



ANU LAW STUDENTS' SOCIETY

LAWS2202

Commonwealth Constitutional Law 2nd Semester 2011

How to Use this Script:

These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore **DO NOT** use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so **YOUR MARK WILL PROBABLY END UP BEING WORSE!** The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

Please do not use them for any other purposes - otherwise you are putting your academic future at risk.

This paper is provided solely for use by ANU Law Students. This paper may not be redistributed, resold, republished, uploaded, posted or transmitted in any manner.

Answering Question 2(i)

The issues to investigate before advising Dr Don are:

- a. Can the NSW Legislation enact such a law?
- b. Is Section 4 valid?
- c. Does Section 6 intend to apply to the Crown?
- d. Can the NSW legislation confer such power to the NSW District Court?

a. Can the legislation make such a law?

Firstly, section 5 of the NSW Constitution Act allowed the NSW Parliament to enact laws for the welfare, peace and good government of the State. Such powers are plenary (*Union Steamship Co Ltd v King*). (tick)

With that in mind, the Act in question can be made by the NSW Legislation.

b. Is Section 4 a valid delegation of legislation?

Parliament can delegate legislative power but cannot abdicate it (*Dignan's case*). Furthermore, if such power as conferred on the Attorney General is one that is not independent of the Act, it will most likely be a delegate power (*Dignan's case*).

Looking at the Act, the power of the Attorney General to declare as such is a power that cannot stand without the legislation. (don't need to consider)

Hence, it is a valid delegation of legislation.

Lastly, is the power given to the Attorney General a judicial power?

In this case, there is non to consider. The ability to declare an organisation as such is not a judicial function. (tick)

In conclusion, section 4 and the Act is valid.

c. Does Section 6 intend to bind the Crown?

Since section 4 is valid, an application of an order can be made to the District Court of NSW of which Section 6 would order 'the payer' to pay the seized income to the district court.

The payer here is a Body of the Federal Crown. It is the Australian Taxation Office. (tick)

Not just is it a Crown's body, it belongs to the Federal Government.

So the question now is **does Section 6 intend to bind the Federal Crown?**

Firstly, there is a presumption against a state legislation intending to bind the Crown of the Federal government or other States, vice versa (*Jacobsen v Rogers*) (tick)

However, the presumption can be rebutted by clear and unambiguous words of the statute or by necessary implications (*Bradken's case*) (tick)

Lastly, the legislation will bind the Crown if not doing so would frustrate the purpose of the legislation in question (*Bropho's case*). The legislation in question is enacted after 1990, hence the *Bropho's* test applies.

Hence, the purpose of this Act is to prevent the funding of terrorist organisation. It seeks to do so by ordering the payer to not pay money owed to the target person. The target person is suspected of funding terrorist.

If the Crown immunity apply to the Federal government's body, namely the Australian Taxation Office, the purpose of the legislation will be wholly frustrated. This is because Don would get the money owed and will continue to fund terrorist organisations. (tick)

Hence, Section 6 will bind the Federal Government and the order is valid. Thus, the Australian Taxation Office must abide by the order. (tick)

d. Can the NSW Legislature confer the power to make the seizure order on the District Court?

As a general rule, the State Court's are creatures of the State legislation and so the State Legislature have plenary power over the State Courts (*Le Mesurier v Connor*). (tick)

However, there are certain limitations because of the integrated judicial system provided by Section 71 and 77(iii) of the Commonwealth Constitution.

Hence, the state legislature cannot confer on the State Courts functions or powers that would be repugnant to or incompatible with their exercise of Commonwealth Judicial power (*Kable's case*). (tick)

To ascertain whether section 5, 8 and 9 of the Act is valid, we must ask whether the function conferred upon the Court to make the seizure order compromises the institutional integrity of the State Court and whether the processes prescribed on the Court to follow before making such an order is repugnant to the judicial process to a fundamental degree (*Kable's case* and *Fardon's case*). (Tick)

Considering Institutional Integrity and the Process

i. The application of the order must be made on an *ex parte* basis. This is already questionable whereby the proper curial process is one that have both parties present (*Fardon's case* and *Kable*) (tick)

ii. The Court cannot challenge the information presented to it by the police. This will seriously limit the impartiality of the court (*International Finance Trust Company Ltd v NSW Crimes Commission*). (tick)

iii. The Court is also unable to challenge the Attorney-General's declaration thus limiting the discretion and independence of the Court (*Totani's case*). (tick)

iv. However, the order seems to be an interim order. Section 10 of the Act allowed Dr Don to challenge the order in Court. Hence, it is akin to *Thomas v Mowbray* where the control order was valid because it is an interim order. (tick)

In conclusion, despite the fact that the Court is not given a lot of freedom, the order is only an interim one. It can be challenged by the target person in court under Section 10 and under Section 7. If this challenge is successful, the money will be returned to the target person. The power conferred upon the Court will be unlikely to compromise the institutional integrity of the Court because the target person can bring a case to the Court to consider whether the order can be set aside.

