SAMPLE: Manner and Form Flowchart

Remember to constantly reflect on what the question is asking, as well as following the steps.

A. Does the **amending law** seek to amend or repeal an **entrenched provision** contrary to the requirements of the **entrenching provision**?

<Amending law> seeks to **<amend/repeal>** the **<entrenched provision>**

contrary to the requirements of the **<entrenching provision>**

because **<list ways the amending law does not meet the manner and form requirements of the entrenching provision>**

B. Is the **entrenching provision** doubly entrenched?

YES

<Entrenching provision> is protected through the double entrenchment of the manner and form requirements which protect **<entrenched provision>**,

because **<explain the words in the provision that provide double entrenchment>.**

Therefore **<entrenched provision>** cannot be **<repealed/amended>** by ordinary legislation,

because **<amending law>** cannot impliedly **<repeal/amend>** the **<entrenching provision>** without satisfying the manner and form requirements of **<list requirement needs to satisfy>.**

GO TO C

NO

<Entrenching provision> is not protected through the double entrenchment of the manner and form requirements which protect **<entrenched provision>**,

because **<explain how there is nothing in the provision that extends the manner and form requirements to the entrenching provision>.**

Therefore **<entrenched provision>** can be **<repealed/amended>** by ordinary legislation,

because **<amending law>** can impliedly **<repeal/amend>** the **<entrenching provision>** without satisfying the requirements of **<list requirement needs to satisfy>.**

McCawley v The King (1920): High Court majority held a later law must expressly repeal an earlier law in State Constitutions, because they have a higher status than ordinary laws. This was overturned by the Privy Council which found State Constitutions could be impliedly repealed because they're not rigid or controlled.

STOP

……

SAMPLE: Legislation Guide

CONSTITUTION

Amendment

- s128 – power for the Governor-General to submit a Constitutional amendment to the people in a referendum and give assent to it if approved by the requisite majorities
    - Applies to all formal amendments of the Constitution
        - NB: application of the Constitution can still be altered by:
            - s51(xxxvii) – matters referred by states;
            - s51(xxxviii) – states request powers available to Parliament of the United Kingdom or by the Federal Council of Australasia at time of federation;
            - s105A - Agreements with respect to State debts
    - In order for a referendum proposal to get to the people for their vote, it must:
        - Be passed by an absolute majority of each House of the Commonwealth Parliament
            - Then submitted to referendum between 2 and 6 months later
        - OR be passed by an absolute majority in one House, where the other rejects it or fails to pass it, or passes it with unacceptable amendments, and after 3 months the same occurs again, and then submitted by the Governor-General to a referendum.
            - GG acts upon ministerial advice, so the Government controls what goes to a referendum and can stop the Senate putting something to a referendum
        - Neither the people nor the states can initiate a referendum
- Parliament cannot require a special majority for amendment of Commonwealth laws
    - Contrary to:
        - s23 – Voting in the Senate, normal majority
        - s40 – Voting in the House of Reps, normal majority
- Must be about a constitutional amendment
    - Otherwise it's a plebiscite
- Last paragraph provides:
    - *No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.*
        - This does not mean laws require a majority approval in all States to any proposal affecting the provisions of the Constitution referring to the States.

Chapter III Courts

1. **Created as per s71**
    - Judicial power of the Commonwealth vested in High Court and other such Federal courts as the Parliament creates and invests with federal jurisdiction.
2. **Constituted as per s72**
    - Judges with life tenure

3. **Other sections to consider:**
    - s73: High Court power to hear appeals from s71 courts
    - s75: Original jurisdictions
    - s76: Parliament can confer additional original jurisdiction on High Court, eg constitutional matters
    - s77: Power to define jurisdiction of federal courts and give State Courts federal jurisdiction

Entrenchment Power

- Only way to entrench laws at a Commonwealth level is to include in Constitution
    - Otherwise Parliament has full power to enact/repeal laws
        - (subject to s51(xxxvii) and s51(xxxviii) which change application of Constitution)

