

CONSTITUTIONAL LAW EXAM SCRIPT/NOTES!

Topic 2: State Legislative Power (does a law fall within the State's legislative power?)

Factor	EXAM SCRIPT
	STAGE 1: DOES THE LAW FALL UNDER PLENARY LEGISLATIVE POWER?
	<p>→ Write (if VIC Parliament): sections 15 and 16 Victorian Constitution grants the Victorian Parliament plenary law making power, stating that the 'Parliament shall have power to make laws in and for Victoria in all cases whatsoever' → Union Steamship Co v King.</p> <p>→ Write (if not VIC Parliament): section 2(1) Australia Act grants 'full power to make laws for the peace, order and good government of that State'.</p> <p>→ Write: State governments are generally quite flexible as a result of their inherently flexible constitutions. States have plenary, meaning unconstrained or no limit on their subject matters, power → McCawley v R. State Constitutions can be amended by passing ordinary legislation → Taylor v Attorney General of Queensland</p> <p>→ Write: If the law is made under the State's plenary legislative power, it will be deemed a valid law</p>
	STAGE 2: DOES THE LAW FALL UNDER COMMONWEALTH EXCLUSIVE POWER?
	<p>→ Write: The states cannot pass a law in relation to a topic over which the Commonwealth has exclusive law making power. Therefore, if the law is deemed to be in relation to a subject matter which the Commonwealth ordinary has power over, the law will be deemed invalid.</p> <p>→ Does State law fall under any of these sections of the Cth Constitution? If so, it will be an invalid law. Section 52 → Exclusive powers of the Parliament</p> <p>→ The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to:</p> <ol style="list-style-type: none"> 1. The seat of government of the Commonwealth and all places acquired by the Commonwealth for public purposes 2. Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth 3. Other matters declared by this Constitution to be within the exclusive power of the Parliament <p>Section 90 → Exclusive power over customs, excise and bounties</p> <p>Section 114 → States may not raise forces (cannot have their own armies). Taxation of property of Commonwealth or State</p> <p>Section 115 → States not to coin money (cannot have their own currencies)</p> <p>Section 109 → inconsistency of laws: Commonwealth law will prevail over State law to the extent of the inconsistency</p> <p>→ Write: noting that, the Commonwealth does not have power unless you can find authority for it in the constitution (e.g., all of the powers listed in section 51)</p>

Topic 3: Manner and Form

Factor	EXAM SCRIPT
	STEP 1: INTRODUCTION
	EXAM NOTE: Look for two state laws → one that wants to amend or repeal the other
	1. DEFINE WHAT MANNER AND FORM PROVISIONS ARE
	<p>→ Write: An RP is a condition and requirement imposed upon the process of lawmaking, which is more onerous than the standard requirement of simple majority and royal assent. It must be followed in order to validly pass a law → A-G (NSW) v Trethowan</p> <p>→ Write: Ordinarily, State parliaments cannot legally bind subsequent parliaments as it is inconsistent with the notion of parliamentary sovereignty (Union Steamship Co v King), unless they comply with a valid RP (s6 Australia Act, successor of section 5 Colonial Laws Validity Act) per McCawley v R.</p> <p>→ Write: Therefore, conditions need to be met to make a restrictive procedure valid and binding on a Parliament.</p>
	2 - IDENTIFY TWO LAWS IN QUESTION (second law may be a bill)
	<p>→ Law one contains the restrictive procedure</p> <p>→ Law two attempts to repeal law one</p> <p>→ Identify and set out these two laws clearly at the beginning of your answer</p>
	STEP 2: CONDITIONS FOR MAKING A RESTRICTIVE PROCEDURE BINDING
Is the RP binding and does law 2 have to comply?	<p><u>LAW 1: RP MUST BE DOUBLY ENTRENCHED - WHAT DOES IT MEAN?</u></p> <p>→ In order to be effective, the Restrictive Procedure must entrench themselves, otherwise the RP provision can be repealed/evaded by the normal procedure (Parliament makes a new law to repeal the existing RP law).</p> <p>→ The provision must employ self-referential language such as “this Act/any provision in this Act/this section may not be amended unless...” → A-G (NSW) v Trethowan</p> <ul style="list-style-type: none"> - E.g., Section 128 Cth Constitution protects the entire Cth Constitution, therefore it protects itself <p><u>LAW 1: RP MUST BE MANDATORY</u></p> <p>→ RP must contain mandatory, obligatory language. It cannot be merely discretionary or directory as that would not be sufficient to bind a later parliament → Clayton v Heffron</p> <p>→ Mandatory language means the first law will make it a condition of the validity of the second law that it comply with the first law</p> <ul style="list-style-type: none"> - Directory language = X may/should not be amended without a referendum - Mandatory language = X must/cannot be amended without a referendum

