

## AUSTRALIAN CONSTITUTIONAL LAW

### Examinable topics

- Judicial power Ch III
- Characterisation
- Acquisition of power s 51 (xxxi)
- Executive power and nationhood
- Federalism: state constitutions and melb corp
- External affairs
- S 109 Inconsistency of laws
- Implied freedom of political communication
- S 80 and trial by jury/religious freedom

### Approach

- Issue (use as a subheading)
- Facts (in Con law these can include clauses within **legislation** as well as material facts)
- Rule(s) (cite the relevant section of the constitution, caselaw (might be conflicting judicial opinion) and legal doctrine)
- Application (of rule(s) to facts)
- Conclusion (explain the most '**probable**' or '**likely**' outcome)

### TIPS

**RULES:** The relevant landmark cases discussing ISSUE e.g. judicial power are... Be careful not to start applying the law. Demonstrate you know what the law is first.

- Cite the broadest/test cases where the courts haven't really fleshed out all the issues.
- But in APPLICATION, you may compare other situations where this rule has arisen, more specific situations.

**CONCLUSION:** always talk in probable terms, never CERTAIN.

- Can use minority argument but assert majority argument, but acknowledge that there may be good policy/ethical views that would support the minority decision
- Consider important issues i.e. s 109 even if it is cancelled out midway

### Answering a question

1. Judicial/Executive Power
2. Characterisation  
Heads of power:
  - a. Trade and commerce
  - b. Implied incidental power
  - c. Acquisition
  - d. Nationhood
  - e. External affairs
3. Constitutional limitations
  - a) Acquisition on just terms: s 51 (xxxi)
  - b) Cth laws and the States
    - i. Melbourne Corporation- intergovernmental immunities
  - c) State laws and the Cth
    - i. Implied immunity of instrumentalities doctrine- Cigamatic): ss. 109 & 5

- d) Trial by jury: s 80
  - e) Implied freedom of political communication: ss 7, 24 & 128
4. S 109

### Testing for inconsistency

1. **Are both laws valid?** i.e. are they constitutional?
  - Valid and operative
2. **Test for inconsistency** (first two are 'direct' inconsistency, third is 'indirect')
  - a) **Textual collision:** impossible to obey both
  - b) **Rights + Duties:** possible to obey both but takes away some right conferred by one, talking about the same thing but set a different standard
  - c) **Cover the field:** looking at intention of Cth act
    - o Can be split into express and implied intention
    - o Only talk about cover the field where there is a question whether Cth is trying to cover the field.

NOTE: choose one of them and prove inconsistency, don't prove them all

### Is Cth Act valid?

1. Identify head/**heads of power**
2. **Characterisation:** does this Act fit within the head/s of power?
  - **Subject matter power** → sufficient connection
  - **Purpose power** i.e. defence power, external affairs (treaties), nationhood power (implied) → proportionality 'reasonably appropriate and adapted' to fulfil the purpose of the head of power e.g. Is this law reasonably and appropriately adapted to protect us?
  - **Incidental power** → is it reasonably necessary to fulfil the head of power?
3. **Limitations:** is there some limitation that makes this Act forbidden? E.g. s 92 trade amongst the states must be absolutely free, separation of powers
4. **Read down-** ignore the unconstitutional interpretation, interpret it as intended in a constitutional way (but only if it was truly intended that way)
5. **Sever-** remove the part of the Act that is unconstitutional- can't take words out within a section but can remove entire sections

**NOTE:** Think of 'read down' as you move down the steps, only consider 'sever' at the end!  
Do the steps for EACH section of the Act in question.

### Is State Act valid?

1. **Plenary power** (Union Steamships) → full power, States don't need to tag it with a specific HOP
  - A State (NSW in this case), can pass laws on \_\_\_\_\_ because it has plenary power (*Union Steamships v King*).
2. Limitations
3. Read down/sever