Principles of Public Law Exam – Semester 2 2011

Question 1

Issue

A wishes to try and invalidate the appointment of the Justices under the PLC Act. To do so, he can argue that the persona designata appointment of the Justices is invalid.
The issue here is whether the non-judicial function of providing a report to the Executive under s 9 can be validly conferred on a federal court Justice.

The Non-Judicial Power

The justices are serving federal court justices. According to the second limb of Boilermakers, chapter 3 courts can only exercise federal judicial power. Here the justices have been appointed to write a report for the Attorney-General. This is arguably not exercising federal judicial power as the justices are not determining a controversy between parties, nor is there any evidence the justices are writing the report in a judicial manner or making a binding and authoritative decision (indicia in Huddart).
Hence the issue has arisen because of the separation of powers issue.

Exception to Boilermakers

To overcome the separation of powers issue, there has been an attempt to confer the non-judicial power on the Justices in their personal capacity, which is consistent with the separation of powers in the Constitution and the Boilermakers rule (Drake v MIEA).
For this conferral to be valid, a number of criteria must be met, as follows:

Clear Expression of Legislative Intention

The statute must be clear in conferring the non-judicial power on the judge, rather than the court (Hilton v Wells).
As specified in s 8 of the PLC Act, the power is conferred "in their personal capacity", satisfying this requirement.

Consent

The judges' consent is required for the conferral to be valid (Grollo v Palmer).
This has been satisfied under s 8 of the PLC Act, assuming the Attorney-General followed the PLC Act.

Incompatibility Test

No function can be conferred on the justices that is incompatible with their roles as federal judges exercising federal judicial power (Grollo v Palmer).
To determine if this function is incompatible, we must consider three main sources of incompatibility:
Breadth of Commitment
If the non-judicial function will be too time-consuming for the judges to adequately perform their judicial function, the conferral will be invalid (Grollo).
On the facts, the commitment arguably will not impair the exercise of judicial functions, as the report must be given within 2 months under s 9 of the PLC Act, which probably won't have a large effect, so the conferral is valid in this respect.

Integrity of judicial institution compromised?
If the non-judicial function of writing the report will compromise the ability of the judges to perform their judicial functions with integrity, the conferral will be invalid (Grollo). This may have arisen if the judges would learn personal facts about possible applicants in later cases, especially when they are seeking judicial review, where this may impact on the fairness and impartiality of the review. On the facts, the justices arguably will not learn personal facts as they are just writing a report and so the conferral is not invalid here.
Public confidence diminished?
The conferral will be held invalid if the non-judicial function causes public confidence in the judiciary to be diminished (Grollo). This test was extended in Wilson v Minister for ATSI Affairs:
1) The conferral may be held invalid if the function is an integral part of the functions of the Legislature or Executive (Wilson). On the facts, the report will be an integral part of the statute making and executive process as the A-G may base his decisions on the report (s 9 of the PLC Act). Hence, we continue to the next limb.
2) Arguably the function is required to be performed independently of the Legislature and Executive, because it says so in s 8 that the Justices are independent. If the justices were liable to removal (we don't know) the conferral could be invalid. Hence we process to the third limb:
3) The conferral will be invalid if it involves political discretion. This is arguably where the conferral might be invalid, because the justices have to consider the social matters of what people should be allowed to do, as well as possibly consider medical evidence against planking which they don't have knowledge of. However, unlike in Wilson the report arguably does not have such serious consequences as the legislation in the Hindmarsh Island Saga did.

Conclusion
A would probably struggle to challenge the conferral, as all in all it seems valid. The only possible point of invalidation might be the judges considering personal rights and freedoms, however it is arguable this is not really political discretion, and so A has no grounds for challenging the legislation for its constitutionality.

Question 2

Separation of Powers
There is no separation of powers at the State level (Gilbertson). However, the Kable principle provides that we have an integrated Australian judicial system, and consequently State Supreme Courts may not exercise functions incompatible with their exercise of federal judicial power. This is not as strict as the Boilermakers principle for federal courts, it is just required that a court capable of exercising the judicial power of the Commonwealth must be and appear to be an independent and impartial tribunal (NAALAS v Bradley).

Issue
Does s 5 of the P(CS) Act breach the Kable principle by giving the Court a function that is incompatible with the exercise of federal judicial power? This is B's main option of challenging the seizure.

Possible problems with the P(CS) Act

B could argue that the seizure breaches the Kable principle. There are a number of possible breaches.

The first is the "ex parte" nature of the order of confiscation. This order is similar to that in International Finance v NSW Crime Commission in that the Police Commissioner can choose to proceed ex parte and the court may then be required to proceed. If the legislation were construed as requiring an ex parte hearing on the application of the Police Commissioner, the legislation would probably be held invalid and the confiscation invalid, following International Finance. This is because the executive (Police) is telling the court what to do and interfering with court process, which breaches Kable.

