

LAWS2202

Commonwealth Constitutional Law

Semester 2 2015

**Commonwealth Constitutional Law – Final Exam – Semester 2 2015**

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

Part 1 Mark 82

1. (a) Tasmania as a state has plenary power to enact laws for the peace, order and good governance of the state unless prohibited by an express of implied limitation contained in constitution (tick)

Limitations: Martina could challenge s 11(3) on the basis of s 90. Excellent

Source of excise limitation is s 90 of the constitution. First it must be established that TAS is imposing a tax. (tick)

Is the levy a tax?

Positive characteristics= From Matthews, according to Latham the positive characteristics of a tax are that it is a compulsory exactions raised by a public authority for public purposes. However as per Caledonie and Tape, this is defs not exhaustive. From facts, it is a compulsory exaction, assuming cant sell fruit unless been certified like in Harper (tick). The levy is collected by the Fruit Fly authority for its functions (keeping TAS fruit fly free). Therefore satisfying public authority (tick) from Tape. Can still be a public purpose even if not put into CRF, just has to be in pubic interest. Keeping TAS fruit fly free is in the public interest. (tick) OK. Yes, but doubted in Roy Morgan + L v C

Negative characteristics= the levy is analogous to Harper v Victoria tberefore appears to be a fee for a service not a tax. (tick) Two characteristics point to the levy being a fee for service. Firstly the fee is applied to the function (tick) of the authority which includes, according to s 10, conducting inspections + certifying fruits, similar to the egg inspections in Harper. Secondly, also like Harper, unclear, s 12, whether any surplus funds are returned to the growers in proportion to the levy. Excellent In Harper, return of surplus pointed towards levy not being a tax. Therefore similar in this case, (tick) levy would be found to be a fee for service not tax. Good.

Is it an excise?

Assuming levy was found to be a tax, if found to be excise s 90 renders it invalid. Majority, in Ha endorsed a broad reading of s 90, (tick) + definition of excise, which is a tax imposed on manufacture, production, sales and distribution of goods and must bear a close relation to ‘the value or quantity of the good that is dealt with’ (Matthews). (tick) Furthermore, look to substantive operation not ‘criterion of liability’ (Ha). Substantively, this levy bears a close relationship to the value or quantity of the good, as due to shear amount of product effected by the 5% Martina will have to pay a large fee, which will ‘affect her business’ and is therefore likely to enter into price of her product. Furthermore, levy calculated by % of fruit therefore bears a close and direct relation to value of good. Good.

In conclusion, if levy found to be a tax, which is unlikely as appears to be fee for service it will be an excise and therefore invalid. (tick)

(b)

AS above TAS had plenary power. (tick)

Limitation: 11(4) may be limited by s 92. Good

Freedom of interstate trades source is s 92, if a law discriminates against trade and commerce in a protective manner without being a proportional response to a valid policy purpose for doing so it will be invalid (Cole). (tick) This is a question of fact and degree as the practical effect of the law is valid (Castlemaine).

Does the law impose a burden? (tick)

S 11(4) of the TAS act requires growers to pay a flat fee for fruit. Hence there is a burden. (tick)

Of a protectionist kind?

This is a question of fact and degree (Cole). (tick) The law substantively (and formally) distinguished between inter and intra state trade (tick) as there is a competition between fruit procedures between states. (tick)

However from Castlemaine a law that is aimed at achieving a legitimate non-protectionist policy goal will not contravene s 92. (tick) In this case the policy goal as states in the facts, is to protect TAS status as a ‘fruit fly free’ state. This is a non-protectionist goal. 11 (4) will be invalid unless the state can show that the law is appropriate and adapted to achieving the legitimate, non-protectionist policy goal.

Were there other means of achieving this policy goal?

Janice could argue that the authority could in TAS charge for them to inspect the fruit from other states. However, would do this within TAS and flies could have been carried in by the fruit prior to inspection and then spread. Therefore raising price to stop retailers buying fruit which could contain fruit flies to deter them, is proportional to the aim of keeping TAS fruit fly free. (tick) Furthermore, an individual right claim will fail. The claim has to be based on showing that interstate competitors as a class are being discriminated against. Firstly, other states do have the certification process. Furthermore, analogous to Betfair no. 2, Janice could pay a lower fee if she decided not to specialise in exotic fruit or even buy from NSW or SA. (Yes, her commercial choice) In Betfair No.2, betfair’s different business model was a commercial choice, (tick) which they hadn’t invested heavily in. Therefore could change their model and pay less of a fee. This is not dissimilar to Janice, who could sell locally grown fruit instead. (tick)

Therefore, Janice will have to change where she get her fruit as it is unlikely this will contravene s 92, as it is proportionate to a legitimate non-protectionist goal. Good. I agree with conclusion.

(c) Assuming state regulation for littering is valid due to plenary power. (tick)

Limitation: Martina could argue state law limited by implied freedom of communication. (tick)

Implied freedom of pol com is necessarily implied from s 7, 24, 64 and 128. (tick) of the constitution (Lange). Test established in Lange and refined in Coleman affirmed in Wotton. Two step test, is there a burden (limb 1) (tick) and is it proportionate to legitimate object (limb 2). Due to recent decision of McCloy under limb 2, ask a series of cumulative questions to decide.

