



LLB 280
CONSTITUTIONAL LAW
EXAM NOTES

Semester 2 2018



Table of Contents

WHAT IS A CONSTITUTION.....	5
FUNDAMENTAL CONCEPTS	5
<i>Parliamentary Sovereignty</i>	5
<i>The Rule of Law</i>	5
<i>Constitutional Conventions</i>	5
<i>Bicameralism</i>	5
<i>Parliamentary Control of Supply</i>	5
<i>Separation of Powers</i>	5
<i>Federalism</i>	5
<i>Representative Government</i>	5
<i>Responsible Government</i>	6
OVERVIEW OF THE AUSTRALIAN CONSTITUTION.....	6
A TIME LINE OF CONSTITUTIONAL DEVELOPMENT	4
CONSTITUTIONAL INTERPRETATION TECHNIQUES	6
TEXT AND CONTEXT.....	6
ORIGINALISM	6
COMPARATIVE ARGUMENTS	6
<i>Policy</i>	6
IMPLICATION.....	6
STARE DECISIS.....	6
INTERNATIONAL LAW.....	7
WHAT HAPPENS WHEN A CONSTITUTIONAL LAW IS FOUND TO BE INVALID.....	7
ENGINEER’S CASE – EXPLOSION OF THE RESERVED POWERS DOCTRINE.....	7
CHARACTERISATION.....	8
DIRECT CHARACTERISATION.....	8
<i>Tests for Characterisation</i>	8
PROPORTIONALITY – REASONABLY APPROPRIATE AND ADAPTED TO A HEAD OF POWER	8
INCIDENTAL CHARACTERISATION	8
<i>Tests for Incidental Characterisation</i>	9
<i>The Way the High Court Has Approached the Issue Under Some Heads of Power</i>	9
THE CORPORATIONS POWER (S 51(XX))	10
WHAT IS A CORPORATION?	10
<i>Foreign Corporations</i>	10
<i>Trading Corporations – Current Activities Test</i>	10
<i>Financial Corporations</i>	11
<i>Inactive Corporations</i>	11
WHAT ASPECTS OF A CORPORATIONS POWER CAN BE REGULATED UNDER S 51(XX) – SCOPE.....	11
THE INCIDENTAL SCOPE OF S 51(XX)	12
<i>The Corporations Power and Natural Persons</i>	12
INCORPORATION.....	13
EXTERNAL AFFAIRS POWER (S 51(XXIX)).....	14
EXTRATERRITORIAL POWER	14
<i>What is it?</i>	14
<i>Nexus? Commonwealth</i>	14
<i>Nexus? States</i>	15
<i>Limitations? Federal Limit on State Actions</i>	15
RELATIONS WITH OTHER COUNTRIES.....	15
<i>Preserving International Relations</i>	15
IMPLEMENTATION OF TREATIES.....	15
<i>Treaty Ratification</i>	16
<i>Effect of Treaties on Australian Law</i>	16

<i>Which Treaty Obligations</i>	16
<i>Limitations</i>	16
<i>Implementation of International Documents Other Than Treaties</i>	17
MATTERS OF INTERNATIONAL CONCERN.....	18
<i>Customary International Law</i>	18
THE DEFENCE POWER (S 51(VI)).....	19
PURPOSIVE – IS THE LAW REASONABLY APPROPRIATE AND ADAPTED.....	19
SCOPE.....	19
<i>Scope – Judicial Deference</i>	19
CIRCUMSTANCES.....	20
<i>War</i>	20
<i>Transition From War to Peace</i>	20
<i>Peace</i>	21
<i>Uneasy or Ostensible Peace</i>	21
<i>Threat of War</i>	22
<i>The Defence Power Today – Terrorism and National Security</i>	23
MILITARY JUSTICE.....	24
EXECUTIVE POWER (NATIONHOOD POWER S 61 AND S 51(XXXIX)).....	25
(APPROPRIATION AND SPENDING).....	25
PERSONS WITHIN THE EXECUTIVE.....	25
THE RESERVE POWERS.....	25
SCOPE OF THE EXECUTIVE POWER.....	25
<i>Execution and Maintenance of the Laws of the Cth</i>	25
<i>Execution and Maintenance of the Constitution</i>	26
<i>Inherent Executive Power: The Common Law</i>	26
CROWN IMMUNITY.....	27
THE NATIONHOOD POWER.....	27
<i>Nationhood and Expenditure</i>	27
<i>Coercive Nationhood Power</i>	28
APPROPRIATION AND SPENDING.....	29
<i>Appropriations Power</i>	29
<i>Purposes of the Commonwealth?</i>	29
<i>Power to Spend Appropriated Moneys</i>	29
FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE (S 92).....	31
THE RELEVANT QUESTION IS WHETHER THE LAW IMPINGES UPON THE FREEDOM OF INTERSTATE TRADE & COMMERCE ...	31
TRADE AND COMMERCE.....	31
COLE V WHITFIELD AND THE TRIUMPH OF THE FREE TRADE APPROACH.....	31
<i>Is There a Burden on Interstate Trade?</i>	31
<i>Is the Burden Discriminatory on its Face or Practical Effect?</i>	31
<i>Does the Discrimination Have a Protectionist Effect?</i>	32
<i>Is the protectionist effect pursuant to or incidental to some non-protectionist purpose? Is it appropriate & adapted to achieving that purpose?</i>	32
FREEDOM OF INTERSTATE INTERCOURSE.....	33
<i>How Might Freedom of Interstate Intercourse be Breached?</i>	33
SPENDING GOVERNMENT REVENUE – S 96 GRANTS.....	34
SECTION 96 GRANTS.....	34
SECTION 96 SCOPE.....	34
<i>What Conditions</i>	34
<i>Limits to Section 96</i>	34
SEPARATION OF JUDICIAL POWER (CTH).....	36
WHAT IS JUDICIAL POWER.....	36

