



VCE LEGAL STUDIES ASSESSMENT TASK UNIT 3 2014

Outcome 2 (50% of Unit 3)

Explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

Reading time: 5 minutes

Writing time: 50 minutes

QUESTION AND ANSWER BOOK

Structure of book

<i>Number of questions</i>	<i>Number of questions to be answered</i>	<i>Number of marks</i>
4	4	30

STUDENT NAME _____

TEACHER NAME _____

- Students are permitted to bring into the assessment room: pens, pencils, highlighters, erasers, sharpeners and rulers.
- Students are NOT permitted to bring into the assessment room: blank sheets of paper and/or white out liquid/tape.

Materials supplied

- Question and answer book of 8 pages.
- Additional space is available at the end of the book if you need extra paper to complete an answer

Instructions

- Write your **name and teacher's name** in the space provided above.
- All written responses must be in English.

Students are NOT permitted to bring mobile phones and/or any other unauthorised electronic devices into the assessment room

Question 1

One of the purposes of a constitution is to limit and describe the powers that each parliament in a federation will have.

- a. Using examples to illustrate your answer, compare and contrast exclusive and concurrent powers as they exist in the *Commonwealth of Australia Constitution Act 1900* (UK). 4 marks

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- b. Outline two restrictions placed by the Constitution on the legislative powers of the Commonwealth Parliament. 2 marks

Question 3

Changing the wording of the Constitution Act can be exceedingly difficult.

- a. Outline the process of change as described in s128 of the Constitution itself.

3 marks

- b. Outline one High Court case relating to the protection of constitutional rights in Australia, and identify the change this made to the Constitution without needing to use s128.

2 marks

c. Explain two ways in which the Australian public could be made more likely to support a proposal to change the wording of the Constitution pursuant to s128.

4 marks

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Question 4

Describe three key differences between the rights protection afforded by the Australian Constitution and the protection given in another jurisdiction you have studied, and indicate in each case why the international approach might be more effective than the domestic one taken here.

9 marks

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EXTRA WRITING SPACE

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COMMERCE PRESENTATIONS AND PUBLICATIONS**VCE LEGAL STUDIES
ASSESSMENT TASK UNIT 3
2014****Outcome 2
(50% of Unit 3)**

Explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, analyse the means by which law-making powers may change, and evaluate the effectiveness of the Commonwealth Constitution in protecting human rights.

**SUGGESTED ANSWERS
AND MARKING SCHEME**

Note to teachers/students: The 2014 examination will consist of 70 marks of questions, to be answered in 120 minutes. This Assessment Task's ratio of marks to time is aiming to be reflective of the examination structure.

Question 1

One of the purposes of a constitution is to limit and describe the powers that each parliament in a federation will have.

- a. Using examples to illustrate your answer, compare and contrast exclusive and concurrent powers as they exist in the *Commonwealth of Australia Constitution Act 1900* (UK).**

4 marks

- 1 mark An explanation of one similarity between exclusive powers and concurrent powers.
- 1 mark An explanation of one difference between exclusive powers and concurrent powers.
- 1 mark Accurate use of more than one example.
- 1 mark Additional detail on one or more of similarities, differences or examples. This final mark should be used to differentiate accurate answers from excellent ones.

Similarities may include:

- ✓ Both exclusive powers and concurrent powers were given to the Commonwealth at federation as categories of specific power. For example, defence and marriage were both given to the Commonwealth in 1901.
- ✓ Both exclusive powers and concurrent powers are exercisable by the federal parliament, and therefore have law regarding them that is uniform across the country. For example, the laws regarding both currency and marriage are consistent across Australia.
- ✓ Both exclusive powers and concurrent powers are listed in the wording of the Australian Constitution. For example, defence and taxation are both listed in s51 of the Act.

Differences may include:

- ✓ Exclusive powers such as coinage and currency are only exercisable by the federal parliament; whereas concurrent powers such as marriage and taxation are shared by the federal parliament with the state parliaments.
- ✓ Exclusive powers tend to be matters of national importance, such as defence and immigration; whereas concurrent powers include matters that have more local aspects and importance as well, such as trade and taxation.

b. Outline two restrictions placed by the Constitution on the legislative powers of the Commonwealth Parliament.