Topic 4: Powers of the Commonwealth

Factor	EXAM SCRIPT
	1 - INTRODUCTION
Is the cth executive's action valid?	<p>EXAM NOTE: Look for facts that include the Commonwealth Minister or Executive arm of Government.</p> <ul style="list-style-type: none"> ● Write: Per section 61 Constitution, the 'executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth'. Therefore, the Commonwealth executive has inherent prerogative powers and does not need to consult Parliament if it has this power ● Write: the executive will argue that their [action] was valid under one of the following sources of executive power. However, [party] will argue that the [action] does not fall under the scope of the executive power, and is thus invalid.
	2 - SCOPE OF THE EXECUTIVE POWER
	<p>Write: the vast majority of executive power is power that has been conferred by statute and commonwealth laws → section 61 Constitution</p> <p><u>EXECUTIVE POWERS TO EXECUTE AND MAINTAIN THE CONSTITUTION (STATUTORY EXECUTIVE POWER)</u></p> <p>→ Write: the Executive requires a HoP to execute the constitution. The Constitution explicitly grants powers for the Executive to execute the constitution per section 61, though the power of the Executive to maintain the constitution does not require a legislative authority or HoP:</p> <ul style="list-style-type: none"> ● Section 64 → power to administer government departments ● Section 67 → appointment of public or civil servants ● Section 72 → appoint federal judges ● Section 86 → collect and control custom and excise duties ● Section 61 → the executive has the power to protect the constitution and the Australian government (Pape) <ul style="list-style-type: none"> - Defence of the nation - National security of Australia <p><u>CONFERRED EXECUTIVE POWERS (STATUTORY EXECUTIVE POWER)</u></p> <p>→ Write: further to explicit constitutional provisions, power can be conferred by the Parliament onto the executive. In Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan, the Governor General had the power to make regulations and override legislation made by parliament and this was held to be valid and was later confirmed in the Work Choices case</p>

Topic 5: External Affairs Power → S 51(XXIX)

Factor	EXAM SCRIPT
	INTRODUCTION
	<p>There are three aspects to the External Affairs Power under section 51(xxix):</p> <ol style="list-style-type: none"> 1. Extraterritorial Power (non-purposive power) 2. Relations with other countries/nations (purposive power) 3. Implementation of treaties (purposive power) <p>→ Write: Per section 51(xxix) Constitution, 'Parliament shall have the power to make laws for the peace, order and good government of the Commonwealth with respect to external affairs. The issue is whether [Cth] law can be characterised as a law with respect to 'external affairs' pursuant to section 51(xxix)</p>
	STEP 1 – EXTRATERRITORIAL POWER
Is the Cth Law valid?	Write: the Commonwealth will argue that [Cth law] falls under its EA power as it relates to 'places, persons, matters or things' situated outside the geographical limits of Australia (ILO).
	<p><u>EXTERNALITY TEST</u></p> <ul style="list-style-type: none"> • Pursuant to Section 3 Westminster Act, Australia has 'full power to make laws having extra-territorial operation' (i.e. plenary extraterritorial power) and hence has the power to legislate on matters outside Australia's borders → Polyukhovich <p>→ Write: Commonwealth may argue that a law falls under the external affairs power because it satisfies the externality test:</p> <ul style="list-style-type: none"> • If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs". This can only apply where the Commonwealth can assert sovereignty over. • Cth can make laws regarding regulation of people outside of Australia's physical territory, but may have trouble enforcing it <p>→ Write: if a law satisfies this externality test, the Commonwealth can likely argue that their legislation is constitutionally valid as the law relates to external affairs.</p>
	<p><u>NEXUS REQUIREMENT</u></p> <p>→ Write: a different view to the externality test, is the nexus requirement. Previous case law suggested the need for a nexus between the legislating jurisdiction and the matter being legislated (subject matter and Australia).</p> <p>→ Write: The [plaintiff] will likely argue that merely relating the [Cth law] to a matter external to Australia is insufficient, and would likely point towards dissenting judgements of Callinan and Heydon JJ in XYZ and Brennan and Toohey JJ in Polyukhovich who all found that a genuine connection between the Commonwealth and the law was required.</p> <ul style="list-style-type: none"> • However, it is unlikely that the nexus requirement exists today as the word 'external' is precise