Human Rights, Protection

- The Constitution affords very limited human rights protection
    - s116 – Commonwealth not to legislate in respect of religion
    - s117 – Rights of residents in states not to be subject to any disability or discrimination which would not be applicable in another state
    - s80 – Right to trial by jury
    - s51(xxxi) – Acquisition of property on just terms

LAWS5007 PUBLIC LAW
FINAL EXAM – CASE GUIDE
Semester 2, 2015

WEEK ONE – INTRODUCTION TO PUBLIC LAW

Outline of history of constitutional documents; The Constitution, its structure and themes

Page 1

Unions NSW v NSW (2013)

- High Court first favoured the notion of popular sovereignty after the Australia Acts
- Keane J based the requirement for the free flow of political communication on the need to "preserve the political sovereignty of the people of the Commonwealth".

Coe v Commonwealth (No1) and Mabo (No2)

- Coe v Cth (No1) - High Court is of the view that acquisition of sovereignty over Australia is an "act of state" which cannot be challenged in the courts.
- Mabo (No 2) - High Court recognised native title held under the "paramount sovereignty of the Crown"

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Momcilovic v The Queen (2011)

- The principle of legality applies to statutes affecting courts in relation to such matters as procedural fairness and the open court principle, albeit its application in such cases may be subsumed in statutory rules of interpretation which require that, where necessary, a statutory provision be read down so as to bring it within the limits of constitutional power.
- It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.

Potter v Minahan (1908)

- Words in a statute are not to be interpreted as overturning fundamental principles, infringing rights or departing from the general system of law unless such an intention is expressed 'with irresistible clearness" (O'Connor J)
- Principle that the executive and Parliament will be taken to intend to implement Australia's international obligations unless the contrary is made clear

Coco v The Queen (1994)

- Parliament must face up to the impact of its laws upon human rights, so the clear intention of parliament must be shown and legislation will not be read to abridge those rights unless expressly stated.
- Intent was to increase attention to the impact of legislative proposals on fundamental rights"

WEEK TWO – CONSTITUTIONAL AMENDMENT

Amendment of the Commonwealth Constitution and State Constitutions (Manner and Form)

Page 3

1998 Proposal by Constitutional Commission (BW 1343)

- As per s128, only the Governor-General acting on ministerial advice can put matters to referenda.
- The Constitutional Commission rejected the idea of citizens' initiated referenda in 1998

because of the problems to which they give rise.

SAMPLE: DETAILED CASE NOTES

WEEK EIGHT – EXECUTIVE POWER

Prerogative powers and statutory executive powers; Nationhood power; Power to contract and spend

<table>
<tr><th colspan="2">Communist Party case (1951) (BW 380)</th></tr>
<tr><td rowspan="3">Whether there is an implied nationhood power has never been conclusively decided by the court. However judges have been highly critical of its existence recently (see Davis v Commonwealth (1988)) and have emphasized that an implied nationhood power resulting from a ‘deeper or wider source’ is a minority view.</td><td>Issues
Does the Commonwealth have an implied nationhood power?</td></tr>
<tr><td>Facts
Dixon J and Fullagar J argued that there was an implied legislative power to protect the Commonwealth against internal threats, such as subversion.</td></tr>
<tr><td>Obiter/Minority
Fullagar J called it the ‘other power’, that is the ‘inherent right of self-protection’ that the Commonwealth as a nation must possess. He saw it as ‘depending really on an essential and inescapable implication which must be involved in the legal constitution of any polity’, while Dixon J also ascribed it to a ‘deeper or wider’ source. This has since been emphasized as a minority view.</td></tr>
<tr><th colspan="2">Davis v Commonwealth (1988) (BW 380)</th></tr>
<tr><td rowspan="2">The idea of an implied nationhood power is a minority view. ‘It is axiomatic [unquestionable] in constitutional law as it is elsewhere that the sum cannot be greater than its parts…. [T]he Commonwealth remains confined to that which is granted to it by the Constitution.’

The Commonwealth cannot be accorded a legislative power to cross the boundaries between State and Commonwealth responsibility laid down by the Constitution.

The majority were unable to conceive of an implication of the kind described that would not be sufficiently and accurately described in the terms of s61 supported by s51(xxxix).

