

Chapter 1 : Studies in Australian Constitutional Law

THE CONSTITUTION OF THE COMMONWEALTH AND THE COMMON LAW – “The Prerogative Powers of the Crown” The relation of the High Court to the Common Law in connection with Appeals from the Courts of the States”.

Each student will have the opportunity to attend six seminars over the course of the semester. Students will be assessed for the participation in all but the first seminar, and their performance in their best four seminars will be used for their participation mark. Students will only be marked for participating in the seminar in which they are enrolled. Students will not be allowed to attend alternative seminars except in exceptional circumstances with the prior approval of the course co-ordinator. If a student will have difficulty regularly attending the seminar in which they are enrolled, they should change their enrolment or contact the course co-ordinator as soon as possible. This assignment includes a peer review exercise. Students must complete this exercise in order to receive any marks for this assignment. Details will be included with the assignment instructions, but the basic outline of the exercise is: Monday, Week 3 via MyUni A draft must be submitted via MyUni for the peer review exercise by 5pm, Friday, first week of the mid-semester break. The interim assignment will consist of a problem question and short answer question, similar to the questions to be set in the exam. The assignment will assess the material covered in the first four weeks of lectures. The assignment will be assessed against the following criteria: This means they must prepare for class by completing the readings and attempting the seminar questions, contribute in small and large group discussions and listen attentively. Seminar leaders are responsible for monitoring and assessing attendance and participation. In order to receive credit for their participation, students must attend the seminar in which they are enrolled. Class participation will be assessed against the following criteria: The exam will be assessed on the following criteria: Submission Interim Assignment The assignment is to be submitted in electronic form only. Detailed instructions on how to submit assignments will be provided in the assignment information. The peer review component of the assignment will be conducted in electronic form. Detailed instructions will be provided in the assignment information. The margins of the paper right, left, top and bottom must be no less than 2. The assignment must be written in prose style using complete sentences, adhere to grammatical rules, and use correct spelling. Extensions Requests for extensions must be made electronically according to law school policy. Extensions will be granted only for unexpected illness, hardship or on compassionate grounds in accordance with University Policy. Work commitments, travel, holidays or sporting engagements are not unexpected circumstances. Word limit penalties The word limit is 2,000 words. Word limits include all words in the text, in headings, and in quotations, but exclude citations in footnotes. Any separate cover page, table of contents, bibliography or list of sources is excluded from the word limit. If the word limit is misstated, this may be regarded as academic dishonesty. Course Grading Grades for your performance in this course will be awarded in accordance with the following scheme: M10 Coursework Mark Scheme.

Chapter 2 : Studies in Australian constitutional law

Australian constitutional law is the area of the law of Australia relating to the interpretation and application of the Constitution of Australia. Several major doctrines of Australian constitutional law have developed.

Reserved State powers Prior to the " reserved State powers " doctrine and "implied inter-governmental immunities" were used to preserve state power. Reserved state powers holds that the Constitution should be read in a restrictive way so as to preserve as much autonomy as possible for the States. As a result, the constitution is no longer read in a way which attempts to preserve the power of the states. For example, Section 109, regarding inconsistency between Commonwealth and State laws, was broadly interpreted. Commonwealth law prevails not only where inconsistent obligations are imposed, but where Commonwealth legislation evinces an intention to "cover the field" by being the whole law on a particular subject. As long as it can be "fairly characterized" as a law with respect to an enumerated power, it is irrelevant that it could also be categorised as a law regarding some other subject matter. The Constitution does not provide the Commonwealth Parliament with any power to control the environment or its use. Nonetheless, a very broad-ranging environmental protection Act could be passed relying on a combination of powers such as interstate and international trade, corporations, taxation, foreign affairs and so on. Particularly in the last two decades, many Acts of very wide-ranging effect have been passed on just these bases, in fields as diverse as environment protection, privacy, and anti-discrimination, fields in which the Commonwealth has no direct power. Since one of the main reasons for Federation was to create a common market, inevitably authority over these taxes was vested exclusively in the Commonwealth Parliament section 109. It was acknowledged that this would create a situation where the Commonwealth would raise much more money than it could spend, whereas the States, being still responsible for most areas of law and of social infrastructure, would need to spend much more money than they could raise the problem now known as " vertical fiscal imbalance ". Accordingly, section 96 of the Constitution provides that the Commonwealth Parliament "may grant financial assistance to any State on such terms and conditions as it thinks fit". One result of this has been that the Commonwealth has been able to make grants to the States on terms so specific as to amount to the virtual takeover of particular fields of competence. For instance, although the Constitution gives the Commonwealth no express power over education, by means of "tied grants" it has in fact become paramount in the field of tertiary education. Although any state has the option to refuse a grant, the consequences of doing so make this unattractive. Similarly, the Commonwealth has become dominant in the field of public hospitals, and a major player in the field of roads and other major infrastructure. The Commonwealth has also come to monopolise income tax. Once the advantages of income tax were recognised, both the Commonwealth and the States levied income taxes. However, during World War II, the Commonwealth government decided to take over the collection of income taxes and return some proceeds to the States as grants. The Commonwealth passed legislation to levy income tax at a nationwide rate similar to the previous combination of Commonwealth tax and the various state taxes. Separate legislation then granted section 96 monetary grants to states if the State did not levy income taxes. In practice, it would be difficult for States to continue taxing. This arrangement was twice challenged by the States in the High Court and twice upheld. The High Court has long stated the definition in terms such as "an inland tax on a step in production, manufacture, sale or distribution of goods". However, it does not include a mere fee for a licence to carry on a particular business or profession. Accordingly, the States had for a long time levied, with the compliance of the High Court, "business franchise fees" on retailers of products, particularly liquor and tobacco products. Although these seem similar to excise duties, a series of High Court precedents had effectively "quarantined" such fees from disallowance in the areas of liquor retailing, tobacco retailing, and petrol distribution. In 1967, by a bare majority, the High Court decided that this area of doctrinal quarantine was incoherent with the rest of the law relating to excise duties and removed it. In 1976, the Commonwealth Parliament passed legislation introducing a new broad-based Federal indirect tax, the Goods and Services Tax; the revenue from this tax was to go entirely to the States and Territories in exchange for abolishing a range of other indirect taxes. By this stage, the financial dependence

