



LAWS8070

Constitutional Law

Session 1, In person-scheduled-weekday, North Ryde 2023

Macquarie Law School

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General Information

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Credit points

10

Prerequisites

(LAWS803 or LAWS8030) and (LAWS805 or LAWS8005)

Corequisites

Co-badged status

Unit description

This unit analyses the Constitution of the Commonwealth of Australia and the New South Wales Constitution. The Commonwealth Constitution is the founding, national document that sets out the powers of the Commonwealth and its structure of government. In this unit students will examine how the constitutional texts are interpreted, analyse practices affecting the operation of government in Australia, and reflect on constitutional change. The unit examines the fundamental distributions of power in Australia between the States and the Commonwealth; between the legislature, executive, and judiciary; and between the government and individual citizens.

Important Academic Dates

Information about important academic dates including deadlines for withdrawing from units are available at <https://www.mq.edu.au/study/calendar-of-dates>

Learning Outcomes

On successful completion of this unit, you will be able to:

ULO1: Describe and analyse central constitutional law concepts, structural features, and implications arising from the constitutional text.

ULO2: Identify and critique theories of constitutional interpretation and understand their relationship to different doctrinal positions.

ULO3: Analyse the legal dimensions of contemporary constitutional law controversies, examining these within their social, political and historical context.

ULO4: Identify and resolve the constitutional dimensions of legal problems, recognizing the impact that the High Court has had on the development of constitutional principles, the character of the federal system and federal institutions of government.

General Assessment Information

Late Assessment Submission Penalty Unless a Special Consideration request has been submitted and approved, a 5% penalty (of the total possible mark) will be applied each day a written assessment is not submitted, up until the 7th day (including weekends). After the 7th day, a mark of, 0 (zero) will be awarded even if the assessment is submitted. Submission time for all written assessments is set at 11.55pm. A 1-hour grace period is provided to students who experience a technical issue. This late penalty will apply to non-timed sensitive assessment (incl essays, reports, posters, portfolios, journals, recordings etc). Late submission of time sensitive tasks (such as tests/exams, performance assessments/presentations, scheduled practical assessments/labs etc) will only be addressed by the unit convenor in a Special consideration application. Special Consideration outcome may result in a new question or topic.

Assessment Tasks

Name	Weighting	Hurdle	Due
Participation	20%	No	Week 13
Final Unit Assessment	50%	No	05/06/2023 9:00-12:00 (3 hours)
Constitutional Law Essay	30%	No	11/04/2023 by 23.55

Participation

Assessment Type ¹: Participatory task

Indicative Time on Task ²: 20 hours

Due: **Week 13**

Weighting: **20%**

Activities such as discussions, role plays, debates and problem-solving exercises.

On successful completion you will be able to:

- Describe and analyse central constitutional law concepts, structural features, and implications arising from the constitutional text.
- Identify and critique theories of constitutional interpretation and understand their relationship to different doctrinal positions.
- Analyse the legal dimensions of contemporary constitutional law controversies, examining these within their social, political and historical context.
- Identify and resolve the constitutional dimensions of legal problems, recognizing the impact that the High Court has had on the development of constitutional principles, the character of the federal system and federal institutions of government.

Final Unit Assessment

Assessment Type ¹: Quiz/Test

Indicative Time on Task ²: 6 hours

Due: **05/06/2023 9:00-12:00 (3 hours)**

Weighting: **50%**

A time limited take-home assessment that will cover all of the unit materials

On successful completion you will be able to:

- Describe and analyse central constitutional law concepts, structural features, and implications arising from the constitutional text.
- Identify and critique theories of constitutional interpretation and understand their relationship to different doctrinal positions.
- Analyse the legal dimensions of contemporary constitutional law controversies, examining these within their social, political and historical context.
- Identify and resolve the constitutional dimensions of legal problems, recognizing the impact that the High Court has had on the development of constitutional principles, the character of the federal system and federal institutions of government.

