PRINCIPLES OF PUBLIC LAW SEMESTER 2 2011 ANSWER

QUESTION 1

I have been asked to advise A on his options for challenging the appointment of Justices Smit, Jones and White as Planking Commissioners.

In accordance with the second limb of the *Boilermakers' Case*, federal courts cannot be vested with any non-judicial power. However, certain exceptions have been made, including that of conferring executive or administrative power upon federal judges in their personal capacity. Such appointments are considered 'persona designata' and are not precluded by the Constitution (*Drake v Minister for Immigration*).

Several conditions must be satisfied for such appointments to be valid.

Firstly, the power must be vested by statute upon the judge themselves, rather than the Court. (*Hilton v Wells*) In the PLC Act, s8 specifically states that the judges will act in their personal capacity. This meets the condition of personal designation.

Secondly, the judge must consent to the designation (*Grollo v Palmer*). S8 of the PLC Act requires that the appointment as Commissioners be subject to the Judges' consent. This condition is no barrier to the designation.

Grollo v Palmer also states that functions given persona designate to judges must not be incompatible with their judicial function. It considers three criteria in testing this:

1. **Breadth of commitment**

   If the commitment involved from the statutory power would interfere with the time and ability of the judge to act judicially then it is incompatible. Here, given that there are only 3 justices of the Federal Court being appointed, and that they have two months to prepare their report for the Attorney General, it is unlikely that the commitment will be incompatible.

2. **Compromise of integrity**

   If the judges will no longer be able to act as independent and impartial authorities in their role, then the appointment will be invalid. Here, given that there is no direction from the

Attorney General (and presumable the rest of the Executive), and that making a report into the legislative possibilities for controlling planking will probably not affect their ability to hear cases without bias, it is unlikely this condition will be breached.

3. **Public confidence in integrity diminished**

   If the public might consider the appointed judges to be acting as advisers or agents of the executive, then this would interfere with their trust in the integrity of the judiciary. *Wilson* gives several sub-tests for whether this condition has been breached:

   a. ***Is the function closely connected with other branches of government?***

      In this case, the Justices are required to make a recommendation to the Attorney General on the executive and legislative action that should be taken on planking. This is a close connection with the other branches of government and could potentially interfere with confidence in the judiciary, requiring the consideration of the other two *Wilson* tests.

   b. ***Is the role required to be performed independently of direction from the other branches of government?***

      The PLC Act specifically requires that the Justices act independently of direction. This means that on the condition of the third test being satisfied, the designation is valid.

   c. ***Are the judges holding a political, rather than legal, discretion?***

      Wilson considered that justices having to balance two opposing parties' interests in a designated role rendered them as political agents rather than independent advisers. It is possible, given the ultimate goal of the PLC Act is to receive their advice on how other brahces of government can suppress planking, that the Planking Legislation Commissioners will be holding a political discretion and be forced to assist the executive and legislature in achieving their desired policy.

It would be on this ground that A would have the greatest chance of succeeding if he were to take legal action to invalidate the appointment of the Justices as Planking Legislation Commissioners.

QUESTION 2

I have been asked to advise B on how he could challenge the seizure of his camera pursuant to the P(CS) Act.

Since this particular case involves close operation of the executive (the Commissioner of Police) and judiciary (the Supreme Court), it is possible that the seizure of the camera, and the ex parte hearing involved violated the principles of *Kable v DPP (NSW)* as restated in *NAALAS v Bradley* - that courts must not act in a manner incompatible with the independent and impartial exercise of federal judicial power.

In this scenario, upon the Police Commissioner's application, the Court may still have discretion as to whether the equipment should be confiscated. This means that the Court is not required to make an order of confiscation upon the Police Commissioner's application, giving them more discretion in the use of judicial power (*SA v Totani*). It still appears that they can act independently of advice from the executive.

However, the ex parte nature of the application hearings could lead to a conflict with the required impartiality of the court. In the P(CS) Act s5, the application may be made ex parte if the Police Commissioner is of the opinion that it is necessary to urgently discourage an instance of planking. If the Act required that all hearings were to be held ex parte, then this would be too substantial an intergerence with the independence of the court (*Re Criminal Proceeds Confiscation Act*). However, even though the statute here says the Commissioner of Police may make the hearing ex parte, it could ultimately be at the court's discretion as to whether it is necessary to proceed urgently to discourage a planned instance of planking - as the courts found in *Gypsy Jokers v Commissioner of Police* and *K-Generation* with regards to secret evidence. The validity of the order would ultimately depend on whether the court has an ability to act independently and impartially in

determining whether to allow the Commissioner of Police to make an application ex parte. Assuming that the Court has the ultimate discretion as to whether hearings can be held ex parte, the order for the seizure of B's camera is valid and challenging it would prove unsuccessful. In the event that the Court allows ex parte hearings on only the discretion of the Police Commissioner then he may have grounds to challenge the decision.

In order to challenge the decision on this ground B could not use the South Australian ombudsman, as the work of police cannot be investigated by them.

