

# Contents

GUIDE TO PROBLEM SOLVING .....	9
OTHER NOTES .....	15
TOPIC 1: CONSTITUTIONALISM.....	16
INTRODUCTION.....	16
TERMINOLOGY .....	16
FORMATION.....	23
STRUCTURE OF THE CONSTITUTION.....	26
LEGITIMACY OF THE CONSTITUTION .....	27
SIGNIFICANCE OF JUDICIAL DECISIONS / JUDICIAL REVIEW .....	27
TOPIC 2: EXECUTIVE.....	29
INTRODUCTION.....	29
EXECUTIVE IN AUSTRALIA.....	29
PREROGATIVE POWER .....	29
RESPONSIBLE GOVERNMENT.....	29
GG-IN-COUNCIL.....	30
RESERVE POWERS.....	31
1975 CONSTITUTIONAL CRISIS.....	31
SOURCE AND SCOPE OF CTH EXECUTIVE POWER.....	32
STATE EXECUTIVE POWER.....	34
REFUSAL OF ASSENT .....	35
TOPIC 3: PARLIAMENT .....	36
INTRODUCTION.....	36
VICTORIAN PARLIAMENT .....	36
GENERAL .....	36

HOUSES OF PARLIAMENT.....	36
DISQUALIFICATION.....	37
COMMONWEALTH PARLIAMENT.....	37
GENERAL.....	37
TERMINOLOGY.....	39
TERRITORY REPRESENTATION.....	40
DISQUALIFICATION.....	41
DISTRIBUTION OF SEATS.....	42
TOPIC 4: LEGISLATIVE PROCEDURES.....	44
TERMINOLOGY.....	44
VOTING.....	44
STANDARD PROCEDURES.....	44
GENERAL.....	44
COMMONWEALTH.....	44
VICTORIA.....	45
CROWN'S POWERS.....	45
RESTRICTIVE PROCEDURES.....	45
COMMONWEALTH RESTRICTIVE PROCEDURES.....	46
STATE RESTRICTIVE PROCEDURES.....	48
ALTERNATIVE PROCEDURES.....	50
COMMONWEALTH.....	50
VICTORIA.....	52
SPECIAL PROCEDURES.....	53
COMMONWEALTH.....	53
VICTORIA.....	55

TOPIC 5: THE JUDICIARY.....	57
INTRODUCTION.....	57
COMMONWEALTH / FEDERAL COURTS.....	57
VICTORIAN COURTS .....	59
TOPIC 6: CHARACTERISATION.....	61
DEFINITION .....	61
CONSTITUTIONAL INTERPRETATION.....	61
FUNDAMENTALS.....	62
PRE-ENGINEERS CASE .....	63
CURRENT APPROACH.....	63
CHARACTERISATION PROCESS .....	66
HEADS OF POWER: TRADE AND COMMERCE S 51(1).....	68
HEADS OF POWER: POSTAL, TELEGRAPHIC, TELEPHONE AND OTHER LIKE SERVICES S 51(5).....	68
HEADS OF POWER: DEFENCE S 51(6).....	68
HEADS OF POWER: INTELLECTUAL PROPERTY S 51(18) .....	69
TOPIC 7: FINANCIAL AND ECONOMIC POWERS.....	70
SUMMARY.....	70
HEADS OF POWER: TAXATION S 51(2).....	70
PROVISION .....	70
FEDERAL DIVISION .....	70
LIMITATIONS .....	70
CORE: DEFINITION OF TAX .....	70
IMPORTANT CONSTITUTIONAL PROVISIONS.....	71
INCIDENTAL RANGE OF TAX POWER.....	71
SECTION 96: GRANTS POWER.....	71

