

LEGAL PROFESSION ADMISSION BOARD

MARCH 2014

AUSTRALIAN CONSTITUTIONAL LAW

Time: Three Hours This paper consists of **six** questions.

Candidates are required to attempt any **four** questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first **four** questions attempted will be marked.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is a closed book examination. No materials are permitted in the examination room.

Attached to this paper is a copy of the Law Extension Committee's Case List and the Course Outline incorporating appropriate excerpts from the Constitution.

As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Question 1

X College has been operating in Australia as an incorporated body providing schools to teach the principles of banking and finance to mature age students who have no prior tertiary education. The students are not charged any fees. The funds to operate the schools are raised by X College running a tennis tournament on each school site during the December-January school holidays. Fees are paid to enter the tournament.

X College is concerned about the impact of a new Commonwealth enactment, the Corporations Law for Schools Act 2014. The new Act is stated to apply to all incorporated education institutions which are foreign corporations or trading or financial corporations within the Commonwealth. The new Act provides inter alia:-

- a. prices must be charged by an incorporated education institution for its goods or services and all prices shall be subject to approval by a School Prices Tribunal established under the Act;
- b. the curriculum offered by an incorporated education institution must be submitted to a Curriculum Approval Tribunal also established under the Act;
- c. The Directors of an incorporated education institution must compulsorily retire after seven years as a Director.

(A) Does the Corporations Law for Schools Act 2014 apply to X College?

AND

(B) Does X College have to comply with provisions (a), (b) and (c) in the Corporations Law for Schools Act 2014?

Advise X College.

(Question 2 follows)

Question 2

Australia is a party to the 1972 Convention for the Conservation of Antarctic Seals. Convention which applies to seals found on the Antarctic continent and surrounding 200km maritime zone, provides in Article 3 that:

Parties to this Convention are required to ensure that seals are not subject to commercial exploitation and in particular are to prohibit:

- (a) the killing of seals other than for scientific research;
- (b) the sale of any seal products, such as seal meat, seal fur or seal oil.

The Southern Fur Seal lives during the summer in colonies along the Antarctic coastline. During the winter, the seals migrate north to Seal Beach in Tasmania.

The Tasmanian Government has for many years operated a tourist information and education centre at Seal Beach. The Tasmanian Government has actively promoted tourist activities at Seal Beach and it is very profitable for the Tasmanian Government due to the ever increasing numbers of tourists coming to the area. International research has alerted the Commonwealth Government to the possibility that the decline in the birth rate for the Southern Fur Seal in Antarctica might be linked to the Tasmanian Government's tourism activities at Seal Beach.

Animal activists and conservationists lobby the Commonwealth Parliament to enact legislation to end the tourism activities at Seal Beach. The Commonwealth Parliament introduces amendments to the Seal Act 1975 (Cth), a statute that generally implemented the provisions of the Convention within Australia.

The amendment introduced in 2014 provides:

"The species of seal known as the Southern Fur Seal shall not be subject to exploitation for the purposes of the tourism industry.

Penalty \$500,000. "

The Tasmanian Government is financially dependent upon the tourism industry located at Seal Beach. It seeks your advice on the validity of the amendment introduced in 2014 to The Seal Act 1975 (Cth).

Advise the Tasmanian Government.

(Question 3 follows)

Question 3

The Australian Competition Tribunal is established by the Trade Practices Act 1974 (Cth). The Tribunal comprises a Presidential member who must be a Federal Court judge and other members all of whom are appointed for 7 years.

The Trade Practices Act 1974 (Cth) s50A deals with an acquisition abroad of a controlling interest in a company, leading to a controlling interest in an Australian trading corporation. The Australian Competition Tribunal, in respect of such an acquisition, may make a declaration under s50A(1) that “it is satisfied that the latter controlling interest results in a substantial Australian market dominance and does not result in any countervailing public benefit”. Further the statute provides that a declaration under s50A(1) “shall not be challenged or called into question in any court of law”.

