannot fulfil the office’s role of national unifier and conscience without public support. GG’s tenure lies in the PM’s hands. Largely ceremonial fns.
- **s5:** Powers to dissolve, prorogue and summon Parliament. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives. After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs. The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.
- **s61** – Exercise the executive power of the Cth. **s128** – submit a proposed change to the Constitution to the people voting at a referendum.
- Such powers are exercised on advice of his/her ministers. Essentially a ‘rubber stamp.’
- **Reserve Powers:** Dismissal of the PM – ‘recourse of last resort, an ultimate weapon which is liable to destroy its user’ (*Republic Advisory Committee, An Australian Republic: The Options*)
- 2 situations when accepted: Where the PM has been defeated in the lower House on a vote of no confidence or where the government is persisting in illegal or unconstitutional conduct.
- Professor Winterton argues: It is clear that the government has persisted in breaching a fundamental constitutional provision, the government has ignored calls from GG to desist from this conduct, and the convention is not justiciable – cannot be brought before the courts.
- Whitlam: failure to secure a passage of supply bills and subsequent failure to resign. GG’s view it was necessary to dismiss Whitlam to resolve a deadlock threatening the economic fabric of the nation; he removed a government acting improperly and appointed one which would obtain the funds for the administration of the country.
- **CONTRA:** argued that since Whitlam enjoyed the confidence of the House of Reps, the confidence of senate never having been regarded under principles of responsible government as a requirement for remaining in office, that perhaps a political solution to the crisis would have been more preferable.
- **Statement by GG (1975):** Because of principles of responsible government...a PM who cannot obtain supply...must either advise a general election or resign. Refusal means the GG has authority and indeed the duty under the Constitution to terminate the PM.