

Constitutional Law Workbook

Christopher Enright



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First Edition	11 November 2015
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Citation	
Enright, Christopher (2015) 'Constitutional Law Workbook'	

National Library of Australia 'Cataloguing in Publication' Entry	
Author	Enright, Christopher 1947 – author
Title	Constitutional Law Workbook / Christopher Enright
ISBN	9780994495327 (paperback)
Subjects	Constitutional law – Australia
	Constitutional law – Problems, exercises, etc
Dewey Number	342.94

Cover Design	
Designer	Howard Randell
Firm	Eye for Image
Website	www.eyeforimage.com.au

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Chapter 1

About this Workbook

Introduction
Legal Skills
Questions
Legislation
Teachers
Feedback

Introduction

Outline

Following the introduction, this workbook has two major parts, questions and answers. It was written to assist teachers and students of constitutional law. It has a major focus on the *Constitution*.

Other Books

There are two other books that may assist the study of constitutional law.

Principles of Constitutional Law

There is a book that may assist students and teachers – Christopher Enright and Clare Cappa *Principles of Constitutional Law* 2015 Sinch. Its aim is to assist students to wade carefully and confidently into the shallow end of constitutional law, before they read major texts that require them dive in at the deep end.

Principles of Constitutional Law: Legislation and Documents

This book contains the text of major constitutional legislation and documents:

- * Colonial Laws Validity Act 1865
- * Commonwealth of Australia Constitution Act
- * Statute of Westminster 1931
- * Statute of Westminster Adoption Act 1942
- * Australia Act 1986
- * The Constitution of the United States
- * The Universal Declaration of Human Rights

The book formats these documents and legislation to make them easier and more pleasant to read than statutes on electronic data bases.

Legal Skills

For these exercises students need to be able to perform the skill of analysing legal rules by dividing them into elements and consequences. Chapter

2 Analysing Law: Technique explains this skill. This skill is relevant to most of the exercises. It is directly relevant to the exercises in Chapter 5 Analysing the Constitution: Questions.

Questions

There are five sets of questions, and four of these have answers. These cover:

1. Touring the Constitution (questions and answers)
2. Analysing the Constitution (questions and answers)
3. Ambiguity (questions and answers)
4. Mini Problems (questions and answers)
5. Problem Questions (questions only)

Touring the Constitution

Chapters 3 and 4 have questions and answers for touring the Constitution:

Chapter 3 Touring the Constitution: Questions

Chapter 4 Touring the Constitution: Answers

The aim of these questions and answers is to provide students with a gentle walk through the *Constitution*. As they do this they are focusing on answering the set questions and this purpose should make the task lighter. By this means they become more and more familiar with the broad structure and content of the *Constitution*.

Analysing the Constitution

There are three files with questions and answers for analysing the *Constitution*:

* Chapter 5 Analysing the Constitution: Questions

* Chapter 6 Analysing the Constitution: Answers

These exercises rest on the notion that the fundamental skill for understanding law (and a much neglected skill) is to analyse a rule or provision by breaking it into its elements and consequences. Working with law without having done this tends to make the work clumsy. Some students may not have learnt this skill, or need a refresher. As explained above Chapter 2 Analysing Law: Technique explains this skill.

Detecting Ambiguity

There are two chapters with questions and answers for detecting ambiguity in the *Constitution*:

* Chapter 7 Ambiguity: Questions

* Chapter 8 Ambiguity: Answers

As would be obvious, ambiguity is relevant to interpretation.¹ It is important to identify the possible meanings of the ambiguous provision as accurately, as precisely and as neatly as possible. There are several reasons for this, based on their being part of the options before the court:

1. Problem. These meanings represent the problem that the court has to solve.
2. Solution. One of these meanings is the solution to the problem (or perhaps two or more of them are). So if a lawyer fails to identify all of the possible meanings they may fail to identify the one that the court finally pronounces as the legally correct meaning of the ambiguous provision.
3. Reasons. Any argument addressed to the court must either support or oppose the court's deciding that a meaning is or is not the legally correct meaning of the ambiguous provision. So, these meanings are the focus of attention or the target in the reasoning process.²

There is a pay off for this work. It can be surprising the extent to which knowing the possible meanings of an ambiguous provision makes it possible to put a coherent framework on areas of law not generally noted for being coherent.³ Conversely shadowy thinking in cases often springs from lack of clear definition of ambiguity.

