

LAW5007

PRINCIPLES OF CONSTITUTIONAL
LAW

EXAM NOTES

TRIMESTER ONE 2018

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TOPIC 2: STATE LEGISLATIVE POWER

The legislative capacity of the State parliaments is to 'make laws for the peace, order and good government (or welfare) of the States in and for Victoria in all cases whatsoever (*Section 16 Victorian Constitution*)

This is not a limiting provision and courts are not able to strike down legislation on the ground that the legislation does not promote or secure peace, order and/or good government (*Union Steamship*)

2.1 STATE PLENARY LEGISLATIVE POWER

States wield plenary legislative power, that is, access to a 'complete and unrestricted power to make laws with reference to the State concerned (*Union Steamship considering section 2(1) of the Australia Acts 1986*)

Thus State power is unlike Commonwealth legislative power, which requires authorization under a valid head of power to create law

Additionally, the Constitution of the States can be amended by Parliament at will

2.1.1 RESTRICTIONS/LIMITATIONS ON STATE LEGISLATIVE POWER

First and foremost, if a State enacts a law that undermines the representative character of the Parliament, it is likely to be deemed invalid (*Taylor v AG of Queensland*)

Other limitations imposed by the Commonwealth Constitution include:

-*Section 52*: Outlines the exclusive powers of the Commonwealth Parliament

-*Section 90*: The Commonwealth will have exclusive powers over customs, excise and bounties

-*Section 109*: The States cannot pass a law regarding a topic over which the Commonwealth has exclusive law making power

-*Section 114*: States cannot raise forces; taxation of property

-*Section 115*: States are not to coin money

2.1.2 EXTRATERRITORIAL STATE LEGISLATIVE POWER

There was a presumption that the colonies could not enact extraterritorial legislation, but this eroded over the 20th century

Under the *Australia Acts* and at common law, the States are now recognized to have extraterritorial power provided there is a sufficient nexus between the States and the extraterritorial matter being regulated (*Rule outlined in Broken Hill v Commissioner of Taxation; confirmed in Union Steamship*)

2.1.3 THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT

The *Victorian Charter of Human Rights and Responsibilities Act* contains mostly civil and political rights and is subject to the parliamentary rights model

It requires a Statement of Incompatibility which causes lawmakers to consider human rights, but it must be noted that the Charter can be circumvented through the Statement of Incompatibility and further, that it can be repealed or changed by later legislation (*s 31(1) Victorian Charter of Human Rights*)

TOPIC 4: COMMONWEALTH LEGISLATIVE POWER & CHARACTERISATION

4.2.2 THE TEST OF INDIRECT/INCIDENTAL POWER

If a law fails to fall under a core duty of a subject matter, it may nevertheless be a 'matter incidental to the execution of any power vested by [the] Constitution in the Parliament' as per *section 51(xxxix) of the Constitution*

Therefore, the Commonwealth also has implied powers to matters that are ancillary or incidental to the express subject matter under a head of power

Ask: Whether there is a sufficient connection with the subject matter of the powers and whether the legislation is reasonably necessary

-If a proposition deals with a subject matter that directly affects the subject matter of a head of power, or is conducive to it, then it may be classed as incidental

-This test is more flexible and open to value judgments as it is up to the High Court to determine whether there is a sufficient connection

4.2.3 PURPOSIVE AND NON-PURPOSIVE POWERS

Purposive powers describe a specific purpose such as the defence power (*s 51(vi)*), the incidental power (*s 51(xxxix)*) and the external affairs power (*s 51 (xxx)*)

Subject matter or non-purposive powers do not describe a specific purpose but rather describe something like an activity, a category of legislation or an object, such as trade or commerce powers (*s 51(i)*), the corporations power (*s 51(xxix)*) and taxation (*s 55(ii)*)

Laws enacted pursuant to a purposive power must satisfy the test of proportionality – if the law is not purposive, there is no need to consider proportionality (*Leask v Commonwealth*)

4.2.4 PROPORTIONALITY

Proportionality refers to the idea that there should be a reasonable relationship or balance between an end and the means used to achieve that end and should only be applied in two circumstances:

1. When characterising a purposive head of power (*Leask v Commonwealth; Communist Party Case*)
2. When characterising a law pursuant to the incidental scope of a non-purposive power (*Leask v Commonwealth; Nationwide News*)

