LAWS5007 PUBLIC LAW
FINAL EXAM – CASE GUIDE
Semester 2, 2015

WEEK ONE – INTRODUCTION TO PUBLIC LAW

Outline of history of constitutional documents; The Constitution, its structure and themes

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Unions NSW v NSW (2013)

- High Court first favoured the notion of popular sovereignty after the Australia Acts
- Keane J based the requirement for the free flow of political communication on the need to "preserve the political sovereignty of the people of the Commonwealth".

Coe v Commonwealth (No1) and Mabo (No2)

- Coe v Cth (No1) - High Court is of the view that acquisition of sovereignty over Australia is an "act of state" which cannot be challenged in the courts.
- Mabo (No 2) - High Court recognised native title held under the "paramount sovereignty of the Crown"

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Momcilovic v The Queen (2011)

- The principle of legality applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power.
- It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.

Potter v Minahan (1908)

- Words in a statute are not to be interpreted as overturning fundamental principles, infringing rights or departing from the general system of law unless such an intention is expressed 'with irresistible clearness" (O'Connor J)
- Principle that the executive and Parliament will be taken to intend to implement Australia's international obligations unless the contrary is made clear

Coco v The Queen (1994)

- Parliament must face up to the impact of its laws upon human rights, so the clear intention of parliament must be shown and legislation will not be read to abridge those rights unless expressly stated.
- Intent was to increase attention to the impact of legislative proposals on fundamental rights"

WEEK TWO – CONSTITUTIONAL AMENDMENT

Amendment of the Commonwealth Constitution and State Constitutions (Manner and Form)

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1998 Proposal by Constitutional Commission (BW 1343)

- As per s128, only the Governor-General acting on ministerial advice can put matters to referenda.
- The Constitutional Commission rejected the idea of citizens' initiated referenda in 1998 because of the problems to which they give rise.

MANNER AND FORM CASE LIST

B. DOUBLE ENTRENCHMENT

Page 3 *McCawley v The King* (1920)

- A later law that is inconsistent with an earlier law impliedly repeals or amends the earlier law.

C. ABDICATION

Page 3 *West Lakes Ltd v SA* (1980)

- A provision requiring the consent of an entity not forming part of the legislative structure (including the people whom the members of Parliament represent) does not prescribe a manner or form of lawmaking, but is rather an abdication of legislative power.

D. NATURE OF AMENDING LAW

Page 4 *Attorney-General (WA) v Marquet* (2003)

- The constitution of Parliament is likely to include provisions regarding voting systems and electoral redistributions: 'One must look to the features which go to give [the Parliament] and its Houses a representative character'.
- The 'constitution' of a State parliament includes its own 'nature and composition' (A- G v Trethowan).

Taylor v Attorney General (QLD) (1917)

- Legislature must remain representative as per s5 of the CLVA or s6 of the Australia Acts, but the High Court held that a law trying to abolish the Legislative Council was not prohibited by the Constitution, despite its reference to Houses.

South-Eastern Drainage Board (SA) v Savings Bank of SA (1939)

- An amending law does not need to comply with manner and form provisions if it is not with "respect the constitution, powers or procedure of the Parliament of the State".

F. JUSTICIABILITY

Page 5 *Cormack v Cope* [1974] HCA 28

- The Court can decline to intervene ahead of the completion of the legislative process, observing that a law passed by the Parliament could be declared invalid afterwards.
- The court will usually only intervene if there is prevailing case law that would compel the court to intervene before the Governor gives assent to the amending law.

Attorney-General (NSW) v Trethowan (1931)

- The Court can agree to hear a challenge to a potentially invalid law ahead of the completion of the legislative process, if there are provisions that expressly prohibit a Bill being presented to the Governor unless it complies with a manner and form procedure.

Attorney-General (WA) v Marquet (2003)

- The Court can agree to hear a challenge to a potentially invalid law ahead of the completion of the legislative process, if:
    - It would not be in the public interest to wait until the Bill received assent; or
    - If there would be no easily accessible remedy; or
    - If all parties agree to the challenge.

G. OTHER SOURCES OF ENTRENCHMENT

1. Reconstituted Legislature

Page 6 *Attorney-General (NSW) v Trethowan* (1931)
- A State Parliament has the power to reconstitute itself for special purposes.
- There is judicial support for the idea that laws may be entrenched by vesting the power to repeal or amend them in a reconstituted legislature.

2. The Ranasinghe Principle

Page 6 *Bribery Commissioner v Ranasinghe* (1965)
- Once there is a written constitution with a special amendment procedure, the constitution, not the Parliament is supreme
- A Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'.

Page 7 *McGinty v Western Australia* (1996)
- It was raised that the Ranasinghe principle was a possible source of entrenchment, but since the Australia Acts this has become doubtful.

