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LAWS1205 Australian Public Law 1st Semester 2007

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Question 1

80/100

NB

Commonwealth → Cth

Constitution → C

Parliament → P

Overall Mark: 80

Problem mark: 88

Essay mark: 72

Q 1. A

a) Advise on the validity of the AVCA 2007.

This is a Cth Act, thus the first step in determining its validity will be determining whether there is a head of power.

No express head of power exists at the Cth level, therefore presumably education is a state matter.

However, the Cth may be able to get around this issue by attempting to invoke the implied nationhood power.

[V]

Nationhood

This power derives from the power of the executive to Act for the 'advancement and protection of the nation' (*Davis*). [V]

As this is derived from s61 and is a power vested by the Constitution in the executive-Parliament is able to use this power under s51(39)- incidental power (*Davis*) [V] [V]

The 'test' for whether the power is being validly exercised has been articulated by Mason J: e.g. in *AAP*:

Is the enterprise adapted to the government of a nation and cannot otherwise be carried on for the nations benefit? [V][V]

Here the Act regards the establishing of a taskforce to advise on a national curriculum. Arguably, states would not have been able to conduct a national investigation (\$) [V] and their powers would be confined to their own state education matters. Therefore arguably this development of a national curriculum is only something Cth can do. [V]

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Other considerations include whether the Act is proportionate to fulfilling aim (*Davis*) [V], this will raise an issue with s5 [V]- which imposes exceptionally harsh remedies as a punishment for criticising taskforce. Coercive powers when being used for advancement of nation will be narrowly interpreted (*AAP, Tasmanian Dams*). IF subject matter/ aim was within power of Cth- setting up task force would be valid (analogous to *Davis*). [V]

However, on the grounds that subject matter does not appear to come within nationhood power because it is disproportionate- the Act may be invalid. The decisive head of power issue, however is that this head of power cannot be used to take away powers belonging to other bodies in the Constitution (e.g. *AAP*). [V]

However, if there was, the Act will be problematic when considering implied restraints:
[Very good so far!]

Political Communication

There is at the Cth level under the C an implied freedom of political communication. This is derived from ss7 and 24 which recognise that Australia's C embodies a system of representative democracy (*Nationwide*). [V]

s5 of the Act provides harsh penalty for any person 'bringing the taskforce into disrepute.' This is analogous to the *Nationwide* case ([V][V]) where provisions attempting to ban criticism of a Union were held invalid on political communication grounds. Here, the P will be restricted where section constitutes a breach and is unjustified.

Firstly;

'communication'- broad

'any form of expression capable of communicating a political/ government message (*Levy v Vic*, similar *ACTV*).

This is clearly within 'communication'- bringing someone into disrepute can be done in many different methods of communication. [V]

Further, this is a political body and therefore clearly a political matters [V]

The provision may stand if it fulfils a legitimate purpose (*Nationwide*) [V] and if the restriction is appropriate to fulfilling it. [V]

Arguably, the purpose- (aided by second reading speech- a valid interpretative tool under the Acts Interpretation Act) [V]- is to provide a universal values based curriculum.

This is arguably a legitimate purpose, but blanket banning any criticism about hte body responsible for the curriculums development is unconstitutional with our system embodying freedom of political communication- allowing citizens to exercise their power by holding ministers accountable in their roles as representatives. [V]

Therefore arguably s5 is invalid.

A further provision of the Act may be invalid on separation of powers grounds.

Boilermakers

Under the Boilermakers doctrine, P cannot invest Ch III courts/ judges with non-judicial power.

[V]

The Federal Court is a Ch III court as it is vested with federal jurisdiction (i.e. same as state supreme courts- *Kable*). [V]

The function exercised is also clearly non-judicial [V] : it doesn't involve application of law to a matter (*Q v M Hospital*). It is advisory (*In Re Navigation*). [V]

And discretionary- taskforce able to inquire and design values as it pleases with no restriction (*R v Spicer*). [V]

Therefore prima facie invalid, however there are exceptions to this doctrine.

Persona Designata

Allows judges to be vested with non-judicial power, where they consent (*Hilton*) [V] and where it is not inconsistent with their function of judicial power (*Grollo*). [V]

Consent is accommodated for in s2. [V]

However, the Act may be invalid on the grounds that it involves a commitment so onerous that it may detract from judges ability to perform functions (*Grollo*). [V] If Justice Cain is required to travel around to all states and territories this will result in detracting from his ability to perform.