2 marks

1 mark An outline of one restriction. Some detail on what the Commonwealth is prohibited from doing must be included for the mark – merely naming a section is not sufficient.

1 mark An outline of a second restriction.

Restrictions may include:

- ✓ The Commonwealth cannot legislate to establish a state religion, limit the free exercise of a religion, set ways to observe a religion, or set a religious test for a Commonwealth government job – s116.
- ✓ The Commonwealth cannot impose taxes on interstate trade – s92.
- ✓ The Commonwealth cannot legislate in areas of residual power, outside its specific powers. For example, on health or education.
- ✓ The Commonwealth cannot remove the right to trial by jury for a federal indictable offence – s80.
- ✓ The Commonwealth cannot legislate to ban political communication. For example, advertising on an issue of public or electoral importance.

Question 2

Explain how the division of power between the state and federal parliaments can be changed both by interpretation by the High Court of Australia and the referral of powers. Differentiate between them as methods of altering the balance of legislative power.

6 marks

1 mark An outline of the way in which the states are able to hand over residual powers to the Commonwealth to use, without changing the wording of the Constitution.

1 mark An outline of the way in which the High Court can change the scope and meaning of the specific powers or restrictions of the Commonwealth Parliament when a case comes before them.

1 mark An explanation of one difference.

3 marks Further detail on either or both of the methods – which may include short examples to illustrate – and/or further detail on the difference or additional differences. These marks should be used to differentiate accurate answers from excellent ones.

Sample responses for each section of the question may include:

- ✓ The Commonwealth Parliament has the power, in s51 of the Constitution, to make laws on any residual matter referred (handed over) to them by the states, even though that power was not given to them in their specific powers – but their legislation will only apply to the state or states that referred the power.
- ✓ One example of referring power was the hand-over of terrorism powers in 2003. The states gave a text-based referral, in which they wrote the text of the act in the referral act – this

meant the Commonwealth could only pass the act they prescribed, and could not do whatever they liked with the power.

- ✓ The High Court can change the division of power by interpreting the scope and meaning of specific powers when cases come before it. A narrow interpretation of specific powers leaves more power over for the states, while a broad interpretation gives more power to the Commonwealth.
- ✓ For example, in the Tasmanian Dams Case the High Court found that the federal "external affairs" power allowed the Commonwealth to legislate to implement the terms of any treaty, even if that treaty covered areas of residual power. The Commonwealth gained power at the expense of the states because any residual power could be used, as long as implementing a treaty was the basis of the legislation.
- ✓ One difference is that any state may refer any residual power to the Commonwealth at any time they like; they do not need for a dispute to arise the way the High Court does before they are allowed to interpret the meaning of the Constitution.
- ✓ Another difference is that the referral of powers will not necessarily result in uniform law being made for the entire country. One state may refer a power, such as Victoria did with workplace relations under the Kennett Government in the 1990s – or multiple states may refer it. The Commonwealth law will only apply to the state or states that referred the power, whereas a High Court ruling applies equally to every state.
- ✓ A third difference is that the referral of powers will only ever increase the power of the Commonwealth, whereas High Court interpretation can in theory increase the power of the states and limit the power of the Commonwealth. This is because referral does not allow the federal parliament to refer powers to the states, whereas the High Court is allowed to take a very narrow interpretation of a specific power.

Question 3

Changing the wording of the Constitution Act can be exceedingly difficult.

a. Outline the process of change as described in s128 of the Constitution itself.

3 marks

Note: *The section number, s128, for the referendum process is one of the few listed in the Study Design that students must recognise and remember.*

- 1 mark A referendum bill must pass through both houses of federal parliament. Better students will note that if it passes through one house twice, and is rejected by the other house twice, it can be put to the people anyway.
- 1 mark It is voted on by all people enrolled to vote for the House of Representatives, and must receive a 'double majority': a majority of votes Australia-wide, plus a majority of votes in a majority of states (4/6). Better students will note that any state directly affected by the proposal must be one of the ones in favour.
- 1 mark After these two stages have been successfully passed, the Governor-General will give Royal Assent, and sign the bill for it to become law. The wording of the Constitution will be changed.