Constitutional Law Essay

Assessment Type ¹: Essay

Indicative Time on Task ²: 30 hours

Due: **11/04/2023 by 23.55**

Weighting: **30%**

The essay topic will be set by the convenor and will require independent research on primary and secondary constitutional law sources

On successful completion you will be able to:

- Describe and analyse central constitutional law concepts, structural features, and implications arising from the constitutional text.
- Identify and critique theories of constitutional interpretation and understand their relationship to different doctrinal positions.
- Analyse the legal dimensions of contemporary constitutional law controversies, examining these within their social, political and historical context.
- Identify and resolve the constitutional dimensions of legal problems, recognizing the impact that the High Court has had on the development of constitutional principles, the character of the federal system and federal institutions of government.

¹ If you need help with your assignment, please contact:

- the academic teaching staff in your unit for guidance in understanding or completing this type of assessment

- the [Writing Centre](#) for academic skills support.

² Indicative time-on-task is an estimate of the time required for completion of the assessment task and is subject to individual variation

Delivery and Resources

Textbook: Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Thompson Reuters, 5th Edition, 2019).

[Australian Constitution](#)

Cases: [AUSTLII](#) for High Court Cases and all Australian legislation

Additional readings accesible via LEGANTO.

Unit Schedule

Week I. Australian Constitutionalism: Introduction and History

Online Lecture. Introduction

[1.10] Fundamental Concepts in Australian Constitutional Law [1.85] Overview of the Constitution [1.155] Cutting the Apron Strings: From Federation to the Australia Acts [1.240] Conclusion

Live Lecture Welcome to the unit & A Historical Overview of Australian Constitutional Law and Indigenous Peoples

[1.60] From Colonisation to Federation [14.10]: Indigenous Peoples and the Constitution

Week II. Judicial Review, Constitutional Interpretation, and Federalism

Online Lecture. Judicial Review, Constitutional Interpretation, and Proportionality

Judicial Review [1.175] Judicial Review Constitutional Interpretation

Proportionality [14.60] PROPORTIONALITY [14.65] Parsing the proportionality inquiry [14.70]

Proportionality in the High Court [14.75] Proportionality and characterisation [14.80]

Proportionality and constitutional guarantees [14.85] Judicial deference to the legislature

[14.90] Conclusion on proportionality

Live Lecture. Indigenous Peoples' Rights Across Constitutional Law

Week III. The Corporations Power, Federalism, and Characterisation

Online Lecture. The Corporation Power

[3.10] FROM HUDDART PARKER TO THE CONCRETE PIPES CASE [3.15]

CONSTITUTIONAL CORPORATIONS [3.20] Foreign corporations [3.25] Trading corporations

[3.30] Financial corporations [3.35] Inactive corporations [3.40] Conclusion on the definition of

constitutional corporations [3.45] SCOPE OF THE CORPORATIONS POWER [3.50] The

development of the broad and narrow views [3.55] The Work Choices case [3.60] The incidental

scope of the corporations power [3.65] The corporations power and natural persons [3.70]

Regulation of the creation of corporations [3.75] Payments to corporations [3.80]

CONCLUSION

Live Lecture. Federalism, Constitutional Law of the States Territories, and Characterisation

Federalism in Australia

Constitutional Law of the States and Territories

Characterisation of Commonwealth Laws

Week IV. The External Affairs Power

Online Lecture. The External Affairs Power

Chapter 4: The External Affairs Power [4.10] EXTRATERRITORIAL POWER [4.15] RELATIONS WITH OTHER COUNTRIES [4.20] IMPLEMENTATION OF TREATIES [4.25] Ratification of treaties [4.30] The effect of international treaties on Australian law [4.35] Incorporation of treaties into domestic law [4.40] Treaty ratification must be bona fide [4.45] The need for a treaty “obligation” [4.50] The specificity principle [4.55] The conformity principle [4.60] Implementation of international documents other than treaties [4.65] MATTERS OF INTERNATIONAL CONCERN [4.70] CUSTOMARY INTERNATIONAL LAW [4.75] CONCLUSION

Live Lecture. International Law and Constitutional Law

The relationships between international and constitutional law in comparative perspective.

Leading cases of the first four weeks

Week V. The Commonwealth Executive

Online Lecture.