Note: Proportionality should never be considered when characterising a law under the direct scope of a non-purposive power (*Plaintiff S153/2013 v Minister of Immigration*)

Ask: Can the law reasonably be regarded as appropriate and adapted to the fulfilment of the head of power? (*Leask v Commonwealth*)

-In the Communist Party Case, the law was struck down as disproportionate because the High Court considered the lowered importance of the defence power in a time of peace

-Proportionality is one of several considerations (*Commonwealth v Leask*)

4.3 CONSEQUENCES OF INVALIDITY

Invalid laws may be:

-Read down if they have two possible meanings (one valid, one invalid – the valid will stand)

-Severed from the Act (*s 15A Acts Interpretation Act*)

-Struck down in whole for invalidity if severance is not possible (changes the operation/effect)

TOPIC 5: THE EXTERNAL AFFAIRS POWER – S 51(xxix)

5.3.1 BONA FIDE/GOOD FAITH

A treaty that is implemented under the external affairs power must be genuine and enacted in good faith (*Koowarta*)

A treaty cannot be used as a means of expanding the Commonwealth's legislative power – this would be deemed bad faith (*Koowarta*)

Note: This limitation has been described as 'at best... a frail shield available in rare cases' by *Gibbs CJ in Koowarta*; consider the timing and context of the implementation

5.3.2 OBLIGATIONS

The Commonwealth can implement clauses from treaties that imposed any obligations (*Tasmanian Dams Case*)

This includes recommendations that give effect to treaty obligations and possibly 'mere recommendations' (*ILO Case*)

The Commonwealth can also implement clauses from treaties that do not directly impose obligations, but are reasonably necessary to fulfil a treaty obligation (*Richardson v Forestry Commission*)

Considerations:

1. Look to the language of the treaty itself and determine whether the words are obligatory in nature such as 'must', 'shall', 'shall endeavour' per *Deane J in Tasmanian Dams*, 'duty', whether they are merely aspirational/a recommendation
2. If the clause is not obligatory, ask if it is reasonably necessary to fulfil another obligation

NOTE: Given the 3:3 split in *Tasmanian Dams*, it is unclear whether an obligation is required

5.3.3 SPECIFICITY

The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states (*ILO Case*)

Consider: Look to the wording of the treaty and consider whether it outlines specifically what States need to do to implement the treaty, rather than simply promoting a vague objective

Note:

- The greater the global consensus regarding the course to be taken, the lesser the level of specificity required (*ILO Case*)
- The greater the discretion, the less specific it will likely be
- If it is specifically in a general direction, this will often suffice (*ILO Case*)

5.3.4 CONFORMITY

This is a test of proportionality – consider the aim of the treaty (*Richardson*)

The Test: Is the law reasonably appropriate and adapted to implement the treaty (*ILO Case*)

- The law cannot undermine the treaty
- The law cannot use disproportionate means to achieve the object of the treaty
- There is a presumption against treaties being implemented in a way that contravenes fundamental human rights (*Deane & Gaudron in Richardson*)

TOPIC 7: THE CORPORATIONS POWER – S 51(xx)

Section 51(xx) of the Constitution holds that ‘the Parliament shall, subject to this Constitution, have power to make laws... with respect to... foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’

It must be noted that the phrase ‘formed within the limits of the Commonwealth’ does not empower the Commonwealth to form, incorporate or dissolve companies under *section 51(xx)* but rather only legislate to regulate corporations already formed (*Incorporations Case; Work Choices*)

7.1 CLASSIFICATION AS A CONSTITUTIONAL CORPORATION

The Commonwealth can only regulate constitutional corporations under *section 51(xx)*

7.1.1 FOREIGN CORPORATIONS

A foreign corporation refers to an entity formed under the law of a foreign country and has been given a corporate legal personality either the foreign law – it does not need to be a trading or financial corporation to be regulated under *section 51(xx)* (*Incorporation Case*)

7.1.2 TRADING CORPORATIONS

A corporation is considered a trading corporation if a substantial or significantly sufficient proportion of its activities constitute trade (*Adamson; Tasmanian Dams Case*)

The Test: Current Activities – does a substantial or sufficient proportion of the corporations activities constitute trade?