3. s106 of the Commonwealth Constitution

Page 7 *McGinty v Western Australia* (1996)
- Because of Australia's status as a federation, if a manner and form provision is not made binding by a higher law, such as s6 of the Australia Acts, then there are no conceivable situations where s106 would give it any greater force.

Page 8 Attorney-General (WA) v Marquet (2003)
- Essentially, if s6 covers all cases in which a manner and form provision is binding, then s106 cannot be used to supplement it.

OTHER SOURCES OF ENTRENCHMENT ARE NOT CERTAIN

Page 8 *Attorney-General (WA) v Marquet* (2003)
- Recent case law has made it very clear that other legal grounds for enforcing a manner and form provision (reconstituted legislature, Ranasinghe, s106) cannot supplement the Australia Acts in the field in which they operate.
- There remains a small possibility that these other legal grounds for enforcing manner and form provisions could operate outside that field (whatever that may be), although probably not in Australia because it's a federation and we don't have unitary States.

WEEK THREE – THE LEGISLATURE AND REPRESENTATIVE DEMOCRACY

Representation of the people in the legislature; Voting and the Right to Vote.

Page 9 *Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975)* (BW 677)
- All s 24 requires is the direct choice of members by the people – not equal numbers of electors in electoral divisions. However, electorates 'could become so grossly disproportionate as to raise a question whether an election held on boundaries so drawn would produce a House of Representatives composed of members directly chosen by the people' but this is not such a case.
- Dissenting: principle of representative democracy operated over time to change the way the Constitution is interpreted.

Page 10 *McGinty v Western Australia* (1996)
- Even if "one vote, one value" could be derived from principle of representative government in ss7 and 24 of the Constitution, it did not apply and was not required in the States, they just need to provide for direct choice by the people

- Rejected that WA Constitution entrenched representative government, because of vast size of WA and sparseness of population in regional areas – Parliament could not have intended that
- Dawson J: proportional representation would cure malapportionment but create other problems, such as encouraging splinter groups.
- He also thought that a franchise that was less than universal suffrage would be constitutional, however politically unacceptable.

Page 11 Mulholland v Australian Electoral Commission [2004] HCA (BW 689)

- Legitimate reasons for parties to have a minimum level of support before being given privileges, including public funding.
- Also express inequality in malapportionment of Senate seats suggests no general principle of equality
- Also voters reasonably take the view parties on the ballot paper are legitimate and 500 rule therefore protects electoral process

Page 12 WA vs Commonwealth (First Territory Senators Case) (1975) (BW 694)

- Majority read ss 7 and 24 as dealing with composition of Houses at time of federation and found that s122 contemplated that additional representation might be added in the future.

Queensland v The Commonwealth (Second Territory Senators Case)

- The precedent of the earlier case prevails and should not be overturned simply because of a change in composition of the court.

Sykes v Cleary (1992) (BW 701)

- A person who is the subject or citizen of a foreign power will be disqualified from parliament, unless they have taken formal steps to terminate citizenship in other countries. It is enough for the person to take reasonable steps to renounce foreign citizenship, even if other country won't take action.
- A person who holds an office of profit under the Crown will be disqualified from parliament, regardless of whether or not he was receiving his salary and regardless of the fact that it was an office under the State Crown.
- Chosen' covered the entire process of being chosen, which commenced at nomination. So a candidate must not hold an office of profit under the Crown at nomination.

Page 13 *Sue v Hill* (1999) (BW 704)

- Although the UK was not a foreign power at the time of federation, it was now, at least since the Australia Acts 1986.

Free v Kelly (1996) (BW 704)

- A person who holds an office of profit under the Crown will be disqualified from parliament, regardless of whether or not he was receiving his salary and regardless of the fact that it was an office under the State Crown.
- If a person who holds an office of profit under the Crown has already been elected to parliament, an entirely new election must be held (not simply a recount without the candidate in question).

Page 14 Langer v Commonwealth (1996)

- Parliament is empowered to prescribe a method of voting that requires voters to give full preferences.
- Court held a law which prevents the subversion of this method of voting is in power

Roach v Electoral Commissioner (2007) (BW 665)

- ss 7 and 24 do not require a universal franchise
- ss 8,30 and 51 (xxxvi) give Parliament power to determine the franchise. If there was no power to make exceptions, then current system of under 18, non-citizens, etc would be invalid.
- The principle of chosen by the people" had expanded and cannot be diminished.
- Needs to be a substantial reason for exclusion, cannot be arbitrary.
- Proportionality: Disqualification needs to be reasonably appropriate and adapted to

serve an end which is consistent or compatible with the maintenance of representative government
- s44(ii) only disqualifies Members of Parliament if they're sentenced for an offence punishable for one year or longer – this influenced the majority.

Page 16 Rowe v Electoral Commissioner (BW671)
- The detriment of the laws must be proportionate to the legal benefit of changing the voting franchise.
- Needs to be a substantial reason for the measures to address the detriment (i.e. last must address a reality, not a possibility).
- As in Roach, "chosen by the people" had expanded and cannot be diminished.
- Didn't matter that the disqualification was the fault of the applicants.

