AUSTRALIAN CONSTITUTIONAL LAW 2012

The marker was Anna Olijnyk. Comments, ticks, etc by the marker are shown within square brackets.

Q1 43/50 = 86%; Q2 34/40 = 85%; Q3 9/10 = 90% => Total = 86%

Q1.1) The Flinders Development Authority (FDA) wants their area to not be subject to a World Heritage Value (WHV) listing so they are not impeded. They can do this by seeing whether s 12 is invalid due to being outside a head of power, and if it is within a head of power, if there are any restraints on Commonwealth legislative power.[✓]

Head of Power: s 51(xxix)[✓]

There is a characterization process per *Re Dingjan* to ascertain if a law fits within a head of power. To do this the law is characterized by the rights and liabilities it imposes and whether it is with respect to a head of power. For subject matter powers such as s 51(xx), this is by a test of "sufficient connection". The type of law here is not linked to corporations. For purpose aspects of powers such as implementing treaties under s 51(xxix), the legislation has to be 'capable of being reasonably considered to be appropriate and adapted to implementing the treaty'.[✓] Under *Tasmanian Dams*, any treaty obligation can be implemented as long as it is bona fide, although this is a very weak defence (Gibbs CJ in *Koowarta v Bjelke-Petersen*). There is no hint of bad faith here. The treaty provision(s) relied on also need to be defined with sufficient specificity,[✓] so that there are not multiple contradictory ways of implementing it (*IR Act Case*) and it can be in 'broad general terms' (*IR Act Case* 523-4) as long as it 'directs the general course' of implementation (*IR Act Case*).

S 12(a) is valid under As 1, 2, 3 as they define the relevant things to be listed and A3 obliges nations to categorise the cultural and natural areas. It is specific enough to implement, as long as following the definition will not give contradictory answers, as Australia is using the UN definition. S 12(a) is reasonably appropriate and adapted as it conforms with the treaty; there is no need for complete implementation as long as it is not 'substantially inconsistent' (*IR Act Case*); there is no inconsistency. So s 12(a) is valid under s 51(xxix).[✓]

S 12(b)

For s 12(b), it is arguably not appropriate and adapted as it is inconsistent with the treaty obligations 1, 2, 3, that do not have the restriction requiring minimum tourism.[✓] In the *IR Act Case*, one provision about dismissal law was struck down for going substantially further than the treaty and this situation is similar here. Arguably as 10,000 in five years is not much,[✓] it is

perhaps not substantial inconsistency, and would not affect the status of many, if any sites. If so, it would be probably valid, relying on As 1, 2, 3.

Articles 4 and 5 are not relevant to this extra criteria as they are mostly administrative support. In any case, regardless of whether it is valid, it would not help FDA, as any invalidity would make it easier for the government to make a WHV listing.

S 12(c)

For s 12(c), part (i) is appropriate and adapted as it follows the As 1, 2 , 3[✓] and these are specific enough, per above (*IR Act Case*), There are no inconsistency problems.

S 12(c)(ii) is not appropriate and adapted as it raises a similar issue to s 12(b) and the dismissal provision[✓] in the *IR Act Case*. [good analogy] The reasoning is the same, and unlike the visitor numbers, which would appear to have little substantive effect, having exclusions based on economic loss, such as proposed by the Tasmanian Government in *Tasmanian Dams*, would lead to lots of eligible places not being classified as WHV, putting Australia's scheme substantially inconsistent to the treaty (*IR Act Case*). So s 12(c)(ii) is invalid.

So challenging the validity of the law as outside Commonwealth power, would likely have s 12(c)(ii) invalidated and maybe s 12(b) but these would only make it more likely that the WHC would be compelled to impede the FDA with a WHV listing.[✓]

Implied Immunities

FDA will want to have immunity from s 12 so that they won't be burdened.

Firstly the Commonwealth has not indicated whether it intends to bind the State Crown. There is a presumption against in *Bradley v Broken Hill* but this can be displaced by 'necessary implication' (*Bombay v Municipal Council*). As Australia would be in breach of international obligations if the treaty was not complied with and there is a statutory presumption (*Polites v Commonwealth*) that parliament will legislate in accordance with international obligations, it can be necessarily implied that they would intend to bind the crowns, otherwise government bodies could cause violations of international law. Using *Bropho v WA*, which emphasizes legislative intent we conclude an intent to bind.

Secondly the FDA has to be part of the crown. The government corporations can be part of the crown (*Tasmanian Dams, Henderson*) [✓] and here the FDA has little income, < 0.1% of budget and is very likely to be closely controlled by and dependent on the government and thus part of the crown.

This is determined by the test in *Austin* [✓] where a general Commonwealth law cannot curtail the capacity of a state to function as a government. This is a very high bar to satisfy, given that an analogous situation in *Tasmanian Dams* [✓] was held to bind the state. In *Tasmanian Dams*, a

whole range of economic activity was banned on 11% of the territory, but here the only burden on the government is a 2% tax [Plus restriction on use of land], so it cannot be held that because there is a decrease in the ability of a government that its inherent capacity is damaged.