of the States on the Commonwealth had become almost complete. New areas of competence[edit] The development of various technologies during the twentieth century also added to the power of the centre. Section 51 v of the Australian Constitution gives the Commonwealth Parliament power over "postal, telegraphic, telephonic, and other like services". With little controversy, this power now covers radio, television, satellite, cable, and optic fibre technologies. A greater struggle occurred over Commonwealth legislation in the field of aviation. Commonwealth regulation is based on the interstate and international trade and commerce power. Prima facie, it does not cover intrastate aviation. However, a purely intrastate aviation industry is no longer economically feasible and separate systems of state regulation pose safety concerns. As a result, the High Court held that all aviation has an interstate character, placing it within Commonwealth legislative power. In a referendum was submitted to the people giving the Commonwealth power over aviation, and that the referendum was rejected by the people. The rejection of a power by the people has never persuaded the Court that the Commonwealth should not exercise the power. Another example concerns intellectual property. Although the Constitution gave the Commonwealth Parliament power over "copyrights, patents of inventions and designs, and trade marks", the enormous growth of electronic media content has given this power a much wider scope than could possibly have been envisaged at Federation. New powers[edit] The Commonwealth power has been extended by four constitutional amendments. An amendment in and an amendment in allowed the Commonwealth to take over and manage state debts. An amendment passed in gave the Commonwealth power over Aboriginal affairs, which has had a significant effect particularly in the pastoral and central regions of Australia. An amendment passed in gave the Commonwealth power to provide a wide range of social services. This included unemployment and sickness benefits, maternity allowances, child endowment, and medical and dental services. Apart from defence, social services is the largest area of Commonwealth expenditure. Along with the grants power, it is the basis for the Medicare scheme of universal health insurance. The High Court decided that the corporations power was not broad enough to cover incorporation itself. The external affairs power[edit] Main article: Section 51 xxix of the Australian Constitution The Constitution gives the Commonwealth Parliament power over "external affairs". As Australia gained independence and international personality, so did the significance of this power. In the case of *Tasmanian Dams Case* , [26] the High Court has upheld Commonwealth legislation forbidding the Tasmanian government from proceeding with a dam that would have submerged an area of Tasmanian government-owned land that had been declared a World Heritage Area under the World Heritage Convention to which Australia is a party. This followed an adverse report by the Human Rights Committee on Tasmanian provisions. Rather than challenge the resulting Commonwealth Human Rights Sexual Conduct Act of , the Tasmanian Parliament repealed the legislation in question. The corporations power[edit] Main article: Section 51 xx of the Australian Constitution The corporations power allows the Commonwealth to legislate on "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth". Although the width of the expression "trading or financial corporations" has never been authoritatively settled, it appears that it covers at least all commercial enterprises carried out under the corporate form. The new legislation applies to all employees of a "constitutional corporation. The legislation also applies to employees of the Commonwealth and its agencies, and some others. On 14 November , the High Court by a 5-to-2 majority upheld the validity of the WorkChoices legislation [33] against all the challenges that had been made to it in an action brought by each of the States and mainland Territories, as well as certain trade unions. Accordingly, the judgment suggests that, henceforth, it may be a sufficient basis of validity that Federal legislation be specifically addressed to constitutional corporations "A constitutional corporation must If this is correct, then given the preponderant role of corporations in the modern economy, the possibility exists for substantial Federal control of the greater part of the economy, with little if any regard to the traditional constitutional "heads of power". Protection of rights[edit] No Bill of Rights[edit] The Constitution contains no comprehensive set of human rights guarantees. The Constitution does contain protection for several specific rights. On the other hand, since the s the High Court has been developing a jurisprudence of rights said to be implied in the text and structure of the Constitution. In addition, a constitutional requirement that "trade, commerce, and intercourse among the States The reference to "intercourse", on the other hand, has