WEEK FOUR – JUDICIAL POWER

Judicial power; judicial independence and the functions conferred on judges.

Page 17 *NSW v Cth (the Wheat Case)* (1915)
- Chapter III Courts must be created as per s71 (ChIII is meant to be exhaustive).

Waterside Workers' Federation v Alexander (1918)
- Chapter III Courts must be created as per s71 (must be able to exercise judicial power).
- Chapter III Courts must be constituted as per s72 (judges with life tenure).

R v Kirby; Ex parte Boilermaker's Society of Australia (1956) 94 CLR 51
- Judicial powers can only be vested upon a ChIII court.
- ChIII courts can ONLY exercise judicial power.
- Can only exercise administrative or executive if it is incidental or ancillary to the exercise of judicial power.
- Powers can be judicial or non-judicial depending on who exercises them. History of exercise of powers is relevant

Page 18 Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 (Moorehead)

An exercise of judicial power:

1) Must be a legal controversy between subjects

2) The court determines it by applying the law

3) Its decision is binding and authoritative

Thomas v Mowbray (2007) 233 CLR 307
- **Enforceability and binding power** are trademarks of judicial power.

Kable v DPP (No1) (1996)
- Judges can exercise non-judicial power in NSW, because the NSW Constitution does not say judicial power of the State is vested in the judiciary.

Momcilovic v The Queen (2001)
- Power to make a declaration of inconsistent interpretation is not judicial, but it is valid, because separation of powers does not apply in the States.
- Despite statutory interpretation, power is not making laws, it's just declaring them and prompting AG and Minister to respond, therefore it's non-judicial.
- **Enforceability** is a trademark of judicial power.

Wilson v Minister for Aboriginal Affairs (1996)
- A function is constitutionally incompatible if it breaches the separation of powers.

Page 19 NSW v Kable (No 2) (2013)

- A function is constitutionally incompatible if it breaches the separation of powers or is detrimental to the confidence of a court exercising judicial power.
- A function will also be incompatible if a judge is acting as persona designate, i.e. his role conflicts with the independence or function of the court, then conferral of judicial power is invalid.

South Australia v Totani (2010)

- State parliament cannot legislate to require the Magistrates Court to implement decisions of the executive in a manner incompatible with the Court's institutional integrity.
- The issuing of control orders against persons who were members of "declared organisations" (criminal activity and risk to the public) was conferring such power on a court is incompatible with one of the essential characteristics of a court – the appearance of independence and impartiality.

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Wainohu v NSW

- Confer upon a State judge a non-judicial function which is substantially incompatible with the functions of the judge's court.
- Provide that a court or judge as persona designata need not give reasons for final decisions.

Kuczborski v Queensland (2014)

- A function can be conferred onto a court by the parliament if there is no usurption of judicial power, i.e. the legislature does not adjudge criminal guilt or impinge anyone's rights, duties or liabilities.

International Finance Trust v NSW Crime Commission

- State parliament cannot legislate to deprive a court of the capacity to accord procedural fairness.
- A state parliament cannot be required to hear a matter ex-parte, without taking into account the merits of the case.
- Additionally, a court cannot be required by legislation to invariably to sit as a closed court (Hogan v Hinch).

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R v Trade Practices Tribunal; Ex parte Tasmanian Breweries (1970)

- Powers can be judicial or non-judicial depending on who exercises them.
- **Binding power** is a trademark of judicial power.

FCT v Munro (1926)

- Ascertaining of facts in a judicial manner can be both judicial and non-judicial.
- **Enforceability** is a trademark of judicial power.

Brandy v HREOC (1995)

- Punishment of crime and sentencing are exclusively judicial in nature.
- **Enforceability** is a trademark of judicial power.
- **Binding power** is a trademark of judicial power.

Good list of indicia of judicial power:

- Elements of judicial, administrative and legislative power:
    - Finding of facts
    - Making value judgements
    - Formation of an opinion as to legal rights and obligations
- Judicial power only:
    - Binding and authoritative decision of controversies
    - Determination of existing rights and duties according to law, i.e. pre-existing standards,
        - Rather than formulation of policy
        - Or the exercise of administrative discretion
    - Enforceability may be decisive factor
        - Can body take action to enforce the decision?
        - E.g. remedies? Like damages and injunctive relief?

Page 22 Hilton v Wells (1985)

- A judge can act *persona designata* in their individual capacity, but cannot exercise judicial power.

Grollo v Palmer (1995)

- *Persona designata* cannot be enforceable or incompatible with function or integrity of the court.

