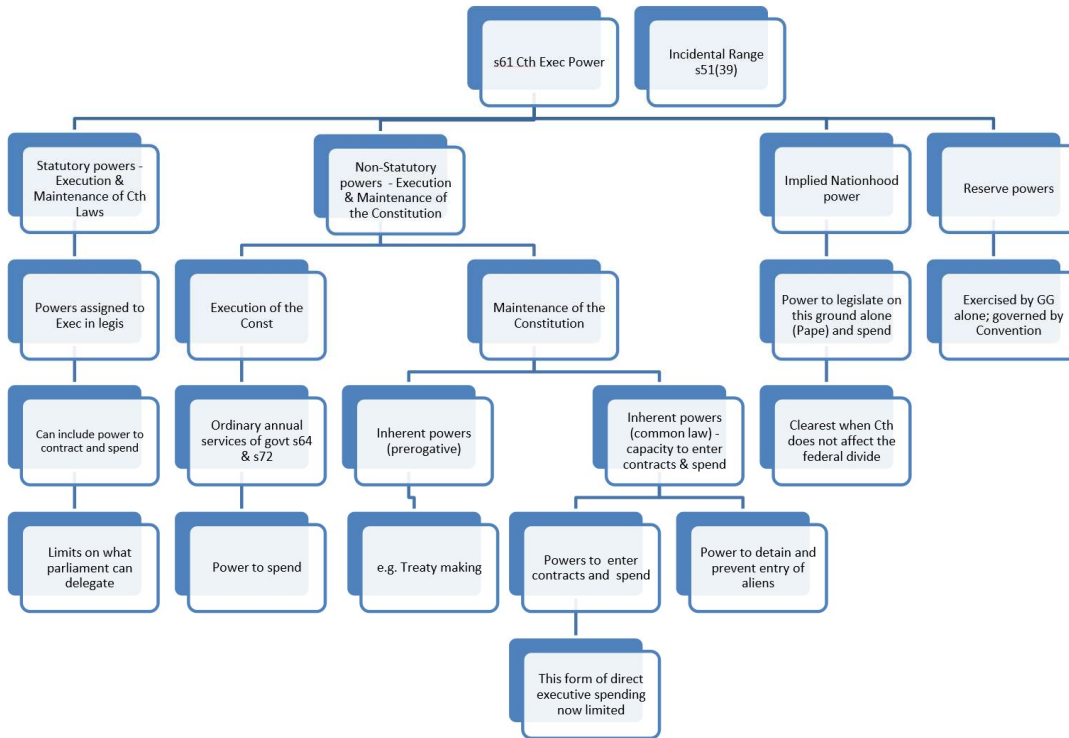


# LA3105 Constitutional Law Notes

## Contents

1. INTRODUCTORY CONSTITUTIONAL CONCEPTS .....	6
Relevance of Constitutional Law .....	6
Sources of Constitutional Law .....	6
Basic Concepts and Terms.....	7
(a) Parliamentary Sovereignty .....	7
(b) Rule of Law .....	7
(c) Responsible Government.....	8
(d) Representative Government .....	8
(e) Separation of Powers .....	9
(f) Federation/Federalism .....	10
(g) Constitutional Conventions .....	10
(h) Bicameralism/Unicameralism.....	10
Progression towards Federation .....	10
(a) English Roots.....	10
(b) Movement towards Union .....	10
The High Court .....	11
Constitutional Interpretation.....	11
Appointment and Removal .....	11
Jurisdiction .....	11
2. CONSTITUTIONAL CHANGE.....	12
Commonwealth Constitution .....	12
Elements of s128.....	12
Territory Votes .....	12
Timeline for Referendum.....	13
Queensland Constitution .....	13
3. SEPARATION OF JUDICIAL POWERS.....	14
1. Defining Judicial Power .....	14
Only Ch III Courts may exercise judicial power .....	15
Separation of Powers Enquiries .....	15
The Incompatibility Exception .....	18
Cloaking & Visibility – The Kable Principle .....	22
Indicia of Judicial Power.....	23
Boilermakers case .....	24
2. Separation of Commonwealth Judicial Power .....	25

