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LAWS1205 Australian Public Law 1st Semester 2011

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80/100 (HD)

Question 1

i)

There is no express power for the government [x parliament] to enact the Clean Up Election Day Act (CUED), creating the commission and conferring powers to it. However, there may be a constitutional source of power to enact the legislation if the subject matter falls within the nationhood power.

The nationhood power is derived from the power of the executive to act for the advancement and protection of the nation (Davis). As this power is vested in the executive via s61 of the Comm Const, the parliament may use the express incidental power in s51(39) which allows it to pass laws giving effect to the section (Davis).

It must be considered whether this measure is within a capacity to engage in enterprises peculiarly adapted to the government of a nation, which cannot otherwise be carried out for the benefit of the nation (Mason J in AAP, supported by Davis and Pape). Here, the CUED regards the establishment of a commission to counteract offensive slogans and language on election days. Its aim, in protecting children and citizens from such language, is likely to be considered to be for the advancement of the nation (Davis).

If the Comm government wants to take a strong stance on offensive language on election days, this may be considered to be a national activity, as Commonwealth elections will take place throughout a nation on one day. It is also very likely that this will protect and advance the nation, as it will be a positive influence on the children of the nation and allows people to attend the polls without offence.

However, there is argument that this is not really the business of a nation state. The existence of a nationhood power is clearest when there is no real competition with the states (Davis). It is not enough to simply describe the problem as “national” in character. It could be argued that this problem could be dealt with on a state level. However, as the power in setting up a board is non-coercive, and rather for the advancement of the nation, the power will be interpreted more broadly than if the power were being used coercively (AAP, Tasmanian Dams), so it is likely the actions taken to enact the legislation and set up the commission will fall within the nationhood power.

If the power is found, setting up the commission will be a proportionate response (Davis). The legislature may take actions to give effect to the power (Davis), and this would extend to setting up a commission. Further, in its powers as a legal person, the government may make enquiries

(AAP Case), so using express incidental power in s51(39), the Commonwealth parliament may legislate for the creation of a commission.

[SOP?]

ii)

Appointment of a registrar of a court as a commissioner.

It will need to be considered whether this appointment infringes the separation of powers.

It has been held that administrative officers of a federal court (e.g. registrars) may have judicial power delegated to them (*Harris v Caladine*). Therefore if the registrar is also to exercise non-judicial power in their role, this may represent a breach of the separation of powers.

The body is exercising non-judicial power. The exercise is of non-judicial power, as involves recommendations only, and no decision regarding a dispute of pre-existing rights (*Tas Breweries, Bass*).

Also, the commission is not a court (clearly – no judge appointed).

If a judge were to be appointed, this is an acceptable breach of the *Boilermakers* doctrine that non-judicial power is not to be exercised by courts. This may be applicable to the appointment of a registrar. A person who happens to be a Federal Court judge may validly be appointed/assigned to perform non-judicial functions that are not incidental to judicial exercise of power, provided three conditions are met (*Grollo*).

Firstly, it must be clear that it is given to them in their personal capacity (*Hilton v Wells*). It is unclear on these facts whether the registrar is being appointed in their personal capacity. [Same as in *Wilson*]

Secondly, the person must consent to the appointment. Again, this is unclear on the facts whether the registrar is consenting.

Finally, no function can be conferred that is incompatible with performance of judicial functions or proper discharge by the judiciary in its responsibilities as an institution exercising judicial power (*Grollo*). A task may be incompatible if it is so permanent and complete that it is not practicable to perform judicial functions (*Grollo*). Presumably, the task of public hearings and submissions will be time consuming for the registrar. It must also be taken into account whether the task would undermine public confidence in the integrity of the judicial branch (*Grollo*).

Although the registrar does make decisions in the same way as a judge, the public independence of the judiciary is achieved by separation of judiciary from persons exercising political functions of government (*Wilson*). The commission here will be advising the minister, analogously to in *Wilson*, where it was found that this was unacceptable. So, although the registrar is not a judge, the use of a judicial officer for a task that is so politically involved may be incompatible.

The power may also be incompatible if the role of the commissioner is of such a nature that the capacity to perform judicial functions with integrity is compromised (Grollo). This is probably not at issue here, as the registrar only has limited judicial function, and those that they do exercise are to be subject to review by a judge (Harris v Caladine).

