LAWS1205

Australian Public Law

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Semester 2 2014Q2 (A)

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# Intro

There is no express power for the Cth government to enact the NAC ER and FP Act (Act), creating the CNL and providing immediate funding to farmers, local councils and regional hospitals; 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.

# Nationhood Power

The NH power allows the Cth executive to use the express incidental power in s 51(39) in combination with s 61 (Cth Const) to enact laws for the advancement and protection of the nation (Davis). ✔

It must be considered whether the Act is a measure 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 in Davis and Pape).

# National?

In Davis, Brennan J asserted it is not enough to simply describe the problem as ‘national’ in character – it is for the courts to decide whether it is of national proportions to attract the NH power. In the present, there may be doubts as to the ‘national’ character of the emergence. The locusts and severe drought is primarily affecting northern Australia – there is no evidence on the facts that this drought/locusts have migrated south. However, I would argue the combined impact of the locusts/drought has had a significant economical impact to the ‘nation’ reducing government revenues and budgets. In Pape, an economic stimulus package was validated a NH power grounds despite potential questions regarding ‘national’ proportions and whether the ‘crisis’ had actually affected Australia yet (interesting). In AAP and Tasmanian Dams it was held if the NH sets up an institution etc and it is non-coercive in nature – the power will be interprested more broadly than if it was used coercively. On balance, the Act is not coercive and I would argue the economic impact elevates the crisis to ‘national in nature’.

✔

# Competition with the states

The existence of a NH power is clearest when there is no real competition with the states (Mason J in AAP and Brennan J in Davis). On the facts,

1. state government’s revenues have been reduced which decreases their ability (practically or constitutionally? Does it matter?) to finance a response to the crisis.
2. There does not appear to be a ‘state response’ to the problem, suggesting there would not need to be a high level of coordination and integration required to meet the need.
3. Due to the ‘national’ impact. It would not be practical for the states to individually combat the dourght/locusts.

On balance, there is nothing to suggest this will interfere with the states and therefore suggests the Act may be valid.

# Creation of the CNL

(This is tricky to follow)

In AAP the NH power was accepted for the creation of the CSIRO and to make ‘inquiries, investigations and advocacy in relation to ‘matters affecting public health (AAP; Pape at [95]). There fore I would argue the Act cannot be struck down because of the establishment of CNL- because in an analogous situation to AAP – I believe the court would conclude that research concerning locusts, drought and global warming would be classed in a similar and therefore the CNL within the Act would not be struck down. ✔  
However, it is only cconcerning Northern Australia which might be problematic.

# Spending Power?

There would not be a case challenging the Act on the grounds of the executive power to spend because similar to the court distinguishing Williams to Pape because in Pape there was legislation and in Williams there was not. Put simply, because this is legislation, there would be no arguments re: spending power. ✔

# Proportionate

I would argue, on balance, the power has been found to enact the act and therefore we must consider whether the act is proportionate and/or reasonably appropriate and adapted to achieve the end sought (Davis).

I would argue the reasoning of French CJ in Pape applies to the current situation. In Pape, French CJ asserted that ‘short term measures to meet adverse economic conditions affecting the nation as a whole’ – was valid. In this case, the Act authorizes funding (short term because it is immediate (Is the CNL short term/immediate?) – although, this is not clear) to meet the need. This can be distinguished from Pape, however because the payments in Pape were made directly to citizens.

In the current case, I have reservations as to whether the executive governemtn can directly provide funding to local councils – local councils are within state legislative power not Cth, farmers should be okay (Ok, but whats the legal basis for your reservation?).

In short, I would argue, the Act is appropriate and reasonably adapted to achieve the end sought – ie. The prevention of this crisis occurring again and responsive tot the immediate situation – the the extensive funding tackles the short term goal and the CNL tackles the long term. It is a proportionate response also because it doesn't interfere with the states (above) and is not coercive.

# Conclusion

In conclusion, I would advise Dr Ronald Swanson the act will be found constitutionally valid by way of the executive NH power. The crisis is national in character does not interfere with the states and is proportionate to achieve the ends sought.

There is a lot of interesting material in this advice & the key issues are dealt with. At times the overall argument/structure was a little tricky to discern, but nonetheless there is some very well done application of the law to facts here & that should be commended.

21.5/25

(B)

# Introduction

I would advise Dr Ronald Swansson that the HCA has accepted that non-judicial power can be given to federal court judges, such as Justice Dwyer in their personal capacity (Hilton v Wells) ✔ as an exception to the boilermakers principle that only Ch 3 courts can exercise judicial power. ✔

I would advise Dr Swanson that three conditions need to be satisfied:

1. personal capacity
2. consent
3. must not be incompatible



✔In the present case, Dwyer J is conferred non-judicial powers to 1) sit on a board that oversees and supervises research and develops, detailed policy proposals for government. It’s these proposals that may be incompatible.

# Personal Capacity

On the facts, there is nothing to suggest any compulsion for J Dwyer to take the appointment and the ‘personalised’ email suggests he was approached in his personal capacity. In Hilton v Wells it was held this would be satisfied if the power was invested in an individual rather than a court – which is the case here. ✔

# Consent

Justice Dwyer ‘enthusiastically’ consented. ✔

# Incompatible?

I would advise Dr Swansson that his strongest argument wopuld be to analagise with Wilson. ✔

In Wilson, the court held that the role of writing a report advising the minister was political and too closely connected with the functions of the executive government- and was essentially taking on the role of an advisor to the Minister.   
In the present Dwyer J is to supervise the detailed policy proposals for government. This could be distinguished from Wilson, however if the court placed emphasis on the individual agency of the judge in writing the report ie in Wilson the judge individually wrote the report, whereas in this case the judge is

1. in a group
2. is not writing, rather he is ‘supervising’ which I would argue it different and perhaps not ‘advising’. Although this might not stand it would depend how much breadth the court gives to the decision in Wilson. ✔

In Grollo, concerns were raised if a judges commitment to non-judicial functions had the potential to interfere with their judicial functions. In grollo, the judge was required to do a lot of travel and this was found to be incompatible because he couldn't write judgments.

In the present I would argue, Grollo would be distinguished because the board only meets three times a year. ✔

Moreover, the fact the Judge is not paid suggests it would not interfere with the public confidence in the judiciary (where is the authority?)

# Conclusion

On balance, Dwyer J’s appointment would fall within the persona designate exception and would most likely be upheld – Dr Swansson may have a case if the court broadens the scope of the principle in Wilson and finds he has too much influence in the report.

Another good answer with some thoughtful application of the law to the facts. Well done.

11/15.