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EXAM ANSWERING GUIDE:

Step 1 – Is it a State or Cth issue?

Step 2 – Which branch are we dealing with? The Executive, Legislature or Judiciary?

Step 3 – Is it a procedure issue or a power issue?

Step 4 – For procedural issues – What is the procedure & was it followed? See topic 3

Step 5 – For power issues – Do they have the power to do this? See topics 4 – 6

Step 6 – If it is a power issue, are there any limitations to this power? See topics 7 - 9

TOPIC ONE: INTRODUCTION TO AUSTRALIAN CONSTITUTIONALISM

What is Constitutional law?

A constitution is the basic law of the state, it contains fundamental rules that define the state and its institutions. Justice John Basten provides that constitutions are about the institutional arrangements for the exercise of governmental powers. It is a framework for governing the relationship and demarcation of power between 2 levels (State & Cth). Constitutional law provides the rules and principles which guide the conduct and actions of government, it sets out the functions and powers of the parliament, executive and judiciary.

The commonwealth constitution is a form of higher law, the laws made under it by the commonwealth parliament are paramount over state laws and the rules of the common law must conform to it as well. S109 provides that in the case of inconsistencies between state and commonwealth law, Cth will prevail. This is also provided by covering cl 5.

Constitutional Design

Written Constitutions & Law vs Convention

Australia has a written constitution unlike UK who have an unwritten constitution.

Convention = Social norms, that are expected or an ongoing occurrence but are not enforceable if they are not followed because they are not the law.

Rule of Law –

The rule of law is a concept Australia inherited from Britain, A V Dicey describes the rule of law as having 3 meaning or 3 different points of view –

1. The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power. Everyone is ruled by the law and by the law alone, everyone may be punished for a breach of law and nothing else.
2. Equality before the law - the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.
3. The constitution is the result of the ordinary law of the land

However, there is considerable debate about the content and practical significance of the rule of law, as noted by Hogg, Monahan & Wright, Dicey's critics repeatedly point out, the state cannot be equal in all respects to its subjects because it has to govern.

Regardless, the core principles underlying the Australian constitutional law are; citizens are free to act except where the law precludes it; the law, rather than the government is supreme; and both are subject to the same laws applied by the courts.

Covering Cl 5 of the Cth constitution implicitly recognises the rule of law - This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.

It is important to be governed by laws because the establishment and existence of laws provides for a minimum threshold or standard that people can establish themselves within a framework of and therefore know how to behave. Without laws there would be no underlying principle or reason for the exercise of government powers which without laws would merely be discretionary & arbitrary.

Exceptions to the rule of law are some statutory prescriptions in which the crown may be immune for the acts from its agents or those acting under its authority

Judicial Review –

Judicial review was first asserted by the US Supreme Court in the case of *Marbury v Madison*, the function of judicial review involves determining the constitutional validity of legislation and executive action and is exclusive to the judiciary. It has been accepted as axiomatic in the AU constitutional system (*Australian Communist Party v Cth*).

Is reference to the power that gives the court the ability to review and determine the constitutionality of legislative, executive or administrative action. In *Marbury v Madison* (persuasive not binding because it's a US case) it was accepted that although the Constitution makes no specific provision for judicial review for constitutional validity, the drafters plainly intended that the Court undertake this function.

In *Plaintiff S157/2002 v The Commonwealth*, the high court stated “in any written constitution where there are disputes over such matters, there must be an authoritative decision maker. Under the constitution of the Cth the ultimate decision maker in all matters where there is a contest, is this court (the high court). In the end pursuant to S75 of the constitution, this limits the powers of the parliament or of the executive to avoid or confine, judicial review.”

Judicial review can be subdivided into 2 forms;

- i. Judicial review of legislative action – is concerned with reviewing the constitutionality of laws passed by parliament and whether they have exceeded their power
- ii. Judicial review of administrative action – is concerned with the decisions made by members of departments, ministers, and members of government

Consequences of Invalidity –

Unconstitutionality renders legislation or executive government action invalid, which prevents the courts from enforcing it. Unconstitutional legislation or government action is treated as a nullity; ‘invalid ab initio’ where it will be treated as though the law never existed.