By s50A(6) it is provided that “After the end of 6 months after a declaration is made...the Australian trading corporation shall not ...carry on business in the Australian market” s50A(6)

If the Australian trading corporation persists in carrying on the relevant business, the Australian Competition and Consumer Commission may ask the Federal Court of Australia “to grant an injunction” under s80(1A) of the Act or for “an order for disposal of assets” under s81(1B).

The statute obliges the Tribunal prior to making any declaration under s50A to allow any party likely to be affected by a declaration to make written submissions to it.

A declaration under s50A(1) has been made against T Ltd without permitting T Ltd to make written submissions. T Ltd wants to obtain judicial review of the proceedings and seeks your advice.

- (a) Is the Tribunal validly constituted and is it a judicial or non-judicial body? Give reasons for your conclusion.**
- (b) What is the nature of the proceedings before the Federal Court of Australia? Explain the constitutional provisions that authorise the jurisdiction.**
- (c) Advise T Ltd whether it may seek review in the High Court of the declaration made by the Tribunal pursuant to s50A(1).**

(Question 4 follows)

Question 4

The Australian Postal Commission proposes to install a bright yellow coloured “Express Mail” box in a residential street of Bellevue Hill, New South Wales; the Commonwealth Authority is prepared to acquire land, even compulsorily, to this end. Under the *Environmental Planning and Assessment Act 1979* (NSW), Woollahra Municipal Council, the local council, has a planning scheme which would not permit the installation of an “Express Mail” box in that locality.

At the instigation of the residents the local council has convened a meeting to consider the issue as the Commonwealth Authority has made it clear that it believes the law is on its side. When the residents attend the meeting they discover it is closed to the residents at the request of the Commonwealth Authority. The residents consider that the closure of the meeting can be challenged and wish to seek legal advice. To permit the residents to seek such advice the meeting is delayed.

The Commonwealth Authority, pending the re-convening of the local council meeting, becomes determined to erect the “Express Mail” box at the site it has chosen even though the local council has made it clear it will offer an alternative site in a nearby street.

(a) Does the Australian Postal Commission have the law on its side?

(b) Do the residents have the law on their side?

BOTH (a) AND (b) must be answered.

Question 5

Assume that the Commonwealth Parliament has enacted the Radio Transmitters and Receivers Act 2014 as “an Act relating to the use of radio transmitters and receivers and other matters”. The lengthy and detailed provisions of the Act deal with such aspects of radio transmitters and receivers as – common standards for radio equipment, radio frequency planning (i.e. dividing the radio spectrum into frequency bands and specifying the purposes of the use for each band), the issuing of licences for radio transmitters and also the issuing of licences for receivers which have been declared by regulations to be “receivers” for the purposes of the Act.

Assume the New South Wales Road Safety Act 1980 provides:

“A person must not own, sell, use or possess a device the sole or principal purpose of which is to prevent the effective use of a prescribed speed measuring device or to detect when a prescribed speed measuring device is being used.”

X does own a police radar detector and uses it in her car when travelling in New South Wales. X has been charged under the New South Wales Act and she advises you that:-

(a) X’s detector is of a type which has been declared by regulation to be a “receiver” and it has been “licensed” for the purposes of the Radio Transmitters and Receivers Act 2014 (Cth).

(Question 5 continues)

(Question 5 continued)

(b) Assume that after X is charged but before the hearing of the charge the Commonwealth Parliament inserts a new provision into the Radio Transmitters and Receivers Act 2014 to provide “this Act is not intended and shall be deemed never to have been intended to exclude or limit the operation of a law of a State which is capable of operating concurrently with this Act”.

You are to advise X in respect of (a) and (b) and whether she will be convicted under the New South Wales Road Safety Act 1980.

Question 6

Assume that the Commonwealth Parliament enacts the Citrus Fruit Industry Act 2002 (Cth). The Act establishes a statutory board, the Citrus Fruit Industry Board, composed of industry representatives and Government appointees. The Board is authorised by the statute to demand and receive a compulsory fee. The fee payable under the Act is \$100 per tree planted during each year. Heavy fines are applicable when the fee is not paid within 30 days of a demand being made by the Board.