References to an inherent nationhood power should be understood as an elliptical way of referring to the incidental power in s51(xxxix), operating upon the executive power in s61,</td><td>Issues
Does the Commonwealth have an implied nationhood power?

Are there any laws regarding suppression, subversion or protection of the Commonwealth that would not be covered by s61/s51(xxxix)?

Does the Commonwealth have the power to legislate across the Commonwealth/State boundary?</td></tr>
<tr><td>Facts
The plaintiffs challenged certain sections of the Australian Bicentennial Authority Act 1980 (Cth) as unconstitutional and argued that section 83 of the Constitution did not authorise the appropriation of money for the purposes of the Bicentennial Authority or for the celebration of the Bicentenary. Section 22 of the Act prohibited the use of certain terms and symbols (such as '1788', '1988') without the consent of the Authority.

The High Court held that the commemoration of the Bicentenary was squarely within the Commonwealth's executive power and they considered the interests of the States in the bicentenary to be ‘of a more limited character’:
The commemoration of the Bicentenary is pre-eminently the business and concern of the Commonwealth as the national government and as such falls fairly and squarely within the federal executive power.

Wilson and Dawson JJ were highly critical of the notion of an implied legislative nationhood power:
‘We think it desirable to deprecate speaking of implied powers as distinct from the proper scope of the executive power conferred by s61 lest the use of the term tend to suggest the existence of some new or independent source of power. The Commonwealth cannot be accorded a legislative power to cross the boundaries between State and Commonwealth responsibility laid down by the Constitution. It is axiomatic [unquestionable] in constitutional law as it is elsewhere that the sum cannot be greater than its parts…. [T]he</td></tr>
</table>

as per Wilson J's comments across Davis and Tasmanian Dams, which would appear contradictory if not read this way. The federal distribution of powers can be unaffected by the exercise of Commonwealth power in an area of State jurisdiction. Despite the existence of an implied legislative power (quite apart from an incidental power) which can extend to coercive laws, legislation must pass a proportionality test: must be proportionate to protect the Commonwealth interest. Must be reasonable and appropriately adapted to achieve the valid ends within constitutional power.	*Commonwealth remains confined to that which is granted to it by the Constitution.'* Wilson and Dawson JJ appeared to take up Deane J's approach from the Tasmanian Dam Case by concluding that the federal distribution of powers was unaffected despite the Commonwealth exercising its powers in an area of State jurisdiction. Mason CJ, Deane and Gaudron JJ concluded that it was within the Commonwealth's executive power to set up a corporation to carry out the commemoration. They thought that it then followed that s 51(xxxix) permitted legislation that regulated the administration and procedures of the Authority and conferred on it such powers and protection as would be appropriate. Coercive laws would even be possible. However, in this case the laws went too far. They were grossly disproportionate to the need to protect the commemoration. They were not reasonably and appropriately adapted to achieve the ends within constitutional power (BW 386). They limited freedom of speech in a manner which was not necessary to achieve the valid ends. <u>Obiter/Minority</u> Dixon J: Did not doubt that the combination of s51(xxxix) with s61 would support particular laws for the suppression or subversion, but he found such an exercise had an artificial aspect and preferred to find the source of the power to legislate against subversive conduct 'in principle that is deeper or wider than a series of combinations of the words of s51(xxxix) with those of other constitutional powers'. The power was to be found, he said, in the very nature of the polity established by the Constitution and the capacity which it must of necessity have to protect its own existence. However this was a minority view. The majority were unable to conceive of an implication of the kind described that would not be sufficiently and accurately described in the terms of s61 supported by s51(xxxix). It was suggested in *NSW v Commonwealth (Seas and Submerged Lands Case)* (1975) that the nationhood power might enable the Commonwealth to legislate for the Australian territorial sea, quite apart from the external affairs power (s51(xxix). In *Commonwealth v Tasmania (Tasmanian Dams Case)* (1983) Wilson J referred to the nationhood power as: 'an inherent power to legislate'. However, his participation in the comments in *Davis* suggest that this should be understood as an elliptical way of referring to the incidental power in s51(xxxix), operating upon the executive power in s61.