

# PUBLIC LAW (JURD7141)

## EXAM NOTES

### 1B OVERVIEW OF AUST. SYSTEM OF PUBLIC LAW

#### STRUCTURAL OVERVIEW

Constitutional law (*Dicey*): “all rules which directly or indirectly affect the distribution or the exercise of the sovereign power of the state”

#### Constitutional hybrid

- **UK:** Westminster system (representative govt and responsible govt) within constitutional monarchy framework
  - **Focus** = establish **chain of command**
  - **Monarchical govt:** the Queen, as represented in Aust by the GG, is Aust’s head of state
  - **Constitutional monarchy:** the *power* embodied in the idea of ‘monarchy’ is *limited* by the ideals and principles of ‘constitutionalism’
  - **Representative govt:** govt by the people through their elected representatives
  - **Responsible govt:** the Exec arm of govt is responsibly to Parl for its actions
  - **Parl:** central institution, through which all the disparate elements of the system of govt (from people to the Crown) are welded into one consolidated chain of command
  - Power of the Crown is controlled by the ministry; the ministry is controlled by the Parl; Parl is controlled by the electorate
- **US:** federalism, separation of powers, JR
  - **Focus** = protect people from govt by **diffusing power**
  - **Separation of powers:** allocated **legislative**, **Exec** and **judicial** functions to distinct institutions (partially) **independent** to one another
    - Theme: need to protect the people *against* the power of govt (prevent the exercise of arbitrary or tyrannical power) – by distributing and dismembering powers in ways that ensure there is no single consolidated chain of command
    - **Montesquieu** highlights that investing the government with all 3 powers would bestow them with limitless capability to act *despotically*, *tyrannically* and with *oppression*
    - **Legislative:** power to make/pass/alter/repeal laws (Parl)
    - **Exec:** power to enforce/carry out laws passed by Parl (govt, public servants employed by govt)
    - **Judicial:** power to interpret/apply laws

- **Federalism**: govt powers (and especially legislative powers) **spread** among different political and territorial units (**federal** and **state govts**)
  - These allocations are subject to checks and balances (JR)
- **JR**: ability of the courts to strike down/invalidate laws and govt action found to be inconsistent with the Constitution (*Marbury v Madison*)
  - Ensures that Parl operates within constitutional limits

## Constitution

- “the rules governing the composition, powers and methods of operation of the main institutions of govt, and the general principles applicable to their relations to the citizens” (Ivor Jennings)
- “a fundamental law, or a fundamental set of principles, and a correlative institutional arrangement, which would restrict arbitrary power and ensure a ‘limited govt’” (Giovanni Sartori)
  - ‘**Nominal constitution**’: dealing only with the ‘formalisation of the power structure
  - ‘**Façade constitution**’: pays lip service to the principles of limited govt, but in practice fails to secure them

## Aust’n Constitution

- Both written and unwritten
  - ‘the Aust’n Constitution’
  - Complemented by *Statute of Westminster 1931* (Imp) and the *Aust Act 1986* (Cth)
  - Supplemented by the common law and unwritten conventions
  - Each State also has written constitution supplemented by conventions and the common law
- Origins
  - Cth of Aust = federation of 6 states
  - Constitution enacted by UK Parl in 1900 (Aust part of British Empire)
  - 6 states previously separate British colonies – each with own constitution that continued in force after 1900 (although subject to new Federal Constitution)
  - Authority of the UK Parl to change Aust law was not formally terminated under 1986 (*Aust Act* – passed by both UK and Cth Parls)
  - Fed Constitution drafted in Aust by representatives of the 6 colonies at constitutional conventions during the 1890s – subsequently approved by voters in separate referenda in each colony
  - To make binding – enacted (with very few changes) by the UK Parl
  - Constitution is not only a statute, but a **compact** b/w the peoples of the states (accepted by HC)
- Structure
  - Chapter I: structure and powers of the **Cth Parl** (detailed and comprehensive)
  - Chapter II: structure and powers of the **Exec** (terse and elliptical)
  - Chapter III: structure, powers, and independence of the **federal judiciary**
    - Federal judicial power vested in the HC, other federal courts that Parl may create, and state courts that Parl may vest with federal jurisdiction

