

Principles of Public Law
Class 7 onwards (examinable)

Contents

Hypo Issue Spotting Table	4
MEGA TOPIC 1: THE STATE	4
1. The State and Territory (Class 7)	4
2. The State and Citizenship	4
2.1. The Constitution on Citizenship	4
2.2. <i>Love and Thoms v Commonwealth</i> [2020] HCA 3 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)	4
2.3. How to gain or lose citizenship (Citizenship Act 2007 Cth).....	5
A. Automatic Citizenship (most common):	5
B. Citizenship by Application:.....	6
C. To Lose citizenship.....	6
D. Stateless people becoming citizens (domestic law).....	6
E. International obligations on Australia to make stateless people citizens	6
3. State and Extraterritoriality	7
3.1. Australian Commonwealth (National Boundaries)	7
3.2. Australian State Boundaries	7
3.3. Extraterritorial legislation powers (WHEN GOVT CAN LEGISLATE OUTSIDE STATE BORDERS).....	7
A. State government extraterritorial interpretation process	7
B. Commonwealth Government extraterritorial legislation powers	8
3.4. Customary International Law Principles of Extraterritoriality.....	9
MEGA TOPIC 2: BRANCHES OF GOVERNMENT	10
4. Legislative power: Representative Democracy	10
4.1. Constitutional Guarantee to Representative Government chosen by the people.....	10
4.2. <i>Rowe v Electoral Commissioner (2010) 243 CLR 107</i>	10
5. Legislative Power: Responsible Government (Checks and Balances).....	11
5.1. <i>Egan v Willis</i>	11
5.2. How the Legislature legislates.....	12
6. Executive Power: Structure and Immunity.....	12
6.1. Structure of Executive Power	12
6.2. Executive Immunities	12
A. <i>Bropho v WA (1990)</i>	13
7. Delegated Legislation – law making power delegated by Parliament to the Executive (very common)	13

7.1.	<i>Victorian Stevedoring v Dignan</i> (1931) 46 CLR 73.....	13
7.2.	Disallowance mechanism of parliamentary oversight of delegated legislation	14
8.	Judicial Power	14
A.	Judiciary and the Constitution	14
8.1.	<i>Plaintiff S157/2002 v Cth</i> (2003) 211 CLR 476.....	15
9.	Protection of Rights.....	16
9.1.	Federal Protection of Rights.....	16
9.2.	State protection of Human Rights	17
A.	VIC: Charter of Human Rights and Responsibilities Act 2006	17
10.	Making Treaties and Implementing International Law	18
10.1.	Process to implement international treaty obligations domestically	18
A.	Contemporary (post-reform process)	18
B.	<i>Tasmania Dams Case (Cth v Tasmania)</i> (1983)	18
11.	Statutory Interpretation Application Skill	19
12.	The State and Territorial Acquisition:.....	21
12.1.	Types of acquisition of territory recognised in 19 th century international law.....	21
A.	Conquest.....	21
B.	Cession	21
C.	Occupation of <i>Terra Nullius</i> (Unoccupied/ Unacquired Land).....	21
12.2.	CASE: <i>Mabo (No. 2)</i> (1992) 175 CLR 1 (Legal consequences of <i>Terra Nullius</i> ' inapplicability)	22
	- Brennan J: Rejected Australia being <i>Terra Nullius</i> however could not implement without fracturing legal system.	22
13.	The State and Citizenship.....	22
13.1.	Importance of Citizenship	22
13.2.	Common Law Argument: <i>Alexander v Minister for Home Affairs</i> (2022) Argument re natural born citizens being considered 'alien'.	22
13.3.	(Citizenship Act 2007 Cth) Preamble binding values onto citizens.....	22
14.	The State and Sovereignty (Australia from Dominion to sovereign state).....	23
14.1.	Methods of Imperial Dominance:.....	23
14.2.	Sovereignty Timeline showing increasing self-determination (Aus claiming freedom from imperial dominance)	Error! Bookmark not defined.
14.3.	<i>Sue v Hill</i> High Court decision that Australia became a sovereign state by 1986 ..	23
14.4.	Indigenous sovereignty.....	23
14.5.	Indigenous view of common law sovereignty claims : Kwaymullina in 'Aboriginal Nations, the Australia nation state and Indigenous legal traditions.	24
A.	Uluru Statement from the Heart	24
15.	State and Extraterritoriality	24

16.	Representative Democracy.....	24
16.1.	Constitutional Guarantee to Representative Government chosen by the people.....	25
17.	Responsible Government.....	25
17.1.	Challenges to responsible Government: Private Contracting.....	26
18.	Executive Power.....	26
18.1.	Executive Immunity	26
18.2.	Delegated Legislation: Constitutionality and Disallowance mechanism of parliamentary oversight of delegated legislation	27
19.	Judicial Power	28
A.	Judicial Power definition.....	28
B.	Importance of the Judicial Review and the Separation of powers:	29
C.	Constitutional mechanisms upholding Judicial independence	29
20.	Rule of Law	30
20.1.	Is the rule of law a rule?	30
20.2.	Origins of the rule of law concept	Error! Bookmark not defined.
20.3.	Does the Rule of Law guarantee rights?.....	30
20.4.	International Rule of Law.....	30
21.	Federalism (Essay Q likely only, return to Week 11)	30
21.1.	Scott Stephenson, 'Federalism and Rights Deliberation' (2014) 38(2) Melbourne University Law Review 709-711, 728-739, 750-754.....	31
21.2.	G Appleby, A Reilly and L Grenfell, Australian Public Law (2nd ed, OUP 2014) 62-74	31
A.	Why federalism? (Pros):.....	31
B.	Character of federal states	31
21.3.	Pros and Cons of Federalism:.....	31
22.	Rights Protection	32
22.1.	Federal Protection of Rights.....	32
23.	Making treaties and implanting international law	33
A.	Dualist System of Australia vs a Monist system	33
B.	Process of treaty implementation	33
C.	Indigenous treaty implementation	34