The Act provides that a producer is entitled to a reduction in the fee by 50% where the producer plants a citrus tree in either rural Victoria or rural New South Wales (defined as land further than 100 km from the GPO of either Melbourne or Sydney).

The Act provides for a complete exemption from the fee where the planting of citrus trees is performed by youth labour and paid at rates recommended by the Commonwealth.

No services are provided by the Board. The fees are paid into the Consolidated Revenue Fund. A later Appropriation Act provides that an amount equal to the fees raised by the Board shall be appropriated for the Australian Film Commission.

A small NSW producer living 30 kms outside Sydney, who plants and grows citrus for her personal consumption, seeks your advice as to whether she can resist payment of any fees to the Board.

Advise the NSW producer whether there is a constitutional ground for her to resist payment of any fees to the Board.

END OF PAPER

CASE LIST**1. Introduction**

Amalgamated Society of Engineers v Adelaide Steamship Co Ltd ("Engineers' Case") (1920) 28 CLR 129
Leask v Commonwealth (1996) 187 CLR 579
Melbourne Corporation v Commonwealth ("Melbourne Corporation Case") (1947) 74 CLR 31
Murphyores Inc Pty Ltd v Commonwealth (1976) 136 CLR 1
Austin v Commonwealth (2003) 215 CLR 185

2. Trade and commerce power: Constitution, s 51(i)

A-G (WA) v Australian National Airlines Commission ("Ansett Transport Industries Case") (1976) 138 CLR 492
Airlines of New South Wales v New South Wales (No 2) ("Second Airlines Case") (1965) 113 CLR 54
Australian National Airways v Commonwealth (1945) 71 CLR 29
Huddart Parker v Commonwealth (1931) 44 CLR 492
Murphyores Inc v Commonwealth (1976) 136 CLR 1
O'Sullivan v Noarlunga Meat (1954) 92 CLR 565
R v Foster: ex parte Eastern and Australian Steamship Co (1959) 103 CLR 256
Redfern v Dunlop Rubber Australia ("Redfern's Case") (1964) 110 CLR 194
Wragg v New South Wales (1953) 88 CLR 353

3a. Taxation power: Constitution, s 51(ii)

Air Caledonie International v Commonwealth (1988) 165 CLR 462
Austin v Commonwealth (2003) 215 CLR 185
Australian Tape Manufacturers Association v Commonwealth ("Blank Tape Royalty Case") (1993) 176 CLR 480
Elliott v Commonwealth (1936) 54 CLR 657
Fairfax v FCT (1965) 114 CLR 1
Fortescue Metals Group Ltd v Commonwealth [2013] HCA 34 (7 August 2013)
Harper v Minister for Sea Fisheries (1989) 168 CLR 314
Logan Downs v FCT (1965) 112 CLR 177
Northern Suburbs General Cemetery Reserve Trust v Commonwealth ("Training Guarantee Case") (1993) 176 CLR 555
Osborne v Commonwealth (1911) 12 CLR 321
Pape v Federal Commissioner of Taxation (2009) 238 CLR 1
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Roy Morgan Research Pty Ltd v Commissioner of Taxation (2011) 244 CLR 97
South Australia v Commonwealth (First Uniform Tax Case) (1942) 65 CLR 373
Victoria v Commonwealth (Second Uniform Tax Case) (1957) 99 CLR 575

3b. Provisions in taxation laws: Constitution, s 55

Air Caledonie International v Commonwealth (1988) 165 CLR 462
Australian Tape Manufacturers Association v Commonwealth (1993) 176 CLR 480
Cadbury-Fry-Pascall v FCT (1944) 70 CLR 362
Collector of Customs (NSW) v Southern Shipping Co (1962) 107 CLR 279
Luton v Lessels (2002) 210 CLR 333
Permanent Trustee Australia Pty Ltd v Commissioner of State Revenue (2004) 220 CLR 388 (pars 55-74)

Re Dymond (1959) 101 CLR 11
State Chamber of Commerce and Industry v Commonwealth (Fringe Benefits Tax Case) (1987) 163 CLR 329