Mini Problems

There are two files with questions and answers for mini problems on the Constitution:

- * Chapter 9 Mini Problems: Questions
- * Chapter 10 Mini Problems: Answers

These are a warm up for major problems. They should give students confidence, enable them to practise their technique without being overwhelmed by complexity. They also demonstrate in a simple way how the *Constitution* can affect a citizen's life.

Problem Questions

Chapter 11 contains a substantial collection of major problem questions. Lecturers can use these directly, or they can adapt them in a variety of ways.

-
1. See Christopher Enright (2015) *A Method for Interpreting Statutes* Sinch, Chapters 11-13 for discussion of ambiguity.
 2. Christopher Enright *Legal Method* Chapters 12-14
 3. Constitutional law is very much in this category. In fact the judgments in this area often read like an upmarket form of voodoo.

Teachers

This workbook is an aid in your task of teaching constitutional law. How you incorporate it into your teaching is, I do not need to say, your business. Each teacher brings their own special insight and their own special self to their subject and students. This may mean that you wish to adapt material in this Workbook for your own purposes.

Here is one suggestion. Ask students to do the exercises in this workbook as pre-course reading before the start of the semester. I acknowledge that the concept of students doing pre-semester reading does not have great hold. Obviously I have to leave that decision to you and your law school. Let me, for my part, explain its advantages.

Absorption of knowledge is a function of time, as is the task of good writing (which is closely connected to absorption of knowledge). Already the capacity of students to make proper use of time is diminished by the practice of running most courses over one semester rather than a full year (or even longer). This means that learning is now a race, a hasty gobble rather than a leisurely digestion of knowledge. A way to offset this is to introduce a practice of setting pre-semester reading for each subject, at least on a voluntary basis.

Chapter 2

Analysing Law: Technique

- Introduction
- Elements
- Consequences
- Elements and Consequences
- Doing the Job
- Uses

Introduction

Micro organisation or analysis involves looking at one law or rule within an area of law. Structurally, micro analysis is the same for all laws. What varies are the details or components of the analysis.

To perform micro analysis of a law there is one task to be done. Break every legal unit into two parts, a check list of elements and the consequences that apply when each of those elements is satisfied by the facts in a particular case. This can conveniently be set out in a diagram which, in abstract form, is as follows:

Elements
Element 1
Element 2
Element n
↓
Consequences
Consequence 1
Consequence 2
Consequence n
<i>Structure of a Legal Rule</i>

By organising or structuring law, micro analysis makes it much easier to perform most basic tasks with law, eg read it, write it, learn it and use it.

Elements

An element can be divided into sub-elements, sub-subelements and so on. Hence in this discussion we consider both elements and sub-elements.

Elements

An element delineates a category or type of fact. For example, in the illustration below of structuring law that uses trespass to land, one of the elements is land. This is a category of fact because it is not specifying one or more blocks of land, it can be any block – your house, my house, the houses next door, the houses in the next street, the houses in neighbouring suburbs. Any land will do to satisfy the element.

To understand how an element functions in this way, ponder what a legal rule is trying to do. It is trying to regulate the world. To this, it attaches consequences to facts, or events or dealings, however you want to describe them. Inevitably, then, a rule must identify and latch onto the facts to which it applies and brings legal consequences. This is why each element of a rule has to delineate a category of facts. Taken together, the elements define the circumstances when the rule applies. Overall, a rule applies to a set of facts only when the set of facts has contains facts falling within all of the categories delineated by the elements.

Such a fact is called a material, relevant or essential fact. In litigation a fact is established by evidence. In transactions facts are established by processes.

A rule, however, not only identifies the facts or circumstances to which it applies, it also visits those facts or circumstances with legal consequences. Thus, a rule is a conditional statement. It is saying that when a set of facts contains facts, Facts 1-n, that fall within each of the categories delineated by the elements, Elements 1-n, then the consequences which it designates apply to those facts. For example, if the facts of a case satisfy the elements of trespass to land, the consequence is that the person who performed the trespass, the defendant is guilty and liable to pay damages to the plaintiff.