- Trade refers to any activity that produces revenue and applies to both goods and services
- There is no precise meaning for ‘substantial’/‘sufficient’ (*Adamson; Tasmanian Dams Case*)
- The purpose for which the corporation was established is irrelevant
- A corporation can be a trading corporation even if it has a different dominant purpose
 - Consider *Adamson* where a sporting league sold tickets, memorabilia, souvenirs etc. but was formed for the purpose of sport – it was still a trading corporation
- Consider both the scale of the trading activity, and the proportionality of the trading activity relative to other corporations’ trading activity

Note: It is common for a corporation to be both a trading and a financial corporation

7.1.3 FINANCIAL CORPORATIONS

A corporation is considered a financial corporation if a substantial or significantly sufficient proportion of its activities are financial (*State Superannuation Board Case*)

The Test: Current Activities – is substantial or sufficient proportion of the corporations activities financial?

- Financial activities are transactions of which the subject matter is finance such as borrowing or lending, investing money, currency or funds; the obligation is upon each side to pay money
- The purpose for which the corporation was established is irrelevant
- A corporation can be a financial corporation even if it has a different dominant purpose
- Consider both the scale of the financial activity, and the proportionality of the financial activity relative to other corporations’ financial activity

Note: Even government bodies such as pensions or superfunds can constitute financial corporations and it is common for a corporation to be both a trading and a financial corporation

TOPIC 9: COMMONWEALTH EXECUTIVE POWER – S 61

Section 61 of the Constitution holds that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution and the laws of the Commonwealth’

Executive power refers to the Commonwealth’s power to implement legislation, do things under the Constitution and enjoy the use of prerogative powers

Note: Although the words seem to grant the Governor-General enormous power, *sections 62, 63 and 64* outline that the Governor-General will act on the advice of the Minister’s

9.1 DELEGATED LEGISLATION

Scope:

In *Dignan’s case*, it was affirmed that Parliament can delegate legislative power to the executive— it does not matter how extensive or vague the delegation is, as long as it is within the scope of the heads of power of the Constitution

Limitations:

- Parliament cannot abdicate its power – there will be no abdication of power as long as Parliament can repeal the delegated legislation (*Dignan’s Case*)
- The delegated legislation cannot be inconsistent with the regulation-making power in the enabling act (*Dignan’s Case*)
- The Executive must explicitly be delegated power – it is not enough that the Parliament was within its power to delegate, the delegation must occur (*Williams v Commonwealth No 1*)

Note: Kirby’s dissent in *Work Choices* which heavily criticised the expansion of executive/Commonwealth power, expressing concerns that there will be a point where the power is so broad that it purely is an attempt to control and expel State law

9.2 PREROGATIVE POWERS

Prerogative powers are unwritten powers, immunities and privileges that were enjoyed by the Crown under the common law – they are non-statutory and therefore do not require statutory authorisation

It is accepted that these powers were inherited by the federal executive (*Ruddock v Vadarlis*)

9.2.1 TYPES OF PREROGATIVE POWERS

1. Executive Prerogatives (power to declare war, execute treaties, royal commissions etc.)
2. Immunities and Privileges (Crown immunity from prosecution, priority of debts)
3. Proprietary Prerogatives (ownership of royal fish and metals)

9.2.2 GENERAL PRINCIPLES AND APPLICATION

The depth of prerogatives is limited and it cannot be used to create offences, impose tax or dispense with statutes – Prerogatives also cannot be used to create new powers and can lapse due to disuse (*Ruddock v Vadarlis*)

Prerogative powers can be abrogated expressly by Parliament through statute if the Act ‘evinces a clear and unambiguous intention to deprive the power’ (*Ruddock v Vadarlis*)

TOPIC 11: INTERGOVERNMENTAL STATE IMMUNITIES

RELATES TO COMMONWEALTH LEGISLATION BINDING THE STATES

11.1 THE ENGINEERS CASE PRINCIPLE

This doctrine of implied immunity was overturned by the High Court in the landmark *Engineer's Case* holding that the Commonwealth was within its power to pass legislation that bound State government instrumentalities

11.2 LIMITATIONS ON THE COMMONWEALTH'S POWER TO BIND THE STATES

The Commonwealth's power to bind the States is subject to limitations:

Express Limitations

1. The Commonwealth can only bind States in areas where it has a head of power
2. The Commonwealth cannot exercise power contrary to existing limitations on Commonwealth Power, such as section 116, the separation of judicial powers doctrine or the implied freedom of political communication

Implied Limitations per the *State Banking Case* (previous test)

1. The Commonwealth cannot discriminate against the States or a State Agency
2. The Commonwealth cannot pass laws of general application that fundamentally impede the States from carrying out essential governmental functions

11.3 REFORMULATION OF THE TEST

The High Court sought to reformulate the tests of immunity by collapsing the above tests into one test (*Austin v Commonwealth; affirmed in Clarke v Commissioner of Taxation*)

The Test:

Does the law impair the capacity of the States or a State to function as a government?