Exceptions to Boilermakers

Judicial power only exercised by ChIII court, except:

- Military tribunals
    - Can exercise judicial power within command structure outside of ChIII courts
    - Military tribunals cannot be turned into courts
- Houses of Parliament may punish persons for contempt
- Courts may delegate judicial powers to court officers
    - Under supervision and subject to review by judges
    - Review preferably de novo - Harris v Caladine

WEEK FIVE – IMPLICATIONS ARISING FROM CHII

Legislative punishment and detention; preventive detention

Page 23 Liyanage v The Queen (1967)

- Parliament may legislate in generality by creating crimes and penalties and enacting laws of evidence, but when it does so in relation to particular known individuals, concerns will arise as to whether the judicial function is involved (ad hominem laws).

R v Kidman (1915) (BW 607)

- The Parliament has the power to enact a retrospective criminal law, but this cannot intrude on the judicial function.
- Authority is doubtful, especially if laws reflect existing common law offences.

Page 24 Polyukhovich v The Queen (1991) (BW 608)

- The Parliament has the power to enact a retrospective criminal law, but this cannot intrude on the judicial function.
- However, Parliament could not enact a bill of attainder (i.e. a law which provides that a person is guilty and imposes punishment, without a judicial trial). This is the exercise of judicial power by the Parliament and is contrary to Chapter III because only courts can exercise judicial power.

Duncan v NSW (2015) (LMS)

- The termination of a right conferred by statute is not of that nature. That is so even where the basis for termination is satisfaction of the occurrence of conduct which, if proved on admissible evidence to the criminal standard, would constitute a criminal offence
- Legislative detriment isn't legislative punishment

Page 25 Chu Kheng Lim v Minister for Immigration (1992) (BW 541)

- It is beyond the power of the Commonwealth Parliament to invest the Executive with an arbitrary power to detain citizens in custody, even if it is described in terms intended to divorce it from punishment or criminal guilt.
- The involuntary detention of a citizen in custody by the State is penal or punitive in character.
- However, detention is incidental to the expulsion or deportation of Aliens, so the Commonwealth can confer authority on Executive to detain aliens until a decision is made to admit or exclude them.

Page 25 Al Kateb v Godwin (2004) (BW 558)

- As long as the dentition is to make them available for deportation or to prevent them from entering Australia, it is non-punitive.
- Such legislation is also within the power of the Commonwealth.

Page 26 Behrooz v Secretary of Dept of Immigration (2004) (BW 567)

- Harsh conditions does not make detention punitive. The detention takes its nature from the purpose of the law, not the conditions of the detention.

Re Woolley; Ex parte Applicants M276/2003 (2004) (BW 568)

- Cannot be said that detention of aliens by the Executive is punitive in nature if there is no breach of criminal law (therefore no exercise of judicial power).

Page 27 Plaintiff S4/2014 v Minister for Immigration (2014) (LMS)

- Executive cannot detain people at their discretion.
- The Court concluded that where an unlawful non-citizen is detained for the purpose of considering whether to permit him to apply for a protection visa, other powers in the Act are to be construed as not permitting the making of any other decision which would foreclose the exercise of the original power, thus prolonging the detention.

PREVENTATIVE DETENTION AND CONTROL ORDERS

Page 27 Kable v DPP (1996) (BW 545) (Kable No 1)

- Legislation is invalid if it conferred a function on the Supreme Court which was incompatible with its exercise of federal judicial power (this did not amount to the imposition of the separation of powers in new South Wales).
- A Supreme Court could still exercise a non-judicial power, as long as it was not incompatible with the Court also exercising federal jurisdiction.

Page 28 NSW v Kable (2013) (BW 551) (Kable No 2)

- Detention order made by the Supreme Court was still judicial in nature even though the Act under which it was made was invalid.

Page 29 Fardon v A-G (Qld) (2004) (BW 579)

- State courts can exercise non-judicial functions repugnant to ChIII, as long as public confidence and integrity and independence wasn't impinged, it is not invalid under ChIII of the Constitution.

Thomas v Mowbray (2007) (BW 590)

- While the circumstances in which a court may order a restraint on liberty outside of adjudging and punishing criminal guilt are carefully confined, they are not altogether prohibited. (Gleeson CJ)
- Court rejected that the manner of conferring a judicial power to make a control order was contrary to ChIII. Held that the exercise of a power based upon an assessment of the risk that a body poses to the community, may fall within the judicial function.

Page 30 Assistant Commissioner Condon v Pompano P/L (2013) (BW 601)

- The High Court again confirmed that the exercise of a power based upon an assessment of the risk that a body poses to the community, may fall within the judicial function.
- The law sets the standard and the court applies it. It therefore falls within the judicial power that may be conferred upon a court.

Page 30 Kirk v IRC (2010) (LMS)

- It is not constitutionally permissible to block appeals to the Supreme Court. It is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description
- The Court stressed that there is one common law in Australia – not a separate common law for each State. This means that there needs to be one ultimate court that supervises the development of the common law and ensures its consistency.

