

AUSTRALIAN CONSTITUTIONAL LAW

SEPTEMBER 2008

Examiner's Comments:-

Overall there was a failure to have read beyond lecture notes. Those who scored well demonstrated knowledge and understanding of the case law together with additional reading.

Question 1

Most students attempted this question which required a discussion of all aspects of the trade and commerce power - Constit. s51(i). Almost, without exception, it was understood that 1(b) fell within the core of s51(i) and could be supported by relying on *Murphyores*. Similarly it was understood that 1(a) needed a discussion of the incidental scope of s51(i) and most students correctly relied upon *Airlines No 2* and *O'Sullivan*. Part 1(c) identified students who lacked depth of knowledge, in particular, some could not recognise that this was a penalty provision and needed further discussion of the incidental scope and could be justified by relying upon *Redfern*.

Question 2

Most students attempted this question which required a full discussion of the corporations power, as it relates to a "trading corporation" – Constit s51(xx). Most students understood that if a hospital was a trading corporation then a law imposing a 3 member community board could be imposed on the management structure of the trading corporation and correctly relied upon *WorkChoices*. The relevant principles to identify a corporation as a trading corporation were discussed relying on *Adamson*, *State Superannuation* and *Tasmanian Dam*. The discussion of the hospital in 2(2) caused no difficulty and it was correctly seen to be a trading corporation. A lack of depth of knowledge was apparent when considering the hospital in 2(1) and many students could not discuss these issues when seeking to answer the problem on the facts for Part 2(b).

Question 3

Most students attempted this question which required a full discussion of the external affairs power, with respect to the implementation of a treaty into domestic law, Constit 51(xxix). There was no issue that the treaty was entered into bona fide. Also it was a proper topic and it was evidence that the power was activated relying on *Tasmanian Dam*. Many students had difficulty in considering whether there was any obligation/recommendation or reasonably apprehended obligation or whether this was no more than a recognition of a privilege. Most could correctly discuss *Victoria v Commonwealth*. Those who correctly expressed doubts about whether Art 17 was more than the recognition of a privilege considered the incidental scope and discussed

Richardson. Consideration of whether the municipal law was reasonably adapted and appropriate, assuming that some law was justified, was well discussed relying on case law such as *Airlines No 2* and most students did realise that even if the law appeared to be valid it had real difficulties because of *Melbourne Corporation* and *Austin*.

Question 4

Few students attempted this question and those who did could not successfully answer (a), (b) and (c). The question did require a clear understanding of the separation of powers, judicial power and jurisdiction. In October 2007 the Australian Military Court was established and the problem is based loosely on that court. Part 4(a) was poorly answered most students understood that they needed to apply the *Boilermaker's* doctrine but few students could do more than recite the criteria to be used when considering whether a power is judicial or non-judicial and could not apply the criteria due to an obvious lack of knowledge of the case law. Most did understand the provisions in s72 and correctly considered that the body was created as a non-judicial body and the presence of a federal court judge was acceptable because of the designated person rule – *Hilton*. Part 4(b) did not cause difficulty and the students did understand that this was original jurisdiction relying on s77(i), s76(ii) and relied upon *Watson*. Part 4(c) needed consideration of the original jurisdiction of the High Court in particular s75(v).

Question 5

Those students who attempted this question, on the whole, understood that (a), (b) and (c) related to three different areas of the Constitution. It was disappointing that some students attempted the question without realising that three different areas were being examined. Part (a) was identified as examining the student in respect of Const. s92 and whilst most understood that this was the issue very few had a clear understanding of the effect of the decision in *Ha* upon *Dennis Hotels*. Many wrote about s92 generally rather than the issues in the problem. The question did ask the student about “what constitutional difficulties” confronted NSW if it imposed (a). Part (b) required a discussion of Const s92 and those who correctly identified that this was the area being examined were able to state the relevant principles from *Cole v Whitfield* and *Castlemaine Tooheys* but too few could apply the law to the facts. Part (c) was well answered by those who recognised that this dealt with Commonwealth State relations and overall applied relevant case law, in particular, *Victoria v Commonwealth* (Payroll Tax Case).

Question 6

Overall this question was well answered. It involved a discussion of Const s109. Few students had difficulty in correctly stating the relevant legal principles and most demonstrated an understanding of the case law. Part (a) was answered correctly by the majority of students who relying on case law such as *Commercial Radio Coffs Harbour* and *Wardley* correctly considered that the laws dealt with different subject matters. Part (b) caused confusion and many failed to adhere to the correct principle that the laws dealt with different subject matters. Those students who correctly dealt

with this part understood *McLean*. Part (c) was well understood by all those who passed as they correctly discussed *Metwally*