However, it could also be argued the legislation is valid if you consider the Gypsy Jokers case. If the court were to construe the legislation such that the Police Commissioner's "opinion" under s 5 meant that the court could determine for itself whether an ex parte hearing is required, the legislation may be held valid as here the court still has sufficient discretion not to be in breach of the Kable principle.

Conclusion

Essentially whether the legislation, and therefore the confiscation, is invalid depends on how the court were to interpret s 5. I think it is arguable we have a "Gypsy Jokers" situation here where the court would have to be satisfied for itself urgent action is necessary. If this is so, the seizure of B's camera would be valid as the court could look at the situation and be satisfied planking was in fact about to occur. Arguably the court still remains an independent and impartial tribunal in this situation, as it is not a puppet of the Executive, and so the legislation would not breach the Kable principle.

Question 3

Reasons for Decision

C wants to obtain information about the Minister's decision. At common law, there is no duty on the Minister to provide reasons (Public Service Board v Osmond). However, because this was a decision at the Commonwealth level, there is statutory relief in s 13 of the AD(JR) Act which means the Minister must provide the reasons for his decision. C needs the reasons so she can seek judicial review of the decision, because C needs to show there were errors in the original decision.

Challenging Decision

Issue

The issue is whether C can challenge the Minister's administrative decision. There are a number of options available:

Talk to MP

This is a political solution that is always available. C could talk to her MP about the decision who could raise it in Question Time which may allow her grievances to be heard and rectified using political means.

Ombudsman
C CANNOT make a complaint to the Commonwealth Ombudsman because she is challenging a Minister's decision (s 5(2)(a) Ombudsman Act (Cth)).

Merits Review
Availability
C is entitled to Merits Review under s 11 of the A-P Act.

Process
C would seek a review of the decision in the AAT. This is the preferable option because it is cheaper, legal representation is often not necessary (AAT Act s 32), there are relaxed procedures (AAT Act s 33(1)(b)), the AAT is not bound by the rules of evidence (s 33(1)(c)) and most importantly, C doesn't have to show the original decision was wrong (Re Greenham). C is able to provide new evidence or reasons to the AAT, which C can't do in judicial review.
The AAT will make a "fresh" decision by exercising the same powers as the Minister (s 43(1) AAT Act). This means the AAT can vary the decision. The decision is not binding however. If C is still unsatisfied, C can get a judicial review of the decision, or could just get judicial review of the original decision in the first place.

Judicial Review
Entitlement to Seek Judicial Review
To be entitled to judicial review under the AD(JR) Act, A must have standing under the AD(JR) Act.
Under s 5(1) of AD(JR), C needs to be a person who is aggrieved by a decision to which the Act applies. C is a "person aggrieved" if C's interests have been adversely affected (s 3(4) AD(JR) Act). Arguably C is aggrieved because C is not able to get a permit to plank legally. Additionally, to be be entitled to review the decision must be of an administrative character made under an enactment (s 3(1) AD(JR) Act). Arguably this is satisfied as a permit is an administrative decision and it was made under the enactment of s 10 of the A-P Act.

Assumption
The above entitlement is assuming the Minister's decision is not listed in sch 1 of the AD(JR) Act, which exempts some decisions. If it was exempt, C could still seek judicial review but challenge the decision under s 39B of the Judiciary Act. Action under this section must invoke one of the common law prerogative writs. C could seek certiorari to quash the decision. However review under the AD(JR) Act is preferable because C doesn't need to identify the writ C would like to invoke.

Grounds of Review Under AD(JR) Act
To be entitled to judicial review it needs to be shown there was a legal or procedural error in the original decision (s 5(1) AD(JR) Act).
Here C could argue there has been a legal error in that the Minister was required under s 10(c) to issue the SPD if C satisfied (i) and (ii), of the A-P Act, which C did. There is also nothing in the A-P Act about the Minister basing his decision on the Commissioner's views, it should just be on the requirement of s 10(c).
C might also be able to argue a procedural error in that C was not given an opportunity for a hearing and this is a denial of procedural fairness (natural justice).

Review
If one of these errors is found in the original decision, the court will remit the decision to the Minister. The court cannot make a new decision itself because this would be exercising executive power, breaching the separation of powers (Boilermakers). The court order is enforceable. If C is still unsatisfied there is the possibility of appealing to the Full Court.