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f the registrar is to be appointed in a personal capacity consistent with the doctrine of *persona designata*, the appointment will be likely to be incompatible with their involvement with the judiciary. However, as *persona designata* is an exception to the Boilermakers doctrine that non-judicial functions may not be given to or exercised by a chapter 3 court. It is likely to be found therefore that the registrar does not fit within this exception, do their appointment would be in breach of the Boilermakers principle.

[good]

iii)

s10 – Constitutional Problems

The conferral of power under s10 may represent a breach of the Boilermaker's doctrine that non-judicial functions may not be given to or exercised by a Chapter III court.

The federal court is a chapter 3 court, so if s10 required it to exercise non-judicial power, the section will be invalid.

Although it is difficult to exhaustively define judicial power (Tasmanian Breweries), we may look to some characteristics. The core characteristic of judicial power is the determination of existing rights (Tasmanian Breweries). Here, the commission[?] has the power to remake or affirm a determination of the commission. As the determinations of the commissions (ad therefore the Federal Court), this advisory role is likely to be non-judicial power. There is no dispute required to be resolved, and the court cannot exercise judicial power unless there is some dispute (Bass v Permanent Trustee). The determination must actually affect rights (Navigation Acts), and as the recommendations are merely recommendations to be submitted to the minister, this will be an exercise of non-judicial power.

The court is making a determination whilst standing in the shoes of the initial decision maker (Luton), this is non-judicial power.

Finally, the recommendations are not binding, as even once submitted to the minister, he does not have to act and legislate on it (Brandy).

Therefore as the Federal Court is a chapter 3 court exercising non-judicial power, there is a breach of the Boilermakers doctrine.

iv)

Firstly, the validity of the section must be considered.

S11 delegates legislative power to the minister. Despite the constitutionally entrenched separation of powers (ss 1, 61, 71), delegation of legislative power to the executive is constitutionally permissible (Dingans Case). The Commonwealth Parl may confer upon the executive a power to legislate upon some matter contained within the legislative power of the Parl (Dingan). In this case, the source of power has been discussed (see part i).

Although delegation is allowed, abdication is not, as abdication is in conflict with the principles of responsible government and representative democracy (Giris, Barwick CJ).

Tabling allows for scrutiny of the legislation, this is provided for by s11, indicating that the power has not been abdicated. However, the ability to disallow delegated legislation is of key importance, however its ability is restricted to do this by the 2/3 votes provision. This points toward abdication.

However, so long as parliament retains power to repeal or amend the authority which it confers upon another body to make law, it is not easy to see how the conferral of that authority amounts to an abdication of power (Capital Duplicators). Therefore the Commonwealth have not abdicated the power, as they could easily modify or repeal s11.

Furthermore, if the power is delegated to a minister, it can be assumed that due to the principles of responsible government, if the parliament do not like the provisions made, the minister will be removed (no confidence). This is effective supervision of the minister.

Therefore the legislation was validly enacted as delegated legislation.

The other grounds upon which RU may challenge the legislation would be that her constitutional mandate to vote has been revoked.

The Constitution provides the source of power to enact laws to determine who is qualified to vote. S13 purports to exclude people upon the basis of their offensive clothing. S8, s30, combined with s51(36) empowers the Parl to legislate. This power is broad (McKinley, Rowe, Roach).

In McKinley and Roach, ss7 and 24 of the Constitution, which state that members and senators must be “directly chosen by the people” was found to restrict this legislative power. These

sections have come to be a constitutional protection of a right to vote (Gleeson CJ in Roach). There is therefore a constitutional mandate of the people to elect their representatives (Rowe).

As found in Rowe and Roach, however, there may exist justifiable reasons for disenfranchisement, the test for justifiability being whether it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of a constitutionally prescribed system of representative government (Roach). There must be substantial reason for the exclusion (Rowe, Roach).

Here, the prevention of voting of people wearing offensive slogans is likely to be invalid. Although attempting to further other interests, the exclusion does not at all further the system of representative government. **[Removing the discomfort of other voters?]**

Although it may be argued that people could simply choose not to wear those slogans if they wished to vote, this would be analogous to Rowe, where it was argued that people ought to enrol on time. The question asked is one of furtherance of the goals of representative government, which s13 does not serve. It does not serve the purpose of the constitutional mandate (French CJ in Rowe). Therefore RU will have a strong legal challenge to her exclusion.