He could make an application for a merits review to a tribunal or the District Court (Administrative and Disciplinary Division) if the P(CS) Act allowed him to do so. Such a review would not be enforceable.

If this avenue was not available B could apply for a Judicial Review. This is guaranteed for all actions undertaken by the Executive at the state level (*Kirk v Industrial Relations Commission*).

QUESTION 3

I have been asked to advise C on

1. Her options to obtain further information about the Minister's reasons for the decision to refuse her application and
2. Her options to challenge the decision

1. Freedom of information

Author's note: The exam feedback made it very clear that this was not the best way to answer the question - apparently s13 of the AD(JR) Act and s28 of the Administrative Appeals Tribunal Act 1975 (Cth) give C a right to obtain a detailed statement of the reasons for the decision. FOI, in this case, is inferior because it assumes that the communication between the Minister and the Commissioner was a 'document' (eg a letter, not a phone call), and that the communication also contained an explicit statement of the reason for the decision. In an exam with a similar question,

mention both but don't go into as much detail about FOI - the crux of the question is about challenging administrative decisions.

The legislation gives jurisdiction to the Minister for Sport, at the federal level, giving C an opportunity to obtain information - for instance, the consultation between the Commissioner of the AFP and the Minister.

There is a right of access to the consultation if it is a document of an agency or a minister (*Freedom of Information Act (Cth) ss11a,b*), whether created or received by them (*s4*). The consultation would be both created and received by the Minister, granting a right of access subject to any exemptions.

If the document is exempt then C cannot access it. *S37 of the FoI Act* gives an exemption to documents relating to the enforcement of law and protection of public safety. It is possible that the document may fall within this class; however, given that the Minister is satisfied on both conditions to s10(c), it is also possible that the Minister's disregard for C's application comes from another matter. Exempt sections of the consultation could be 'redacted', while the rest of the document could be made available to C.

In the event that the document is not exempt on this basis, it could be conditionally exempt under *s47(c) of the FoI Act*, since it is consultation that has taken place in the course of the deliberative processes of government. This would be made available if it were in the public interest to do so. Factors favouring access in these circumstances include promoting government transparency and other objects of the FoI Act, and allowing C to access information about herself (*s11B(3), FoI Act*). It is irrelevant that the document's authors (the Minister and Commissioner) were of high seniority in their respective agencies (*s11B(4), FoI Act*).

If her request were reject, C could variously seek an internal review or review by the Information Commissioner (*pts VI and VII, FoI Act*). If these did not succeed, she could seek a Review of the Information Commissioner's findings by the AAT (*FoI Act Pt VIIA*) and if that did not succeed she could seek judicial review by the Federal Court.

2. Challenging executive decisions

The most readily available option for C to challenge the Minister for Sport's decision may be to write a letter to her Federal MP. Under the principles of responsible and representative government, her MP may be able to place political pressure on the Minister, particularly if they are not a Government politician. Alternatively she may consult with an NGO, the media, or a lobby group who can otherwise put pressure on the Minister to reverse his decision.

If this fails, she may begin to undertake legal avenues for review of the decision.

No internal review of the decision can be made, as the Minister has no superior in his department.

The Commonwealth ombudsman cannot review a Minister's decision (*s5(2)(a) Ombudsman Act Cth*). They will not assist C in her challenge.

C may seek a merits review of the decision by the AAT. The statute giving discretion to the Minister must explicitly allow review by a Tribunal (*AAT Act s25(1(a)*). S11 of the A-P Act gives this right to review to applicants like C.

The decisions of such tribunals are not enforceable (*Brandy v HREOC*) but will be made 'fresh' with the same discretion of the original decision maker and can consider evidence not available to the original decision maker (*Re Greenham and Minister for Capital Territory*).

If this fails C may seek a judicial review of the Act. If she is a person aggrieved by an administrative decision pursuant to an Act she may seek the review at the Federal Court under the *AD(JR) Act*. If the A-P Act is exempt under Schedule 1 of the legislation, the decision cannot be reviewed. Assuming otherwise, C must find a legal or procedural error with the decision (*AD(JR) Act s 5*). Given that the Minister did not issue an SPP despite C being able to demonstrate both conditions under s 10c of the A-P Act, she could argue that he acted ultra vires, a legal error.

If it were exempt under Schedule 1, then C may seek a review under the *Constitution* (*s75(v)*) in the High Court, or under the *Judiciary Act* at the Federal Court. This requires a jurisdictional error

made by the decisionmaker. The error stated above appears to involve the decisionmaker acting outside his legal power.

C here could only seek a writ - to quash the decision (Certiori), to prevent it being made again (Prohibition), or to mandate that a decision be made (Mandamus). A writ of Mandamus requiring the Minister to issue the SPP may be of assistance to C.

QUESTION 4

The Commonwealth Government has the most power in dealing with international law issues. Through its constitutional jurisdiction, the executive signs and concludes treaties; the legislature implements its obligations, and the judiciary takes international legal concepts into account when developing the common law.