4. Corporations power: Constitution, s 51(xx)

Actors and Announcers Equity Association of Australia v Fontana Films ("Actors Equity Case") (1982) 150 CLR 169
Commonwealth v Tasmania ("Tasmanian Dam Case") (1983) 158 CLR 1
Re Dingjan; ex parte Wagner ("Dingjan's Case") (1995) 183 CLR 323
Fencott v Muller (1983) 152 CLR 570
New South Wales v Commonwealth ("Incorporation Case") (1990) 169 CLR 482
New South Wales v Commonwealth; Western Australia v Commonwealth (2006) 229 CLR 1 ("Work Choices Case")
R v Australian Industrial Court: ex parte C L M Holdings (1977) 136 CLR 235
R v Federal Court of Australia: ex parte Western Australian National Football League ("Adamson's Case") (1979) 143 CLR 190
State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282
Strickland v Rocla Concrete Pipes ("Concrete Pipes Case") (1971) 124 CLR 468
Victoria v Commonwealth ("Industrial Relations Act Case") (1996) 187 CLR 416

5. External affairs power: Constitution, s 51(xxix)

Airlines of New South Wales v New South Wales (No 2) ("Airlines No 2") (1965) 113 CLR 54
Bradley v Commonwealth (1973) 128 CLR 557
Commonwealth v Tasmania ("Tasmanian Dam Case") (1983) 158 CLR 1
Koowarta v Bjelke-Petersen (1982) 153 CLR 168
New South Wales v Commonwealth ("Seas and Submerged Lands Act Case") (1975) 135 CLR 337
Pape v Federal Commissioner of Taxation (2009) 238 CLR 1
Polyukhovich v Commonwealth ("War Crimes Act Case") (1991) 172 CLR 501
Queensland v Commonwealth ("Tropical Rainforest Case") (1989) 167 CLR 232
R v Burgess: ex parte Henry (1936) 55 CLR 608
R v Poole: ex parte Henry (No 2) (1939) 61 CLR 634
Richardson v The Forestry Commission (1988) 164 CLR 261
Victoria v Commonwealth ("Industrial Relations Act Case") (1996) 187 CLR 416

6a. Executive power Constitution, s 61

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Victorian Stevedoring and General Contracting Co and Meakes v Dignan (1931) 46 CLR 73
Williams v Commonwealth (2012) 86 ALJR 713

6b. Separation of powers: Constitution, s 71

Harris v Caladine (1991) 172 CLR 84
Hilton v Wells (1985) 157 CLR 57
R v Joske: ex parte Australian Building Construction Employees and Builders Labourers Federation (1974) 130 CLR 87
The Boilermakers Case (1956) 94 CLR 254; (1957) 95 CLR 529
Waterside Workers Federation of Australia v J W Alexander (1918) 25 CLR 434
Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1

7. Judicial power of the Commonwealth: Constitution, s 71

Attorney-General (Cth) v Breckler (1999) 197 CLR 83
Attorney-General (Cth) v Alinta (2008) 233 CLR 542
Brandy v Human Rights and Equal Opportunity Commission ("Brandy's Case") (1995) 183 CLR 245
Cominos v Cominos (1972) 127 CLR 588
Farbenfabriken Bayer Aktiengesellschaft v Bayer Pharma (1959) 101 CLR 652
Huddart Parker v Moorehead (1909) 8 CLR 330
Lane v Morrison (2009) 239 CLR 230
Precision Data Holdings v Wills (1991) 173 CLR 167
R v Commonwealth Industrial Court: ex parte Amalgamated Engineering Union Australian Section ("Shearer's Case") (1960) 103 CLR 368
R v Davison (1954) 90 CLR 353
R v Joske: ex parte Australian Building Construction Employees and Builders Labourers Federation (1974) 130 CLR 87
R v Quinn: ex parte Consolidated Foods (1977) 138 CLR 1
R v Spicer: ex parte Australian Builders Labourers Federation (1957) 100 CLR 277
R v Spicer: ex parte Waterside Workers Federation of Australia (1957) 100 CLR 312
R v Trade Practices Tribunal: ex parte Tasmanian Breweries (1970) 123 CLR 361
Re Tracey: ex parte Ryan (1989) 166 CLR 518
Rola Co (Australia) v Commonwealth (1944) 69 CLR 185
Thomas v Mowbray (2007) 233 CLR 307

