

Australian Constitutional Law

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For the essay... A couple of well publicised cases:

Pape v Commissioner of Taxation 2009 – stimulus package; Williams v Cth 2012 – Cth funding the school’s chaplaincy program

Compare interpretive methods, then give your opinion as to which is preferred and why

Exam is problem based. Characterisation is looking at a law and trying to determine which head of power in the constitution ... often overlooked, an important topic.

SUBJECT NOTES

Topic 1 - Fundamentals of Australian Constitutional Law

1.1 What is the Constitution?

The aim of this lecture is to equip the student with the requisite knowledge to understand:

- the basic framework of the Australian Constitution, including the division and separation of powers
- the elements taken from the Westminster model of constitutional government
- the elements taken from the Washington model
- how the Australian constitution compares with other national constitutions
- the process of judicial review
- the Rule of Law and its influence on the Constitution

What is Constitutional Law?

- The rules that constitute the state.
- It is both a legal and a political document
- It defines the powers of the Govt and their institutions – the machinery of Govt.
- Constitutions may be written or unwritten

What is Australian Constitutional Law?

The Constitution: An Act proclaimed in 1901 to reflect the balance and powers between the Commonwealth and the States at Federation. Each State also has its own Constitution (most are still using Colonial Constitution...by and large it is the same Constitution that the colony of NSW used prior to Federation).

What is Sovereignty?

It is the source of the legitimacy of the power of the state – where the authority comes from (question of sovereignty arises in this course...where the source of legitimacy for power of government comes from... why should govts abide by the Constitution? “Imperial Parliament” was the source (this believed for many years) – in the 1980s... Australia Acts. It is now generally accepted that ‘even if it had ever been’, that authority no longer exists... the source for the authority is “the people” – people elect govts and the people and only the people can *change* the Constitution. Citizens are the source of legitimacy of govts in Australia.

Questions to consider:

- What are the strengths and its weaknesses of the Australian Constitution?
- The Constitution operates in the context of in a changing Australian society. Why does this matter?
- Why is it significant that the Constitution is both a political and a legal document

- Does our Constitution generate its binding power because it was enacted by the Imperial Parliament at Westminster, which is regarded to have had the power to do so (in 1900)? Or should we favour the view expressed by many contemporary observers (such as Professor Geoff Lindell, and also by Justice Deane and others) that the true source of the authority of the Constitution is that the people endorsed it and continue to acquiesce in its operation?
What implications might flow from this approach?
- Is Australia independent of the United Kingdom? What features of our legal and constitutional history compel the conclusion that it is?

1.2 The Structure of the Constitution

- What are the three branches of government?
- How is power distributed between the three branches of government?
- How is power distributed between the Federal Government and the States and Territories?

Required Reading:

AC: Preamble, ss 51, 61, 6, 71, 72, 73, 75 and 109

A Constitutional Road Map: Some Basic Principles and Ideas

The Constitution

- Australian Constitution enacted as s 9 of the Commonwealth of Australia Constitution Act 1900. This is a British Act.
- It establishes the Commonwealth and the States as a federal system.
- The States also have Constitutions - these are the 19th century statutes that gave each colony responsible government.
- They continued as State constitutions.
- The Constitution is enforced by the High Court which has the power to invalidate any unconstitutional exercise of legislative, executive or judicial power. **High Court is seen as the guardian of the Constitution, power of judicial review.**

Legislative powers

- The Commonwealth can pass laws as long as they come within the heads of power set out in s 51 (are laws 'with respect to' those heads of power) or another provision of the Constitution. **S51 is important...grants most of the legislative powers of Commonwealth. "External affairs" – subject matter of any treaty or international agreement...eg power to make implementations on environment because treaty on environmental law. However, Cth has been restrained in use of power (mainly in use of Environment) – govts of both sides are not too inclined to use the external affairs power.**
- The States can pass any laws provided they are for the 'peace, welfare and good government' of the State (they are not restricted by s 51 or any other heads of power)
- Sometimes the Constitution specifically prevents a State from making particular laws - eg the States can't make laws with respect to excises or can't impose customs duties (s 90).

- If a State law is inconsistent with a Commonwealth law, the State law is read down to the extent of the inconsistency (s 109).

Executive power

- Most significant powers of the Executive are conferred by legislation but some derive directly from the Constitution (eg the Governor-General's power as Commander-in-Chief of the armed forces) and some from common law (ie prerogatives).
- The Executive cannot impose penalties or spend money without parliamentary approval.
- According to the principles of responsible government, the Governor-General exercises nearly all powers only on the advice of the Prime Minister and/or another minister. Therefore the real executive power belongs to elected representatives.

Judicial power

- Judicial power is the power to resolve disputes by the application of law.
- It is exercised by the High Court, the Federal Court, the Family Court and some State courts.
- Because judges are independent, the exercise of their functions cannot be interfered with by the legislature or the executive.