Topic 7 – Judicial Powers

Factor	Exam Script
	PART 1 – COMMONWEALTH SEPARATION OF JUDICIAL POWERS
	STEP 1: INTRODUCTION
	<p>Write: [Party] may argue that [Cth law] is invalid for breaching the Doctrine of Separation of Judicial Power (SOJP). At the federal level, there is extensive quarantining of judicial power from the exercise of legislative and executive power, implied from the text of the constitution (sections 1, 61 and 72) and the structure of it, particularly Chapter III → Boilermakers</p> <p>TWO KEY PRINCIPLES</p> <ol style="list-style-type: none"> 1. Principle 1: Only Chapter III Courts may exercise Judicial power (no other institutions can exercise judicial power) → Wheat case, affirmed in HREOC; Waterside 2. Principle 2: Chapter III Courts may only exercise judicial power, they cannot exercise non-judicial power <ul style="list-style-type: none"> • <i>Example of non-judicial power: policy determination</i>
	STEP 2: PRINCIPLE 1: IS [BODY] A CHAPTER III COURT?
Principle 1	<p>→ Write: Pursuant to principle 1 of the doctrine of the separation of judicial powers, federal judicial power can only be exercised by Chapter III Courts. This is to protect the integrity of the judicial process and the civil rights of people to a fair trial → Wheat</p> <p>Per section 71, a Chapter III court is:</p> <ul style="list-style-type: none"> • A Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates, <ul style="list-style-type: none"> - Federal Circuit and Family Court of Australia; Federal Court; • An in such other courts as it invests with federal jurisdiction <ul style="list-style-type: none"> - State Supreme Courts → Wheat • Further, a single Federal Judge can constitute a Chapter III court, as Judges are the one who wields Judicial power → Wells • Section 71 is an exhaustive list and is a complete and exclusive statement of what constitutes a Chapter III Court → Wheat <p>Factors to consider if body is Chapter III Court:</p> <ul style="list-style-type: none"> • Tenure requirement: Pursuant to sections 71 and 72 Constitution, Judges invested with federal jurisdiction shall have a tenure which is constitutionally guaranteed until 70 years. However, Tenure is only indicative of a Chapter III court and is not determinative. • Mere registration does not convert decisions to Federal Court decisions → Brandy <p>→ Write: Given judicial power can only be exercised by a body covered under the exhaustive list</p>

seeming like a non-judicial power

Comparison of Judicial and Non-Judicial Powers	
JUDICIAL POWERS	NON-JUDICIAL POWERS
Enforcement of witness examination → HREOC	Settling industrial disputes through conciliation and arbitration → Boilermakers; Waterside
Hear and determine complaints → Wheat	Make orders and Industrial Awards, despite creation of new rights → Boilermakers
Imposition of penalties for breach of orders or awards → Wheat; Boilermakers	Issuance of a warrant → Grollo; Wilson
Order compliance orders → Boilermakers Q	Quasi-Final decisions under contract → Today FM
Interpret Legislation and the constitution → Momcilovic; Project Blue Sky	

→ **Write for Principle 2:** As per the reciprocal principle created in the **Boilermakers** case, federal courts may not exercise non-judicial power. If [body] is deemed to be a Chapter III court, and is deemed to be exercising non-judicial power, then evidently principle two of the doctrine of the separation of judicial power has been breached. However, there are some exceptions to this principle that must be considered, as it may influence whether [body] is deemed to be exercising judicial/non-judicial power.

STEP 3.2 - EXCEPTIONS TO PRINCIPLE 2

INCIDENTAL NON-JUDICIAL POWERS

- Chapter III courts can exercise non-judicial powers that are incidental to the exercise of judicial powers → **Boilermakers Case.**
 - **Section 51(xxxix) Constitution** extends to furnishing courts with authorities incidental to the performance of the functions derived under or from Chapter III, and no doubt to dealing in other ways with matters incidental to the execution of powers given by the Constitution to the federal judicature
- **Re Wakin; Ex parte McNally** → If a conferred power is incidental to the effective exercise of judicial functions, it is still valid. The exercise of State jurisdiction by a federal court might be possible where the state issue was incidental to the determination of the federal issue in the case (federal issue would still have to be the main issue)

PERSONA DESIGNATA (PD)

→ **Write:** [Body/court] will argue that a Judge of a Chapter III court may exercise non-judicial power when acting in their personal capacity as opposed to their official capacity as a member of a Chapter III Court, so as to make [decision] valid → **Hilton v Wells**