- b. Outline one High Court case relating to the protection of constitutional rights in Australia, and identify the change this made to the Constitution without needing to use s128.**

2 marks

Note: *Answers in which students have confused rights cases with division of power cases must receive no marks, in line with examination marking.*

1 mark An outline of the facts and legal issue to be determined in one High Court case regarding the protection of rights.

1 mark A description of the impact that the outcome of this case had on rights, and how it related to the meaning of the Constitution.

Sample answers might include:

- ✓ In the ACTV (Political Broadcasting) Case the parliament banned most political advertising in the lead-up to an election. The High Court found that it infringed an implied right to freedom of political communication, because ss7 and 24 set up a system of representative government that required people to make an informed vote. The Constitution now includes this implied right in the common law surrounding it.
- ✓ In the Roach Case the parliament passed a law preventing anyone with a jail term from voting. The High Court found that there was no individual right to vote, but that the structure of the Constitution established a representative government in which large sections of the public could not be prevented from voting without a substantial reason. The Constitution now includes this structural protection in the precedent surrounding it.

- c. Explain two ways in which the Australian public could be made more likely to support a proposal to change the wording of the Constitution pursuant to s128.**

4 marks

Note: *This question is essentially asking about factors influencing the likely success of a referendum, but is simply asking about them in terms of how they can influence people in a positive way – to support the proposal.*

1 mark An outline of the first factor.

1 mark An explanation of how this factor might generate or result in public support. An example may be used to support the detail of the answer, however it would need to be linked to the answer and not simply listed out of context.

2 marks Repeat for a second factor.

Sample answers may include:

- ✓ The timing of referenda may generate support if the referendum is on the same day as an election. If the referendum issue is closely tied to election campaigning many people will be informed on the change to the Constitution simply because they have been following the election. This means they are in the best position to understand and feel confident voting on it, which can lead to a majority 'yes' vote and success.
- ✓ Bipartisan agreement on the proposal may result in support. If the two major parties agree on the proposal they will urge their supporters to vote in favour of it. Many people vote along

party lines, so this encouragement from both sides of politics can increase the chance of a successful double majority being achieved.

- ✓ Support for the centralisation of power may result in a 'yes' vote. If the states believe that a proposed increase of Commonwealth power is in the best interests of the country they may be willing to overlook their concerns regarding loss of power and endorse the proposal. It will then be easier to achieve the state majority as well as the nationwide majority. One example of this is the 1946 post-war increase to Commonwealth power, to allow the federal parliament to legislate regarding widows, unemployment and family benefits among others. It was seen as an important part of recovering from WWII.
- ✓ A lack of complexity or legalistic language in the proposal may increase support. If the proposal is not presented as complex or highly legal, more people in the community will be able to understand it and will thus feel more confident voting in favour of it. This increases its chance of success. For example, the 1977 proposal to set the retirement age of 70 for federal judges was easy to understand and passed easily, as did the 1967 proposal to count Aborigines in the census.

Question 4

Describe three key differences between the rights protection afforded by the Australian Constitution and the protection given in another jurisdiction you have studied, and indicate in each case why the international approach might be more effective than the domestic one taken here.

9 marks

Note 1: *The countries that may be chosen for this comparison are Canada, New Zealand, South Africa or the United States of America.*

1 mark An outline of one difference between Australia and the chosen jurisdiction.

1 mark A small amount of detail on the operation in each country.

1 mark An explanation of how this approach is more effective than Australia's current approach. Essentially, this will be drawing on weaknesses of Australia and strengths of the other jurisdiction.

6 marks Repeat for two further differences.

Note 2: *If more than three differences are explained, only the first three should be marked.*

Note 3: *The Study Design specifies that it is the "approach" taken to the protection of rights that must be focused on: not the specific rights themselves. Any answers focusing on individual rights rather than broad approaches should not receive marks.*

Sample answers for a range of countries and differences may include:

- ✓ The Supreme Court of Canada can issue an 'advisory opinion' on whether a particular law or action would infringe the Charter of Rights. The Australia High Court does not give advisory opinions; the action must be taken, then the matter must be challenged by a party with standing. Advisory opinions are beneficial, as they can avoid much of the time and expense of a rights claim being made.
- ✓ The Canadian Constitution includes a Charter of Rights and Freedoms – a part of the constitution devoted to the protection of human rights and where they are all listed together. There is no such charter or list in the Australian Constitution. Having a formal bill

of rights serves as a symbolic and inspiring document in a way that scattered rights do not, and it is easier for the average person to locate their rights and understand them.