8a. Courts and federal jurisdiction: Constitution, s 71

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In re Judiciary and Navigation Acts (1921) 29 CLR 257
Re Wakim; ex parte McNally (1999) 198 CLR 511
R v Hickman; ex parte Fox and Clinton (1945) 70 CLR 598
The Marriage Act Case (1962) 107 CLR 529

8b. High Court's appellate jurisdiction: Constitution, s 73

Cockle v Isaksen (1957) 99 CLR 155
Mellifont v A-G (Q) (1991) 173 CLR 289
O'Toole v Charles David (1990) 171 CLR 232
Smith Kline and French Laboratories (Australia) v Commonwealth (1991) 173 CLR 194

8c. High Court's original jurisdiction: Constitution, ss 75, 76**(1) Section 75(iii)**

Bank of New South Wales v Commonwealth (1948) 76 CLR 1
Inglis v Commonwealth Trading Bank (1969) 119 CLR 334
R v Collins: ex parte ACTU-Solo Enterprises (1976) 50 ALJR 471
Repatriation Commission v Kirkland (1923) 32 CLR 1
Toowoomba Foundry v Commonwealth (1945) 71 CLR 545

(2) Section 75(v)

Bodruddaza v Minister for Immigration and Multicultural Affairs (2007) 228 CLR 651
Plaintiff S157/2002 v Commonwealth of Australia (2003) 211 CLR 476
R v Cook; ex parte Twigg (1980) 147 CLR 15
R v Drake-Brockman: ex parte National Oil (1943) 68 CLR 51
R v Murray: ex parte Commonwealth (1916) 22 CLR 437

Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82

(3) Section 76(i)

A-G (NSW) v Commonwealth Savings Bank (1986) 160 CLR 315

James v South Australia (1927) 40 CLR 1

(4) Section 76(ii)

Felton v Mulligan (1971) 124 CLR 367

R v Commonwealth Court of Conciliation and Arbitration: ex parte Barrett (1945) 70 CLR 141

Watson v FCT (1953) 87 CLR 353

8d. Investing State courts with federal jurisdiction: *Constitution*, s 77(iii)

Commonwealth v Hospital Contribution Fund of Australia (1982) 150 CLR 49

Harris v Caladine (1991) 172 CLR 84 (**s77(ii)**)