[5.10] PERSONS WITHIN THE EXECUTIVE [5.15] The reserve powers [5.20] SCOPE OF EXECUTIVE POWER [5.25] Execution and maintenance of the laws of the Commonwealth [5.30] Execution of the Constitution [5.35] Maintenance of the Constitution [5.40] Inherent executive power: The common law [5.45] Prerogative power [5.50] Other common law executive powers [5.55] The power to enter contracts and spend moneys [5.60] The relationship between s 61 and common law executive powers [5.63] No autonomous powers to detain [5.65] The nationhood power

Live lecture.

[5.70] Nationhood and expenditure [5.75] Coercive nationhood power [5.80] Commonwealth/ State co-operation [5.85] Conclusion on nationhood power [5.90] CROWN IMMUNITY [5.95] PRIVATISATION AND EXECUTIVE POWER [5.100] CONCLUSION

Week VI. Separation of Judicial Power

Online Lecture.

[6.10] JUDICIAL POWER [6.15] Enforceability [6.20] Binding and conclusive decisions [6.25] Need for a controversy [6.30] Breadth or nature of discretion to be exercised [6.35] Decisions regarding existing rights and duties [6.40] Historical considerations [6.45] Conclusion on judicial

power and the “chameleon principle” [6.50] JUDICIAL POWER OF THE COMMONWEALTH [6.55] SEPARATION OF JUDICIAL POWERS – COMMONWEALTH [6.60] Principle 1: Judicial power may only be exercised by Chapter III courts [6.65] Principle 2: Federal courts may not exercise non-judicial power [6.70] Wakim: Extension of the Boilermakers doctrine [6.75] EXCEPTIONS TO THE TWO PRINCIPLES [6.80] Exceptions to principle 1 [6.80] Delegation of judicial power [6.85] Discrete exceptions [6.90] Exceptions to principle 2 [6.95] Incidental powers [6.100] Persona designata exception

Live Lecture. Federal and State Separation of Powers

Separation of powers at federal level [6.105] SEPARATION OF JUDICIAL POWERS – STATE [6.110] The Kable principle and its subsequent application [6.112] The revival of the Kable principle [6.115] Persona designata and State judges [6.120] Required characteristics of State courts [6.125] The investiture of judicial power in non-judicial bodies at the State level [6.130] Summary of the Kable doctrine at the State level [6.135] CHAPTER III AS A SOURCE OF INDIVIDUAL RIGHTS [6.140] The broader scope of the incompatibility doctrine [6.145] Legislative usurpation of judicial power [6.150] Powers to detain [6.155] Powers of sentencing [6.160] Retrospective criminal laws [6.165] Implied right of legal equality [6.170] Right to a fair trial [6.175] SEPARATION OF JUDICIAL POWER IN THE TERRITORIES [6.180] CONCLUSION

Week VII. Inconsistency

Online Lecture.

[7.10] WHAT IS A “LAW” FOR THE PURPOSES OF SECTION 109? [7.15] MEANING OF “INVALIDITY” [7.20] TESTS FOR INCONSISTENCY [7.25] IMPOSSIBILITY OF SIMULTANEOUS OBEDIENCE [7.30] CONFERRAL OF RIGHTS [7.35] INDIRECT INCONSISTENCY/COVERING THE FIELD [7.40] Identification of the “field” [7.45] Overlapping fields: The subject matter approach [7.50] Commonwealth intention to cover the field [7.55] Express intention [7.60] Implied intention [7.65] INCONSISTENT CRIMINAL LAWS [7.70] REASSESSING THE TESTS FOR INCONSISTENCY [7.75] CONCLUSION

Live Lecture. Leading Cases I.

Week VIII. Intergovernmental Immunities

Online Lecture [8.10] PRELIMINARY ISSUE: CROWN IMMUNITY [8.15] THE EARLY LAW: THE DOCTRINE OF IMPLIED IMMUNITIES [8.20] THE ENGINEERS CASE: ABANDONMENT OF IMPLIED IMMUNITIES [8.25] COMMONWEALTH LEGISLATIVE POWER OVER THE STATES [8.30] The State Banking case [8.35] Discriminatory laws [8.40] Indirect discrimination [8.45] “Rational” discrimination [8.50] Prohibition on the impairment or curtailment of a State’s capacity to function as a government [8.55] Austin v Commonwealth: A reformulation of the test for State immunity? [8.60] STATE LEGISLATIVE POWER OVER THE COMMONWEALTH [8.60] Reciprocity [8.65] The folly of Cigamic: Reciprocity abandoned [8.70] The “affected by” doctrine [8.75] Section 64 of the Judiciary Act [8.80] The criminal law exception [8.85] A reformulation of Cigamic: The Residential Tenancies Tribunal case [8.90] CONCLUSION

Live Lecture: Leading Cases II.

