



ANU LAW STUDENTS' SOCIETY

LAWS1205 Australian Public Law 1st Semester 2007

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Question 1

80/100

Head of Power

Commonwealth has no express HoP to legislate on education. Bu the Cth can use the HoP under s 51.39, read in conjunction with s 61, to legislate on this topic if it can establish that the Australian Values Curriculum Act 2007 (Cth) falls under executive nationhood power.

(Davies v Commonwealth) [✓✓]

The sections of the Act will be examined one by one.

Section 1

The test for nationhood power is led down in Davies v Commonwealth.

Is the setting up of the Australian Curriculum Task Force for the protection and advancement of the Australian Nation? As per the Minister of Education's second reading speech, (secondary material), the purpose of the Act and, by extension, the setting up of the task force is to retain a sense of Australian identity. As such, the Act can be said to be enacted for the advancement of Australia for as a united nation.

Is it preeminently the business of the Nation State? Setting up the task for coordinate and to formulate a national curriculum is arguably a business of the Nation State, especially if it involves cooperating with all states and territories.

Is it in conflict with state laws? Prima facie, setting up of the task force will not conflict with the state law.

Is it reasonable and proportionate? Setting up a task force is proportionate to formulating a national curriculum on Australian values. [More on this]

Section 1 will most probably be valid. [✓✓]

Section 2

As established above, the Cth has Nationhood power to set up a task force.

However, having a Chapter III judge (ie the judge of FCA) doing non-judicial thing is, prima facie, not allowed. (Boilermaker)

The chairing of the task force is not incidental to judicial function. (R v Joske)

However, under the principle of persona designata, this may be allowed. This may be allowed. (Hilton v Wells) The fact that the judge in this case is given a personal choice to be part of the task force ("consenting judge") points to the fact that the judge will be appointed in his/her capacity. (Grollo)

However, his role of chairing the task force must not be incompatible with his judicial function. (Grollo; Wilson) [✓✓]

Impracticability (Grollo)

Traveling around Australia holding public consultations might be consist in so complete a commitment that the further performance of substantial judicial function is not practicable.

Integrity and public confidence (Grollo)

Being involved in a potentially politically sensational task, even if they appointed judges might preserve his personal integrity in the conduct of his role, might inevitably lead to the public confidence in him and in the FCA as a whole being diminished.

Connectedness (Wilson)

The judge will effectively be a part of the minister's exercise of the minister's ministerial power, which is different from reviewing the ministerial power.

Independence (Wilson)

Having to report to the ministers might compromise the judge's independence.

Political function (Wilson)

Formulating a curriculum involves making a lot of political discretion.

As such, appointment of judge might be found to be incompatible with the judges' judicial function. [✓✓ good]

Section 3

Under nationhood powers. No applicable constrains.

Section 4

While determining the content of the value caused, might be within the nationhood powers, the making of declaration as per s 4(ii) might be in conflict with state laws. However, the Cth can utilize its power under s 96 of the Constitution to carry out s 4(ii) of the Curriculum Act.

This is still subjected to another constraint. The content of the Australia's Religious Heritage component must not amount to the imposing of religious test as per s 116 of the Constitution.

Will the minister making the declaration amount to abdication? Most probably not because legitimate delegation of power is allowed. (Victorian Stevedoiring) Furthermore, the scope given to the minister is limited and easily revocable (Victorian Stevedoing).

This section, subject to its compliance with s 116 of the Constitution, will be valid.

Section 5

While the setting up of task force is within the nationhood power, creating of criminal offence might not.

Nationhood power do not extend to the creation of offences except in so far as it is necessary to protect the efficacy of the Constitution. (Davies v Cth)

The penalty imposed cannot be said to be reasonably necessary in formulating a national curriculum.

Furthermore, the Boilermaker principle [✓] might act as a constraint.