The source of the Commonwealth's power to conclude a treaty is the executive power function under s61 of the *Constitution*. The conclusion of a treaty, via ratification or accession, does not immediately have an impact on our domestic law (*Dietrich v the Queen*). In this way, Australia is a dualist country. The executive makes treaties and conducts international relations.

This power is controlled by the Parliament in that it is their job to change Australian law to make Australia's international law obligations enforceable under domestic law. This is given under the power of the Parliament to legislate for matters regarding 'external affairs' (*Constitution, s51xxix*, as interpreted in *Victoria v Commonwealth (1995)*). After 1996 reforms, any new treaties must be tabled in both Houses of Parliament with a National Interest Analysis before binding action is taken. Additionally, treaties are scrutinised by the Joint Standing Committee on Treaties, and discussed in consultation with the Australian heads of government via the Treaties Council.

However, it is not the legislature alone that is empowered to legally implement Australia's obligations under a treaty. The judiciary may implement our international legal obligations in their development of the common law - it is presumed that when implementing laws, the Parliament does not intent to violate Australia's international legal obligations, so certain principles may arise under

the common law that place international laws into effect. This was the case in *Teoh* which held that the ratification of a treaty provides a legitimate expectation that its principles be considered by the executive. This was removed in SA, however, by the Administrative Decisions (Effect of International Instruments) Act.

It is questionable whether international obligations under treaties can be used to restrain the Constitution. *Kartinyeri* considered a presumption that the Constitution conforms to Australia's international obligations under basic human rights treaties such as the ICCPP and ICESCR. However, *Al Kateb* declared that any reading of the Constitution consistently with international law is 'heretical'.

The Australian Constitution empowers all three branches of the Federal government with an ability to consider international law: the executive makes and breaks treaties with other nations, the legislature formally implements the obligations under those treaties, and the judiciary may attempt to constrain the common law to satisfy our international obligations.

QUESTION 5

The rights of Aboriginal and Torres Strait Islander people are protected under Australian law through four mechanisms: the Australian Constitution, various statutes made by the Federal Parliament under that Constitution, the common law through court decisions, and political means facilitated by Australia's democratic system of government.

Australia's Constitution specifically enables the Federal parliament to create laws for the benefit of particular races (*s51 xxvi*). This has enabled the creation of statutes that protect Australian Indigenous peoples' rights. However, it also allows the legislature to make laws removing benefits to particular races (*Kartinyeri v Cth*), suggesting it does not provide a great extent of protection to the rights of Indigenous peoples.

Some of the statutes created under this power have been to the benefit of Indigenous people. The Native Title Act, for instance, codified entitlements of Indigenous people to native land that they

have held a relationship with. However, it also specifically extinguishes native title on types of land title. The Aboriginal and Torres Strait Island Heritage Protection Act may also assist Indigenous people in protecting their right to use their native land, particularly if it is sacred to their people. However, executive action is still required to make this possible, and the whim of the ruling party may easily lead to exclusion of sacred Indigenous land from Heritage protection, as was done by the Howard Government through their introduction of the Hindmarsh Island Bridge Act. Similarly, the Racial Discrimination Act implements some of Australia's international law obligations to its First Peoples, but can be suspended at the Parliament's will (as has occurred to facilitate the Northern Territory Intervention).

Other statutory means may allow for Aboriginal people and Torres Strait Islanders to appeal government decisions affecting them: for instance, executive tribunals and judicial review. However, decisions affecting Indigenous people may be specifically exempt, and contemporary socio-economic disadvantage among Indigenous peoples may inhibit their access to justice or claims.

Certain protections of Indigenous rights exist under common law: for instance, the recognition of customary laws and punishments. Initiatives like the Victorian Koori Court, which intend to reduce the cultural barriers between Indigenous customs and Australian law, may also make justice and protection more readily available to indigenous people. Courts also hold discretion on whether Australian law recognises their claims, as was the case in *Mabo v Queensland (No 2)*, which recognised native title. However, this requires controversial decisions by courts who may still be restrained by legislation of the Parliament preventing the recognition of such claims.

Political avenues also exist for Indigenous people to lobby against governmental interferences with their rights. The National Congress of Australia's First People and other lobby groups may place political pressure on the Government to consider the rights of our first people. However, their influence is not guaranteed, given that there is no official representation of their views to Parliament.

Constitutionally, the rights of Indigenous people are not well protected. Statutory bodies and procedures may help but are effectively at the whim of the executive. Past common law protections may assist but establishing new ones requires courts to develop the law in an innovative way. Politically there is no guarantee of protection of Indigenous rights.

(Author's note: this portion of the question I wrote in dot points due to lack of time. The question still received an HD mark.)

Additional protections?

- Mandated seats in Parliament for ATSI people (like New Zealand)
- Constitutional recognition ie in preamble
    - Requires referendum
    - May only be symbolic
- Statutory Bill of Rights giving specific protections to Indigenous people
    - Difficulties with actually invalidating legislation under Victorian Charter of Rights
- Reformation of ATSIC - government advisory body w/Aboriginal and TSI elected representatives
    - No guarantee [that] their findings will be considered by govt of day.