Question 4

A treaty is one of the various sources of international law, which regulates the relations between nations.
The source of the Commonwealth Executive's power to make a treaty arises from s 61 of the Constitution. The source of this executive power is that it is a common law prerogative power. This means the Executive, and only the Executive, has the power to sign treaties.
However, the exercise of this power is controlled by the Commonwealth Parliament, due to the 1996 reforms which increased the Parliamentary control of signing treaties.
The 1996 reforms mean that a treaty now has to be tabled in Parliament (both Houses) along with a "National Interest Analysis" (an analysis into whether signing the treaty is in Australia's best interests) before the Executive power is exercised and binding action on the treaty is taken.
In addition, the treaty is scrutinised by the Joint Standing Committee on Treaties which produces a report outlining recommendations on whether the treaty should be signed or not.
In terms of consultation, before a treaty is signed there is consultation with the Treaties Council, which comprises the heads of Australian Governments and introduces some State involvement in the process.
The final reform is the provision of the Australian Treaties Library.
All of this must occur before the Executive can exercise its power to sign the treaty. However, once a treaty is signed and ratified, it has no direct domestic legal effect (Dietrich v The Queen). Because of the separation of powers, the Commonwealth Parliament only is empowered to legally implement Australia's obligations under a treaty. The Parliament must incorporate the provisions (using the s 51(xxix) external affairs power) before a treaty is binding domestically. If the Executive had the power to incorporate the provisions of a treaty into domestic law, it would be exercising legislative power, as changing the law is a legislative function, and it does not have that power under the Constitution.
There are some indirect effects of treaty making, such as the presumption of statutory interpretation that Parliament does not intend to violate Australia's international obligations, however none of the effects are "legally implementing Australia's obligations" as such.

Question 5

Aboriginal and Torres Strait Islander peoples' rights are protected under 3 main headings: constitutional protections, statutory protections and common law

protections. Arguably, however, these sources don't adequately protect aboriginal rights, as history shows rights have been continued to be violated and the life expectancy, and general standard of living still remains lower for Indigenous people, signalling rights are not being protected as adequately as what they could be.

Constitutional Protections

The main protection of Indigenous rights in the Australian Constitution was the 1967 referendum which removed the Aboriginal exclusion clause from the race power (s 51(xxvi)) and the census power (s 127). The idea of these protections was that Indigenous people could not be discriminated against by various states and also Aboriginal people would not be discounted when the Commonwealth allocated funds per capita to the States.

However, it is arguable that at least the race power hasn't been adequate in protecting indigenous rights. The Hindmarsh Island Bridge Saga cases showed that Aboriginal cultural rights could still be violated. It was found in Kartinyeri v Cth that the race power was not limited to beneficial legislation. This means the referendum did not guarantee Federal legislation would lead to positive outcomes for Indigenous people, and as such, in this case, the Hindmarsh Bridge went ahead and cultural rights were violated.

To further protect and promote Indigenous rights, it has been suggested specific rights are added to the Constitution via a referendum. There is general agreement there should be recognition of Australia's First Peoples in the preamble, however this has no legal significance and so probably won't help the protection of Indigenous rights.

As for including a "Bill of Rights" in the constitution, this may give a constitutional guarantee of rights, however it required broad public and government support and so it is arguably unlikely, in the near future, to come about.

Statutory Protections

There are a number of statutes aimed at protecting Indigenous rights.

The right to vote was given to Indigenous people in 1962 by legislation. Rights to equal pay, access to mainstream institutions and venues and welfare was granted by legislation in the late 1960s. It could be argued these provisions at least have helped to protect Indigenous Rights.

Land and property rights have also been recognised in various statutes, including the Native Title Act (following Mabo (2)) and Northern Territory land rights legislation.

The Racial Discrimination Act (implemented some provisions of ICERD) has also had an effect on the protection of rights. It was key to holding the Qld legislation in Mabo (1) invalid, thus helping to protect property rights.

The Heritage Protection Act has attempted to protect cultural rights, but as can be seen from the Hindmarsh Island Bridge saga, this can be overruled and rights can still be infringed.

All of these statutory protections have protected Indigenous rights to a greater extent than the Constitution, but more can still be done.

The provision of the National Congress of Australia's First Peoples will hopefully help to lobby governments to argue for better protection of indigenous rights and interests.

Common Law Protections

Common law protections of rights are generally limited. One of the main cases was Mabo, which made the common law recognise pre-existing land rights and gave rise to

native title. The other main case is Trevorrow, which provided compensation for one of the stolen generation who was taken as a baby – this was held to be wrongful imprisonment and a breach of the State's duty of care. It is possible more cases will arise in situations like Trevorrow, however it is arguable the recognition of this cases isn't really doing much to protect Indigenous rights, it's just recognising they were infringed in the past.

Conclusion

It can be seen quite clearly that while there are many protections of Indigenous rights, Indigenous rights aren't protected to a great extent. In my opinion more can be done to further these protections. A constitutional, or even statutory, Bill of Rights, as identified above, may held the protection. This is what has occurred in Canada.

Political representation may also help – if, for example, we had dedicated Indigenous politicians/representatives (like in New Zealand), there may be more political incentive to take action to protect indigenous rights.

Ideally, what is required is a change which recognises the plight of Indigenous people, and actually does something to fix it, rather than create a false sense of protection. This will only happen with the Australian public supporting these protections.