Firstly, is this political communication?

According to Levy silent protests are forms of communication. (tick) Communication was connected to political matters, a state law. (tick) Therefore political communication.

Limb 1 - is there a burden?

Regulation prevented Martina from dropping oranges on the ground which was a burden against protesting. In Levy stopping protesting was found to be a burden. Good

Limb 2 - Law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with system of gov prescribed by constitution. (tick)

(a) Does the law serve a legitimate end/purpose?

The purpose of the litter regulation, is to stop littering in order to keep streets clean which is either for public or for environment reasons. Both of which are legit purposes. (tick)

(b) Suitable to achieve legit purpose?

Whether the law is suitable requires an assessment of whether there is any rational connection between the laws and legitimate purpose. (tick) Preventing rubbish from being dropped on the floor is rationally connected to keeping street clean for public and environmental reasons. (tick)

(c) Law reasonably necessary? (d) Adequate balance between burden on political communication and legit purpose?

Firstly there are many alternatives to this act. For instance, rather than blanket ban, could be ok if you picked it up after. (tick) This would be practical as if someone is seen littering they can be asked to pick it up. If they walk away then they are find. The balancing will only really become important when burden is substantial (Tajour). In this case, it is unlikely that the law will be found to be reasonably necessary to achieve purpose.

If it is a blanket ban yes it may not be

(tick) Yes, well done you’ve shown you understand the process of limb 2 well

Therefore likely law will be invalid and Martha can challenge on the basis of the implied freedom of pol com.

A very well argued, balanced paper demonstrating very, very good handle on issues and excellent application of present facts to the law.

Part 2- Mark 80

Question 1

Throughout the existence of the HC, judges have exhibited vastly differing conceptions of federalism and responsible representative government. The conceptions range from the broad interpretation of the constitution and centralisation, to a more narrow conception (tick) of reserved powers. The development of necessarily implied limitations provide an analysis of these conceptions and the importance certain judges place on responsible and representative government. (tick)

The early courts conception of federalism was a strong belief in the prominence of the states and that the judiciary held a strong role to protect federalism. Griffith, Barton and O’Connor in particular perceived the states to hold a central role in federalism. Seen through the establishment of both the doctrine of intergovernmental immunities and the reserved powers doctrine. (tick) In 1906 the majority in Huddart Parker held Cth law to be invalid based on Reserved powers doctrine as they believed the distinction between inter state trade and intra state trade couldn’t be undermined as that would take power from states. Highlighting the narrow conception of federalism prior to 1920.

The 1920 Engineers case highlights different conceptions of federalism between the justices. The court, Knox, Isaacs, Rich, Starke and Higgens, exploded the doctrine of intergovernmental immunities and the reserved powers doctrine. This rejection was done on the basis that the doctrines were grounded on implication formed on vague, individual spirit of the company (tick) thus calling Griffiths reasoning into question. Engineers left a great potential for the expansion of federal power (tick) and opened up the court to a more centralised conception of federalism.

The trade and commerce power and the Grants power show two different conceptions of federalism. The jurisprudence around these heads of power have lest the Cth with much broader power then initially. The Second uniform tax rules that s 96 permitted conditional grants allowing cth (tick) to tempt states into doing what the Cth wants in regards to areas of power that vested in the states. Regarding, trade and commerce the court has to an extent, managed to define a distinction between intra state and inter state trade in order to protect states. (tick) However in a globalised world this distinction is becoming blurred and there are arguments for the centralisation of trade and commerce which provides a compelling argument for a broad conception of federalism. (tick)

EAP and Defence have tended to allow for expansion of cth power however some judges have strongly disagreed, In Koowarta, Gibbs believed that a broad view of the EAP would render the “division of sovereign legislative authority which is the essence of federalism” meaningless. However Murphy + Stephens disagreed, saying that in order to participate in a globalised world need to have strong centralised government. (tick) This need is also discussed in cases regarding defence. As many believe federalism to be inefficient in war time Crennan and Gummow, in Thomas v Mowbray put forth a compelling conception saying that regarding the defence power there should be no limitation on cth power. (tick) Therefore power which have international influence provide a compelling argument for a centralised conception of federalism. (tick)

The implied freedom of pol com highlights an interesting conception of responsible government. Mason’s conception of R/R gov lead him to imply the freedom of pol com from the text (7, 24, 64, 128). (tick) However McHugh dissented saying that an implication drawn from the constitution cannot be a free standing principle. However, Mason’s conception was affirmed later in Lange.

Through an analysis of the HC’s rulings in cases regarding an interpretation of constitutional principles many different conceptions of federalism and R/R gov are seen. However the most compelling of these are the ones that take into account modernisation. The concept of centralisation of government tends to fit better in the context of a globalised world. Furthermore, implied FPC, protects individuals in a way not possible in early stages of the HC. (tick)

This was an excellent attempt at the question. Well substantiated. Good use of cases and very respectable attempt of constructing an argument. Well Done