WEEK SIX – MID-SEMESTER EXAM

WEEK SEVEN – JUDICIARY AND EXECUTIVE

Advisory jurisdiction of the High Court; Matters; Standing (BW 442-464)

Page 32 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 (BW 442-443) 6:1 Majority

- An abstract question about the validity of a law is not sufficient to satisfy the requirement of 'matter' in s76(i) of the Constitution.
- An advisory opinion constitutes an exercise of judicial power when it is authoritative (Queen of Queensland interprets this as not needing to be immediately binding).
- The High Court does not have jurisdiction to determine abstract matters of law because s76 of the Constitution confines its jurisdiction to 'matters'. There can be no 'matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court'.
  - (Minority: the conferral of advisory jurisdiction is supported by the express incidental power, s 51(xxxix), with respect to the Federal Judicature. Higgins J , stated that there was nothing in the Constitution's separation of powers 'that necessarily involves that the High Court cannot be employed to aid the Executive – judicially, at all events' But the separation of powers doctrine has developed significantly since 1920, so the Court is unlikely to change its position.

Page 33 **Seabed petitions: State requests for an advisory opinion from the Privy Council (1972)

- Privy Council does not regard advisory opinions as an exercise of judicial power when they are not authoritative (non-binding). (Main concern was that a non-binding decision would not resolve the matter and would undermine the prestige of the Privy Council if its opinion was ignored. Might be okay advisory opinions if they're binding.)

Commonwealth v Queensland (Queen of Queensland Case) (1975) 134 CLR 298 (BW 443-445)

- A hypothetical question about the validity of a law is not sufficient to satisfy the requirement of 'matter' in ss 75-77 of the Constitution.
- Chapter III of the Constitution is an exhaustive statement of the manner in and the extent to which judicial power may be conferred on or exercised by any court in respect of the subject matters set forth in ss75-77.
- No court in Australia can exercise advisory jurisdiction relating to the subject matter dealt with in ss75-77, under any law. Chapter III is exhaustive. 'This is so, not only in respect of federal courts, but also in respect of State courts whether or not they are exercising federal jurisdiction conferred on them under s77(iii)'.
- An advisory opinion constitutes an exercise of judicial power, even if it is non-binding. 'No parties are immediately bound by the determination as a res judicata, [but] the decision is an "authoritative declaration of the law"'.
- Advisory opinion by the Privy Council relating to the subject matters in ss75-77 is still restricted by the exhaustive jurisdiction of ChIII as it relates to Aust.

Page 34 *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 (BW 445-446) 6:1 Majority

- The High Court has jurisdiction to make a determination regarding a question of law, even after an acquittal or the discharge of a defendant. (However, the determination will have no effect upon the situation of the defendant).
- While not binding, such a referral of a question of law is still seen as constituting a matter, rather than an advisory opinion, because the reference

arose out of proceedings in a matter and was a statutory extension of those proceedings. The answer of the High Court falls within the description of 'judgments, decrees, orders' in s73 of the Constiution, from which an appeal could be taken to the High Court.
- Answers given by the full court to questions reserved for its consideration in the course of proceedings in a 'matter' do not constitute an advisory opinion or abstract declaration.

Page 35 *Croome v Tasmania* (1997) 191 CLR 119 (BW 446-448) 4:3 Majority

MATTER
- A 'matter' may consist of a controversy between a person who has a sufficient interest in the subject and who asserts that a purported law is invalid and the polity whose law it purports to be.
- A person will have a cause of action to claim a law is invalid if it is likely that in the future he or she will be affected in his or her person or property by the purported law (this does not require any immediate likelihood that person will be prosecuted under the law).
- The distinction between matter and cause of action allows jurisdiction to determine an action by the State Attorney-General for a declaration that a challenged Commonwealth law is invalid.
- Majority held: when Parliament chooses to confer jurisdiction, it must do so with respect to a 'matter', but does not need to give jurisdiction over the whole of that 'matter'.

STANDING
- It can be conceptually difficult to separate standing from existence of a 'matter'.
- A plaintiff can have standing if they have a 'real interest' in knowing whether or not their conduct is legal (this is not an abstract or hypothetical question).
- There is concern about expanding the area of standing too far: *'We do not wish now to assent to the broad proposition that any person who desires or intends to act in contravention of a law has, by reason merely of that desire or intention, a cause of action to seek a declaration of invalidity of the law.'*

Page 36 *Abebe v Commonwealth* (1999) 197 CLR 510 (BW 449) Majority 4:3
- Nothing in s77 of the Constitution requires the Parliament to give a federal court authority to decide every legal right, duty, liability or obligation inherent in a controversy, merely because it has jurisdiction over some aspect of the controversy.
- Parliament of the Commonwealth, having conferred jurisdiction on a federal court to review or hear an appeal from a decision, can constitutionally limit the grounds upon which that court can examine the correctness or, at all events, the lawfulness of the decision.