<i>Enforceability</i>	36
<i>Binding and Conclusive Decisions</i>	36
<i>Need for a Controversy</i>	36
<i>Breadth or Nature of Discretion</i>	36
<i>Existing Rights and Duties</i>	37
<i>Historical Considerations</i>	37
JUDICIAL POWER OF THE CTH	37
SEPARATION OF JUDICIAL POWERS – CTH	37
<i>Principle 1: Judicial Power May Only Be Exercised by Chap III Courts</i>	37
<i>Exceptions – First Principle</i>	38
<i>Principle 2: Federal Courts May Not Exercise Non-Judicial Power</i>	38
<i>Exceptions – Second Principle</i>	39
SEPARATION OF JUDICIAL POWER (STATES)	40
(KABLE AND WAINOHU PRINCIPLES)	40
STATE SEPARATION OF POWERS?	40
<i>Kable Principle</i>	40
INCONSISTENCY S 109	43
WHAT IS A LAW	43
‘INVALID’	43
TESTS FOR INCONSISTENCY – ARE BOTH LAWS CONSTITUTIONALLY VALID	43
<i>(Direct Inconsistency) Test 1: Impossibility of Simultaneous Obedience</i>	44
<i>(Direct Inconsistency) Test 2: Conferral of Rights</i>	44
<i>(Indirect Inconsistency) Test 3: Covering the Field</i>	45
INCONSISTENT CRIMINAL PENALTIES	47
IMPLIED INTERGOVERNMENTAL IMMUNITIES	48
CTH LEGISLATIVE POWER OVER THE STATES	48
<i>Does the Law Directly or Indirectly Discriminate Against a State? QEC v Cth</i>	48
<i>Prohibition on the Impairment or Curtailments of a State’s Capacity to Function as a Government – Does the Law Impair or Curtail the State’s Capacity to Function as a Government? Re Australian Education Union; Ex parte Victoria 1995</i>	49
STATE LEGISLATIVE POWER OVER THE CTH	49
<i>Cigamatic 1962</i>	49
<i>Exceptions to Cigamatic</i>	49
<i>A reformulation of Cigamtic: The Residential Tenancies Tribunal Case</i>	49
ACQUISITION OF PROPERTY ON JUST TERMS (S 51(XXXI))	50
GENERAL FEATURES	50
TEST – HAS THERE BEEN AN ACQUISITION OF PROPERTY THAT WAS NOT MADE ON JUST TERMS	50
<i>Property?</i>	50
<i>Acquisition of Property</i>	50
<i>Exceptions to s 51(XXXI) Acquisition</i>	51
<i>Just Terms</i>	52
<i>Acquisition for the Purposes of the Cth?</i>	52
<i>Applications of s 51(XXXI) Within the Territories</i>	52
THE RIGHT TO TRIAL BY JURY – S 80	53
NATURE AND DEVELOPMENT OF S 80	53
WHAT CONSTITUTES A BREACH OF S 80?	53
WHAT ELEMENTS OF 80 ARE CONSTITUTIONALLY REQUIRED?	54
FREEDOM OF RELIGION – S 116	55
TEST – DOES THE LAW INFRINGE A FREEDOM OF RELIGION?	55
<i>Definition of a Religion</i>	55

