Where the question goes

OPEN	Commonwealth Constitution ("s" below); Australia Act 1986; Constitution Act 1902 (NSW); Legislation Act 2003 (Cth); the judgments.
SOURCE	the Public Law notes; CONST 15–19 from the judgments alone (not in your notes); statutes read live (date in each footer).

ROUTER · THE QUESTION INVOLVES → PAGE

Source and limits of power; colonial limits; Australia Acts	AA ss 1–3; ss 106–108	**CONST · 1 Foundations**
Changing a constitution; manner and form	s 128; AA s 6	**CONST · 2 Amendment**
Electoral laws; implied freedom	ss 7, 24	**CONST · 3 Representation**
Who may vote; prisoners; enrolment	s 41	**CONST · 4 The franchise**
Can this person sit in Parliament?	s 44	**CONST · 5 Qualifications**
The Crown and its representatives; reserve powers	ss 61, 64	**CONST · 6 The executive**
Executive action without a statute; spending	ss 61, 81, 83	**CONST · 7 Executive power**
A House demands documents; FOI; ICAC	judgments	**CONST · 8 Accountability**
Regulations and delegated power	Legislation Act	**CONST · 9 Delegation**
A non-court decides rights; judicial power	ss 71–73	**CONST · 10 Chapter III (1)**
Tenure, removal of federal judges	s 72	**CONST · 10 Chapter III (1)**
Detention or punishment by law or the executive	Ch III	**CONST · 11 Chapter III (2)**
A judge given a non-judicial job	Ch III	**CONST · 12 Chapter III (3)**
A State law about State courts; Kable	Ch III	**CONST · 13 Chapter III (4)**
A "matter"; standing	ss 75–77	**CONST · 14 Chapter III (5)**
Is a Commonwealth law within power?	s 51	**CONST · 15 Federal (1)**
Trade, tax, corporations, external affairs	ss 51, 55	**CONST · 16 Federal (2)**
State v Commonwealth law; immunities	s 109	**CONST · 17 Federal (3)**
A State tax on goods; a border barrier	ss 90, 92	**CONST · 18 Federal (4)**
Just terms, jury, religion, residents of other States	ss 51(xxxi), 80, 116, 117	**CONST · 19 Federal (5)**
Which case to cite	the judgments	**CONST · 20– Cases**

THE ANSWER, IN ORDER (EVERY PAGE)

1	The law or act and its source	Which Parliament or officer, which law or power, which State or the Commonwealth.
2	The limit invoked	The provision, implication or doctrine said to be breached.
3	The test	State it with its elements, from the page.
4	Apply; answers	Apply each element; then the other side's best answer.
5	Outcome; consequence	"[The law] is [valid / invalid / read down / inoperative to the extent of the inconsistency]".

Foundations Constitution ss 106–109; Australia Act

USE THIS PAGE WHEN	a State law said to be repugnant or to reach beyond the State; a statute said to abrogate a right.
OPEN	Constitution cl 5, ss 51, 52, 106–109; Australia Act 1986 ss 1–3, 5, 6, 11, 15.
FIRST QUESTION, ALWAYS	whose Parliament, and what limits its power?

RELATED PAGES · CONST 2 · CONST 15.

ss 106–108
subject to this Constitution

A State's powers and laws after federation

→ State constitutions continue "subject to this Constitution" (s 106); State powers continue unless "exclusively vested in the Parliament of the Commonwealth or withdrawn" (s 107); colonial laws continue (s 108). Commonwealth laws bind "notwithstanding anything in the laws of any State" (cl 5), and prevail over inconsistent State laws (s 109; CONST 17).

CLVA s 2
void

A colonial or early Commonwealth law repugnant to an Imperial Act

→ "[T]he Colonial Laws Validity Act applies to laws passed under a power given by an Imperial Act passed after that Act" (Knox CJ at 141); a repugnant law is, under s 2, "to the extent of such repugnancy, but not otherwise, … absolutely void and inoperative" (Isaacs J at 152, quoting s 2).

Union Steamship (NZ) v Commonwealth · CLVA s 2: Knox CJ, Isaacs, Higgins, Rich, Starke JJ; Higgins J dissenting in part
▸ *the Navigation Act against the Merchant Shipping Act*

Australia Act
no longer void

A State law after 1986 said to be repugnant to English law

→ The CLVA "shall not apply to any law made after the commencement of this Act by the Parliament of a State" (s 3(1)); no State law is void as "repugnant to the law of England" (s 3(2)); no later UK Act extends to Australia (s 1). The Australia Act "is to be traced to its Australian source – the Constitution of the Commonwealth" (s 51(xxxviii), s 109; Marquet [67]).