Kable v Director of Public Prosecutions NSW (1996) 189 CLR 51

9a. Duties of excise: *Constitution*, s 90

Capital Duplicators v Australian Capital Territory (No 2) (1993) 178 CLR 561

Dennis Hotels v Victoria (1960) 104 CLR 529

Dickenson's Arcade v Tasmania (1974) 130 CLR 177

Gosford Meats v New South Wales (1985) 155 CLR 368

Ha v New South Wales (1997) 189 CLR 465

H C Sleigh v South Australia (1977) 136 CLR 475

Harper v Minister for Sea Fisheries (1989) 168 CLR 314

Harper v Victoria (1966) 114 CLR 361

Hematite Petroleum v Victoria (1983) 151 CLR 599

Logan Downs v Queensland (1977) 137 CLR 59

Matthews v Chicory Marketing Board (Victoria) (1938) 60 CLR 263

Parton v Milk Board (Victoria) (1949) 80 CLR 263

9b. Freedom of inter-state trade: *Constitution*, s 92

Barley Marketing Board (NSW) v Norman (1990) 171 CLR 182

Bath v Alston Holdings (1988) 165 CLR 411

Betfair Pty Ltd v Western Australia (2008) 234 CLR 418

Castlemaine Tooheys v South Australia (1990) 169 CLR 436

Cole v Whitfield (1988) 165 CLR 360

Sportsbet Pty Ltd v New South Wales [2012] HCA 13 (2012) 86 ALJR 446

10. Implied freedoms

Aust Capital Television v Commonwealth (No 2) (1992) 177 CLR 106

Coleman v Power (2004) 220 CLR 1

Lange v Australian Broadcasting Corp (1997) 189 CLR 520

Nationwide News v Wills (1992) 177 CLR 1

Wotton v State of Queensland (2012) 246 CLR 1

11. Inconsistency of laws: Constitution, s 109

Airlines of New South Wales v New South Wales (No 2) ("Second Airlines Case") (1965) 113 CLR 54
Ansett Transport Industries (Operations) v Wardley (1980) 142 CLR 237
Clyde Engineering Co v Cowburn (1926) 37 CLR 466
Colvin v Bradley Bros (1943) 68 CLR 151
Commercial Radio Coffs Harbour v Fuller (1986) 161 CLR 47
Dickson v The Queen (2010) 241 CLR 491
Ex parte McLean (1930) 43 CLR 472
O'Sullivan v Noarlunga Meat (1954) 92 CLR 565
R v Credit Tribunal: ex parte General Motors Acceptance Corporation, Australia (1977) 137 CLR 545
Viskauskas v Niland (1983) 153 CLR 280
Wenn v A-G (Vic) (1948) 77 CLR 84
Wollongong University v Metwally (1984) 158 CLR 447

12. Commonwealth – State relations

Amalgamated Society of Engineers v The Adelaide Steamship Co ("Engineers Case") (1920) 28 CLR 129
Austin v Commonwealth (2003) 215 CLR 185
Australian Coastal Shipping Commission v O'Reilly (1962) 107 CLR 46
Clarke v Federal Commissioner of Taxation (2009) 258 CLR 272
Commonwealth v Cigamic (1962) 108 CLR 372
Commonwealth v Tasmania ("Tasmanian Dam Case") (1983) 158 CLR 1
Melbourne Corporation v Commonwealth (Melbourne Corporation Case) (1947) 74 CLR 31
Pirrie v McFarlane (1925) 36 CLR 170
Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192
Re The Residential Tenancies Tribunal of NSW and Henderson; Ex parte The Defence Housing Authority ("Hendersons Case") (1997) 190 CLR 410
Victoria v Commonwealth (1971) ("Payroll Tax Case") 122 CLR 353
West v Commissioner of Taxation (1937) 56 CLR 657

COURSE OUTLINE

Introduction

1. The **Constitution**

General considerations

Approaches to interpretation and characterisation:-

- a. scope of head of power
- b. characterisation
- c. restrictions

Federal powers

2. Trade and commerce power: **Constitution, s 51(i)**

s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:

(i) Trade and commerce with other countries, and among the States."

- a. Understanding what is "trade and commerce"
- b. Overseas trade and commerce
- c. Interstate trade and commerce
- d. Regulation of intrastate trade and commerce

3a. Taxation power: **Constitution, s 51(ii)**

s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:

...

(ii) taxation; but so as not to discriminate between States or parts of States: ..."

- a. Identification of tax
- b. Characterisation of tax laws
- c. Revenue or regulation
- d. Meaning of discrimination and preference

3b. Provisions in taxation laws: **Constitution, s 55**

s 55: Tax Bills "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

- a. Operation of the two limbs of s 55
- b. Consequences of breach of s 55

4. Corporations power: *Constitution*, s 51(xx)

s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:

...

(xx) foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth:"

- a. Identification of corporation as "trading" and/or "financial" corporation
- b. Ambit of power
- c. Incorporation case
- d. Liquidation
- e. Incidental scope of power

5. External affairs power: *Constitution*, s 51(xxix)

s 51: "The Parliament shall, subject to this Constitution, have power to make laws for the peace order and good government of the Commonwealth with respect to:

...

(xxix) External affairs: ..."