<i>Establishment of a Religion</i>	55
<i>Laws 'For' Prohibiting the Free Exercise of Any Religion</i>	55
<i>Requirement of Religious Test a Qualification for Public Office</i>	56
DISCRIMINATION ON THE BASIS OF STATE RESIDENCE	57
S 117	57
DEVELOPMENT OF S 117	57
EXCEPTIONS TO S 117.....	57
NO EXPRESS RIGHT TO VOTE – S 41	58
IS THERE AN EXPRESS RIGHT TO VOTE?.....	58
FREEDOM ON POLITICAL COMMUNICATION	59
(FREEDOM OF MOVEMENT, PARTICIPATION AND ASSOCIATION; VOTING EQUALITY AND RIGHTS)	59
THE SOURCE OF THE FREEDOM.....	59
<i>Source of Freedom</i>	59
<i>Developments on Source</i>	59
TEST – DOES THE LAW IMPINGE ON THE IMPLIED FREEDOM OF POLITICAL COMMUNICATION?*	60
<i>Stage 1/Question 1 of the Test Lange/Coleman, McCloy</i>	60
<i>Stage 2, Question 1 Lange/Coleman Test – Question Two McCloy Test</i>	60
<i>Stage 2, Question 2 Lange/Coleman Test – Question Three McCloy Test</i>	61
<i>Operation of the Freedom</i>	63
<i>Nature of the Freedom – is it a right?</i>	63
FREEDOMS OF MOVEMENT, PARTICIPATION AND ASSOCIATION	63
VOTING EQUALITY AND VOTING RIGHTS	64
<i>Voting Equality</i>	64
<i>Voting Rights</i>	64
THE RACE POWER (S 51(XXVI))	66
THE RACE POWER TODAY	66
<i>The Race Power: Issues</i>	66
<i>Case Law Pre-Kartinyeri</i>	66
<i>The Hindmarsh Island Bridge Case</i>	66

Introduction: Basic Concepts

What is a Constitution

- A written document? – often is and in most cases it will be (although UK does not have a written constitution)
- The source of power to make laws
- In Australia, the Constitution regulates the relationship between States and the Federal government
- The Australian Constitution, the drafting of which did not reflect the views of women or non-white men, is not a document for civil rights

Fundamental Concepts

Parliamentary Sovereignty

- Australia's constitution is a limitation on parliamentary sovereignty

The Rule of Law

- The Australian constitution is framed upon the assumption of the rule of law *Plaintiff s157/2002*
 - Rights are best protected by courts
 - Everyone is equal under the law

Constitutional Conventions

- Unwritten rules of the constitution

Bicameralism

- Two houses of parliament

Parliamentary Control of Supply

- Government spending
- Must go through both Houses of Parliament
- Must start in the House of Reps not the Senate

Separation of Powers

- Reflected in the chapter design of the Constitution

Federalism

- Governance within States themselves, and then a centralised governance through the federal system

Representative Government

- The legislature directly represents the interest of the constituency
- Ss 7 and 24 of the Constitution

Responsible Government

- Collective and individual ministerial responsibility

Overview of the Australian Constitution

Chapter I: The Parliament Part I – General

Section 1 – Legislative Power

- The legislative power of the Cth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Reps and which is hereinafter called the Parliament, or the Parliament of the Cth

Section 2 – Governor General

- A governor-general appointed by the Queen shall be Her Majesty's representative in the Cth, and shall have and may exercise in the Cth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him

Chapter I: The Parliament Part II – The Senate

Section 7 – The Senate

- The Senate shall be composed of senators for each state, directly chosen by the people of the State, voting until the Parliament otherwise provides, as one electorate
- Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each state, but so that equal representation of the several original states shall be maintained and that no original states shall have less than six senators
- The senators shall be chosen for a term of six years, and the names of the senators chosen for each state shall be certified by the governor to the GG

Chapter I: The Parliament Part III – The House of Reps

Section 24 – Constitution of House of Reps

- The House of Reps shall be **composed of members directly chosen by the people of the Cth**, and the number of such members shall be as nearly as practicable, **twice the number of the senators**
- The number of members chosen in the several States shall be **in proportion to the respective numbers of their people**, and shall, until Parliament otherwise provides, be determined, whenever necessary, in the following manner
- But not withstanding anything in this section, **five members at least** shall be chosen in each Original state

Chapter I: The Parliament Part IV – Both Houses of Parliament

Section 41 – Right of Electors of States