

JURD7141 Principles of Public Law

Essay Themes and Method

Contents

- How to align an essay to any prompt
- Theme cards: thesis, argument moves, authorities and critiques for each theme
- Which theme card to use for which kind of prompt
- Extra authorities

Part A: The essay engine (align to any prompt)

Step 1. Deconstruct the prompt (2 minutes, always do this)

THE FOUR QUESTIONS

1. **What is the CLAIM?** Most prompts hide a proposition inside a quote. Write it out as a bare sentence you could agree or disagree with. If the quote says the rule of law is 'a doctrine of form, not substance', the claim is: Australian rule of law is purely formal.
2. **What is the VERB?** 'Discuss' (take a position), 'Critically evaluate' (position + weaknesses), 'To what extent' (a calibrated answer, not yes/no), 'Compare' (a shared axis), 'Should' (normative, argue for a change).
3. **What is the SCOPE?** Which institution or doctrine does it name (Parliament, executive, courts, rights, federalism)? Answer within that scope; do not import your favourite unrelated topic.
4. **What is the HIDDEN ASSUMPTION?** Nearly every prompt smuggles in a premise. Naming it and challenging it is the single easiest way to lift a mark ('the quote assumes formal and substantive are exclusive; they are not').

Step 2. Pick the thesis shape

Every Public Law essay prompt is one of six shapes. Each shape has a thesis formula. Fill the blanks from your theme cards.

Prompt shape	What it is asking	Thesis formula
Evaluate a claim	'X is Y.' Discuss.	'The claim is right about ____ but wrong about _____. X is Y in ____ sense, but not in ____ sense.'
To what extent	A calibrated degree	'Only to the extent that _____. Beyond that, _____ shows the opposite.'
Has X failed / is X adequate	A performance judgement	'X succeeds at _____, which is the task it was designed for, and fails at _____, which is the task critics assume it has.'
Should Australia adopt / reform X	Normative	'Australia should adopt _____ in the _____ form, because _____; the standard objection, _____, is answered by _____.'
Compare A and B	A shared axis	'A and B differ less in _____ than in _____; on the axis that matters, _____, A does _____ while B does _____.'
Who should decide / who has the last word	Institutional allocation	'_____ should decide, because _____; the competing claim of _____ underrates _____.'

THESIS RULES

- A thesis must be **contestable**. If nobody could disagree, it is a summary, not a thesis.
- Answer the **actual** question in the first two sentences. No throat-clearing, no 'this essay will'.
- The **nuanced** thesis usually beats the one-sided one, but it must still take a side: 'largely

PIVOTS (link to another theme)

- To political versus legal constitutionalism. Bridge: 'The graft explains the split: judicial review and federal limits are the American half, rights-through-politics the British half, so the hybrid is not indecision but inheritance.'
- To the rule of law. Bridge: 'Judicial review, the source of the rule of law's institutional bite in Australia, is a Washington import; without the written supreme text the *Communist Party Case* has no foundation.'
- To parliamentary sovereignty. Bridge: 'The moment a Westminster Parliament is placed inside a written federal Constitution, Dicey's negative limb cannot survive, so Westminster and the death of sovereignty are the same fact seen twice.'
- To federalism and the Senate. Bridge: 'The s 53 compromise is federalism's price: a house designed to represent States sitting in a system designed around confidence in one house.'

Parliamentary sovereignty and its limits in Australia

Whether Dicey's claim that Parliament can make or unmake any law and that no body can override it describes any Australian legislature, once a written Constitution, judicial review, federalism and manner-and-form requirements are in the picture.