Page 37 *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 (BW 452-456) Majority 4:3

MATTER
- In determining whether there is a matter, the basal question is whether there a "matter" in the sense required by Ch III of the Constitution.
- Three inquiries as to whether there is a matter:

  1. The identification of the subject-matter for determination in the proceedings

  2. The identification of the right, duty or liability to be established in each proceeding

  3. The identification of the controversy between the parties for the quelling of which the judicial power of the Commonwealth is invoked.

STANDING
- Attorney-General cannot grant fiat for parties with no standing and intervene in the relator proceedings. He or she cannot appear on both sides of the record.
- Hayne J: Once the Attorney-General grants his fiat, he or she *'has complete charge of the litigation at all times… although it is said that by the fiat the Attorney-General "lends standing" to the relator, such metaphors musty not obscure the fact that it is and remains the Attorney's proceeding'*

Page 39 *Attorney-General (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559 (BW 456-459)

- State Attorneys-General have standing due to the federal nature of the Constitution, even when the matter does not relate to the limits of State and Commonwealth powers.
- No majority of the Court has ever taken a view of standing so wide as to cover any person to secure the observance of constitutional guarantees. It is doubtful that being a taxpayer or parent was enough for an individual to obtain standing.

Australian Conservation Foundation v Commonwealth (1980) 146 CLR 493 (BW 457)

- A party must show a 'special interest' in a subject to bring proceedings in a matter.
- The requirement to show 'special damage' has been perceived as being too restrictive (Gibbs J).
- 'Special interest' in the subject matter of the action is distinct from a 'mere intellectually or emotional concern', or a belief that 'the law should be observed, or that conduct of a particular kind should be preserved.

Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 (BW 458)

- 'Special interest' criterion is not a 'ready rule of thumb'.
- Special interest should be determined on a case by case basis, with importance given to the concern a plaintiff has with the subject matter and the closeness of that plaintiff's relationship with the subject matter.
- A limited approach to determining standing may leave a section of evolving and modern public duties without an effective procedure for curial enforcement.

Page 40 *Combet v Commonwealth* (2005) 224 CLR 494

- A government M-P might have standing because they have a special interest in matters concerning the actions of Parliament, of which they are a member. McHugh and Kirby JJ held this view in dissent.
- Kirby J made allowance for a person to be assimilated to the organisation they represent and therefore held they could have special interest in a matter if their organisation also had special interest in a matter.

Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd (2000) 200 CLR 591 (BW 461-463)

- Standing is not an issue if the relevant legislation allows 'any person' to bring proceedings. However, just because there is standing does not mean there is a matter.
- 'There is no matter within the constitutional meaning of that term unless there is a remedy available at the suit of the person instituting the proceedings in question.' i.e. A declaration cannot be made if it will produce no foreseeable consequences for the parties
- The existence of a 'special interest' is not a constitutional requirement for there to be a matter.

Page 41 *Pape v Commissioner of Taxation* (2009) 238 CLR 1 (BW 463-464) Majority 4:3

- Decisions of the Court relating to ss75-77 are of a binding and authoritative nature by definition, therefore they are of binding force in relation to other, similar disputes.

Williams v Commonwealth (2012) 288 ALR 410

- An Attorney-General can intervene in proceedings to afford a plaintiff standing, without actually giving his or her fiat.
- 'Special interest' is determined on a case-by-case basis and can be based on the impact on one's family, not necessarily the plaintiff themselves.

Page 42 *Kuczborski v Queensland* [2014] HCA 46 (LMS)

- A person will only have standing to challenge the validity of laws if they affect their 'freedom of action'.

- Whether or not actions are illegal =standing.
- Whether or not a law will add consequences to a breach of an existing law = no standing.

Page 42 *Town Investments Ltd v Department of Environment* (1978) and *Sue v Hill* (1999)

- Different meanings of 'the Crown'

Dismissal of Sir Joh Bjekle-Petersen (1987)

- Caucus/governing party has no power to advise Governor.
- Only a vote of no confidence by the House and further refusal to resign would justify a leader's dismissal.

Appointment of Sir Isaac Isaacs (1930)

- Sovereign acts upon the advice of the Australian Prime Minister in appointing the Governor-General

Page 43 NSW Premier Holman - Vote of No Confidence (1916)

- Caucus/governing party has no power to advise Governor

Dismissal of NSW Lang Government (1932)

- Dismissal may occur for reason of persistent and serious illegality

Dismissal of Whitlam Government (1974)

- A Prime Minister who cannot obtain supply must either resign or advise a general election.
- The confidence of both Houses is required in Australia.
- A Governor-General impelled to find a democratic and constitutional solution (to a deadlock over supply).
- Dismissal may occur for reason of persistent and serious illegality.
- Governors-General and Governors can informally consult Attorneys-General and judges about reserves powers and constitutional crises.
- A Governor-General does not have to advise the Queen or a Prime Minister that they are about to dissolve parliament or dismiss the Prime Minister.
- The Queen does not immediately act upon advice to dismiss, whereas a Governor-General may act immediately.