Part 1: Hypo Help

Hypo Issue Spotting Table

- 1: State and Territory (Mabo + Terra Nullius) -> Located in Essay section
- 2: State and Citizenship (Indigenous people can't be considered aliens, constitutional heads of power for parliament re aliens, immigration, naturalisation)
- 2.3: Ways to gain and lose citizenship + statelessness provisions
- 3: State and Extraterritoriality: ability for parliament (federal and state) to legislate extraterritorially)
- 4: Representative Government: when parliament can limit the right to vote
- 5: Responsible Government: Validity of exercising of powers of the legislature to scrutinise executive
- 6: Executive Immunity for statutory authorities (bropho)
- 7: Delegated Legislation from parliament to the executive + disallowance procedure/exemption
- 8: Judicial Power: privative clauses invalidity S157
- 9: Protection of Human Rights on Federal and State Levels (Vic Charter)
- 10: Executive power to make treaties/ procedure and legislative power to implement treaty obligations Tasmania Dams Case
- 11: Statutory Interpretation Skill Set

MEGA TOPIC 1: THE STATE

1. The State and Territory (Class 7)

Considering the international law of territorial acquisition in comparison to how the territory of Australia was acquired.

Summary of key facts:

- a) 3 ways to acquire territory: cession, conquest and occupation of *Terra Nullius*
- b) Legal consequences of each: cession deals can be made, but rare. Conquest prohibited under art 2(4) UN Charter since 1945. Occupation of *Terra Nullius* acceptable but only in the absence of people, not the absence of civilisation (*Western Sahara* decision)
- c) Mabo demonstrated *Terra Nullius* false, however recognised the impossibility of the courts ability to deny it as a result of its foundational character to the Australian legal system.
- d) After Mabo, native land is recognised in land and consistent with crown's radical title

2. The State and Citizenship

2.1. The Constitution on Citizenship

s 51: 'The parliament shall, subject to this constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xix): Naturalisation and aliens

(xxvii) Immigration and emigration

- Constitution only uses 'citizenship' in reference to foreign citizens
- S44(i): 'a citizen of a foreign power... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives (lower house).

2.2. *Love and Thoms v Commonwealth* [2020] HCA 3 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ)

“Indigenous people of Australia are the first peoples of this country, and the connection between the Indigenous people of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European ‘settlement’.” [289]
 “Aboriginal Australians occupy a unique or sui generis position in this country, such that they are not aliens.” (cannot be aliens)”

- Tripartite Test as to legal definition of aboriginality [366-368]:

‘Membership of an indigenous people was explained in *Mabo (No 2)* by reference to

1. biological descent,
2. self-identification,
3. recognition by an elder or elders.’

- In Summary: “Indigenous people cannot be considered aliens, as the constitution in no way disrupted the connection between indigenous Australians and the land”

EXAM: CAN INDIGENOUS PERSON BE DEPORTED AS AN ALIEN UPON LOSING CITIZENSHIP?

Issue: *Can [indigenous party] be deported as an alien upon losing their citizenship?*

Rule: ‘Aboriginal Australians occupy a unique or *sui generis* position in this country, such that they are not aliens,’ nor can they be (*Love and Thoms v Commonwealth* Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ). By being precluded from being ‘alien’, the High Court has recognised them to be essentially exempt from legislation under the head of power provided by *Commonwealth Constitution 1901* s51(xix), therefore precluding them from deportation. As such, it is pertinent to deploy the tripartite test elucidated in set out in *Mabo (No 2)* to assess [party]’s legal aboriginality. It is dependent upon their biological descent, their self-identification, and their recognition by Aboriginal elders.

Application: Clearly [party] satisfies [insert above factors] however it is contentious as to whether they satisfy [insert contentious factor] and

Answer Qs:

Analogies

(*Love and Thoms*):

- 1) *Love and Thoms* held x for tripartite 1, y for 2,

Conclusion: as a result, are unlikely to be considered legally to be an Aboriginal Australian and therefore will not be exempt from the legislation.

2.3. How to gain or lose citizenship (Citizenship Act 2007 Cth)

Preamble:

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- a. by pledging loyalty to Australia and its people; **and**
- b. by sharing their democratic beliefs; **and**
- a. by respecting their rights and liberties; **and**
- b. by upholding and obeying the laws of Australia.

Ways to Gain Citizenship:

A. Automatic Citizenship (most common):

Birth to Australian citizen/ permanent resident parent	S12(1)(a)	Born in Australia, and at least one parent is a citizen
---	-----------	---