(a) Judicial Power of the Commonwealth .....	25
(b) Only Chapter III Courts May Exercise Judicial Power (Tenure).....	25
(c) Commonwealth may not confer Non-Judicial Power on Ch III Courts.....	25
(d) Extension .....	25
Determination of Existing Rights?.....	26
Exercise of Discretion.....	26
Predictive assessments .....	26
Mandatory Sentencing .....	27
3. Exceptions to the Separation of Judicial Power .....	28
A. Exceptions to the First Limb.....	28
B. Exceptions to the Second Limb .....	28
4. Separation of Powers at State Level.....	29
CH III and Institutional Integrity.....	30
State Cases .....	30
Cloaking and Visibility – Kable Principle.....	32
ICAC Cases.....	32
4. REPRESENTATIVE GOVERNMENT .....	33
‘Directly Chosen by the People’ – Right to Vote .....	33
Compulsory Voting .....	33
Voting Equality .....	34
Territories and Representation .....	34
5. EXECUTIVE POWER OF THE COMMONWEALTH .....	35



	.....	35
Reserve Powers .....		36
Scope of Executive Power .....		36
Prerogative Powers .....		36
Limbs of s61 Executive Power .....		36
Implied Nationhood Power .....		36
Nationhood Power .....		36
Commonwealth Expenditure .....		37
6. EXPRESS RIGHTS IN THE CONSTITUTION .....		38
Freedom of Interstate Trade .....		38
4 Step Test .....		38
Freedom of Religion .....		39
Four limbs which function as separate guarantees in s116 .....		39
Criteria or Indicia for a Religion .....		39
Establishment of a religion .....		39
Prohibiting the Free Exercise of a religion .....		39
Test of Purpose and Proportionality .....		39
Acquisition of Property on Just Terms .....		40
Element 1: Meaning of Property .....		40
Element 2: Acquisition of the Property .....		41
Exceptions .....		42

Element 3: Just Terms.....	43
S80 Trial by Jury.....	43
S51(31) Acquisition of Property .....	43
S117 Freedom of discrimination on the basis of State residence .....	43
7. IMPLIED FREEDOMS IN THE CONSTITUTION .....	44
Implied Freedom of Political Communication ('IFPC') .....	44
The Lange Test .....	44
Scope.....	45
Recent Cases .....	47
Other Implied Freedoms .....	47
Freedom of Movement/Association .....	47
8. CHARACTERISATION (NOT ASSESSABLE) .....	48
9. THE COMMONWEALTH POWERS .....	49
ECONOMIC POWERS .....	49
The Corporations Power: s 51(xx).....	49
What is a corporation for the purposes of s 51(20)? .....	49
Regulation and control of trading activities .....	49
POWERS RELATING TO AUSTRALIA'S RELATIONSHIP WITH OTHER COUNTRIES .....	51
The External Affairs Power: s 51(xxix).....	51
The Defence Power .....	53
Elements: .....	53
Times of War.....	54
Limitations in Times of War .....	54
Immediate Post War .....	55
Time of Peace.....	55
Preparation for War .....	56
FISCAL POWERS.....	58
The Taxation Power: s 51(ii).....	58
Excise Duties: s 90.....	60
10. COMMONWEALTH AND STATE RELATIONS.....	61
Inconsistency: s 109 .....	61
Direct Inconsistency .....	61
Simultaneous Disobedience.....	61
Conferral of Rights Inconsistency .....	61
Indirect Inconsistency (The Covering the Field Test) .....	62
Inconsistent Criminal Penalty .....	63
Intergovernmental Immunities – NOT ASSESSABLE.....	63

Doctrine of Implied Immunities .....	63
Commonwealth Power to Legislate Over the States – Melbourne Corporation Principle .....	63
States Power to Legislate Over the Commonwealth .....	65
Exceptions to the Commonwealth Immunity: .....	65
Exam 2016 .....	66
Part A:.....	66
Part B:.....	66