Freedoms

- Freedoms as expressed or implied in the Constitution are limits to Commonwealth law making power (the Commonwealth cannot make a law which infringes a freedom).
- Freedoms can also limit the scope of State laws. It depends on the wording of the section or the scope of the implied freedom.
- **There are very few freedoms or "rights" within the Constitution. Up until Cole v Whitfield, not a freedom (trade); right to trial by jury...not really a right; freedom of religion, but this is not really a right at all.**

1.3 An Introduction to the Rule of Law, judicial review and the separation of judicial power

Required Reading:

Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp)

Chapter III of the Constitution, especially ss 71, 75(iii) and 75(v)

Further References:

- *Marbury v Madison* 5 US 137 (1803)
- *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1
- *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476
- *A v Hayden [No 2]* (1984) 156 CLR 532

What is the rule of Law?

- *A set of contestable doctrines*

- **AV Dicey** (greatest Constitutionalist from the UK!) defines it by separating it into three categories:
 1. Ruled by the law - supremacy or predominance of the law as opposed to arbitrary power
 2. Equality before the law - equal subjection of all classes to the ordinary law of the land **PM, GG or a regular person, all equally subject to the law**
 3. Power comes from the people - the rights of individuals is the source of the law **the people are the source, ultimately, through our acceptance of laws that they are exercised with authority.**
- The rule of law connotes regulation by:
 - laws that are democratically made by the process with which we are well familiar;
 - laws that protect and enforce universal human rights;
 - laws that are certain, being prospective, open, clear and relatively stable;
 - laws that apply generally and equally to all, including (so far as possible) to the government;
 - laws that can be applied impartially, honestly and fairly and whose effects are subject to review by independent arbiters.

1. Ruled by the Law

Clause 5 of the Commonwealth of Australia Constitution Act 1900 (Imp)

“This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.”

This above is confirmed in... Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 27-28 per Brennan, Deane & Dawson JJ

Every **citizen** is ‘ruled by the law, and by the law alone’ and ‘may with us be punished for a breach of law, but he can be punished for nothing else.’ (eg generally only punished by finding of court...but if you’re not a citizen, it’s a “free for all” ... eg ability to detain asylum seekers – if you’re not a citizen protections do not cover you...this is different to the US, where if you’re in the US, you are protected)

Fardon v Attorney-General (Q), (2004) 78 ALJR 1519; [2004] HCA 46 [Farden convicted sex offender in Qld, govt tried to pass a law to keep him in prison after release... it was the principle, not right to allow a govt to say, served sentence, but going to keep in jail longer because don’t like you. HC rejected the argument... 3 types of protection: punitive, protective and (3), only where it is punitive. If protective, court can lock up. Court under French CJ, have not accepted this view and have stepped back]

This case directly raises the issue whether the “rule of law” doctrine gives rise to certain implications about the proper (read desirable) content of law. It reinforced the notion that the separation of powers does not extend to the States

2. Equality before the law

Note that there is no constitutional guarantee to equality before the law

***Kartinyeri v The Commonwealth (1998) 195 CLR 337* [Race Power, govt can pass laws that discriminate against people because of their race, so we don't have fully equality before the law]**

The Cth has the power to pass laws which discriminate against classes and subclasses of people, including Aborigines.

Limited Recognition

***A v Hayden [No 2] (1984) 156 CLR 532 per Brennan J (at 580)* [“Exercise” hostage situation... done in a hotel. Rented a room, set up the operatives. Never told the hotel! Argued “acting under authority of Attorney General”...Hayden. Have “authority” of government. Courts – govt does not have authority to put above the law, AG cannot put above the law. Limited recognition of equality before the law]**

“The incapacity of the executive government to dispense its servants from obedience to laws made by Parliament is the cornerstone of a parliamentary democracy”

“The principle is that all officers and ministers ought to serve the Crown according to the laws”

“This is no obsolete rule; the principal is fundamental to our law, though it seems sometimes to be forgotten when the executive government or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies.”

Leeth v Commonwealth (1992) 174 CLR 455 per Gaudron J at 502

“All are equal before the law. And the concept of equal justice – a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such – is fundamental to judicial process”

3. Power comes from the People

- Australia is now considered to have popular (or Constitutional) sovereignty as opposed to Parliamentary sovereignty, therefore the idea is that the people have control through the Constitution.
 - o As an Act of the Imperial Parliament there where many who saw this as the source of legitimacy of the Constitution.
 - o However there has been a shift in attitude
- The passage of the Australia Acts in 1986 is now seen as confirmation of ‘popular sovereignty’.
- In a series of cases in the 1990s the High Court, under the leadership of Mason CJ acknowledged, the essential role of the people under the Constitution.

Giving Effect to the Rule of Law