Attorney-General (WA) v Marquet · Australia Act ss 3, 6: joint reasons of four; Callinan J concurring; Kirby J dissenting
▸ *WA Bills to repeal the Electoral Distribution Act 1947 without the absolute majority s 13 required*

AA s 2(1)
real connexion

A State law reaches persons or things outside the State

→ States have "full power to make laws for the peace, order and good government of that State that have extra-territorial operation" (Australia Act s 2(1)). A State law "should be held valid if there is any real connexion – even a remote or general connexion – between the subject matter of the legislation and the State" (Gibbs J in Pearce v Florenca, adopted in Union Steamship v King; via Mobil [48]); "peace, welfare [or order], and good government" are not words of limitation ([46]).

Mobil Oil v Victoria · Australia Act s 2: Gaudron, Gummow, Hayne JJ; Callinan J dissenting in part; not on the list
▸ *a Victorian group-proceedings law*

legality
irresistible clearness

A statute is said to abrogate a common law right

→ The legislature would not "infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness" (O'Connor J at 304, quoting Maxwell). It is "a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language", but it "does not constrain legislative power" (French CJ, Momcilovic [43]). Coco: the legislature must have "directed its attention to the question" (via Electrolux [20]; not on the list).

Potter v Minahan: O'Connor J in the majority; Isaacs and Higgins JJ dissenting on the facts
▸ *a Victorian-born man, taken to China at 5, returned after 26 years: not an "immigrant"*

Marquet
subject to the Constitution

An argument from parliamentary sovereignty or the rule of law

→ Australian norms are "more complex than an unadorned Diceyan precept of parliamentary sovereignty" and give "an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements" (Marquet [66]). A State law respecting the constitution, powers or procedure of its Parliament has no force unless made in the manner and form then required (Australia Act s 6; CONST 2).

Attorney-General (WA) v Marquet: as above

DECIDE

Is the State law valid, and how is it read?

1 A State law made after 1986 attacked for repugnancy to English law (Australia Act s 3)?
YES → no longer void for repugnancy

NO ↓

2 Does it operate outside the State: any real connexion, even remote or general (Mobil [48])?
→
YES valid extraterritorially (s 2(1))
NO invalid in that operation

3 Does it abrogate a right with irresistible clearness (Potter at 304; Momcilovic [43])?
→
YES it does; the principle does not limit power
NO read so as not to abrogate

SAY

State Parliament's power continues under s 107, subject to the Constitution and to s 109. (Constitution ss 106–109) Since 1986 the law cannot be void for repugnancy to English law. (Australia Act s 3(2); Marquet [67]) There is a real connexion between subject and State, so the extraterritorial operation is valid. (Australia Act s 2(1); Mobil [48]) The Act does not show with irresistible clearness an intention to abrogate right, so it is read not to. (Potter at 304; Momcilovic [43])

Right is abrogated: the words are clear and unequivocal, and the principle does not limit power. (Momcilovic [43])

MARKS LOST

1. Arguing repugnancy against a post-1986 State law (Australia Act s 3).
2. Treating "peace, order and good government" as words of limitation (Mobil [46]).
3. Requiring a close connection for extraterritorial State laws (Mobil [48]).
4. Using the principle of legality to strike down a law (Momcilovic [43]).
5. Treating Parliament as sovereign over the Constitution (Marquet [66]).
6. Missing cl 5 and s 109 for a clash with a Commonwealth law.
7. Forgetting the Australia Act rests on s 51(xxxviii) (Marquet [67]).

Amendment; manner and form s 128; AA s 6

USE THIS PAGE WHEN	a proposal to change the Commonwealth Constitution; a State Bill to abolish a House or change elections; an Act that says it can be changed only by referendum or special majority.
OPEN	Constitution s 128; Australia Act s 6; Constitution Act 1902 (NSW) ss 5, 7A, 7B.
FIRST QUESTION, ALWAYS	is the later law one "respecting the constitution, powers or procedure" of the Parliament?

RELATED PAGES · CONST 1 · CONST 3.

s 128
double majority

Changing the Commonwealth Constitution
→ The proposed law must pass "by an absolute majority of each House" (or one House twice, three months apart), then be put to the electors; it needs approval "in a majority of the States" and by "a majority of all the electors voting". An alteration diminishing a State's proportionate representation or altering its limits needs "the majority of the electors voting in that State" (s 128).

flexible
implied repeal

A State Act inconsistent with its Constitution Act, with no entrenchment
→ "[A]s McCawley's Case establishes, … no formal repeal is necessary to resume the power and the legislature remains competent to make laws inconsistent with the restraints" (Dixon J in Trethowan at 430). "Constitution" means "the composition, form or nature of the House" (Barton J in Taylor at 468).