Topic 8 – Implied Freedom of Political Communication (IFPC)

Factor	Exam Script
	PART 1 – IMPLIED FREEDOM OF POLITICAL COMMUNICATION
	STEP 1: INTRODUCTION
	<p>→ Write: It may be argued that [Cth law] impermissibly burdens the implied freedom of political communication (IFPC) to the extent that it prohibits communicating in relation to [subject matter] and hence should be deemed constitutionally invalid.</p> <p><i>IFPC AS A LIMIT ON STATE LEGISLATIVE ABILITY?</i></p> <p>→ IFPC can also act as a fetter on state legislatures. Almost all State political communications will be protected due to the necessary interconnection between federal and state politics (Coleman)</p>
	STEP 2: NATURE AND SOURCE OF IFPC
	<p>→ Write: Since ACTV and Nationwide News, the High Court has recognised that freedom of political communication can be implied from the text and the structure of the constitution, pursuant to sections 7, 24, 64 and 128. This operates as a limit and fetter on State and Commonwealth legislative ability, not as an individual right → Lange</p> <p>→ Write: Therefore, [Party] will argue that their IFPC is sourced from those constitutional provisions and that the freedom is essential to sustaining representative government by mandating that Parliament is directly chosen by the people → Nationwide News</p> <p>→ Counter-argue and write: However, [law-maker] will argue that the source of IFPC is not in the constitutional text itself, and that it must appear from the terms of the instrument and not extrinsic circumstance</p>
	STEP 3: SCOPE OF IFPC
	<p>Write: It is arguable that the law effectively burdens IFPC about Government or political matters, either in its terms, operations or effect (Lange). The contemporary scope of the IFPC was refined in McCloy v NSW, where a third stage was introduced to the Lange test to introduce proportionality testing in the endeavour to ascertain if legislation infringes upon and effectively burdens political communication. To determine if political communication has been burdened, three questions are to be asked:</p>
QUESTION 1	<p><u>1 - Does the law effectively burden political communication in its terms, operations or effect?</u></p> <p>1.1 → Is it communication?</p> <ul style="list-style-type: none"> • Levy → Noted that communication is 'not limited to verbal utterances' and can include signs, symbols, images and gestures which can be perceived by all and used by many to communicate ideas, information and opinions

Topic 9 – Intergovernmental Immunities (IGI)

Factor	Exam Script
	<p>PART 1 - STATE IMMUNITY FROM COMMONWEALTH LAWS (EXAM NOTE: where a Commonwealth law is trying to bind a state!)</p>
	<p>STEP 1: INTRODUCTION → ASCERTAIN IF LAW IMPAIRS STATE'S CAPACITY?</p>
	<p>→ Write: Before discussing if [Cth law] exceedingly limits [State's] ability to regulate State activities, the [Cth law] must fall under a HoP to ensure its constitutional validity. On the facts, this is/is not contentious as [Cth law] evidently falls under the [HoP].</p> <p>→ Ask: Is the Commonwealth seeking to bind the State itself or an Agency of the State?</p> <ul style="list-style-type: none"> ● Agency of the State: an agency created for the purpose identified by the State Executive even if actions/assets/income are independent of the Government → QEC <p>→ Write: Implied limits on the Commonwealth arise from Australia's federal nature, and the detrimental impact that some laws have on the relationship between the Commonwealth and the States → State Banking Case. There is no blanket immunity that exempts States from the Commonwealth laws of general application → Engineers</p> <p>→ However, [State] may challenge the validity of [Cth law] on the basis that it exceeds the limitations on the Commonwealth's ability to regulate State activities, as the Commonwealth's ability to regulate States and State Agencies is not limitless → State Banking Case</p> <p>A NOTE ON INTERGOVERNMENTAL IMMUNITIES AND SECTION 109</p> <p>→ Section 109 Constitution is utilised to resolve clashes between two laws – one of the State and one of the Commonwealth; whereas</p> <p>→ Intergovernmental immunities are enlivened where one Parliament's law seems to apply or bind to another government (e.g., Commonwealth trying to tell a State what to do) ○ This only applies to governments and their officers and instrumentalities → private officers are not involved in intergovernmental immunities based questions as it only applies to governments (which they do not form part of)</p>
	<p>STEP 2: CONSIDER EXAMPLES OF CTH LAWS THAT IMPAIR CAPACITY</p>
<p>IMPAIRMENT</p>	<p>Write: It is necessary to ensure that no explicit limitations apply to the [Cth law]:</p> <p>→ Commonwealth cannot bind the States in areas where there is no head of power (e.g., health, environment, roads, education, hospitals → unless Commonwealth can find the power → Welfare)</p> <p>→ Commonwealth cannot bind the States contrary to express or implied prohibitions in the Commonwealth Constitution. For example:</p> <ul style="list-style-type: none"> ● Section 116 → express right to a freedom of religion ● Separation of judicial power ● Sections 7 and 24 → implied freedom of political communication