Sub-elements

Elements, as we have said, can be divided into sub-elements. Sub-elements can be divided into sub-subelements, sub-subelements, into sub-sub-subelements, and so on. For simplicity, however, these various divisions of an element, no matter what their level, can be referred to in either of two other ways. They can be described as sub-elements. Or, where they are numbered with a hierarchical numbering system, as in the example below, they can be called elements. So, Sub-subelement.1 can be referred to as Element1 because the numbering system makes clear its place in the hierarchy.

When dividing a rule into its sub-element keep going until all the relevant provisions of the rule are covered. In abstract form, sub-elements can be

illustrated by the following hypothetical structure that focuses on the subdivision of just one element, Element 2 of a rule that has three elements, Elements 1-3:

Law		
<i>Element 1</i>		
<i>Element 2</i>		
Element 2.1		
	Element 2.1.1	
		Element 2.1.1.1
		Element 2.1.1.2
	Element 2.1.2	
	Element 2.1.3	
Element 2.2		
Element 2.3		
Element 2.4		
<i>Element 3</i>		
<i>Sub-elements</i>		

Let us explain how the hierarchy works. When Element 2.1.1.1 and Element 2.1.1.2 are satisfied, the outcome is that Element 2.1.1 is satisfied. When Element 2.1.1, Element 2.1.2 and Element 2.1.3 are satisfied, Element 2.1 is satisfied. When Element 2.1, Element 2.2, Element 2.3 and Element 2.4 are satisfied, the outcome is that Element 2 is satisfied. When Elements 1, 2 and 3 are satisfied the consequences of the law, whatever they may be, apply to the parties involved.

Discussion to this point has treated all sub-elements as the same. In fact we can distinguish several classes of sub-elements. Three major ones are fixed characteristics, variable characteristics and statutory common law.

Fixed Characteristics

When a term is defined by fixed characteristics the definition is simply the list of these characteristics. Thus X consists of A, B and C. If something has all of these characteristics it falls within the definition of X; if it lacks just one characteristic it falls outside of the definition.

Thus a proper formal definition based on fixed characteristics achieves two important goals – it identifies all instances of the thing to be defined, and it includes nothing else. Putting this in more formal language, the definition states the necessary and sufficient characteristics of the thing which is defined.

Variable Characteristics

A concept with variable characteristics (sometimes called factors or indicia) is one which has the following features. (i) Potentially it has a number of components or characteristics. (ii) The presence of only some of these characteristics is necessary to constitute the thing defined.¹ (iii) These constituent characteristics are not fixed but vary from case to case.

Where a term has variable characteristics, it is necessary to go through the following steps to determine on any occasion when some fact falls within the term, it is necessary to take five steps:

1. Identify all of the characteristics that can be used.
2. Identify the characteristics that are present in the case before you.
3. Some characteristics can be present in varying degrees, so in these cases determine the degree or extent to which the characteristic is present.²
4. Some characteristics have greater weight or importance than others. This may vary from cases to case, so in each case assess the importance of each characteristic.³
5. Finally, look at the characteristics 'as a whole.'⁴ Weigh up the characteristics to see if they are sufficient to constitute the thing defined,⁵ taking into account (a) which characteristics are present and which are absent,⁶ (b) the importance of each characteristic that is present, (c) where applicable, the degree to which these characteristics are present. In weighing these factors greater weight must be given to substance rather than to form⁷ or label.⁸ Moreover, these factors have to be weighed in the context of the particular case.⁹

By its nature this type of definition does not yield a precise result. Whether something falls within this definition involves considering and weighing characteristics which are not constant from one use of the concept to another. Clearly different people are likely to do these tasks in different ways producing different results. Moreover, there will be further uncertainty because (i) this type

1. *Evans v FCT* (1989) 89 ATC 4540, 4554-4555, *Customs and Excise v Commissioners v Lord Fisher* [1981] 2 All ER 147, 157