So the implied immunities doctrine won't help FDA.

There are no s 92 issues here in s 12, so in summary, some provisions of s 12 may have to be severed, but this would make it harder for FDA.

Q1.2) For FDA to be compelled s 13 must be valid under some head of power. If it is a tax under s 51(ii) it will be valid as the tax does not discriminate on an intra/interstate basis on its face, it would be fine [Is it a tax?]. A licence fee is not a tax (*Air Caledonie*). The question is whether the licence fee is actually a tax, per the *Ha* criteria [an excise case]. The proximity and length of the evaluation period is distant, and long, so it is closer to the *Dennis Hotels* licence (6%, result still valid), also the rate appears to be very low, 2%, or alternatively on profits rather than sales, so many bodies will pay very little. So it appears not to be a revenue raising scheme, although there seems to be no explicit regulation given, as revenue raising is the central factor in a tax.

If it is not a tax, it must fit under some other head of power. Using s 51(xxix) does not appear viable because there is nothing specific [? Licensing use of WH areas relates to the treaty obligations] enough in the treaty. A5.4 talks about financial measures but this is not specific enough (*IR Act Case*) due to the money being raisable by either taxes or laissez faire privatization. Defence power is also useless. The corporations power would not be relevant here [✓] unless it was read down to only apply to s 51(xx) corporations in which case it would be valid per Gaudron J in *Workchoices* as the licence fee regulates the activities and business of a constitutional corporation. Then if it is valid, under the read down version, s 13 would not apply to FDA per the analysis in Q1.3, not enough trading activity.

In the case that s 13 is valid and applies to FDA (very unlikely) they will want to have it invalidated under the implied immunities doctrine [✓]. Applying *Austin* again per Q1.1 [✓], FDA is in the crown, but the second limb would not fail [discriminatory], in analogy to the *Pay Roll Tax case* [good analogy], where a 2.5% tax was not severe enough to curtail the capacity of the state, here the 2% tax will not be enough.

S 109 is useless for FDA as it only kills off state legislation. S 90 is irrelevant as it does not limit the commonwealth, and there is no discrimination indicated (s 92). Thus it is likely that FDA will not need a licence irrespective of whether a read-down version of s 13 is valid.

Q1.3) This is about the implied immunities doctrine, and whether s 14 binds the state crown if it is valid, and applies to the FDA. Firstly s 14 must be within some head of power. Using *Re Dingjan* characterisation and Gaudron J quoted in *Workchoices* [✓], the scope of s 51(xx) extends to imposing regulations, regulating the activities of a corporation and those whose conduct is capable of affecting it. This would include regulating employees, per the laws in

Workchoices. Then, s 51(xx) does allow constitutional corporations to employ an environmental officer with specified work obligations (*Workchoices*) [✓].

However, FDA only has to comply if it is a s 51(xx) corporation. It is clearly not financial or foreign, and needs to have 'substantial trading activities' [✓] (*Tasmanian Dams, Adamson's Case*) in order to be a trading corporation. *Tasmanian Dams* had a much larger proportion [✓] of trade and absolute value, whereas here it is miniscule (< 0.1%, $30,000) [✓]. It fits Mason J's comment in *Tasmanian Dams* [Adamson's] as being 'so slight and so incidental' to the primary purpose that it is not a trading corporation. Thus it is not a s 51(xx) corporation and need not comply with s 14 [✓].

An alternative grounds for not complying is the implied immunities doctrine. Per above, there is an intent to bind the crown and FDA is part of the crown. Using *Austin*, and comparing the application in *Re AEU* [✓], it was held that the Commonwealth cannot regulate the terms and conditions of the higher level [not only those] state government employees such as ministerial staffers. Here although FDA is not directly in the ministry, it is a large government-run entity and the environmental officer has a lot of policy power [this is a misapplication of AEU], similar to a ministerial adviser, so the FDA would not be bound under s 14 in analogy to *Re AEU*.

Q2) We assume the federal law is valid entirely.

ZR does not want to pay the mining licence so it would try and get in invalidated under either ss 90, 92 or inoperative under s 109.

A state cannot levy excise [✓], which is a tax on goods before the point of consumption [✓], and is not a licence fee (Dixon J in *Parton v Milk Board*) [Is it a tax?]. It is clearly not a consumption tax. It is on goods (*Matthews v Chicory Board*) as there is an apparently proportional correlation in the cost to the products produced. Even though it is on how much was actually transported, the mine would probably not leave ore lying there so there is a close correlation between transported and mined quantities, which is close enough.

If it is a licence fee it is not an excise and legal under the state's plenary power (s 5 SA Constitution). Using the *Ha* formula, the proximity [Immediately proximate] and length of the evaluation period is the same as in *Dennis Hotels*, which was a licence (result of *Dennis Hotels* still valid) then the short, and proximate period in Ha (a tax). The rate of the fee is very low $10, given the money that can be made from one tonne, so it is looking more like a licence than a revenue, despite a very skimpy regulatory scheme [✓], it only gives general investment at large, for a purported licence, a tax revolves around revenue raising (*Ha*), so likely this is a licence fee.