[*Wilson incompatibility?*]

Other incompatibility issues may arise- all leading to the conclusion that s2 is an invalid vesting of power. [?]

A final issue- whether s4 constitutes abdication. Parliament is allowed to delegate (*Dignan*).

Recognised delegation to ministers- arguably not abdication. It does not have broad scope (*Cth Aluminium Corp v AG*)- confined to one subject area. Revocable as per parliamentary sovereignty (*Cth Aluminium Corp/ Cobb and Co*). [Not an issue]

Thus not abdication but invalid on other grounds. Thus judge dismissed.

Q.1

b) Can the Senate request Senator to table Cabinet documents?

- 1) This involves a consideration of whether Cabinet confidentiality immunity is operating in this case
- 2) Further, P privilege issue
- 3) Lastly justiciability.

1. It is recognised that it is often in the public interest that cabinet interests remain confidential (*Egan v Willis*). [V]

The immunity essentially means that in certain circumstances cabinet members can be immune to requests of documents of proceedings being tabled. [V]

Its importance is largely political- there will be a distinction between documents which disclose deliberation and those which are reports etc (*Egan v Chadwick*). Deliberation as in this case more likely to be protected. [V]

However, this immunity is considered against the importance of P privilege. [V]

It must also be remembered that no group has right to absolute secrecy- allowing operation of representative democracy, freedom of information, accountability of leaders. [V]

Thus at this point inconclusive- must consider balancing interests of public information and cabinet secrecy.

In our current system responsible government has been found to prevail in the Egan cases. [V]

Thus I would argue that there is unlikely to be an immunity in this case.

2. Under s49 of the C, P employs the same privilege was the house of commons [V] - including power to request documents (E.g. *Egan Cases*) and punish for contempt. [V]

3. Justiciability:

The court may not be able to determine this issue, as it is for the courts to judge the distance of a privilege but for P (in either house of P) [V] to decide the occasion and manner of its exercise (*R v Richards*) [V]

Arguably power exists therefore Senate should be able to require this document and charge Senator with contempt for a failure (as in *Egan*).

Q.1

c) If the taskforce is valid- issues regarding the validity of warrants:

1. Warrant by Justice Cain

As discussed, this warrant will arguably be invalid on separation of powers grounds. [V]

Justice Cain's warrant is an inconsistent function with that of his judicial appointment as it detracts from ability to perform judicial functions. (*Grollo*).

Further, they may also be incompatible because public confidence in judges independence may be diminished where judge is effectively restricting public dissent on an issue (*Grollo*) [V]

Therefore I would advice Adam that he would be unlikely to be subject to this warrant.

However as the warrants have not been granted the court can not take action prior to decision- e.g. analogous to inter-mural proceedings of P? *Cormack*)

[...injunctions...you'll do this in another course]

2. The warrant sought by senator

This may be a valid exercise of P contempt. Derived from s49 (E.g. *Egan*). [V] This case is analogous to *R v Richards; Fitzpatrick*). [V]

It was held in that case, where 2 journalists published defamatory arguments that their imprisonment was valid. In that case the warrant was unspecific- the reasons for judgement were not included. Therefore non-justiciable (*R v Fitz*). [V]

Thus, if the Senators address was vague and imprecise legally, non-justiciable. [V]

Court can only determine whether P has exercised power validly. (*R v Fitz*). [V]

However, as P has now enacted P Privileges Act specifying terms of warrants and allowing judicial review [V] – Senators warrants will need to comply with requirements of that statute and will be justiciable. [V]

Thus on balance and facts, neither warrant likely to be granted.

Q.1 d)

If Senator Borghose failed to resign from Any, she will not be able to sit as a member of the Senate- ss44 and 45. [V]

This is because she is likely to be held as being in an office of profit under the Crown (ss44iv).

[V]

In *Sykes v Cleary* analogous facts, a teacher employed by a state department who was on leave without pay was held to be holding an office of profit for the purposes of the section. [V]

The ANU is not a department of government but does receive funding from the Cth government.

[V] [And set up under Cth statute]

P intention is to exclude permanent officers of the state from being on neither of the houses of P due to the high risk of duties impairing performance of the others and through potential for political influence over representation etc (*Sykes- Mason, Toohey and McHugh*). [V]

Therefore while the case seems analogous the connection is separated- the only influence executive could have over senator would be if she depended on Cth grants for income and was subject to influence. This is unlikely.