Separation of Powers –

The doctrine of the separation of powers asserts that governmental functions can be divided into 3 categories; legislative, executive and judicial; that the institutions of government should be similarly divided and that each function of government should be exercised only by the relevant institution of government so that the functions and institutions of government are kept strictly separate (de smith and Brazier).

The drafting of the Cth Constitution appears to reflect the separation of powers doctrine, with 3 chapters dealing separately with 3 institutions of government –

- Ch I: Parliament (make laws)
- Ch II: The Executive (administers/enforces law)
- Ch III: The Judicature (interprets law)

The separation of powers is important because it ensures no one person holds all the power, to prevent tyranny and arbitrary rule, it is founded upon the need to preserve and maintain the liberty of the individual. However, the extent to which the drafters of the Cth Constitution intended to incorporate a separation of powers is unclear.

A pure separation of powers involves no cross membership or overlapping of the 3 branches. However, the Cth Constitution incorporates responsible government (Westminster system) in S64 where the executive is drawn from and are accountable to the parliament, meaning no strict separation of power exists between the parliament and the executive, therefore in Australia we only have partial separation of powers. The judiciary is the only branch that is strictly separate. No constitution of any Australian **state** formally recognises a separation of powers.

Responsible Government –

A state governor, or the Cth Governor-General will exercise the legal powers vested in that office, on the advice of the parliamentary leader of the political party that controls the lower house. The political leaders are thus 'responsible' for the acts formally taken by the governor or governor-general.

The business of government cannot be carried out without access to finance, which is legally controlled by parliament under S83. In dealing with financial legislation, the lower house is dominant therefore, the party that politically controls the lower house, controls the governments access to money. Put in simple terms, the executive holds the power but the parliament controls the money, and to exercise powers you need money; therefore, the executive is accountable to parliament and ultimately the Australian people.

This has been called the 'efficient secret.'

Bicameralism –

The commonwealth has a bicameralism system of government where the legislative power is held by 2 houses of parliament, the HOR & the Senate. Pursuant to S53, apart from the power to initiate Bills that appropriate money, the senate shall have equal power with the HOR in respect to all proposed laws.

Parliamentary Sovereignty –

Parliamentary sovereignty is the idea that parliament can make laws about whatever they want and no one can set aside the laws of government.

UK have absolute parliamentary sovereignty and are not bound by anything.

AU has partial parliamentary sovereignty meaning our parliament can make laws about anything subject to the constitution – we are bound by the constitution.

The parliament, in theory, is supreme over the other 2 arms of government, so long as the law it enacts is constitutional, a parliament can legislatively abrogate the effect of the judicial decision and responsible government provides that the executive is accountable to parliament, therefore parliament is supreme.

Representative Government/Democracy –

In *Lange v Australian Broadcasting corporation*, the HC said in ss 1, 7, 8, 13, 25, 28 & 30, the constitution provides the fundamental features of representative government. The constitution provides in S7 & 24 that the senate and HOR shall be composed of members directly chosen by the people, there for the constitution expressly provides that we have a democratic system.

There can be representative democracy & direct democracy.

You vote for the people who will make the decisions for you.

Federalism –

The defining feature of a federal system is the existence of a division of power between central and regional governments, where governmental power is divided between 2 territorially defined levels of government.

The commonwealth of Australia presently shares power with six states and 2 self-governing territories, each state has its own constitution and the territories are governed by legislative assemblies.

The intention of the people who wrote the Cth constitution was that power should be shared between the commonwealth and the states. Cth have enumerated powers and can only make laws listed in the constitution mainly but not wholly in S51 which are 'concurrent powers' and the states whom have plenary powers, share power in the areas that were not given exclusively to the Cth.

Exclusive powers are those that give the commonwealth special immunity from the operation of state laws, these powers include S52, S90, S114 and S115.