Week IX. Excise Duties, Spending Government Revenue – The Grants and Appropriations Powers

Online Lecture. Excise Duties

[9.10] DEFINITION OF A “TAX” [9.15] THE BROAD AND NARROW DEFINITIONS OF “EXCISE” [9.20] The differing views regarding the purpose of s 90 [9.25] History of the definition of “excise”: From Peterswald to Parton [9.30] Exceptions to the broad view [9.35] The “criterion of liability” approach [9.40] Consumption taxes [9.45] THE MODERN CASES [9.45] The demise of the criterion of liability and the triumph of the broad view [9.50] Hematite Petroleum [9.55] Philip Morris [9.60] Capital Duplicators [9.65] Ngo Ngo Ha [9.70] The minority: Reviving the narrow view of excise [9.75] CONCLUSIONS: THE FUTURE FOR SECTION 90?

Live Lecture. Grants and Appropriation and Expenditure

[10.10] SECTION 96 GRANTS [10.15] Background to s 96 [10.20] Types of grants [10.25] The scope of the grants power [10.30] The Uniform Tax cases [10.35] Are there any limits to s 96? [10.40] Conclusion on s 96 [10.45] APPROPRIATION AND EXPENDITURE [10.50] Appropriations power [10.55] Power to spend appropriated moneys [10.60] Conclusion on appropriations and spending

Week X. Freedom of Interstate Trade, Commerce, and Intercourse

Online Lecture.

[11.10] A BRIEF HISTORY OF SECTION 92 [11.15] “Trade and commerce” [11.20] Early interpretations of s 92 [11.25] The “individual rights” approach and consequent confusion [11.30] A FRESH START FOR SECTION 92 [11.35] The triumph of the “free trade” theory [11.40] What is “discrimination”? [11.45] What is “protectionism”? [11.50] Export restrictions and s 92 [11.55] Proportionate regulation as an exception [11.60] A new direction for s 92? Betfair 1 [11.65] Betfair 2: Discrimination against who or what? [11.70] Conclusion [11.75] FREEDOM OF INTERSTATE INTERCOURSE [11.80] SECTION 92 AND THE TERRITORIES

Live Lecture. Leading Cases III.

Week XI. Express Rights

Online Lecture.

[12.10] ACQUISITION OF PROPERTY ON JUST TERMS – SECTION 51(XXXI) [12.15] “Property” for the purposes of s 51(xxxi) [12.20] “Acquisition of property”: A compound conception [12.25] Acquisition vs deprivation: What needs to be acquired? [12.30] Common law choses in action [12.35] Statutory proprietary rights [12.40] Exceptions to s 51(xxxi) [12.45] “Just terms” [12.50] Acquisition for the purposes of the Commonwealth [12.55] Application of s 51(xxxi) within the Territories [12.60] Conclusion on s 51(xxxi)

Live Lecture.

[12.65] THE RIGHT TO TRIAL BY JURY – SECTION 80 [12.70] FREEDOM OF RELIGION – SECTION 116 [12.75] Definition of “religion” [12.80] Establishment of a religion [12.85] Laws “for” prohibiting the free exercise of any religion [12.90] Requirement of religious tests a qualification for any office or public trust under the Commonwealth [12.95] DISCRIMINATION ON THE BASIS

OF INTERSTATE RESIDENCE – SECTION 117 [12.100] Exceptions to s 117 [12.105] NO EXPRESS RIGHT TO VOTE [12.110] CONCLUSION

Week XII. Implied Political Rights and Freedoms

Online Lecture. [13.10] THE COMMUNIST PARTY CASE [13.60] VOTING EQUALITY AND VOTING RIGHTS [13.65] Voting equality [13.70] Voting rights [13.75] CONCLUSION

Live Lecture.