- Impliedly prohibits both the vesting of federal judicial power in any non-judicial body, and the vesting of non-judicial power in federal courts
- Remaining sections concern:
  - Finance and trade (incl. free trade among the states);
  - Relationship b/w the Cth and the states (including the supremacy of Cth laws over inconsistent state laws);
  - Territories;
  - The seat of govt; and
  - Constitutional amendment (s 128: double majority referendum) – passed by Parl, then approved by a majority of voters both nation-wide and in a majority of states
- **Rights protection**
  - **s 41** – persons entitled to vote in state elections cannot be prevented from voting in Cth elections
  - Cth (not states) not permitted to compulsorily acquire property without **just** compensation (s **51(31)**), remove trial by jury for indictable offences (s **80**), or violate freedom of religion (s **116**)
  - **1946**: guarantee against conscription in the provision of medical or dental services was added, as a proviso to a new federal power to legislate with respect to such services (s **51(23A)**)
  - The states are not permitted to discriminate against the residents of other states (s **117**)
  - **Reasons for no BoR** (Jeffrey Goldsworthy):
    - Influenced by British constitution tradition (federation resulted from calm, pragmatic reform by colonial politicians encouraged and assisted by the Imp govt)
    - Utilitarianism had replaced natural rights as the main currency of British political thought – Aust had been described as a paradigmatically utilitarian society
    - Framers deemed it both unnecessary and unwise to fetter their Parls
    - Given the progress of liberal ideas under British institutions, democratically elected Parls seems to them the best possible guardians of liberty
    - The harsh Aust'n environment was still being settled by Europeans, who wanted strong govt to underwrite enterprise, provide necessary infrastructure, and enact social regulation
    - Framers feared that judicial interpretations of abstract rights could have unpredictable and undesirable consequences
      - They did not want to be prevented from discriminating against people of other races in order to protect the racial and cultural homogeneity of their communities
  - It was necessary to arm an independent federal judiciary with power to enforce the terms of the federal compact – but, with a few minor exceptions, the traditional British doctrine of Parl sovereignty was disturbed only to that extent
  - Provided they were acting within their respective spheres of responsibilities, and not violating either paramount Imp laws or constitutional limits, Aust Parl were deemed to exercise powers as plenary and ample – as sovereign – as to that of the UK Parl itself
  - Aust'ns remain wary of constitutionally entrenched rights

- **1988:** proposal to amend the Constitution by extending to the states the existing guarantees of religious freedom, jury trial, and just terms for the expropriation of property suffered the worst defeat of any amendments ever proposed (less than 31% of electorate)
- Since then, no significant political impetus towards strengthening the protecting of rights in the Constitution

## Federal Judicial Review

- Review of govt decisions – 4 mechanisms for review and oversight of administrative govt decisions:

### 1. Merits review

- Process by which a person or body, other than the primary decision maker, **reconsiders** the **facts, law and policy aspects** of the original decision and determines the **correct** or **preferable** decision
- New decision can be made after review of the facts
- Different from JR, where only the *legality* of the decision making process is considered
- A decision is **correct** in the sense of being made according to law and **preferable** in the sense that it is the best decision that could have been made on the basis of the relevant facts (as per the Council's guide)
- **Internal merits review**
  - When a decision made by an officer of an agency is reviewed by another person in the agency
  - Formal systems vs. ad hoc systems
  - Can be sought by requesting reconsideration or by following set procedures (formal)
  - May be stipulated in legislation or may be available through administrative processes in an agency
- **External merits review** (including tribunals and the Office of the Aust Information Commissioner)
  - Involves fresh consideration of a case by an external body
  - Often a tribunal, may also be a regulator reviewing the decision of a private body given decision-making power by legislation or an independent officer from another agency
  - Must be provided for by **legislation**; it is **NOT** available without specific prescription
  - Administrative Appeals Tribunal (AAT) established by the *AAT Act*, setting out AAT's powers and functions (however, jurisdiction is also conferred on the AAT by particular statutes)