- a. Matters within "external affairs"; relations with other countries; matters external to Australia; international law
- b. Treaties and Conventions
- c. Subject matter of treaty; historically the differing views
- d. Implementing the treaty into municipal law
- e. Obligations and/or recommendations
- f. Relationship between treaty and municipal law
- g. Possible limitations
- h. Matters of international concern

6. Separation of powers

s 1: "The legislative power of the Commonwealth shall be vested in a Federal Parliament..."

s 61: "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 this Constitution, and of the laws of the Commonwealth."

s 71: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction"

Boilermakers' case and its significance: *Constitution*, s 71

Executive power of the Commonwealth: *Constitution*, s 61

- a. General considerations
- b. Width of power to delegate legislative authority to executive

7. Judicial power of the Commonwealth: *Constitution*, s 71

s 71: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction"

s 72: "...The Justices of the High Court and of the other courts created by Parliament –

- (i) Shall be appointed by...
- (ii) Shall not be removed ...
- (iii) Shall receive such remuneration...

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under appointment made before the repeal or amendment. ..."

- a. Identification of judicial power of the Commonwealth.
- b. Factors to distinguish it from non-judicial power
- c. Exceptions to *Boilermakers* – power to delegate; designated person rule; other exceptions
- d. Significance of *Boilermakers*
- e. Practical consequences of separation of powers

The judicature: Constitution, Ch III

8. Federal jurisdiction: Constitution, s 71

- a. Nature of "federal jurisdiction"
- b. Nature of "matter"

High Court's appellate jurisdiction: Constitution, s 73

s 73: "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences-

- (i) Of any Justice or Justices exercising the original jurisdiction of the High Court;
- (ii) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
- (iii) Of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

- a. Prerequisites for s 73 jurisdiction
- b. Parliamentary power to make exceptions and regulate

High Court's original jurisdiction: *Constitution*, s 75(iii) and s 75(v); s 76(i) and s 76(ii)

s 75: "In all matters ...

- (iii) *In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party ... the High Court shall have original jurisdiction.*
- ...
- (v) *In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ... the High Court shall have original jurisdiction."*

s 76: "The Parliament may make laws conferring original jurisdiction on the High Court in any matter ...

- (i) *Arising under this Constitution or involving its interpretation.*
 - (ii) *Arising under any laws made by the Parliament."*
- a. Sections 75-76 specialised original jurisdiction
 - b. "Commonwealth" or person within extended phrase "being sued . . ." in s 75(iii)
 - c. "Officer of the Commonwealth" and relevant remedies under s 75(v)
 - d. Matter "arising under or involving the interpretation of the *Constitution*" within s 76(i)
 - e. When a matter "arises" within s 76(ii)

Power to define jurisdiction: *Constitution*, s 77

s 77: "With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) *Defining the jurisdiction of any federal court other than the High Court:*
 - (ii) *Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States:*
 - (iii) *Investing any Court of a State with federal jurisdiction."*
- a. "Any court of a State"
 - b. Role of administrative officers and implications of *Harris v Caladine*
 - c. Repository of federal judicial power - *Kable v DPP*

Prohibitions

9a. Prohibition of a State from imposing duties of excise etc: *Constitution*, s 90

s 90: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive ..."

- a. "Excise duty"
- b. What is a duty of excise? The history.
- c. What is excluded?
- d. Reason s90 included in Constitution
- e. The *Dennis Hotels* anomaly and restrictions on it
- f. The broad view has triumphed

9b. "Absolute freedom" of trade, commerce and intercourse: Constitution, s 92:

s 92: "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..."

- a. The fresh start to the interpretation of s 92 in *Cole v Whitfield*
- b. The application of the fresh start
- c. Absolutely free and legitimate local interest
- d. Marketing legislation

Implied freedoms

10a. The implied freedom of communication

- a. Freedom of political discussion
- b. The *Lange* modifications
- c. Broad view of political discussion

Federalism

11. Inconsistency between Commonwealth and State laws: Constitution, s 109

s 109: "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."

- a. "Laws"
- b. "Invalid"
- c. "Inconsistency"

12. Commonwealth-State relations

- a. Power of the Commonwealth and the States to make laws binding on each other
- b. Commonwealth regulation of States
- c. State regulation of Commonwealth
- d. Does Commonwealth have any general immunity?
- e. Commonwealth subjecting itself to State laws