

BRANCH: LEGISLATURE

Topic 1: Candidates for Election

General Principle - 1

- Who is eligible (*s 163 Cth Electoral Act*) - 1

Restrictions on Candidates for Office - 1

- Can't be member of both houses (*s 42 Cth Cn*) – 1
- Disqualifications: 'being chosen' refers to entire process (*s 44 Cth Cn*) – 1
- Can't have allegiance to another country unless reasonable steps taken – 1
 - *Sykes v Cleary* (Primary School Teacher) - 3
 - *Sue v Hill* (UK is a foreign country) - 2
- No treason or conviction – 1
 - *Re Culleton [No 2]* (Date of nomination convicted for larceny) - 3
- Undischarged bankrupt or insolvent – 1
- Holds office of profit under crown – 1
 - *Sykes v Cleary* (Primary School Teacher) – 3
 - *Free v Kelly* (Includes military) - 2
- Pecuniary Interest in any agreement with Public Service – 2
 - *Re Webster* (Shareholder of family company) - 2

Topic 2: Electoral Systems

General Principle - 4

- Senate directly chosen by people (*s 7 Cth Cn*) – 4
- House of Reps directly chosen by people (*s 24 Cth Cn*) – 4
- 'Directly Chosen by People' Parliament has discretion – 4
 - *McKinlay v Commonwealth* (Disproportionate Electorates) - 4
 - *McGinty v WA* (WA Disproportionate) - 6
 - *Mulholland v Aus Electoral Commission* (Registered Political Party) – 6
 - *Day v AEC* (Five arguments) - 7
- State Makes Divisions (*ss 29 & 51 (xxxvii) Cth Cn*) – 4
- Overseas Australians (*ss 94 & 94A Cth Electoral Act*) – 5
- Compulsory Voting (*s 245(1) Cth Electoral Act*) – 5
- No religion (*s 116 Cth Cn*) – 5
 - *Adelaide Company of Jehovah's Witnesses Inc v Cth* – 5
- Cn limitations don't affect state – 5
 - *McGinty v WA* (WA Disproportionate) - 6
 - *ACTV v Cth*
- Cth Cn does not forbid party identification – 7
 - *McKenzie v Cth* (Party identification) – 7

Topic 3: Right to Vote

General Principle - 8

Express Right to Vote - 8

- Express right to vote is statutory (*s 93 Cth Electoral Act*) - 8
- S 41 Cth Cn does NOT provide express right – 8
 - *King v Jones* (lowering age to 18) – 8
 - *R v Pearson; Ex parte Sipka* (Issue of writs) - 8

Implied Right to Vote – 9

- Cth Cn confers implied right to vote (*ss 7 & 24 Cth Cn*) - 9
- Implied Right Universal with Exceptions – 9
 - *McGinty v WA* (Needs substantial reasons for exclusion) - 6
 - *Roach v Electoral Commissioner* (Prisoners 3+ yrs) – 9
 - *Rowe v Electoral Commissioner* (No enrolment grace period) – 9

Topic 4: Parliamentary Supremacy

General Principle - 10

Limits on Parliament Power - 10

- Parliamentary Sovereignty constrained by Cns - 10
- Cts won't recognise laws threatening 'essential elements' – 10
- Cannot restrict substantive power but can impose procedural restrictions – 10

Topic 5: State Constitutions & Parliamentary Power

General Principle – 11

State power is PLENARY - 11

Limits on State Power - 11

- 'Peace, welfare & good govt' is not a limitation of power – 11
 - *Union Steamship Co of Australia Pty Ltd v King* (Workers Compensation) - 11
- Cannot abrogate 'deeply rooted' rights – 11
 - *Durham Holdings Pty Ltd v NSW* (Acquisition of coal no compensation) - 11

Constitutional Amendment - 12

- State have wide powers to amend cn through legislative means – 12
 - *Taylor v AG of QLD* (fixing deadlocks) – 12
 - *McCawley v The King* (UK: new court) - 12
- Amendment can be Explicit or Implicit through doctrine of implied repeal – 12
- Amendment subject to manner and form - 12

- *Union Steamship Co of Australia Pty Ltd v King* (Workers Compensation) – 12
- SEE MANNER AND FORM

Topic 6: Manner & Form

General Principle – 13

Manner and Form impose more difficult procedures (*s 6 Australia Act*) – 13

- *AG (WA) v Marquet* (Required absolute majority) - 15

Limitations for Manner and Form - 13

- (1) More recent law respect Cn, powers and procedure? – 13
- (2) Earlier law prescribe any manner and form? – 13
- Leg cannot abrogate or unreasonably constrain power of later Parliaments - 13
 - *South-Eastern Drainage Board (SA)* (requirement of special declaration) – 14
- Executive cannot prohibit parliament from enact/proposing legislation – 14
 - *West Lakes Ltd v SA* (Consent of corp) – 14
- Manner and Form cannot abdicate power to another body – 14
 - *West Lakes Ltd v SA* (Consent of corp) – 14
 - *Cth Aluminium Corp Ltd v AG* (Consent of corp) - 15