Topic 10 – Freedom of Interstate Trade and Commerce (s92)

Factor	Exam Script
	STEP 1: INTRODUCTION
	<p>→ Write: [Plaintiff] may argue that [Cth law] breached section 92 of the Constitution, arguing that trade and commerce should be absolutely free. Section 92 states that ‘on the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.</p> <p>→ Cole v Whitfield entrenched the free trade state view instead of the individual rights view. Thus, a law breaches section 92 if it imposes a discriminatory burden of a protectionist kind. The impugned law must be both protectionist and discriminatory, as one or the other is insufficient →</p> <p>Bath</p> <ul style="list-style-type: none"> ● Palmer held that only the Act itself requires consideration on whether or not it imposes a discriminatory burden on interstate trade and commerce so as to make it constitutionally invalid, rather than the actual exercise of power under the Act
	STEP 2: 4 STEP TEST FROM COLE V WHITFIELD
	1 - DOES THE LAW IMPOSE A BURDEN ON INTERSTATE TRADE AND COMMERCE?
	<p>→ What is trade and commerce → Buying, selling, transporting goods and services but is not limited to trading in physical goods. It can include intangible transactions (e.g., transferring money) and digital trading and commerce conducted on the internet (Betfair No. 1)</p> <p>→ [Law] will impose a burden on interstate trade or commerce where there is a tax/fee/quota or general prohibition on interstate trade and commerce. Burdens on intra-state trade and commerce does not infringe section 92, meaning burdens on trade and commerce within a state is not invalid.</p> <p>Examples of burdens:</p> <ul style="list-style-type: none"> ● Bath → Imposing a specific fee on interstate goods (tobacco retail licence variable fee) ● Cole → Banning the imports of a particular product (ban on crayfish below minimum size) ● Betfair No. 1 → Making it an offence to operate an interstate product (outlawing betting exchanges) ● Barely Marketing Board → Restricting the export of a particular product (marketing schemes) <p>→ Write: Thus, [Cth law] burdens interstate trade and commerce by attaching additional regulatory burdens on [object].</p> <p>IF NO → Law is valid IF YES → go to step 2</p>

Topic 11 – Inconsistency (s109)

Factor	Exam Script
	STEP 1 – INTRODUCTION
	<p>→ Write: Pursuant to Section 109 Constitution, when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. The Commonwealth will argue that [State law] is inconsistent with their [Cth law] and should thus be rendered, to the extent of the inconsistency, inoperative under section 109 Constitution.</p>
	STEP 2 - TESTS FOR INCONSISTENCY (3 distinct tests)
	<p>→ Write: Three distinct tests for inconsistency have emerged throughout case law and the development of judicial application of section 109:</p> <ol style="list-style-type: none"> 1. SIMULTANEOUS OBEDIENCE 2. CONFERRAL OF RIGHTS 3. COVER THE FIELD
	2.1 SIMULTANEOUS OBEDIENCE TEST (DIRECT INCONSISTENCY)
	<p>Write: [Party] will argue that they cannot comply with both the State and Commonwealth law simultaneously, and thus [State law] should be rendered inoperative pursuant to section 109. The direct inconsistency test refers to prohibiting inconsistency which is apparent in the test or factual application of the competing laws → Ex Parte Daneill; R v Licencing Court of Brisbane; McBain v Victoria</p> <p>Write: In this case, [State law] commands [party] to do [action], whereas [Commonwealth law] commands [same party] to do [action different to State law's command]. Therefore, on the facts the inconsistency is evidently apparent.</p>
	2.2 - CONFERRAL OF RIGHTS (DIRECT INCONSISTENCY)
	<p>→ Write: [Party] will argue that [State law] should be deemed inoperative pursuant to section 109 as it alters, impairs, diminishes or detracts from rights conferred by Commonwealth law → Clyde Engineering v Cowburn; Mabo. This may be interpreted broadly (higher likelihood of inconsistency) or narrowly (lower likelihood of inconsistency)</p> <p>→ Write: Even though Commonwealth and State laws may be able to be simultaneously obeyed,</p>