2. *FCT v Dixon* (1952) 86 CLR 540

3. *Evans v FCT* (1989) 89 ATC 4540, 4554-4555, *Duff v FCT* (1998) 98 ATC 2129, 2133

4. *Evans v FCT* (1989) 89 ATC 4540, 4554-4555

5. *Hallstroms v FCT* (1946) 72 CLR 634, 646 per Dixon J, *FCT v Blake* 84 ATC 4661, 4664

6. *Erichsen v Last* (1881) 8 QBD 414, 416 and see *Taxation Ruling TR 97/11*

7. *FCT v Bivona* (1989) 89 ATC 4183, 4191, *FCT v Radnor* (1991) 91 ATC 4689, 4700

8. *Narich v Commissioner of Pay-roll Tax* (1983) 50 ALR 417, *Transport Workers Union of Australia v Gynburnm Contractors* (1990) 34 IR 138

9. *FCT v Bivona* (1989) 89 ATC 4183, 4191, *FCT v Radnor* (1991) 91 ATC 4689, 4700

of definition does not exclude things from its potential scope which are not properly included in the term defined, and (ii) not all of those who seek to define a term will use the same set of characteristics in the definition. All of this means that it is often uncertain whether the characteristics are satisfied. Hence, judicial consideration in cases normally does two things. They identify characteristics criteria, and generally they will illustrate the weighing and application of criteria rather than yield a firm statement of principle.¹⁰

Statutory Common Law

On the surface there is a distinction between interpreting statute law and making common law, but in one type of case the two processes are similar so that interpreting a statute can be a simulated form of making common law. This happens when a statute uses a wide and open term such as ‘just,’ ‘equitable,’ or ‘appropriate.’ A court has to interpret such a provision. Strictly the resulting law is just statutory interpretation, but realistically it is common law developed from a statutory launching pad.¹¹ It is really statutory common law. Its sub-elements may have fixed or variable characteristics.

Illustration

Trespass to land, a tort or civil wrong has six elements:

Element 1. Land	There is land.
Element 2. Possession	The plaintiff has a right to possess the land.
Element 3. Interference	The defendant interferes with this land.
Element 4. Intention	The interference is intentional.
Element 5. Permission	The interference is without the plaintiff's permission.
Element 6. Defences	There are no defences available to the defendant.
<i>Elements of Trespass</i>	

Now, to illustrate the division of an element into its sub-elements, the element ‘land’ in the tort of trespass can be subdivided as follows:

1. Land
Land may be either of the following:
1. Surface. One legal form of land is land on the surface of the earth. This is extended or defined by:
A. Air space. Air space is something that is <i>above</i> land.

10. *FCT v Bivona* (1989) 89 ATC 4183, 4191, *FCT v Radnor* (1991) 91 ATC 4689, 4700, *Evans v FCT* (1989) 89 ATC 4540, 4554-4555, *Duff v FCT* (1998) 98 ATC 2129, 2133

11. See Kirby, ‘In Praise of Common Law Renewal’ (1992).

B. Sub-soil. Sub-soil is something that is <i>below</i> land.
C. Middle line. Land can extend to the middle line of adjacent roads or water, something that is <i>beside</i> land. ¹²
D. Fixtures. Fixtures are something that is <i>attached to</i> land.
2. Strata. Land as strata comes in two forms:
A. Common law. Title to strata can be conferred under common law.
B. Statute. Title to strata can be conferred under statute.
<i>Sub-elements of Land</i>

Consequences

When the elements are satisfied by appropriate facts, the consequences follow. Consequences are whatever the law designates. Consequences can vary from law to law, but in some cases there are standard consequences because particular types of laws cause similar types of consequences. Major examples:

1. Establishment provisions set up or establish an institution such as a court.
2. Action provisions. Action provisions create a cause of action. (i) Elements of the cause of action are called substantive provisions. They state and define the wrong which the defendant has done. (ii) Provisions determining the consequences when all of the substantive elements are satisfied by appropriate facts are called remedial provisions. They grant and define the remedy when the plaintiff makes out a cause of action. They state the means by which the wrong done to the plaintiff can be righted. In civil litigation the consequences are similar to a substantial extent. First, the defendant is guilty. Second, the defendant is liable to some remedy. Damages are the standard general remedy. In addition, a court may make some other order if the law so provides. A major example is issue of an injunction to restrain illegal conduct. In criminal law the consequences are that the defendant is guilty and is punished by a fine or imprisonment.
3. Procedural provisions set down the rules for bringing and hearing a cause of action. Failure to comply with these rules generally means that an action has not been properly heard.
4. Jurisdictional provisions authorise a court or tribunal to hear a cause of action.