Topic 7: Delegation and Abdication of Legislative Power

General Principle – 16

Delegation of Legislative Power - 16

- Cth can delegate power to subordinate body with limits – 16
 - *Dignan's Case* - 17
 - *Work Choices Case* – 17
- State can delegate power to subordinate body with limits - 16
 - *Cobb & Co Ltd v Kropp* (empowered Commissioner of Transport) - 16
- Disallowed regulations inoperable from when disallowed – 16
 - *Dignan's Case* – 17
- Delegation for creation of law not constitutionally acceptable – 17
 - *Work Choices Case* – 17
- Rules for disallowance by Parliament set out in *Legislative Instruments Act 2003* - 17

Limitations on Delegation of Legislative Power - 18

- Manner and Form (SEE MANNER AND FORM) – 18
 - *West Lakes* - 14
 - *Cth Aluminium Corp* – 15
- Parliament cannot abdicate its power - 18
 - *Dignan's Case* - 17
- Factors that could constitute abdication – 18
 - *Capital Duplicators* (duty of excise on x-rated films) – 18

- *Cth Aluminium Corp* – 15
- *Cobb & Co Ltd v Kropp* - 16

Topic 8: Parliamentary Privilege

General Principle – 19

- Federal Parliament has power to declare own 'powers, privileges' (*s 49 Cth Cn*) – 19
 - *R v Richards; ex parte Fitzpatrick and Browne* (journalist complaint) – 19
- Cth Parliamentary Privilege regulated by *Parliamentary Privileges Act 1987* - 19
 - *Egan v Willis* (produce certain documents) – 20
 - *Egan v Chadwick* (produce certain documents again) – 20
- State Parliaments inherited privileges reasonably necessary for existence - 20

Topic 9: Justiciability of Parliamentary Power

General Principle – 21

- Two reasons for non-justiciability – 21
 - *Thomas v Mowbray* (Terrorism) – 47
 - *Thorpe v Cth* (Aboriginal UN) – 22
- Not all political questions are non-justiciable – 21
 - *Bennett v Cth* (confining voting rights) – 21
- Exercise of executive power derived from the royal prerogative is justiciable - 21
 - *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (Extradition) - 21
- Parliament proceedings not examinable unless validity of law relies on them - 22
 - *Cormack v Cope* (Double Dissolution) - 22
 - *PMA Case* (passage of bill failing to meeting cn requirements) – 23
- Courts are willing to in 'intra-mural' issues of parliamentary privilege - 23

Topic 10: Validity of Legislature Provision and Delegated Legislation

General Principle – 24

How to Do a Validity Analysis – 24

How Is Legislation Invalidated – 24

BRANCH: EXECUTIVE

Topic 11: The Executive Branch

General Principle - 26

- Ministers > 3 Months need to be in Senate or House of Reps (*s 64 Cth Cn*) – 26

The Crown - 26

The Governor-General - 26

- Powers of Governor General (*s 2 Cth Cn*) – 26
- Governor General is Commander in Chief (*s 68 Cth Cn*) – 26
- GG required to exercise power only on ministers advice (*s 63 Cth Cn*) – 27
 - Exception of reserve powers
- Office of State govt created by letters patent (*s 7 Australia Act; s 9A NSW Cn*) - 27

The Cabinet & Federal Executive Council - 27

- Cabinet functions according to convention – 27
- Courts in rare cases may review cabinet decisions – 27
 - *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd*
- Federal Executive Council advises G-G (*s 62 Cth Cn*)

Reviewing Executive Decisions - 27

- Two main sets of constraints around exec action – 27
- Judicial review of executive action is entrenched (*s 75(v) Cth Cn*) – 27
 - *Egan v Willis* (produce certain documents) – 20
 - *Egan v Chadwick* (produce certain documents again) – 20

Topic 12: The Executive Power

General Principle - 28

- Exec power source is Cth Cn (*s 61 Cth Cn*) – 28
 - *Barton v Cth* (Extradition) – 28
- FOUR main forms of exec power – 28

Prerogative Powers - 28

- Prerogative powers are inherent through common law – 28
 - *Dicey* - 28
- State exec branch also inherited prerogatives relevant to the state's role – 28
- Prerogatives classified in THREE categories – 29
- Up to the court whether a prerogative exists and its extent – 29
 - *Ruddock v Vadarlis* (Tampa Case) – 31
 - *AG v De Keyser's Royal Hotel Ltd* (UK Requisition) – 29
- Legislation can override a prerogative – 29