Page 44 Australian Republic Debate (1999)

- Australia Acts entrench relationship between the States and the Queen.

WEEK EIGHT – EXECUTIVE POWER

Prerogative powers; statutory executive powers; nationhood power; contract and spend

Page 45 *Attorney-General v De Keyser's Royal Hotel Ltd* (1920)

- Parliament may abrogate or regulate the exercise of the prerogative (i.e. Statute may override or the prerogative).
- Parliament can expressly regulate some aspects of the exercise of the prerogative, while allowing other elements to remain unchanged.

Page 46 Cadia Holdings P/L v NSW (2010) (BW 370)

- The prerogative of the Crown can only be displaced by express words or necessary implication (consider the purpose of the statute).
- Assumption that prerogative to mine royal metals is allocated to the States may be incorrect, considering purpose of royal metals (subject matters of coinage, defence are allocated by the Constitution to the Commonwealth).

Page 46 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (BW 372-375)

- Royal prerogative allows UK Government to legislate for territories, but t**here is a distinction between her Majesty's powers as Queen of the United Kingdom and her powers in respect of colonial territories under the British Crown.** Lord Hoffman: Her Majesty in Council is entitled, on the advice of Her United Kingdom ministers, to prefer the interests of the United Kingdom.
- Courts need to look for historical precedent when royal prerogative is in question. *How was it used historically and how is it used today?*
- Royal prerogative has been eroded over the centuries and cannot be enlarged (BBC v Johns)
- Relationship between the citizen and the Crown is based on reciprocal duties of allegiance and protection. Duty of protection cannot ordinarily be discharged by removing and excluding the citizen from his homeland.
- Whether a decision is capable of judicial review depends not on the source of the power, but on its nature.
    - Non-justiciable matters:
    - The making of treaties
    - The defence of the realm
    - The prerogative of mercy
    - The grant of honours
    - The dissolution of Parliament
    - The appointment of ministers
- Sedley LJ noted: grant of honours for reward, the 'waging of a war of manifest aggression' or a 'refusal to dissolve Parliament at all' might give rise to justiciable questions today.
- Sedley LJ: Not the court's job to criticize executive's judgment, but can assess situation – "An ordinance will fall outside the prerogative power if it is not rationally and legally capable of providing for a colony's wellbeing".
- Lord Hoffmann argued that since the CCSU case, there was no reason why prerogative legislation should not be subject to
- review on ordinary principles of legality, rationality and procedural
- impropriety in the same way as any other executive action.
- Standard requirement for legitimate expectation is that there must be a "clear and unambiguous" promise made that led to a reliance or a detriment; Foreign Secretary Robin Cook's statement after the first Bancoult case could not be described as a clear and unambiguous promise of resettlement, and the requirements of reliance and detriment were not met.
- *Right of abode*

  Crown has no power to exile anyone except by statutory authority, but Crown has plenary legislative power over ceded colonies. Lord Hoffman: Right of abode is so important that general or ambiguous words would not be interpreted as taking it away, but no basis for saying that the right of abode by nature is so fundamental that the Crown's legislative power simply cannot touch it. 'Right of abode is a creature of the law. The law gives it and the law may take it away.'
- *Exclusion of citizens and aliens*

  Residents with citizenship can only be excluded by law. But the position is different with respect to aliens, in that that every country has the right to refuse entry to aliens and to expel or deport them from the State.

Page 49 *Ruddock v Vadarlis (Tampa Case)* (2001) 183 ALR 1 (BW 375-378)

- There is prerogative to prevent non-citizens from entering a State, absent abrogating statutory authority. Such prerogative is central to Australia's sovereignty.
- Statutory authority will abrogate prerogative if it operates in a way that is inconsistent with the subsistence of the Executive power in question.
- The intention of statutory authority in protecting or abrogating prerogative is not relevant. What is relevant is the way the statute operates in practice and whether the two can subsist.
-

Page 50 CPCF v Minister for Immigration and Border Protection (2015) (LMS)

- Statute is needed to authorize any detention by the Executive of aliens for the purpose of deporting them.
- Kiefel J concluded that this proposition in *Lim* applied equally to the off-shore actions of Commonwealth officers on the high seas.
- While there may be a sovereign power to expel an alien, this says nothing about whether the executive can exercise it without statutory authority.
- The legality of statutory authority should not be treated as a limitation on power, but rather a threshold question in interpretation. There needs to be a textual indication supporting the limit on power for which the plaintiff contends to support, otherwise it is largely a matter for the Executive to assess.

Page 52 Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan (1931) (BW 400)

- A law conferring upon the Executive a power to legislate upon some matter within the legislative power of the Commonwealth
- Parliament is a law with respect to that subject and the separation of powers does not operate to restrain Parliament from enacting such a law.
- Parliament retains control of its legislative power. The Parliament may take back its power into its own hands if it chooses.
- It would be possible for a delegation of legislative power to be so broad that it would amount to the abdication of legislative power and not be supported by a Commonwealth head of power, but this was not
- such a case, because Parliament ultimately retained control of its legislative power and may take back its power into its own hands if it chooses.