- ✓ Courts in Canada can award damages for rights abuses; no such compensation is available from the High Court for the breach of constitutional rights in Australia. Allowing the court to award damages for rights infringements, however, saves injured parties the time, stress and expense of taking a second legal action to a second court.
- ✓ The Canadian Parliament can validly pass laws that breach express rights (even after a court has declared that the law breaches the Charter) because there is a constitutional clause allowing this; the Australian Parliament, on the other hand, cannot ever enact legislation that breaches constitutional rights. Allowing the parliament to override some rights reinforces the supremacy of the elected parliament, however, and puts the rights more in the hands of the people because they vote for parliament.
- ✓ Because the New Zealand Bill of Rights Act ('BORA') is a normal statute, rights in the New Zealand Bill of Rights can be amended by an act of parliament at any time. In Australia the rights are in the Constitution and there must be a referendum. Allowing the parliament to amend the rights document more easily by itself, rather than requiring a public vote, creates more flexible rights that can be more easily updated and added to over time.
- ✓ In New Zealand remedies can be sought if a party believes their BORA rights have been infringed. In Australia, remedies do not accompany a High Court declaration that a law is invalid. Allowing the court to award damages for rights infringements, however, saves injured parties the time, stress and expense of taking a second legal action to a second court.
- ✓ Acts of parliament in New Zealand are scrutinised by the Attorney-General to ensure they don't contradict rights in the BORA, however parliament will still be able to pass conflicting legislation. The Attorney-General plays no such formal role in the Australian Parliament, and the Australian Parliament cannot choose to infringe constitutional rights. Allowing the parliament to override some rights reinforces the supremacy of the elected parliament, however, and puts the rights more in the hands of the people because they vote for parliament.
- ✓ New Zealand's rights are not fully enforceable, and courts cannot invalidate legislation that infringes them; Australia's rights are fully enforceable by the High Court, and the High Court can invalidate any legislation that infringes them. Allowing the parliament to override some rights reinforces the supremacy of the elected parliament, however, and puts the rights more in the hands of the people because they vote for parliament.
- ✓ Some rights in South Africa are able to be limited by an act of parliament, either in a state of emergency or where parliament can show the infringement is necessary for some greater purpose. This is not possible in the Australian system, as we have no 'limitations clause'. Including some limitations clauses is more transparent than the system Australia currently has, where the High Court simply redefines a right to make its scope smaller. At the moment rights cannot be limited in Australia, but their definitions and scope can be altered subtly to achieve a very similar result.
- ✓ The South African Constitutional Court can award a remedy to the injured party in addition to declaring legislation invalid because it contravenes a constitutional right. The Australian High Court does not award damages when it invalidates legislation. Allowing the court to award damages for rights infringements, however, saves injured parties the time, stress and expense of taking a second legal action to a second court.

- ✓ In South Africa the rights give both vertical and horizontal protection. In other words, they protect people from the power of government as well as from other citizens. In Australia we have vertical protection only: protection from the power of government. Allowing horizontal protection for the rights that are appropriate to it recognises the practical reality that employers, large corporations and even schools and families can limit things such as political and religious freedom.
- ✓ The United States of America has an entrenched bill of rights in its constitution, which takes the form of ten amendments added; Australia has five express rights entrenched in its constitution, but they are not organised into a list-style bill of rights. Having a formal bill of rights serves as a symbolic and inspiring document in a way that scattered rights do not, and it is easier for the average person to locate their rights and understand them.
- ✓ In the United States the vote for changing the wording of the Constitution does not need to be held around the country on the same day; different states can hold it at a time that suits them. In Australia this is different, because the referendum votes in each state do need to be held on the same day. Allowing states to choose their own time for voting allows different states to investigate the change, educate the public or debate the impact of the proposal to a timeline that suited them and their population. If this resulted in people feeling more informed and in control, it might raise the number of proposals receiving a yes vote.

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