- *AG v De Keyser's Royal Hotel Ltd* (UK Requisition) – 29
- Prerogatives MODIFIED in TWO ways – 29
 - *Cadia Holdings Pty Ltd v NSW* (Mining) – 30
 - *AG v De Keyser's Royal Hotel Ltd* (UK Requisition) – 29
- Modified prerogatives cannot be reverted/enlarged – 29
 - *Bancoult* (UK: legislating colonies) - 31
- TEST FOR MODIFICATION: Express words or necessary implication – 29
 - *Cadia Holdings Pty Ltd v NSW* (Mining) – 30

Nationhood Power - 32

- Executive powers implicit in idea of national govt (*ss 61 & 51(xxxix) Cth Cn*) – 32
- PECULIARLY ADAPTED to the nation govt and cannot otherwise be carried out - 32
 - *AAP Case* - 32
 - *Pape v Commissioner of Taxation* (GFC) - 34
- Nationhood Power may change with time – 26
 - *Pape v Commissioner of Taxation* (GFC) – 34
- More readily available when NOT ENCROACHING on state sphere of influence – 32
 - *Pape v Commissioner of Taxation* (GFC) – 34
- Convenience does not render use of nationhood power appropriate – 32
 - *AAP Case* - 32
- Courts determine whether a matter necessitates Nationhood Power – 32
 - *Davis v Cth* (Bicentennial) – 33
- Cth may use power to legislate for Aus territorial sea – 32
 - *Seas and Submerged Lands Case* – 32
- PROPORTIONALITY TEST used to determine validity of power – 33
 - *Davis v Cth* (Bicentennial) – 33
- Cannot override or displace ordinary legislative or executive powers
 - *Tasmanian Dams* (national heritage) – 33
- Historical test to determine whether a prerogative power exists – 34
- TEST ON WHETHER LEGISLATION EXTINGUISHES/REGULATES EXEC POWER – 34
 - *R (Miller)* (Brexit Case) - 35
 - *Cadia Holdings Pty Ltd v NSW* (Mining) – 30
 - *Barton v Cth* (Extradition) – 28
 - *Ruddock v Vadarlis* (Tampa Case) – 31
 - *AG v De Keyser's Royal Hotel Ltd* (UK Requisition) – 29

Power to Contract and Spend - 36

- *Chapter IV* of *Cth Cn* deals with financial power-sharing and processes – 36
- Cn gives exec power to appropriate BUT NOT spend money (*ss 81 & 83 Cth Cn*) - 36
 - *Pape v Commissioner of Taxation* (GFC) – 34
- Parliamentary authority required for expenditure of money by exe – 36
 - *Williams v Commonwealth (No 1)* (Chaplaincy Case) – 37
 - *Williams v Commonwealth (No 2)* – 38
- Situations where executive does have spending power – 36
 - *Williams v Commonwealth (No 1)* (Chaplaincy Case) – 37

BRANCH: Judicature

Topic 13: Nature of Judicial Power

General Principle - 39

- Cth Judicial power given by Cth Cn (*s 71 Cth Cn*) – 39
- Cth exercisable by HC, Federal Crts and state crts (*ss 71, 75, 76, 77 Cth Cn*) – 39
- Appointment, tenure & remuneration of federal judges (*s 72 Cth Cn*) – 40
- High Court has appellate jurisdiction for federal and state (*s 73 Cth Cn*) – 40
- Heads of original jurisdiction (*ss 75 & 76 Cth Cn*) – 40
- Parliament can invest federal jurisdiction in crts (*s 77 Cth Cn*) – 40
- Trials on indictment of federal offences shall be by jury (*s 80 Cth Cn*) – 40

Separation of Judicial Power – 41

- Cth Judicial power strictly separated from other branches (*Ch III Cth Cn*) – 39
 - *Boilermakers' Case* (new court had both judicial and non) – 41
- BOILERMAKERS' PRINCIPLE: Ch III can only exercise judicial with exceptions – 41
 - *Boilermakers' Case* (new court had both judicial and non) – 41
- State Judicial power does not have a strict separation of powers – 41
 - *Kable v DPP* (Legislation for one person) – 53
- Federal Judicial power cannot be vested in non-judicial body – 41
 - *Boilermakers' Case* (New court had both judicial and non) – 41
- Modern affirmation of *Boilermakers* – 42
 - *Brandy v HREOC* (Racial discrimination) – 42