PROVISION .....	71
SCOPE AND LIMITATIONS .....	71
APPROPRIATIONS POWER – SECTION 81.....	72
PROVISION .....	72
INCIDENTAL RANGE .....	72
SCOPE AND LIMITATIONS .....	72
HEADS OF POWER: CORPORATIONS POWER S 51(20) .....	73
PROVISION .....	73
WHAT CORPORATIONS .....	73
WHAT ACTIVITIES.....	74
INCORPORATION.....	74
TOPIC 8: EXTERNAL AFFAIRS AND EXTRA TERRITORIALITY.....	75
HEADS OF POWER: EXTERNAL AFFAIRS S 51(29).....	75
PROVISION .....	75
GENERAL .....	75
MATTERS GEOGRAPHICALLY EXTERNAL.....	75
RELATIONS WITH OTHER COUNTRIES.....	75
TREATY IMPLEMENTATION.....	75
MATTERS OF INTERNATIONAL CONCERN.....	76
OTHER LIMITATIONS .....	77
STATE EXTRATERRITORIAL COMPETENCE.....	77
TOPIC 9: INCONSISTENCY AND INTERGOVERNMENTAL IMMUNITIES .....	78
SECTION 109: INCONSISTENCY .....	78
GENERAL .....	78
PROVISION .....	78

DEFINITIONS.....	78
INTERGOVERNMENTAL IMMUNITY .....	80
GENERAL .....	80
STATES’ LEGISLATIVE POWER OVER CTH .....	80
COMMONWEALTH LEGISLATIVE POWER OVER STATES.....	81
PRESUMPTIVE IMMUNITY OF THE CROWN .....	82
TOPIC 10: CONSTITUTIONAL RIGHTS AND FREEDOMS.....	84
GENERAL .....	84
STATE RIGHTS.....	84
HEADS OF POWER: ACQUISITION OF PROPERTY ON JUST TERMS S 51(31) .....	85
PROVISION .....	85
GENERAL .....	85
TERRITORIES.....	85
PROPERTY.....	85
ACQUISITION.....	85
JUST TERMS.....	86
EXCEPTIONS .....	86
SECTION 80: TRIAL BY JURY.....	86
PROVISION .....	86
WHEN DOES IT APPLY .....	86
SCOPE.....	87
SECTION 116: FREEDOM OF RELIGION .....	87
PROVISION .....	87
GENERAL .....	87
DEFINITION OF RELIGION.....	87

ESTABLISHMENT OF A RELIGION .....	88
IMPOSING ANY RELIGIOUS OBSERVANCE.....	88
PROHIBITING FREE EXERCISE OF ANY RELIGION.....	88
HOLDING OFFICE UNDER THE CTH.....	89
TERRITORIES.....	89
SECTION 117: FREEDOM FROM INTERSTATE DISCRIMINATION.....	89
PROVISION .....	89
GENERAL .....	89
TEST.....	89
LIMITATIONS .....	89
IMPLIED FREEDOM OF POLITICAL COMMUNICATION.....	90
HISTORICAL .....	90
CURRENT TEST: <i>LANGE</i> .....	90
MODIFIED <i>LANGE</i> TEST .....	91
RIGHTS IMPLIED FROM SEPARATION OF POWERS.....	93
RIGHT TO PROCEDURAL DUE PROCESS.....	93
FREEDOM TO PARTICIPATE IN THE DEMOCRATIC PROCESS.....	93
TOPIC 11: SEPARATION OF POWERS.....	95
INTRODUCTION.....	95
WHAT IS JUDICIAL POWER.....	95
JUDICIAL POWER ONLY EXERCISABLE BY CHAPTER III COURTS.....	95
PROVISION .....	95
GENERAL .....	95
EXCEPTIONs.....	96
CHAPTER III COURTS CAN ONLY EXERCISE JUDICIAL POWER AND INCIDENTAL NON-JUDICIAL POWER	97