Page 53 NSW v Commonwealth (2006) (BW 404)

- Legislative delegation of authority is valid so long as the scope, however broad, can be determined by the legislation.
- In this case 'prohibited content' was determined by provisions in the Act that specified requirements for the regulations. The scope of the regulations is wide, but still construed conformably within the scope and purposes of the Act as a whole and with the provisions in relation to workplace agreements in particular (unlikely to be valid if there were no provisions outlining these requirements, because the regulation would be a 'carte blanche' in this instance).

NATIONHOOD POWER

Page 53 R v Sharkey (1949) and Burns v Ransley (1949) (BW 380)

- Nationhood legislative power can be derived from a combination of s61 and s51(xxxix) of the Constitution, where the Commonwealth has the power to protect and maintain itself legally and politically.
- Whether there is an implied nationhood power has never been conclusively decided by the court. However judges have been highly critical of its existence recently (see Davis v Commonwealth (1988))

Page 54 Communist Party case (1951) (BW 380)

- Whether there is an implied nationhood power has never been conclusively decided by the court. However judges have been highly critical of its existence recently (see Davis v Commonwealth (1988)) and have emphasized that an implied nationhood power resulting from a 'deeper or wider source' is a minority view.

Davis v Commonwealth (1988) (BW 380)

- The idea of an implied nationhood power is a minority view. *'It is axiomatic [unquestionable] in constitutional law as it is elsewhere that the sum cannot be greater than its parts…. [T]he Commonwealth remains confined to that which is granted to it by the Constitution.'*
- The Commonwealth cannot be accorded a legislative power to cross the boundaries between State and Commonwealth responsibility laid down by the Constitution.

- The majority were unable to conceive of an implication of the kind described that would not be sufficiently and accurately described in the terms of s61 supported by s51(xxxix).
- References to an inherent nationhood power should be understood as an elliptical way of referring to the incidental power in s51(xxxix), operating upon the executive power in s61, as per Wilson J's comments across Davis and Tasmanian Dams, which would appear contradictory if not read this way.
- The federal distribution of powers can be unaffected by the exercise of Commonwealth power in an area of State jurisdiction.
- Despite the existence of an implied legislative power (quite apart from an incidental power) which can extend to coercive laws, legislation must pass a proportionality test: must be proportionate to protect the Commonwealth interest. Must be reasonable and appropriately adapted to achieve the valid ends within constitutional power.

Page 55 *Victoria v The Commonwealth and Hayden (AAP Case) (1975) (BW 381)*

- The court was effectively split on whether the Commonwealth had the Constitutional power to appropriate money to the Australian Assistance Plan (seventh judge held Victoria did not have standing, so the issue is effectively undecided).
- The court did acknowledge the existence of an implied nationhood power, but both Barwick CJ and Mason J denied that it extended to support the Australian Assistance Plan. They said that the Commonwealth should have 'the capacity to engage in enterprises and activities peculiarly adapted to the government of a nation', even though they do not fall within any heads of legislative power allocated to the Commonwealth, but with the caveats that such power is limited in scope and should not be used for convenience.
- The activities cannot otherwise be carried on for the benefit of the nation' (i.e. must lay outside the scope of State legislative and executive powers)
- Such power is not given a wide operation, i.e. because such programmes can be conveniently formulated and administered by the national government'.
- The attainment of nationhood by the Commonwealth did not affect or destroy the Constitutional distribution of powers.
- Other side argued the power should be wider:
- *It fell within the Commonwealth's executive power to 'formulate and co-ordinate plans and purposes which require national rather than local planning and of its legislative power to appropriate its funds accordingly'; and 'it is an expenditure of money which is incidental to the execution by the Commonwealth of its wide powers respecting social welfare.'(77)*
- Examples of implied nationhood power for appropriation:
  AAP Case: *CSIRO*
  Pharmaceutical Benefits Case: *Antarctic exploration, medical research, literary grants and pensions, subscriptions to international organizations, such as the Agricultural Institute at Rome, public health, assistance to distressed Australians abroad'.*

Page 58 NSW v Cth (Seas and Submerged Lands Case) (1975) (BW 382)

- Any rights the colonies had regarding external affairs became vested in the Commonwealth on the enactment of the Constitution, as a consequence of the creation of the Commonwealth and the grant of power over external affairs.
- None of the judges here denied that a nationhood power existed, but all denied it had a wide scope.

Tasmanian Dam Case (BW 382)

- The Commonwealth can exercise executive powers (and incidental legislative powers) outside of the subject matters of legislative power distributed to the Commonwealth by the Constitution.
- Tasmanian Dam Case established that the Commonwealth can now exercise those powers within state areas of jurisdiction as long as such activity did not involve 'competition' with the states and was confined to 'truly national endeavours'.