Hence, I would advise Dr Don that the income seizure order is legally sound. There is no constitutional issue with it. Dr Don should use Section 10 of the Act to ask the Court to set aside the order. (tick)

(Very Well Done!)

Answering Question 2(ii)

In order to advise Hermione, the following issues must be considered:

- a. Can section 12 be enacted in lights of section 11?
- b. Can the premier make such an order for the police to destroy cattle? Is it a prerogative power?
- c. Can section 12 abrogate or limit the prerogative power? (tick)

a. Can Section 12 be enacted in lights of section 11?

As a general rule, parliament cannot bind its successor.

However, section 6 of the Australia Act applies since the Act is enacted in 2011. (tick)

So, the question becomes, is the Act in question an Act regarding the Constitution, power and procedure of Parliament? (tick)

Also, is section 12 a provision regarding the Constitution, powers and procedures of the NSW Parliament?

Section 11 will only be valid if section 12 is a provision with regards the constitution, powers and procedures of the Parliament (*Trethorwan's case* and Section 6 of Australia Act)

Such provision must affect the nature of Parliament and its composition (*Marquet's case*) (tick)

In this case, Section 12 protects farmers. It got nothing to do with the nature and composition of NSW Parliament (It is actually an Act about the executive and judiciary). (tick) (tick)

Hence, the manner and form provision stated under Section 11 doesn't apply. Section 12 is thus a valid law. (tick)

Lastly, although section 11 is a valid manner and form because it is doubly entrenched (*West Lake Ltd v SA* and *Trethowan*), it does not apply for the enactment of section 12. (plus - maf process is O.G) (tick)

Furthermore, the Act in question is also about infectious disease and got nothing to do with the nature and composition of the NSW legislation.

Hence, section 12 is enacted validly and thus apply. So section 12 must be considered.

b. Can the Premier declare a State of emergency and authorise the police to destroy cattles? Is it a prerogative power?

Knowing that there are grave concerns on human health and that a lot of people eat meat, the situation is very dire. Hence, it may be wise to declare a state of Emergency and contain the situation.

However, questions arise whether such situation will warrant the Crown to destroy cattles and run the livelihood of good farmers. (tick)

Despite being a state of emergency, whether such powers are prerogative powers requires the Court to first engage in a historical enquiry to see if such is the case. (tick)

However, suffice to say that there are no new prerogative powers after 1689 (*Burma Oil Co Ltd v Lord Advocate*). (tick)

Hence, here we are unclear as to the source of the power the premier possess. We need more legal research into the history of such powers. (double tick) (You might have compared to federal prerogative powers in emergencies).

c. However, suppose there is a prerogative power, does section 12 limit such powers?

As a general rule, there is a presumption that statute does not intend to abrogate or limit the prerogative power of the Crown(*Cadia's case*). (tick)

However, the presumption can be rebutted. An intention to do so must clearly be shown (*Tampa's case*) (tick) (express words or necessary implication).

To establish that, we must first investigate the purpose of Section 12 and ask whether if the prerogative is not limited, the purpose of section 12 will be frustrated. If so, then by necessary implication, section 12 intends to limit the prerogative power (*Tampa's case and De keyser's case*) (tick)

What is the purpose of Section 12?

Section 12 requires that the permission of the farm owners be asked and that a vet certifying such a threat be obtained before livestock could be destroyed.

Will Section 12 be frustrated if the police and premier can order the destruction of cattles regardless?

Definitely. Doing so would render Section 12 useless (it might apply to neighbours). Hermione is a cattle farmer and so section 12(i) is crucial. Not following it would frustrate the legislation. (tick)

Conclusion

To conclude, section 12 is enacted validly and section 12 intends to limit the prerogative power of the State. Hence, the police cannot lawfully destroy her cattles. (tick)

Also note that a historical enquiry is needed to see whether the premier can make such an order in the first place. (tick)

(Very Well Done!) - 84