[13.15] FREEDOM OF POLITICAL COMMUNICATION [13.20] The source of the freedom [13.25] The scope of the freedom [13.30] The first stage of the Lange test: What is “political communication”? [13.35] The second stage of the Lange test: Limits to the implied freedom [13.40] Revisiting the second stage of Lange; the cases of McCloy and Brown [13.45] Operation of the freedom [13.50] The nature of the freedom [13.55] FREEDOMS OF MOVEMENT, ASSOCIATION AND PARTICIPATION

[14.40] CONSTITUTIONAL PROHIBITIONS ON DISCRIMINATION [14.45] Direct and indirect discrimination [14.50] “Reasonable” discrimination [14.55] The limited nature of constitutional prohibitions on discrimination

Policies and Procedures

Macquarie University policies and procedures are accessible from [Policy Central \(https://policies.mq.edu.au\)](https://policies.mq.edu.au). Students should be aware of the following policies in particular with regard to Learning and Teaching:

- [Academic Appeals Policy](#)
- [Academic Integrity Policy](#)
- [Academic Progression Policy](#)
- [Assessment Policy](#)
- [Fitness to Practice Procedure](#)
- [Assessment Procedure](#)
- [Complaints Resolution Procedure for Students and Members of the Public](#)
- [Special Consideration Policy](#)

Students seeking more policy resources can visit [Student Policies \(https://students.mq.edu.au/support/study/policies\)](https://students.mq.edu.au/support/study/policies). It is your one-stop-shop for the key policies you need to know about throughout your undergraduate student journey.

To find other policies relating to Teaching and Learning, visit [Policy Central \(https://policies.mq.edu.au\)](https://policies.mq.edu.au) and use the [search tool](#).

Student Code of Conduct

Macquarie University students have a responsibility to be familiar with the Student Code of Conduct: <https://students.mq.edu.au/admin/other-resources/student-conduct>

Results

Results published on platform other than [eStudent](#), (eg. iLearn, Coursera etc.) or released directly by your Unit Convenor, are not confirmed as they are subject to final approval by the University. Once approved, final results will be sent to your student email address and will be made available in [eStudent](#). For more information visit ask.mq.edu.au or if you are a Global MBA student contact globalmba.support@mq.edu.au

Academic Integrity

At Macquarie, we believe [academic integrity](#) – honesty, respect, trust, responsibility, fairness and courage – is at the core of learning, teaching and research. We recognise that meeting the expectations required to complete your assessments can be challenging. So, we offer you a range of resources and services to help you reach your potential, including free [online writing and maths support](#), [academic skills development](#) and [wellbeing consultations](#).

Student Support

Macquarie University provides a range of support services for students. For details, visit <http://students.mq.edu.au/support/>

The Writing Centre

[The Writing Centre](#) provides resources to develop your English language proficiency, academic writing, and communication skills.

- [Workshops](#)
- [Chat with a WriteWISE peer writing leader](#)
- [Access StudyWISE](#)
- [Upload an assignment to Studiosity](#)
- [Complete the Academic Integrity Module](#)

The Library provides online and face to face support to help you find and use relevant information resources.

- [Subject and Research Guides](#)
- [Ask a Librarian](#)

Student Services and Support

Macquarie University offers a range of [Student Support Services](#) including:

- [IT Support](#)
- [Accessibility and disability support](#) with study
- Mental health [support](#)
- [Safety support](#) to respond to bullying, harassment, sexual harassment and sexual assault

- [Social support including information about finances, tenancy and legal issues](#)
- [Student Advocacy](#) provides independent advice on MQ policies, procedures, and processes

Student Enquiries

Got a question? Ask us via [AskMQ](#), or contact [Service Connect](#).

IT Help

For help with University computer systems and technology, visit http://www.mq.edu.au/about_us/offices_and_units/information_technology/help/.

When using the University's IT, you must adhere to the [Acceptable Use of IT Resources Policy](#). The policy applies to all who connect to the MQ network including students.

Changes since First Published

Date	Description
23/02/2023	Exam moved again after shuffling in shared law assessments calendar
14/02/2023	Final exam date changed from 5th June to 7th of June due to clash with International Law per the Sharepoint Assessment Calendar
25/01/2023	Updated due time to 23:55