Defining Judicial Power – 43

- Enforceable binding and authoritative decisions regarding existing rights/duties – 43
 - *Huddart, Parker & Co Pty Ltd v Moorehead* - 43
 - *R v TPT; ex parte Tasmanian Breweries* - 44
 - *Momcilovic v The Queen* (Advisory opinions) - 44
- INDICIA in defining judicial powers – 43
 - *Chu Kheng Lim v MILGEA* (detention of boat people) – 45
 - *Thomas v Mowbray* (Terrorism) – 47
 - *White v DMP*
 - *R v TPT; ex parte Tasmanian Breweries* – 44
 - *Wainohu v NSW* (anti-biker legislation/persona designata) – 58
- Lack of decisional capacity or ENFORCEABILITY indicates no judicial power – 44
 - *Momcilovic v The Queen* (Advisory opinions) - 44

Voluntary and Involuntary Detention – 45

- Involuntary detention exists consequence of judicial finding of crime – 45
 - *Chu Kheng Lim v MILGEA* (detention of boat people) – 45
- Inhumane conditions do not affect the legality of the immigration - 46
 - *Behrooz v Secretary of DIMIA*

- Involuntary detention serving a non-punishment role is fine – 46
 - *Al-Kateb v Godwin* (stateless detention) – 46

Control Orders – 47

- Control orders historically falling under purview of judicial power – 47
 - *Thomas v Mowbray* (Terrorism) – 47

Chameleon Principle – 47

- Function that is regarded as either admin or judicial will take its colour from whom it is entrusted – 47
 - *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries* - 47

Topic 14: Exceptions to Boilermaker's

General Principle - 48

- Exceptions to Boilermakers' Principles – 48
 - *R v Richards; Ex parte Fitzpatrick and Browne* (Punish for contempt) - 48

Military Tribunals - 48

- Court Martials and Tribunals established under defence power (*s 51 Cth Cn*) – 48
 - *White v Director of Military Prosecutions*
 - *Lane v Morrison* (Affirming White) – 48
 - *Haskins v Commonwealth* (Historical reasons) - 49

Delegation of Judicial Power - 49

- Judicial power can be delegated to administrators at both Federal and State – 49
 - *Harris v Caladine* (Registrars making orders) - 49
- DELEGATION TEST: Two conditions must be met to allow delegation – 49
 - *Harris v Caladine* (Registrars making orders) – 49

Persona Designata Rule - 50

- Judges can be individually given non-judicial functions – 50
 - *Drake v Minister for Immigration & Ethnic Affairs* – 50
 - *Hilton v Wells* (Telephone interception) – 50
 - *Grollo v Palmer* (Following Hilton) - 51
- Determining whether the power invokes persona designata – 50
 - *Hilton v Wells* (Telephone interception) – 50
- TWO CONDITIONS must be met to confer persona designata – 51
 - *Grollo v Palmer* (Following Hilton) – 51
- INCOMPATIBILITY DOCTRINE: No persona designata if incompatible with judicial – 51
 - *Grollo v Palmer* (Following Hilton) – 51
 - *Wilson v MATSIA* (Minister making declarations) – 51
- STEPS to establish whether a statute bestows incompatible condition – 52
 - *Wilson v MATSIA* (Minister making declarations) – 51
- WAYS INCOMPATIBILITY MAY ARISE - 52

Topic 15: State Courts and Kable

General Principle - 53

- Strict Separation of Powers not found in State – 53
 - *R v Richards; Ex parte Fitzpatrick and Browne* (Punish for contempt) – 48
 - *Kable v DPP* (Legislation for one person) – 53

Incompatibility Doctrine for State - 49

- State cannot pass laws 'substantially impairing courts institutional integrity' – 49
 - *Kable v DPP* (Legislation for one person) – 54
 - *AG (NT) v Emmerson* - 53
 - *Fardon v Attorney-General (Queensland)* - 53

Impartiality, Independence and Integrity - 54

- THREE CONSIDERATIONS whether conferral of power is compatible – 54
 - *Kable v DPP* (Legislation for one person) – 54
- Modern Kable Cases – 55
 - *Forge v ASIC* (Appointment of acting judges) - 55
 - *Gypsy Jokers Motorcycle Club v Commissioner of Police* (confidential info) - 55
 - *K-Generation Pty Ltd v Liquor Licensing Court* (classified info) – 56
- Process bestowed on court is invalid if 'repugnant to a fundamental degree' – 56
 - *International Finance Trust Co v NSW Crime Commission* - 56
- Departure from typical procedure & process doesn't breach procedural fairness – 57
 - *Assistant Commissioner Condon v Pompano Pty Ltd* – 57
- Law controlling or removing judicial decisional independence is not valid – 57
 - *Gypsy Jokers Motorcycle Club v Commissioner of Police* (confidential info) - 55
 - *South Australia v Totani* (Bikie club declaration) – 57
- Kable principle still applies to persona designata at state level – 58
 - *Wainohu v New South Wales* (following Totani but individual judge) - 58