### 2. Administrative investigation (Ombudsman)

- Cth Ombudsman has wide powers to investigate complaints about the administrative actions and decisions of most Aust Govt agencies to consider if they are unreasonable, unjust, wrong, unlawful or discriminatory
- *Ombudsman Act 1976* (Cth): Ombudsman can investigate complaints about govt contractors providing goods and services to the public under a K with a govt agency

- Available for all administrative and decision-making processes of agencies within the Ombudsman's jurisdiction (*Ombudsman Act* s 5)
- Has discretion not to investigate a complain (s 6)
- Can conduct 'own motion' investigations (s 5)
- Remedies offered:
  - Recommendations to depts
  - Specific reports to the govt
  - Broader reports making recommendations to the govt about systemic problems
- Other govt agencies with investigative function comparable to Ombudsman
  - **Aust'n HR Commission (AHRC)**
    - Investigate whether Cth administrative activity complies with HR or anti-discrimination standards
    - Functions (as per *AHRC Act 1986*):
      - To inquire into, and attempt to conciliate, complaints of unlawful discrimination
      - To inquire into any act or practice, including any systemic practice, that may constitute 'discrimination' in employment or occupation; and
      - To inquire into any act or practice that may be inconsistent with or contrary to any HR
    - Function of the AHRC under each of these provisions must be performed by the President (s 8(6))
    - President may not delegate his or her powers with respect to:
      - Unlawful discrimination
      - Acts or practices that may be inconsistent with or contrary to HR
      - That relate to equal opportunity in employment
    - AHRC resolves many complaints through conciliation, but reports to the relevant Ministers or body may recommend specific action, including the payment of compensation
    - After President has terminated complaint and given notice of the termination, any person who was an affected person in relation to the complaint may apply to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint
    - The Federal Court can make a variety of orders including a declaration that the respondent has committed unlawful discrimination, orders requiring the respondent to perform an action and orders for damages

### 3. Judicial Review

- Review by a court of a decision to determine whether it was made within the lawful limits of the decision maker's authority including, where necessary, in compliance with the requirement of procedural fairness
- Not a re-hearing of the merits of a particular case

## Judicial Review

- HC assessing govt action for consistency with Constitution
- Where law passed (federal or state) that is contrary to the Constitution, HC will exercise its power of JR to hold the law invalid (law will be of no effect)
  - Check by HC on the exercise of arbitrary power
    - Implements rule of law
    - Provides fundamental protected against infringement of HR
- Contrast with administrative law JR
  - Judges assess lawfulness of administrative decision making against statutes and common law
  - Underlying conception the same: a specific govt power is conferred by a superior instrument and the court scrutinises the exercise of the power to ensure its conformity to the superior instrument
- Common law protection?
  - Hold legislation void because it is inconsistent with the common law (not exercised by English or Aust court)
- Suggested that common law might afford basis for JR in extreme case (Dicey e.g. ‘all blue-eyed babies should be murdered’)
  - Suggestion reinforced by opening words of s 51 (... power to make laws for the ‘peace, order and good govt’) – rejected by Kirby (inconsistent with Parliamentary sovereignty)
- While common law does not afford a power of JR, has been applied to protect **civil liberties**
  - Common law rules for statutory interpretation to reflect presumption against the invasion of fundamental rights by the legislature (principle of legality)
- Implied constitutional rights (Murphy 1970s) – used to read legislation down as an alternative to (and to some extent a precursor of) the more drastic step of invalidating the legislation
- Power to exercise JR not expressed in constitution
  - *Implied* from Chapter III, which achieves a separation of judicial power from that of legislative and Exec power
  - s 75 established certain ‘matters’ as being within the jurisdiction of the court
- Convention debates