Taylor v Attorney-General (Qld) · CLVA s 5: Barton, Isaacs, Gavan Duffy, Powers, Rich JJ
‣ a referendum Act to bypass the Legislative Council: valid

AA s 6
manner and form

A Bill to abolish a House without the referendum an earlier Act requires
→ A law "respecting the constitution, powers or procedure" of a State Parliament "shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament" (AA s 6). A referendum requirement is "properly described as requiring a manner in which the law shall be passed" (Dixon J at 432); but "no degree of rigidity greater than this can be given" (at 431). Double entrenchment: s 7A(1)(b) (in Trethowan, s 7A(6) of the 1929 text) protects s 7A itself.

Attorney-General (NSW) v Trethowan · CLVA s 5; s 7A: Rich, Starke, Dixon JJ; Gavan Duffy CJ, McTiernan J dissenting
‣ Bills to abolish the Legislative Council without a referendum

s 6
constitution, powers or procedure

Is the later law about the Parliament? Electoral boundaries; a "notwithstanding" clause
→ "At least to some extent the 'constitution' of the Parliament extends to features which go to give it, and its Houses, a representative character" (Marquet [76]). A requirement of express words "does not profess to limit or qualify the power of the legislature in any way" (Dixon J in South-Eastern Drainage at 625), so it is not manner and form.

South-Eastern Drainage Board v Savings Bank · RPA (SA) s 6; CLVA s 5: Latham CJ, Starke, Dixon, Evatt, McTiernan JJ
‣ drainage charges against a registered mortgage

outsider
not manner and form

Consent of a company or outside body to amend; an agreement
→ s 6 "is confined to ensuring compliance with requirements which an existing law of the Parliament of a State imposes upon a process of making a law" (Mineralogy [77]); no "legislative intention to take the drastic step of attempting to limit the legislature's freedom to legislate" ([80], adapting King CJ in West Lakes). An implied requirement of agreement with external parties "would be an implied restructure of parliamentary power", not manner and form (Edelman J, [152]).

Mineralogy v Western Australia · AA s 6: joint judgment of six; Edelman J separately; not on the list
‣ a State Act ending a mining arbitration

assent
very exceptional

Injunction to stop a Bill being presented for assent
→ Restraining presentation of a Bill "is, I will say, not unprecedented but it is at least very exceptional. We do not think it should be granted on this occasion or later or in any case" (Dixon CJ in Hughes and Vale at 204); the remedy comes after assent (at 205). Courts "will ordinarily permit parliamentary procedures to be completed before they intervene" (Kirby J, Egan v Willis [133]).

Hughes and Vale v Gair: Dixon CJ, McTiernan, Webb, Fullagar, Kitto, Taylor JJ; not on the list
‣ a Queensland Bill: injunction refused

DECIDE

Does the manner and form bind?

1 Is the amending law one respecting the constitution, powers or procedure of the Parliament (AA s 6; Marquet [76])?

NO → s 6 not engaged: ordinary law; implied repeal

YES ↓

2 Is the requirement a manner and form (referendum, special majority), not an abdication to an outside body (Trethowan at 432; Mineralogy [77])?

NO → not binding

YES ↓

3 Is the entrenching provision itself entrenched (s 7A(1)(b))?

→

YES must be followed; otherwise no force or effect
NO it can be repealed in the ordinary way

SAY

The later Bill respects the constitution / powers / procedure of the Parliament, so s 6 applies. (AA s 6; Marquet [76]) The entrenching provision is itself entrenched, so it cannot be impliedly repealed. (s 7A(1)(b); Trethowan at 430–432) A referendum / special majority is a manner and form, not an abdication. (Trethowan at 432; Mineralogy [77], [80]) Not made in that manner and form, the law has no force or effect. (AA s 6)

The remedy comes after assent; an injunction before assent is very exceptional. (Hughes and Vale at 204–205)

MARKS LOST

1. Applying s 6 to a law not about the Parliament's constitution, powers or procedure (South-Eastern Drainage at 625).
2. Missing implied repeal of a singly entrenched provision (Trethowan at 430).
3. Treating an outside body's consent as manner and form (Mineralogy [80]).
4. Treating a "notwithstanding" requirement as manner and form.
5. Reading "any Bill to amend this Act" as excluding a Bill to repeal it (Marquet [52]).
6. Seeking an injunction before assent as of course (Hughes and Vale at 204).
7. Misstating the s 128 double majority.