

LAWS1205

Australian Public Law

Semester 1 2015

**Australian Public Law – Final Exam – Semester 1 2015**

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***High Distinction (81/100)***

Q1A) Can Kuragin J be the head of the NIVA?

In this case, the PM, a member of the Executive has chosen a member of the judiciary to perform a judicial function. It must be determined if this is valid or if it is a breach of the Constitutional SoP.

Is this judicial power? [tick]

The role conferred on K J does not appear to be an exercise of judicial power.

There are a number of characteristics that indicate judicial power which include a need for dispute (Huddart), the making of binding and authoritative decisions (Huddart), enforceable decision-making (Brandy) and adjudging criminal guilt (Lim). None of these characteristics are present in this function as to be exercised by K J. [good application]

Instead, K J has been given the task of advising the PM upon research and scientific matters in a report to the PM. [tick] This is NOT a judicial power as it is not something judges historically do (R v Davison). Thus, the NIVA is not exercising judicial power and neither is K J in this role as chair. According to the principle in Boilermakers, judicial officers and Ch 3 courts cannot exercise non judicial power. An exception to this is where the judge is acting in his or her personal capacity (Hilton v Wells) [tick]. The justification for this exception is that often judges [tick] have more knowledge and expertise in their person to be able to exercise these functions.

However, in exercising a function persona designata, the exercise of the non judicial function must not be incompatible with their exercise of judicial functions, either practically or in regards to their integrity (Grollo). Wilson reinforces that it must not infringe the institutional integrity of the judicial officer (Wilson).

In this case, K J has not been expressly asked to give her consent in writing (Grollo) [do the facts give away any sign of acceptance?], which may indicate toward invalidity. Moreover, the Act does not expressly state [what would this look like? Is this the test?] that this function is to be carried out persona designata.

Additionally the functions as chair person fo the NIVA involves many task heavy obligations such as travelling, taking evidence on matters of great importance, hiring researchers and compiling a ‘multi-volume report’. The breadth of this task is likely to infringe K J’s practical ability to perform her judicial functions because the tasks given to her as chair are ‘so complete’ [tick] and permanent (Grollo) and will consume most of her time.

Moreover, K J’s position as chair is likely to infringe the ‘institutional integrity; of her judicial office (Wilson) because the issue of voting age is a highly contentions, politically controversial matter. Indeed she may argue that as chair she can give ‘non partisan recommendations’ however, the public will likely still perceive her decision as a political one, thus diminishing public confidence in the judiciary as K J will no longer appear to be an impartial arbiter of the court. This will likely diminish the ‘public confidence’ (Grollo) in K J and the federal court. [Are there any factually similar cases to drawn on here?]

Furthermore, the issue of voting rights is an activity that is an ‘integral part’ or ‘closely connected’ with the legislature (Wilson). [Interesting – is the key the issue or the function?] Voting rights and the ability for the Legislature to determine rules and laws regarding them is the interest role of the legislature subject to s7 and s24 of the Cth Cn to do so. Thus, K J’s involvement even in recommendations as to this, may be seen as delving too far into political and legislative tasks. [Was this reasoning used in the same way in Wilson?]

Finally, as the report is to be delivered solely to the PM [Tick] this is analogous to Wilson, where the court found that this function of producing reports solely to the minister was to closely connected with the functions of the executive. [Good] This is because it appeared to contravene and impair ‘public confidence in the integrity of the judiciary’ (Grollo), and was also a task that was quite alien to the exercise of judicial power (Wilson).

Although, K J is likely to argue that her role involved researching and considering evidence on constitutional matters, which arguably she would have special knowledge about in her job as judge of the Federal Circuit Court, on the balance it appears that this role as chair person will infringe the ‘institutional integrity’ (Wilson) of the judiciary and is thus, invalid.

[A crisply written advice covering the key issues well. At times there was a little slipperiness with the facts or the tests, but overall this advice did well at integrating the law and facts in a thoughtful way.]

Q1B Can the act change the voting age from 18 to 21?

The source of power for the Cth Parliament to enact laws determining the qualifications of electors and voting rights is enshrined in s8 and s30 of the Cth Cn, which when combined with 51(xxxvi) allows the Parl to legislate on these matters. [Tick]

At the Cth level the Cth electoral Act 1918 currently states the age of an elector must be 18 years or older. [Ok]

S41 of the Cn does not create a right to vote [Tick], however, s7 and s24 prescribe that the Parl be ‘directly chosen by the people’; a requirement that was found to import a restriction as to the legislative power as to voting rights. [Tick]

The legislature can only import restrictions as to voting rights that are ‘reasonably appropriate and adapted to the maintenance of representative Gov’ (Roach). Additionally, the Parl must have a substantial reason (Rowe) to do so, that must [reason?] not be disproportionate to its advancement of the Cnal Mandate (Rowe). [Good – quite clear]

Here, the PM likely to argue that this qualification is ‘reasonably appropriate’ to serving representative democracy because it the electors under 21 yo do not have sufficient cnal or political knowledge and thus, by increasing the voting age, it win mean that those who can vote are those who can make well informed decisions to further the principle of ‘directing chosen by the people’. [Try to apply the tests as stated there wherever possible]

On the other hand, this increase in voting age is very arduous because it is a substantial increase in age and thus many people will be disqualified from voting. This reasoning was used in Roach, as the court held that disqualifying all prisoners from voting ‘casts the net of disqualification too wide’ [tick] and thus, is antecedent to the mandate of ‘directly chosen by the people’ s7 and s24. The same is evident here.

Moreover, upon the facts and reasoning of the PM, there is insufficient evidence to show that an increase in age automatically renders people move informed as to political and constitutional matters. Thus, no ‘substantial reason for the conclusion’ (Roach) is present upon the reasoning of the PM, as there is no nexus between the increase in voting age and an increase of political knowledge. [Interesting]

It is clear through the case law on restriction of voting rights, that the Parliament’s power to restrict voting rights is read very narrowly in order to protect the mandate in s7 and s24.

The case at hand is analogous to Rowe [tick], where the court told that reducing the 5 day period to enrol to vote to 3 days was invalid because it was ‘disproportionate to the Cnal mandate AND there was a lack of a substantial reason to warrant this adverse legal and practical effect. Although the Parl argued that a reduced period was to limit individuals from falsifying or interfering with enrolments, there was insufficient evidence to substantiate this claim in order to warrant the restrictive limitation imposed. Likewise, in this case the disqualification of such a large proportion of the Aus population from voting is so large and is vastly ‘disproportionate’ (Rowe) to the unevidenced claims as to political knowledge given by the PM.

Therefore, since the Act is a unreasonable restriction on voting rights of the people, it is likely to be held invalid, as it is antecedent to the advancement of ‘directly chosen by the people’ is s7 and s24.

[Well done on a very good advice making good use of the law and the facts and sharing real thought and effort especially in its application.]