Therefore, the mining licence does not violate s 90.

Does it violate s 92?

S 92 protects free trade, and there is a problem here as there is a discriminatory burden (*Cole v Whitfield*) [✓] even though the law is prima facie non discriminatory, it is in effect [✓], as state companies have access to close mines where they are exempted from the fee, whereas interstate companies cannot access the close mines (presumably there are no stocks). This kind of discrimination is only permissible if there is a regulatory purpose (*Cole*) otherwise it is invalid as protectionist. If there is a valid purpose, and the court is very deferential (*Castlemaine Tooheys*), it must be 'reasonably appropriate and adapted' and the arguably stricter 'reasonably necessary' (*Betfair 1*) [✓] to achieve a non-protectionist end. The only possible one is that mines next to large port cities have less carbon emissions from transport [✓], but then this has to be proportionate, for example by using a pro rata tax. Arguably, given the existence of a carbon tax, it is just adding a competitive disadvantage to interstate traders (*Bath v Alston Holdings*). We would also need to know more information about the environmental costs (per *Castlemaines*), but this scheme looks suspicious [✓] given that only SA miners are benefited, and is not likely to be reasonably necessary. So it is likely a violation of s 92.

S 109

Even if the law was valid under state plenary power, we would need to check s 109 inconsistency [✓]. If there is inconsistency with s 13 of the Commonwealth Act, the SA provisions ss 2, 3, 4, 5 become inoperative (*Carter v Egg Pulp*) and ZR is free.

It is possible to obey both laws (*R v Licensing Court*) [✓]. For the conferral of rights test (*Kakariki*) there is no problem as the Commonwealth law imposes an obligation, and there is no implied or explicit intent that the state cannot burden miners some more. Here this overlaps with the covering the field test.

Following Isaacs J's process in *Clyde Engineering* the field of the Commonwealth law is World heritage sites. Arguably, there is an intention to cover the field as international schemes [✓] and treaties need the central government to administer it uniformly and unilaterally, else it will be easy to get confusion and violation of treaty obligations, similar to ICERD is *Viskauskas v Niland* [✓]. On the contrary, there is no real need to exclude extra taxes [✓], in this case, so there is no need to cover the field if the states can only add more obligations that would not detract from treaty obligations. However, as a uniform scheme is important, it is likely implied, and so this would result in the state field of mining licences, where they overlap with heritage protection to be invalid.

Thus the mining licence is invalid under s 109, if not already under s 92, so ZR can avoid it.

Q3) Wang Resources (WR) will be subject to s15 if s 15 is valid under a head of power and if WR is a s 51(xx) corporation and if the law does not violate the implied freedom of political communication.

Firstly, using the characterisation process in *Re Dingjan* this will be a law with respect to s 51(xx) is 'no one' [not likely] is read as 'persons' and read done to be only 'constitutional corporations'. S 51(xxix) could not be [This would be a better option] used here as there is nothing that is specific enough to support the implementation of s 15. A 5.4 about 'appropriate legal … administrative … reasons' to further heritage causes, is not specific enough and could be implemented in contradictory ways (*IR Act Case*) as awareness and concern for green ideas could be promoted by allowing free rational discussion, or forcing anti-greens to remain silent in analogy with full employment in the *IR Act Case*.

So using s 51(xx) and reading down s 15, to mean s 51 corporations, and again applying Gaudron J's quote from *Workchoices*, s 15 regulates the activities of a s 51(xx) corporation and imposes obligations on it, so it is valid under s 51(xx).

WR is a s 51(xx) corporation as it was seemingly formed outside Australia (*Workchoices*) and is a foreign corporation. If it was not, and the assumption was wrong, then it would be a trading corporation, in an analogous way to the process in Q1.3 as this time it is either selling a lot of minerals (substantial activities in *Adamson*). So WR would be subject to s 15, unless it is invalid for violating the freedom on political communication [✓], as defined by the *Lange* test.

Here the law does effectively burden freedom of communication about political or government matters [✓], as the WHC is a government authority and cannot be criticized at all, and this occurs in the law's terms and effect. So the first limb is satisfied.

For the second limb, the legitimate end is likely to be something similar to the analogous case in *Nationwide News v Wills* [✓][good analogy], so that people cannot insult and intimidate the WHC and influence its decisions. This is a legitimate end, but arguably it is not compatible with the maintenance of representative and responsible government when it directly burdens political communication. This especially true as Mason CJ noted this in the *ACTV* case, that it will be very difficult to allow the direct curtailment of speech [✓], in comparison to modes of speech. In *ACTV*, a mode restriction was struck down, and s 15 is even stronger [✓✓] than the invalid law in *Nationwide News* as it also covers 'unreasonable criticism'. Thus s 15 is in no way reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of representative and responsible government. For example, only bans intimidatory criticism may be more appropriate.

Thus s 15 is likely invalid [✓].

[While you have not always picked up on the most relevant aspects of the problem, all of the analysis is very logical most of the issues have been spotted and this paper demonstrates a strong understanding of the material + impressive knowledge of cases. Well done.]