12. This happens because of the rule known generically as the *medium filum* (middle line) rule or the *usque ad medium filum* (as far as the middle line) rule (and sometimes the *usque* is omitted). It applies to both land, when it is labelled *ad medium filum viae* rule (middle line of the road) and non tidal streams, when it is labelled the *medium filum aquae* rule (middle line of the water). It applies when the following requirements are satisfied. (i) Land is described in a conveyance or transfer as bounded by a non-tidal stream or road. (ii) The grantor or vendor is the owner of the bed of the stream or the road at the time of the grant or sale. In this case the grantee or purchaser is assumed to have received the grant or transfer of the property to the middle of the road or the stream. See, for example, *Mary Lord v Commissioners for the City of Sydney* (1859) ER 991 and *Berridge v Ward* (1861) 10 CB (NS) 400; 30 LJCP 218; 25 JP 695; 7 Jur NS 876; 142 ER 507.

In a transaction, consequences vary according to the type of transaction. For example, in the case of a sale of land the consequences are that the seller no longer owns the land because the purchaser now owns it.

Elements and Consequences

Now we have to consider the relationship between elements and consequences of a law. Since each element delineates a type of fact that must be established to satisfy the element, an element is a necessary requirement for the consequences to apply. Therefore, all of the elements together constitute the necessary and sufficient requirements for the consequences to apply. In practical language, the list of elements constitutes a check list of the type of facts which must be found to satisfy the elements and so bring the consequences designated by the law. This means that:

1. Each element must be satisfied. Even if only one element is not satisfied the consequences do not follow.
2. Consequences still follow if the facts of a case contain other facts besides the facts needed to establish the element. Indeed they will always do so.

Doing the Job

To divide a legal rule into elements and consequences it is necessary to have adequate sources of the rule. In principle, primary sources are best, being totally reliable. While extracting the elements of a rule from the provisions of a statute is simple enough, it is not so simple with common law. A common law rule is made, qualified, developed, refined and interpreted in a vast number of cases. It would be impractical to read these for day-to-day use of the rule. Hence, the better source in practice is a textbook or similar publication.

Statute

When a legal rule is in a statute it is typically not difficult to ascertain its elements. Find the parts of the text of the statute which define the rule. Every word or phrase in the relevant provision must be accounted for.

Ordinarily, one part of the text will state the bulk of the rule. This however, may be supplemented by other provisions in the statute itself (most likely a definition), or provisions of some other statute (typically the provisions of an Interpretation Act).¹³

13. Each Australian jurisdiction has an Interpretation Act, although there is some variation in title. This type of Act lays down general provisions about the function of Acts, including definition of commonly occurring terms.

Text

While the text of a statute is constant, just stating elements of legal rules, a legal text is not so. First, a text is likely to have over things besides elements. In regard to the rule it may discuss its history, policy, social operation, effects, or difficulties about the rule in practice, to name the obvious. Hence it is necessary to sift through the text, separating element from non element. In doing this, the basic test for an element is to ask this question: Is this part of the text describing a category of facts necessary, by their presence or absence, to invoke the operation of the rule and its consequences.

Second, a text may overlook an element or not state it emphatically and clearly. When this happens, you may have no hint of the element's existence and be oblivious. Or you may see or sense that it is not stated, in which case you need to search for it in another textbook or in one of the leading cases.

Uses

Although the skill of analysing (or organising or structuring) law is often neglected in law schools, it is vital for performing a number of tasks:

1. Reading law
2. Writing law
3. Understanding law
4. Applying law to facts (as in a problem question, an opinion or a judgment of a court)
5. Interpreting law (because until the law is properly analysed, it may be difficult to see where the ambiguity lies)
6. Using law in litigation and transactions