always been understood as guaranteeing a right to movement across State boundaries. Although express protections for human and civil rights in the Constitution are scant, and have mostly been read down, some protections have been created by the High Court through its jurisprudence on the separation of powers and through its findings of rights implied by the text and structure of the constitutional document. A referendum proposal to amend the Constitution to clarify these rights and to make them good also against the States was defeated in 1999. As will be seen, guaranteed access to the High Court can itself amount to an important right. And the guarantee of free trade and commerce was for a time interpreted as something like an individual right.

Freedom of religion[edit] Main article: Section of the Constitution of Australia The Constitution states that the Commonwealth "shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth" section 116. In determining what is considered a religion, the High Court has adopted a broad approach; demonstrating an unwillingness to create a limiting definition. The High Court, in rejecting a challenge to Federal funding of church schools, [37] seemed to take the view that nothing less than an explicit establishment of a State Church as the official religion of the Commonwealth would come within the terms of the prohibition. Section 116 also protects the right of a person to have no religion by prohibiting the Commonwealth from "imposing any religious observance".

Section 51 xxxi of the Constitution of Australia The Constitution gives the Commonwealth power "with respect to The differences between acquisition and taking, and between terms and compensation, combined with the fact that the Australian provision is expressed as a positive grant of power coupled with a limitation, have been read so as to weaken the Australian guarantee relative to the American one. The use of the term "acquisition" has been interpreted so as to require that the Commonwealth or some other party for a Commonwealth purpose actually acquire possessory or proprietary rights over the property in question, or at least some benefit: This narrow view is confirmed in the majority judgement of *Kingswell v the Queen*. However, the Constitution grants the Court some original jurisdiction directly, without the possibility of Parliamentary limitation section 76. This includes matters in which "a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth". In recent years, the Parliament has all but eliminated the possibility of appeal against many decisions in the area of migration , especially in regard to applications for refugee status. However, since the Parliament is not constitutionally able to limit or abolish access to the High Court for the purpose of applying for one of these "constitutional writs", such applications have become a major means of challenging migration decisions.

Section 92 of the Constitution of Australia The constitutional requirement that "trade, commerce, and intercourse amongst the States But in relation to "intercourse" i. **Freedom of political communication**[edit] Two cases decided in 1971 established a new implied right to freedom of communication on political matters. The first case, *Nationwide News Pty Ltd v Wills* , concerned a Federal provision criminalising the "bringing into disrepute" of members of an industrial relations tribunal, and a prosecution under that provision of a person who had published a newspaper article repeatedly describing such members as "corrupt" and "compliant". That being so, freedom of public discussion of political and economic matters is essential to allow the people to make their political judgments so as to exercise their right to vote effectively. Furthermore, since "public affairs and political discussion are indivisible", it is impossible to limit this necessary freedom to purely Federal issues: Therefore, there is implied in the Constitution a guarantee of freedom of communication on all political matters. In the latter case, some strong dissents to the effect that limiting expenditure on political advertising in the electronic media might actually enhance representative democracy did not prevail. Both these cases concerned the validity of Federal legislation. But two years later, the Court extended the implied guarantee into the area of private law, by holding that it also applied to limit the statutory and common law of defamation. A former chairman of a Commonwealth Parliamentary Committee on Migration claimed to have been defamed by a newspaper which had published a letter accusing him of bias, in his official capacity, towards people of his own ethnic background. However the Court accepted a "constitutional defence" which was said by three Justices to operate when otherwise defamatory statements concerning the fitness of a public official to hold office were published without knowledge of, or recklessness as to, their falsity, and when publication was reasonable in

the circumstances. This case, however, and a series of following cases, failed to produce a clear statement of the operative principle which commanded the support of a majority of the Court.

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Chapter 9 : Full text of "Studies in Australian Constitutional Law"

He noted that Australian courts regularly look to the U.S. in matters of constitutional law; Australia, like the U.S., has a common law system and the American model was "a significant point of reference for the Australian Constitution."