

LAWS1205

Australian Public Law

Semester 1 2014**Australian Public Law – Final Exam – Semester 1 2014**

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**High Distinction (80/100)**

**Part I (25%)**

The Appropriation Act passed through parliament appropriates money to the department of PM and cabinet under s 81/83 of the constitution. The High Court in Williams has ruled that ss 81 and 83 do not confer a spending power on the government, and therefore the issue is whether a power exists that would allow the expenditure of money on the advertisement.

*Is there a spending power?*

French CJ in Williams help that an executive power to spend money may come from a number of different sources – power necessary or incidental to the execution and maintenance of a law of the CW, the prerogative powers, the capacity of the executive to act as a legal person, and the nationhood power. If none of these are present, expenditure must be supported by legislation, which is not the case here.

As to the first of these powers, the CW may argue that the expenditure of money on the ad was incidental (it was certainly not necessary) to the execution of the OoA(TP) act. While related, it can hardly be said to be the case, since the expenditure does not give effect to or assist in the execution of any of the sections of the act, it simply raises awareness, which is quite a political endeavour. While the bestowing of honours may be a prerogative power of the crown, the expenditure of money on an ad (as above) is quite removed from the exercise of this power, and so the prerogative power would not apply. Bardolph held that the power of the CW to contract (as a legal person) is confined to activities “incidental to the ordinary and well recognised functions of government,” which is clearly not the case here. The final power which may give rise to expenditure is the nationhood power. While there may be an argument that the expenditure of money on this ad was an enterprise “peculiarly adapted to the government of a nation” (Pape), Hayne J’s cautionary remarks in Williams state that while the Nationhood power may in some circumstances give rise to expenditure (as in Pape), it should not be invoked to set aside the distribution of powers, “absent some national emergency or crisis.” The citizens of the nation’s ignorance of the honours process can hardly be deemed a crisis, and therefore the nationhood power can probably not be invoked in this case to allow for spending not authorized by legislation.

Since no law was passed allowing for spending on the ad, Sven could probably challenge his company’s involvement on the above grounds. [Good answer 19/25]

**Part II (50%)**

The OoA(TP) Act (the “Act”) must first be passed under a valid head of power. This does not seem to present any issues, as the power to bestow honours has traditionally been a prerogative power, and s 51(xxxix) acting upon s 61 (where prerogative powers are now sourced, Tampa)[[1]](#footnote-1) allows the legislature to codify or repeal prerogative powers (DeKeyser’s, Tampa). In this case, the Act may be seen as a codification of the prerogative, and therefore falls under a head of legislative power.

Next, we must look to the content of the Act to see if it offends any principals which are central to our constitution. It seems that there may be an argument pertaining to the separation of powers doctrine.

Separation of Powers

Separation of powers is implied by the structure of the constitution and the way in which it vests power in three arms of government. One way in which the separation of powers may be violated is by granting non-judicial power to a judge of a Ch 3 court, in this case the advice given by the CJ of the High Court (the highest federal court in Australia) to the government regarding the bestowing of honours.

*Is the power judicial?*

Lim held that a number of indicia of Judicial power exist, such as the ability to make binding and authorative decisions, to enforce those decisions, to determine existing rights and duties, to decide disputes about ‘matters,’ etc. It seems fairly obvious that the power given is not judicial, if for no other reason than s 4 of the act classifying it as ‘approaching the CJ for an opinion.’

*Can the non-judicial power be given?*

Since the power is not incidental to the exercise of judicial functions (Boilermakers), the only way this non-judicial power may be exercised is if the CJ of the High Court is a ‘*persona designata*,’ that is, he/she gives his/her ‘opinion’ in their personal capacity (Drake). The first indication that the CJ is not a *persona designata* is that they are referred to not be name, but by their position as Chief Justice of the HCA (Hilton v Wells, a reference to a member of the court may be a reference to the court). However, the administrative nature of the power, and how removed it is from the judicial role of the CJ, may show an intention of the legislature to have the CJ act in their personal capacity (Hilton v Wells). Grollo held that no non-judicial power that is not incidental to judicial power can be conferred without the judge’s consent. It is unclear on the facts, however there is no indication that the CJ’s consent would have been sought (though a justice of the High Court would probably be aware of this need to consent and, given that the deliberation went ahead, it is likely that they did in fact consent). Then, the nature and extent of the functions must not (Grollo):

1. Hinder the Judge’s ability to act as a Judge (here it does not)
2. Hinder the ability of the Judge to perform judicial functions with integrity (this does not seem to pose problems)
3. Hinder public confidence in the judge or the judiciary.

This last requirement is probably where the Act falls down, since the political nature of the decision about who should receive honours (demonstrated by the three criteria in s 5) would undermine public confidence in both the HCA and the CJ and compromise the separation of powers.

For the above reasons, the act is likely to be invalid, or at least the participation of the CJ. [Very strong response 42/50]

**Part III (25%)**

The power to confer honours was a prerogative power, and as such, may still exist whether the Act is valid or not. If it is invalid, as the previous answer determined was most likely, there are no issues, and Dr Skate may be granted honours under the prerogative power. If it is valid, there may be some argument that the Act extinguished the power.

*Has the prerogative been extinguished?*

The prerogative may be extinguished if it falls into disuse (Tampa, but clearly not the case here) or if it is codified or repealed by statute. There is a presumption that the prerogative will not be displaced absent express words or necessary implication (Mason J, Barton). The more central the prerogative to sovereignty, the clearer the words or stronger the implication must be (French CJ, Tampa). There are no clear words extinguishing the prerogative power, though the words “The OoA is only to be bestowed ... following a recommendation,” demonstrate an implication that the prerogative is displaced. The power to grant honours is not particularly central to sovereignty (as opposed to war-making or exclusion of aliens, for example) and so it is likely that the necessary implication present in “is only” is strong enough to displace the prerogative.

Therefore, the PM must follow the process provided in the Act (if it is valid). [Good overall 19/25]

1. And the prerogative’s original common law source [inserted in exam booklet margins] [↑](#footnote-ref-1)