Considerations Outlined in *Clarke v Commissioner of Taxation* by French CJ:

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 (*State Banking; QEC*)
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 of the functions affected
6. The subject matter of the law affecting the States or States and in particular the extent to which the constitutional head of power under which the law is made authorises its discriminatory application

TOPIC 13: COMMONWEALTH SEPARATION OF JUDICIAL POWERS

13.1 INTRODUCTORY PRINCIPLES

The constitutional framework implies that the framers intended to adopt a separation of powers doctrine – although it is not complete in that the executive and legislative branches are not completely separated, the judiciary is completely independent (*Victorian Stevedoring v Dignan*)

13.2 JUDICIAL POWER AND INDICIA

13.2.1 PRELIMINARY DEFINITION

Griffith CJ has best defined judicial power in *Huddart Parker v Moorehead* to mean:

‘The power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects... the exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision... is called upon’

This has two elements:

1. The need to decide a controversy
2. The application of a binding and authoritative decision

Note: This test is difficult to apply with certainty so we must also look to the indicia

13.2.2 INDICIA OF JUDICIAL POWER

1. The ability to make binding, enforceable decisions (*Brandy v HREOC*)

- Judicial decisions are legally binding and are not simply recommendations or advice
- Often involves the finding of guilt and there is punishment/consequences of disobeying judicial orders

2. Application of legal standards and historical considerations (*Thomas v Mowbray*)

- Courts must apply purely legal principles in determining law, not policy
- These decisions generally concern existing rights and duties
- Courts consider their developed, historical principles to guide their application over time

3. Issuing control orders (*Thomas v Mowbray*)

- Control orders etc. form part of the historical powers that Courts have had

4. Discretion

- Discretion must not be of an arbitrary kind, and must be governed by some ascertainable tests or standards
- The narrower the discretion, the more likely it is that the power is judicial

Note:

These indicia are precisely that, indicators – In *Thomas v Mowbray*, the High Court determined that the issuing of control orders was a judicial power despite discretion being broad, absence of controversy and the creation new rights (legislative in nature)

13.3 CHAPTER III COURTS

Chapter III Courts per *section 71 of the Constitution* are courts that can be ‘invested with federal jurisdiction’ and include the High Court, Federal Court, Family Court, Federal Circuit Courts and State Supreme Courts

Chapter III Courts mandate that judges have tenure until age 70 (*Section 72 – Constitution; Waterside Workers v JW Alexander*)

TOPIC 16: FREEDOM OF INTERSTATE TRADE AND COMMERCE

Section 92 of the Constitution holds that 'on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'

16.1 HISTORICAL CONSIDERATIONS

Defining Trade and Commerce

Historically the meaning of 'trade, commerce and intercourse' has been extremely unclear, particularly relating to how broadly/narrowly it should be construed – thus the scope of the power proved extremely difficult to determine

Competing Principles of Trade

In addition the competing principles of laissez-faire trade (trade without government interference) and free trade theory (government regulation to protect consumers) were debated by the High Court – however now it is clear that individual protectionism has succeeded (*Cole v Whitfield*)

Current Approach

It was ultimately championed by the High Court that the purpose of *section 92* is to protection free trade by preventing discrimination between interstate trades (*Cole v Whitfield*)

16.2 DEVELOPMENT IN THE HIGH COURT

16.2 PRINCIPLE TEST

The Test to be Applied per *Cole v Whitfield*:

1. Is there a burden on interstate trade and commerce?

-This includes tangible trade and commerce, and Internet based trade and commerce (*Betfair Cases*)

2. Does the law discriminate against interstate trade or commerce?

-A law will discriminate against interstate trade if in its factual or practical operation it singles out a state's commercial or financial operations to impose an advantage or disadvantage or burden (*Bath v Alston Holdings*)

Note:

-Not every form of different treatment between local and interstate trade will offend *section 92* (Consider the impact of laws on different business models *per Betfair No. 2*)

-Commonwealth schemes that apply uniformly across the country will, given their nature, generally not be found to be discriminatory