THESIS OPTIONS (pick to fit the prompt)

Agree	Dicey's account does not describe Australia at all: every Australian Parliament is the creature of a legal instrument that both empowers and confines it, so sovereignty resides in the Constitution and behind it in the people, not in any legislature.
Disagree	Dicey survives in Australia in substance if not in form: within its heads of power the Commonwealth Parliament legislates plenary and unreviewably on the merits, State power is plenary and unlimited by any deeply-rooted rights (<i>Durham Holdings</i>), and manner-and-form constrains procedure rather than competence.
Nuanced	Neither limb of Dicey holds in Australia, but the reason is structural rather than substantive: legislative power here is broad to the point of near-plenary in content, and the limits that bite are limits of source, form and forum (the Constitution, manner and form, and Ch III), so what Australia rejects is not the breadth of legislative power but its self-sufficiency.

ARGUMENT MOVES (one per paragraph)

- State Dicey clearly first, because the essay is graded on the fit: a positive limb (unlimited legislative competence) and a negative limb (no court or body can set legislation aside), both of which make sense only in a system with an unwritten constitution and no power of invalidation.
- The written Constitution defeats the positive limb: the Commonwealth Parliament exists because ss 1 and 51 create it and cannot legislate on subjects withheld from it, and s 128 reserves alteration of its own charter to the people at referendum. A body that cannot rewrite the rules constituting it is not sovereign in Dicey's sense.
- Judicial review defeats the negative limb: courts decide validity and a law beyond power is void (*Australian Communist Party v Commonwealth* (1951) 83 CLR 1), and even Parliament's attempt to oust that role fails (*Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, on s 75(v)). In Australia a body plainly does have the right to override.
- Handle *Engineers* carefully, because it is routinely misread: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 swept away the reserved State powers doctrine and implied intergovernmental immunities and affirmed broad,

numbers of the people, so exclusion was written into the text and positive recognition was never part of it.

- Re-read 1967 rather than celebrating it: the referendum repealed s 127 and deleted the words excluding 'the aboriginal race in any State' from s 51(xxvi), but what it conferred was legislative capacity on the Commonwealth with respect to Aboriginal people; it gave Aboriginal people no power, voice or protection of their own, entrenched nothing on their behalf, left s 25 in place, and did not confer the vote, which had come through the *Commonwealth Electoral Act 1962* (Cth).
- *Kartinyeri v Commonwealth* (1998) exposes the double edge of that grant: the Court upheld the *Hindmarsh Island Bridge Act 1997* (Cth), Brennan CJ and McHugh J reasoning that the power to make a law includes the power to amend or repeal it, while Gummow and Hayne JJ indicated that s 51(xxvi) is not confined to laws for a race's benefit and Kirby J dissented on that point, so the beneficial-only reading was left unresolved and the celebrated 1967 reform turned out to be a power of uncertain direction.
- That is why the Uluru Statement from the Heart (2017) asked for a First Nations Voice enshrined in the Constitution, together with a Makarrata Commission for treaty and truth-telling, rather than a preamble or a purely statutory body: an ordinary statute can be repealed by an ordinary majority, and after *Kartinyeri* symbolic recognition and revocable legislation were plainly inadequate, so the demand was recognition as power rather than recognition as sentiment.
- Section 128 then supplies the obstacle: an alteration must pass the Parliament and then be approved by a national majority of electors and by majorities in a majority of States, a threshold built for stability and for the protection of the smaller States, and the record of only 8 successes out of 45 proposals since 1901 shows it doing that job.
- The 2023 result fits the pattern exactly: the Voice was defeated with 60.06 per cent voting No against 39.94 per cent Yes, and with a No majority in every one of the six States, so it failed both limbs of the double majority and did so uniformly rather than narrowly.
- Draw out the bipartisanship marker as the operative variable: the proposals that have carried, including 1967, were comparatively low-stakes and supported across the major parties, so once bipartisan support fell away in 2023 the double majority converted ordinary partisan disagreement into a geographic veto.

