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LAWS1205 Australian Public Law 1st Semester 2006

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Question 1

80/100

a) Constitutionality of PELA (Parliamentarians English Language Act) + s51(xxxvi)

S34 of the constitution provides that the parliament may provide for the qualifications for a member of the HOR's. The parliament therefore has a valid HOP to enact the PELA. However there may be a limitation imposed by the freedom of political communication doctrine

Freedom of Pol Com

There is an implied freedom of pol com which exists at common law in Australia *Nationwide News, ACTV*. This freedom has its roots in the doctrine of representative democracy as gleaned from s7 + 128 and s24 of the constitution. This constrains parliaments from passing laws that inhibit discussion on government and political matters and is generally considered a broad freedom (Brennan J *NWN*). On the facts it seems as though this may be such an act, as it limits candidates as requiring English proficiency, however this requirement may not be limiting enough to invoke this doctrine as it does not expressly stipulate that only English may be spoken by candidates although the legislation may imply this. (*Discussion? McGuinty Mulholand – apply to the facts.*)

(*Limits on Cths power to regulate states intergovernmental immunity – Austin*)

Therefore the requirement of an English certificate is probably not limiting enough to invoke the freedom of pol com doctrine and Felix will not be eligible for the HOR if he fails the test.

b) Challenge to decision of MELA

HOP

The commonwealth will probably have a HOP under s51(v) and therefore have power to enact MELA (and nationhood and trade comm. And corps – *Print Media*)

Constitutional Limitations

Freedom of Pol Comm

(as set out in a) may apply here. All news in Australia would definitely be inclusive of political news as well. However it doesn't prohibit the communication totally only stipulates that it must occur in a certain way so may not be limiting. Since the freedom is broad it may still impinge on the doctrine (Brennan J *NWN*). The concept of freedom of pol com is not absolute (Mason CJ, *ACTV*) and a test to see whether a law which impinges on the freedom is valid was set out by Brennan J in *NWN* and upheld in *ACTV*:

1. *is the law enacted to fulfil a legitimate purpose?*

If the parliament is enacting it due to the climate of racism and intolerance then this is not a legitimate purpose in a democratic society. If it is trying to get people from all cultures communicating with each other in a universally understood language this may be a legitimate purpose (*good application on the facts*)

2. *Is the restriction appropriate and adapted to fulfilment of that purpose?*

It is likely that restricting broadcasting in this way would be viewed as an inappropriate restriction because it is likely that such an act would only further racism rather than counter it.

SOJP

The appointment of Jenny Joplin a federal magistrate conflicts with the SOJP doctrine which holds that non-judicial functions may not be exercised by Chap III courts *Boilermakers Case*. However an exception to the doctrine applies where federal judges are appointed to non-judicial roles in the personal capacity *Hilton v Wells (Grollo)*. It had been held that the appointment of judges for the issue of telephone warrants conferred power on the judges in the personal capacity *Hilton v Wells*. Here the issue of licences may be analogous as the judge is also making value judgements. The act also refers to a language licensing officer rather than a judge which points to appointment in a personal capacity here. An exception to PD is where the role would be incompatible with the judges duty as a Chapt III

judge *Wilson*. Especially relevant here are consideration of public confidence in the Chapt III judiciary. As the issuing of telephonic warrants was not incompatible this position may also not be. However the fact that Jenny needs to set aside one full day of the week may be a major consideration as the court as already full of litigants and there may not be time for her to hold both positions. Impatient litigants may also query why she devotes so much time to this other role, which may create an image of Chapt III judges not being concerned with the level of waiting lists for cases. This means that the role may be incompatible with Jenny's job as a Chapt III judge

Very good

- c) Successful repeal of the NSW Act depends on whether there is a valid manner and form provision.

The states have the power under s2AA (*is the act valid, head of power? S5 NSW Con, limits to parliamentary supremacy: entrench*) and specifically in NSW s7A and 7B of the NSW constitution to enact a manner and form provisions. To find out whether such a M&F provision is binding we apply a 2 stage test *Trethowan*

1. Firstly we ask whether the act to appeal or amend the first act would relate to the constitution, power and procedure of parliament?

An act to repeal the PIEA 2007 (NSW) would concern the procedures of parliament ie. The language in which they are conducted

2. Does the EIPA 2007 (NSW) impose a valid M & F provision?

Concurrence of 2/3 majority of both houses is a fairly well recognised procedural requirement which may be imported by M & F provisions. A M&F provision may be so onerous as to be invalid *King CJ Westlakes*, however this requirement would probably not be too onerous since it could be held to relate to a fairly major procedural requirement of parliament. Therefore on the facts it seems as though Kellie Kwang would only be able to repeal the act if there is compliance with s8 of the Act. If she gets into government

then a 2/3 majority in the lower house may be easily achieved however it may be less certain in the senate.