GENERAL ..... 97

EXCEPTIONS ..... 98

SEPARATION OF CTH LEGISLATIVE AND EXECUTIVE POWER..... 99

SEPARATION OF STATE JUDICIAL POWER..... 99

    GENERAL ..... 99

    KABLE V DPP (NSW): PREVENTATIVE DETENTION AIMED AT ONE PERSON..... 100

    SCOPE OF KABLE REDUCED ..... 100

STATE LEGISLATIVE AND EXECUTIVE POWER ..... 102

# GUIDE TO PROBLEM SOLVING

## Step 1: Cth or State

- Look at the name of the Act
- Look at whether PM / Premier, or GG/G

## **Commonwealth wants to do something (handout):**

- Is there Constitutional power to do this?
  - o Look for source of power
    - Can be one or many
    - Check heads of power for legislative power
    - Check executive power:
      - Parliament has enacted legislation granting the power
      - Could be expressly in the Constitution (e.g. s 68 military)
      - Prerogative power intrinsic in s 61 (*Vadarlis*)
        - o Can be reduced or removed by Parliament via s 61 and s 51(xxxix)
      - Nationhood power (s 61 & 51(xxxix))
    - **See Characterisation handout**
  - o Other ways Cth can get its way:
    - Section 96 State grants
    - Section 109 inconsistency
      - Cover the field
    - Spending (ss 81 & 83 for appropriation only – need separate spending power)
    - Executive power (s 61 & express incidental power s 51(xxxix))
  - o Restrictions
    - Melbourne Corporation principle (impeding essential functions of a State government)
    - Chapter III issue
      - Is it a judicial function? If so, only Ch III court can exercise it
      - If it's not a judicial function, look at who is exercising it.
        - o Ch III court can only exercise judicial power
          - Exceptions:
            - Persona designata?
    - Rule of law
      - Section 75(v) & covering clause 5 (*Communist Party* case)
      - Procedural fairness (*Pompano*: Bikie gang)
      - Can't be arbitrary (e.g. right to vote (*Roach*) or targeted at just one person (*Kable*))
  - o Contravention of one of the rights?



- Application to Territories? Section 122 – *Wurridjal* s 51(xxxi) “just terms” applies
- Express rights:
  - Just terms (s 51(xxxi))
    - Must be property (*Dalziel*)
    - Must have an acquisition (*Tasmanian Dam, Newcrest*)
    - Just terms (balance interest – *Wurridjal*)
  - Trial by jury s 80
    - Must be indictable
    - Essential aspects of jury
  - Interstate discrimination s 117
    - Does it impact unfairly on someone from another state?
    - Direct vs indirect discrimination
  - Freedom of religion s 116
    - Religion interpreted broadly but 4 aspects narrowly
    - 4 aspects
      - Establishing religion
      - Imposing religious observance
      - Prohibiting free exercise
      - Religious test for public office
- Implied rights:
  - Political communication – *Lange* test as modified by *McCloy*
    - Is it burdened?
    - Covers more than just “speech”
    - Is it political communication?
    - Covers both State and Cth communication due to interrelatedness of different levels of government
  - Due process (*Kruger, Leeth, Pompano*) – part of the “rule of law”
  - Right to vote in a Commonwealth election (*Roach and Rowe*) ss 7 & 24 – directly chosen by the people
    - Not universal but must not be excluded by arbitrary reason
- Legislative procedures / restrictions
  - Sections 53 & 54 (non-justiciable – about proposed laws)
    - Senate powers and appropriation bill tacking
  - Section 55 (justiciable – about laws)
    - Tax tacking
  - Section 57 (proposed law, but justiciable)
    - Double Dissolution

### **Characterisation (handout)**

- Look at EACH head of power (see Heads of power handout)

- What is the law about?
- What is the scope of the legislative power?
- Is there a sufficient connection (*Leask*)
  - Purposive or non-purposive?
  - If purposive:
    - Defence (s 51(v)) or treaty implementation aspect of external affairs (s 51(xxix))
    - Look at purpose and proportionality
      - Reasonably appropriate and adapted
      - Is a less restrictive means possible?
      - Does it go further than necessary?
  - If non-purposive:
    - Does it fall within core or incidental?
      - If core, there is sufficient power (look at precedents)
      - If incidental, look at the purpose which must be to facilitate the core
      - Use proportionality analysis as well (*McCloy*)

### **Heads of power (handout)**

- Legislative:
  - Dual characterisation OK (*Murphyores*)
  - Section 51(i) Trade & Commerce
    - International & Interstate only
    - Intrastate only for incidental
      - If there is physical interference with the activity (*Airlines of NSW*)
      - Mere economic convenience not sufficient
      - Vertical integration (*Noarlunga Meats*)
  - Section 51(ii) Tax
    - Definition (*Matthews*) – not fee for services with direct benefit
    - Purpose irrelevant if core
    - Incidental
      - Reasonably necessary to give effect to the tax (*Grannall*)
      - Includes assessment, objections, appeals, collection (*Permanent Trustees*)
    - No discrimination between States (*Fortescue Metals*)
      - Not the substantive effect – OK if applies everywhere even if unequal result
    - Section 55 Tax tacking
      - Amending bill (*Air Caledonie*)
    - Section 53 Senate powers
      - Not justiciable (*Northern Suburbs*)
    - Section 90 Tax on goods