THE COUNTER, AND YOUR ANSWER

Strongest counter: blaming s 128 is fatalism, because 1967 carried with the largest Yes vote in Australian referendum history under the identical provision, so a better model, a clearer proposal and preserved bipartisanship could have carried the Voice too. Answer: accept the contingent factors and show they confirm the design point rather than displacing it. 1967 succeeded because it was symbolic, low-stakes and agreed across the parties, and because it asked voters to remove offensive text rather than create an institution. The double majority is not a random filter: it selects for consensus, so it passes uncontroversial change and defeats contested change regardless of merit. Reform that redistributes power will always become contested, which means the very feature that made the Voice worth pursuing is the feature that made it fail. The design does not make change impossible; it makes substantive change conditional on a bipartisanship no proponent can guarantee.

QUOTABLE

- The Constitution began by writing Indigenous peoples out: s 25 contemplated racial disqualification from voting, s 127 refused to count them.
- 1967 gave the Commonwealth power with respect to Aboriginal people; it gave Aboriginal people no power at all.

Commonwealth Attorneys-General first).

- Use the composition data as evidence about the process rather than about individuals: ALJA figures at 30 June 2025 show women at 47.3% of the judiciary overall but a leaky pipeline, thinning the higher the court, the High Court at 3 of 7 (42.9%), still no First Nations Justice, and a heavy NSW and Vic skew. The point is not that appointees lack merit, it is that a process with no visible standards cannot demonstrate merit or answer for who it leaves out. Lynch's line is that for a multi-member appellate court the only indefensible stance would be a commitment to homogeneity.
- Put a concrete reform on the table so the answer is not just critique: published criteria (the ALJA's six), open expressions of interest, and an advisory panel to shortlist, as introduced by Attorney-General McClelland in 2008 and abandoned in 2013, leaving Australia an outlier when roughly 81% of Commonwealth peers have some form of appointments body; the ALRC's judicial impartiality work (Report 138) supports greater transparency.
- Turn to structural independence and concede the formalism charge partly: *Boilermakers* holds that federal judicial power may be vested only in Ch III courts and that such courts may exercise no non-judicial power beyond the incidental, a rule long criticised as rigid, and the persona designata cases show labels doing real work (*Grollo v Palmer*: a judge may issue interception warrants in a personal capacity with consent; *Wilson*: incompatible where the function is to advise the executive on a political question and draws on the judge's judicial character).
- Answer the formalism charge with the incompatibility limb and the protective payoff: *Wilson* reintroduces substance, and *Kable* and *Kirk* extend a Ch III minimum to State courts that have no entrenched separation of their own, *Kable* by invalidating a scheme that conscripted the Supreme Court into non-judicial preventive detention of a named individual, *Kirk* by entrenching the Supreme Courts' supervisory jurisdiction for jurisdictional error against any State privative clause.
- Close the loop between the two halves: independence is protected in the middle of a judicial career and left to political actors at both ends, entry by unreviewable executive choice and exit by parliamentary address with Parliament judging 'proved misbehaviour' for itself (*Blackshield*: s 72 has the double purpose that only Parliament, but also that Parliament, can remove a judge). A bright line at appointment costs the Constitution nothing and repairs the asymmetry.

THE COUNTER, AND YOUR ANSWER

Counter: executive appointment is a feature, not a bug. A minister who chooses is a minister who can be attacked in Parliament and at an election for the choice, whereas a commission moves selection to unelected professional and judicial insiders who may reproduce the same narrow bench by another route, and who answer to nobody. Answer: distinguish accountability for the outcome from transparency of the process, then design for both, an advisory or shortlisting commission with the Attorney-General retaining the final pick and the answerability. Note too that the counter proves too much: genuine political accountability would produce published criteria and stated reasons, and there are none, so what exists is responsibility in theory and opacity in fact.

QUOTABLE

- s 72: removal only on an address from both Houses 'in the same session' on the ground of 'proved misbehaviour or incapacity'; remuneration 'shall not be diminished during their continuance in office'.
- George Williams: federal judicial appointment is the 'gift of the government of the day', a process that can alter with each Attorney-General.
- *Boilermakers*: Ch III is exhaustive, the judicial power of the Commonwealth may be