

ADVANCED CONSTITUTIONAL LAW EXAM NOTES (LLW5002)

Constitutional validity, legislative power & characterisation	2
Constitutional Principles and Concepts	9
Section 109	13
Indigenous people and the race power	17
Legislatures and parliament summary	20
Judicial power	23
Victorian Constitution	27
Executive power	29
Commercial powers	34
External Affairs, Immigration, Naturalisation & Aliens.....	41
Financial powers	46
Rights.....	54

CONSTITUTIONAL VALIDITY, LEGISLATIVE POWER & CHARACTERISATION

COMMONWEALTH

STEP ONE: A HEAD OF COMMONWEALTH POWER

1. Identify the power(s) that might be invoked to support the law

For a *Commonwealth Act* to be valid, the Commonwealth legislation must fall within a head of power over which the Commonwealth has legislative power conferred on it by the *Constitution*:

- Section 51 – the enumerated powers (concurrent powers – consider s 109)
- Section 52(i) – Commonwealth places
- Section 52(ii) – Commonwealth public services
- Section 81 – appropriations
- Section 90 – imposition of customs and excise duties
- Section 96 – grants power
- Sections 51(vi) and 114 – defence
- Section 51(xii) and 115 – coinage
- Section 122 – the territories
- Powers found in *Pape*
- The executive power
- Section 51(39) – the incidental power. Where the Commonwealth has the power to do something, it has the power to put it into effect.
- Section 51 (xxiv), (xxv), (xxx), (xxxi) are also held to be exclusive
- The nationhood power - matters of national concern

2. Describe the ambit of the power(s) by reference to the case law

Example: lighthouse power – is satellite navigation the common use of the lighthouse power?

Characterise the law

Characterisation is the process used to determine whether a law falls within a legislative head power of the Commonwealth. Can you fit the legislation within the scope of meaning of a particular head of power? Is it a law that can be characterised as being with respect to an enumerated power?

- *Consider what rights, duties, obligations, privileges or immunities the law creates, affects or destroys*

Identify those factors and whether it would bring the legislation within a particular characterisation and whether they are sufficient

- *And whether those rights etc. are sufficiently connected to, and/or reasonably appropriate and adapted to the power(s) invoked to support them.*

Whether the law is with respect to a legislative power is a matter of degree and it must be determined whether the law is sufficiently related to the power to be constitutionally valid.

Proportionality test when dealing with a purposive power – is this legislation fulfilling the purpose that the Cth power is permitting? Is it doing so in an appropriate way?