

CONSTITUTIONAL EXAM NOTES

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Element 2 – Has there been discrimination/disability? Error! Bookmark not defined.

Interpretation of the Constitution

Textual Originalism

- Better mode of interpretation regarding the Constitution; **Cole v Whitfield (1988)**
- **Eastman v R (2000) (McHugh J)**
 - The Constitution was made with purposeful generality and abstraction to “enable it to be infused with the current understanding of... concepts and purposes.”
 - “It must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.”
 - Two steps:
 - Actual language understood according to original meaning
 - “while adjusting that meaning to accommodate later developments.”

Use of Historical Materials – **Cole v Whitfield (1988)**

- Regard can be had to the history of a constitutional provision including Debate for the purpose of identifying the contemporary meaning of language, nature and objective
- Cannot be used for substituting the meaning of the words used
- Do not want to implement subjective intentions as constitutional principles

Exam Question 1 – Powers of State Parliaments

Question and Tips

- Can a state government use parliamentary sovereignty to foreclose litigation against it?
- Some provisions of legislation designed to achieve that goal are outlined
- Identify the points of argument against the subject legislation
- Assistance:
 - E.G. Mark McGowan
 - Breach of judicial separation - *Kable*, etc.
 - Melbourne Corporation
 - Spence Case - reverse Melbourne Corporation, the states cannot do things maybe that interferes with Cth??
 - *Palmer* case
 - Think outside the box
 - Can a state use this principle to say you cannot sue us for anything, you cannot review our legislation, etc.!
 - IFPC
- Issues to think about

- Does or can a state constitution prevent future legislation inconsistent with past ideas?
 - *Colonial Validity Acts* s 5, s 6 of *Australia Act*
 - Manner and form requirements
 - They are restricted to political things
- States are bound to Constitution
 - *Melbourne Corporation vs Spence Case*
 - Do these provisions foreclose the judicial independence of the state courts that will be required to implement/enforce them in any way
- Entrenchment of terms??
- Why does this go too far?????

Federal jurisdictions are distinguished from being bound by M&F:

- Constitution can be amended by s 128
- S 6 AA only applies to States
- If there is a dispute between Cth and State = *Melbourne Corp* and s 109
- If there is a dispute between two State laws = manner and form, s 6 AA

State Constitutions

Constitution

- **S 106:** preserves the State constitutions to "continue as at the establishment of the Commonwealth... until altered in accordance with the Constitution of the State." These constitutions are "subject to this Constitution"
- **S 107:** preservation and continuation of the legislative powers of the State Parliaments, except of course those provided for exclusively the Cth, and those withdrawn from the States in the Constitution
- **S 108:** preservation of State legislation already in place, subject to the State's powers to repeal and amend
- **S 109:** inconsistency

Powers

- Abrogation of "deeply rooted right" with no basis in law does not operate as a restraint on State and Cth legislative powers; it derives its existence from the Constitution
 - *Durham Holdings Pty Ltd v NSW (2001)*
- All that is necessary is that the laws are made for the peace, welfare and good government of the State; **s 2(1) *Australia Act 1986* (Cth)**
 - E.g. **s 5 *Constitution Act 1902* (NSW)**
 - These are not words of limitation; *Union Steamship Co of Australia v King (1988)*

Limits

- Areas of power exclusively vested in the Commonwealth
 - **S 90** – levy duties of excise
 - **S 51** powers are then made exclusive, e.g. s 51(vi) is made exclusive to Cth by s 114

- This does not reserve any topics of legislation to the Cth
 - States may legislate in any field left vacant by the Cth; *Pirrie v McFarlane* (1925)
 - State law would only be inoperative if invalid to the extent of inconsistency under s 109
- Express limits of State legislative powers:
 - S 114 – states may not impose tax on Cth property
 - S 92 – cannot restrict free trade, commerce, intercourse over state borders
 - S 117 – may not discriminate against other State residents purely on their residency
- Implied limits (may underly the Constitution, e.g. representative government, federalism, separation of powers/judiciary):
 - Cannot substantially impair the institution integrity of State courts, and cannot make laws that impinge impartiality, fairness, independence and openness
 - *North Australian Aboriginal Justice Agency Ltd v NT* (2015)
 - Cannot deprive a State Supreme Court of the power to grant relief in an order of certiorari for jurisdictional error
 - *Kirk v Industrial Court of NSW* (2010)
 - Jurisdictional error:
 - Where the court purports to act outside its jurisdiction:
 - Disregard of a matter statute compels the court to consider
 - Misconstruction of statute
 - Absence of jurisdictional fact
 - Where the court mistakenly asserts/denies existence of jurisdiction
 - Certiorari – order sought for a higher court to review the decision of a lower court
 - Cannot impinge implied right to fair trial – cannot be required to exercise power in a manner inconsistent with the nature of judicial power; *Kable v DPP* (1996)

Amending a State Constitution

- **S 5 Colonial Laws Validity Act 1865 (Imp); s 6 Australia Acts 1986 (Cth)**
 - Affirmed that every Colonial Legislature had full constituent power in respect of its own judicial system, every Rep Legislature had full power "to make Laws respecting the Constitution, Powers and Procedure of such Legislature...provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required."
 - If laws are made respecting C, P, and P – bound by manner and form requirements
- States have the power to repeal and amend the Constitutions like any other statute
- **S 106** – interpreted that to amend the Constitution, States must abide by manner and form provisions as in *WA v Wilsmore* (1982)
- *Taylor v A-G (Qld)* (1917)
 - QLD passed a law altering how legislation is passed: referendum if there is a deadlock, which would result in the abolition of the Legislative Council (Senate)
 - HELD valid. Passed ordinary legislation which amended the constitution
- *McCawley v The King* [1920] AC 691
 - Confirmed that a State Parliament in Australia had the power to amend a State constitution by ordinary legislation including, through the conventional doctrine of implied repeal, by legislation that was merely inconsistent with the State constitution
 - Implied repeal: the later Act takes precedence and the conflicting parts of the earlier Act become legally inoperable

- Essentially, if a later legislation is inconsistent with earlier, it is assumed that Parliament knew this and were happy to impliedly repeal the earlier legislation