If it is found that she is breaching the promise she will be required to step down from either post.

ESSAY Question 3

The 'public confidence' enunciated in the *Grollo* incompatibility doctrine refers to the confidence of the public in the impartiality of the judiciary, not confidence in terms of majority public support. [V]

The reasons for this distinction are explained with reference to the doctrine of the separation of powers, which ensures judicial independence. This principle is essential to the maintenance of the C in our system. Further, there are issues as to whether certain roles performed by the judiciary with reference to the doctrine of separation of judicial power is appropriate.

The separation of powers is a doctrine requiring the powers of the executive, judiciary and the legislature to be separate as a means of preventing restricting the chances of tyranny (Montesquieu). It has been found to be a doctrine implied by the text and structure of the constitution (*Wheat Case*). It is important in monitoring the independence of the judiciary- from political pressures etc compromising its ability to adjudicate constitutional matters fairly. Boilermakers argued that the separation of the judiciary allows courts to be uninhibited and unbiased in maintaining and enforcing the constitution.

As a product of this doctrine the judiciary is unable to be vested with non-judicial functions (*Boilermakers*) where they are inconsistent with the performance of judicial function (*Grollo*). A form of inconsistency noted is that of public confidence in the impartiality of the judiciary which have the potential to compromise public confidences in the impartiality of the judiciary in its performance of functions. The constitutional functions the judiciary are: essentially to decide on constitutional matters involving the Commonwealth, the interpretation of the C (in a dispute situation), adjudication between matters arising between Cth and States (s75).

If the public confidence of the judiciary was judged through elections there would be no guarantee of impartiality. [Is there now? Or a facade] This is because the judges would have to essentially politicise appointment and act according to promises made to satisfy the wider community. It essential that judges are not subject to pressure groups- if election was made to appoint and determined by majority there would be no societal protection for the rights of minorities. [A bit idealistic to think our system does this!]

This protection of minorities and impartial adjudication are significant benefits which are enjoyed as a result of the independence of the judiciary. This doctrine of independence which is reinforced by the *Grollo* public confidence/ incompatibility test, allows the courts to maintain a constitutional system in harmony with other important constitutional principles. Having an impartial adjudicator protects federalism (the system we have involving division of power

between territories and central government (James Gillespie). Allowing the courts to be free from government pressure allows protection of federalism through the performance of the mentioned function of adjudicating between Cth and states (s75). Further, under a constitution the goal, according to constitutionalism is to restrain the government from unlawful Act and define persons (i.e. Walochow). In enforcing law against Cth and State, the judiciary fulfils functions compatible with these doctrines embodied within our system. (Including the rule of law which is relevant in interpreting the C- (*Communist Party Case*)).

Therefore arguably this doctrine is essential for maintaining essential doctrines embodied within our federalist system. The separation of powers doctrine has been used to imply rights which raises issues as to the appropriateness of the judiciary engaging in such an exercise. For example, it has been recognised by the courts that the separation of the judiciary advances the guarantee of liberty (Brennan, Dawson, Toohey etc Majority in *Wilson*). Rights protected/enunciated include: protection from retrospective legislation which may amount to a Bill of Attainder (*Polyukovich*), from involuntary detention where no criminal guilty (*Lim*), guarantee of due process in *Kable*- no bill of attainders allowed. All of these attributed to the fact that the judiciary alone exercises these functions and only according to the law. Further Jacobs J in *R v Quinn* acknowledged that the separation of powers is based on recognition that C intends system of law to protect the rights of persons by ensuring disputes are determined by an independent judiciary. [V]

However, problems with implications- clear intention of drafters not to have a bill of rights (Clear from absence and conventions) [!]- therefore should judges imply rights? If the C is to survive it must be adapted. So long as rights are derived from the text and structure of the C, not vague political doctrines- valid (*McGinty*; Brennan.)

The rights are not restrictive and rarely enforced. Some interpretation of modern application of judiciary to rights of citizens necessary for its survival.

Therefore independence of judiciary essential in a C system and maintenance for maintenance of impartial application of law. Implication of rights is rare and questionable but essentially valid if from the text of the C, otherwise there is no hope of evolution and adaptation of ancient document. Public confidence essential to the spirit of obedience to the law but is only confined to the confidence in integrity of performance of judicial function NOT agreement with particular decisions- thus reinforcing the independence of the judiciary.