Is the task force a chapter III court? Its members are not judges with life or age based tenure. (WWFA v GW Alexander) Therefore, it will not be a chapter III Court. Is contempt powers judicial powers? Yes. (Boilermaker) Therefore, s 5 will most likely be not valid. [✓]

Q1B

Parliament has no power to demand documents that directly or indirectly reveal the internal deliberation of cabinet. (Egan v Chadwick)

Recommendations made to cabinet

As this alone will not reveal the internal deliberation of cabinet, the senate can require it to be tabled. Analogously, in Egan v Chadwick, the Court found that even documents pertaining to legal advice which the executive receive will not be protected by the cabinet privilege.

Cabinet Deliberations

As these documents might reveal the cabinet's internal deliberations, and compromise the principle of collective responsibility, the senate has no power to demand this. (Egan v Chadwick)

Justiciability

Unless senator Sally forcibly thrown out of the chambers, this issue will not be justiciable - parliamentary finding is only justiciable if it is related to the general laws such as trespass. (Egan v Wills) [\[more details required here\]](#)

[\[√√\]](#)

Q1C

Warrant from Parliament

Justiciability

Under s 9 of the Parliamentary Privileges Act 1987 (Cth), where the senate imposes a penalty of imprisonment for contempt, the warrant committing the person (ie Adam) must set out the particulars of the offence. This allows judicial review of the senate's action upon an application of habeas corpus. The court can inquire into whether the particulars constitute an offence, but not whether there are true or accurate.

Can the Parliament issue such warrant?

Yes. This is provided for in s 49 and s 50 of the Constitution.

Case laws consistently upheld the Parliament's right to regulate its own affairs, including by use of force (Bradlaugh v Gossett, R v Richards; Ex parte Fitzpatrick and Brown). In this regard, the Court has some judicial power (Bradlaugh b Gossett).

However, the particulars of the offence as set out in the warrant must constitute offence according to the Parliamentary Privileges Act 1987 (Cth). It's up to the Senate to particularize the offence.

Freedom of Political Communication [\[√√\]](#)

This might be an issue – however, in R v Richards, the court said that the Parliamentary contempt power is a deliberate constitutional exception. (However, the Court was then not explicitly referring to freedom of political communication.)

Warrant for Breach of s 5

As discussed in Question 1(a), s 5 is invalid. As such, Cain J has no power to seek a warrant of arrest under s 5.

However, if s 5 is valid, the powers conferred by s 5 will be akin to judicial contempt powers.

Tone of Comment

Adam has evidential support to back-up his criticism and thus his comment could qualify as an informed and reasoned criticism. (R v Dundabin)

Effect and Purpose

It was calculated to shake the confidence of the people in the task force (R v Dundabin).

Liability of the Speaker

Adam was the President of ASA, arguably an important personality. (Gullager)

Timing of the Comment

It was given while the task force is being debated – and therefore can be said to be calculated to bring the task force into disrepute. (Gullager)

If s 5 is valid, even if the article is one of reasoned and honest criticism, its effect, purpose, identity of speaker, timing and intention can be said to bring the task force into disrepute in contravention of s 5. [Freedom of pol com is the issue with s 5 – see Nationwide News by analogy]

Q1D

If ANU is a crown and if Sen. Burghese is holding an office of profit under the Crown, she might be disqualified from sitting as per s 44 of the Constitution. [✓✓]

Is Senator Burghese holding an office of profit?

Even if Sen. Burghese is not paid by ANU, an employee on leave without pay is still considered holding an office under the Crown (Sykes v Cleary).

On being chosen?

She is chosen on the day of nomination. (Sykes v Cleary)

Is ANU the Crown?

The purpose of s 44 is to exclude of the rise of executive influence over the House (Skyles v Cleary).

Taking a purposive interpretation, the Crown should be interpreted broadly to exclude even an employee of a statutory authority so as to eliminate any rise of executive influence.

As such, with regard to s 44, ANU should be considered a Crown.

Conclusion

Sen. Burghese might be disqualified from being a Senator.

[+ Issue of consequence of this in relation to passage of legislation in Senate.]