



LEGAL FUNDAMENTALS IN AUSTRALIA

Activity Centre: Unit 4 AOS 1

SECTION A

Question 1

Example points that could be made in an answer, in addition to or as an alternative to the more basic royal assent answer outlined above, include:

- ✓ *Royal assent is the final stage in a bill becoming law during which errors in drafting can be caught and the parliament can be prevented from acting outside its constitutional powers or creating legislation that has oversights or impracticalities in its implementation.*
- ✓ *The Crown can contribute to law-making by heading up non-partisan reform initiatives or authorising royal commissions by issuing letters patent.*

Question 2

a. **Example:** *The High Court has the responsibility under s76 of the Constitution to interpret the meaning of the wording of the Constitution and to set precedent on it. This is its exclusive jurisdiction, which means that neither another court nor the federal parliament has the power to do this. This interpretation can have the effect of limiting the matters the Commonwealth can legislate on, by defining a matter as being outside the scope of one of the specific powers or subject to a restriction. Alternatively, the High Court has the power to extend the Parliament's legislative authority by confirming that the matter is included in the scope of the specific powers. The scenario refers to the way the Court has prevented the Commonwealth from legislating to improperly restrict political communication, by finding that the conditions necessary for a representative democracy were implied in the Constitution and were therefore a restriction on parliamentary power.*

b. **Examples of possible roles include:**

- *The lower house is the seat of government because it has the responsibility of determining which party or coalition of parties will control the executive branch and determining the main policy direction for the state. The governing party would most likely have been responsible for developing the policy behind limiting campaign donations from these sections of the community, because it has the confidence of the representative lower house and possibly a mandate to do it.*
- *The lower house functions as the people's house, because its electoral system makes it the more truly representative house. The policy behind the bill was therefore probably one supported by the majority of people in Victoria, unhappy with the influence of money over politics, and the lower house would have been representing majority interests.*
- *The upper house played a role in scrutinising the bill and using its committee system to debate its provisions and possibly make amendments. The upper house performs this 'house of review' role because it usually is not controlled by the government party so can use its crossbencher influence to negotiate improvements – for example, refining the categories of organisation the bill limits.*

- c. **Example:** *Sheik Man Haron Monis wrote abusive letters to the families of soldiers who had died in Afghanistan. When Monis was charged with “using a postal service to cause offence,” he argued that the legislation infringed the freedom of political communication. The matter was heard by a Full Bench of only six justices, and the High Court was split 3:3. All six justices confirmed that his communication came under the umbrella of political speech, even though the letters were private communications; the justices also agreed that the postal service law put a burden on political communication. They were split 3:3 on the outcome of the McCloy proportionality test so the operation of ss7 and 24, however, because they couldn’t agree on whether the prevention of a serious offence constituted a legitimate reason to burden political communication. This would be the kind of precedent that would be helpful in the question scenario, though; if the Victorian law is challenged, the Court may have to consider whether there is a right to use financial resources to influence political decisions, even in ways that benefit us and don’t benefit another group. This would be a proportionality test issue, because if this is an undesirable thing a burden on political communication may be appropriate to prevent it. Without the Court making the clarification in the Monis case, however, we have been left without some persuasive precedent to apply.*
- d. *It is possible for a Victorian state law to be in conflict with a Commonwealth law because both parliaments have power under the Australia Constitution to make law in areas of concurrent power. Concurrent powers include matters such as marriage and taxation, and are areas that were given to the federal parliament at federation, but also kept with the states; the parliaments may both legislate on the area, but pass laws that people would be unable to follow simultaneously. Section 109 will only have an impact if someone challenges the state law in a federal court if they do, however, the application would impact the law by potentially making it invalid to the extent of its inconsistency with the Commonwealth law. The Commonwealth law would therefore prevail, and people would disregard the inconsistent provisions of the Victorian legislation. The reason why Justice Kirby calls this “drastic consequences” is that it essentially takes two equal, sovereign parliaments and gives one of them more power than the other, and the power to overrule laws passed by the other. If the Commonwealth disagrees with a Victorian law in an area of concurrent power, it can essentially nullify that part of the state parliament’s law by passing legislation to the contrary.*

SECTION B

- a. **Example:** *A ‘bicameral’ parliament is one that is made up of two houses or chambers. The sources show how one of these houses in federal parliament is called the House of Representatives – this is the lower house. The upper house is the Senate, and this is the house depicted in the second source, where the Coalition holds 31 seats.*
- b. **Examples:**
- *Because the sources show us the party composition of each house in terms of the seats each party holds, they show us how the Coalition held more seats in the lower house than the opposition Labor party, and therefore needed fewer non-Coalition members of parliament to support them as government. This requirement for the government to have the confidence of the lower house puts it in control of the executive branch of government.*
 - *The party with the majority of seats in the lower house of parliament – here, the House of Representatives – forms government and controls the executive branch. The sources show how no party had the majority of seats in the lower house of parliament, therefore the lower house of parliament was not controlled by the executive government.*
- c. **Examples of points that could be made:**
- *The minority government shown in the source material helps the separation of powers because it maintains some independence of the legislative branch, separate from the executive branch.*
 - *If the Coalition held three more seats in the lower house, it would have control of the lower house in a way that would prevent the rest of the house from acting effectively as a check and balance on the*

power of the executive – because the government could outvote every other MP every time, and could even guillotine debate to cut it short.

- *The upper house helps the legislature act as an independent arm of government from the executive because it is so rarely controlled by the government. Here, we can see that the Coalition does not have a majority of seats, but nor does Labor – instead, the deciding vote known as the ‘balance of power’, is held by minor parties and independents.*

Question 2

a. Examples of points that could be made:

- *Express rights are protections from the power of parliament that are written into the wording of one section of the Constitution. They therefore impact on the law-making power of the federal parliament because they discourage the parliament from making laws in those defined areas – any infringing legislation can be challenged and struck down.*
- *Express rights will have no impact on the power of the federal parliament to legislate if no-one with standing challenges the validity of the laws – they can still be passed, and will still continue to operate.*
- *The High Court can change the scope of the express rights through statutory interpretation of the Australian Constitution, and can therefore change the impact that express rights have on the power of the federal parliament to legislate. This is what the final sentence of the source material refers to: the ability of the High Court to determine the scope of the Parliament’s constitutional power to legislate.*
- *When the High Court interprets provisions in the Constitution such as (but not limited to) express rights, it is not making a policy or value judgment. Instead, as the source material statement by Chief Justice Gibbs makes clear, the Court is approaching the question from a legal perspective, asking what the Constitution does mean and how that applies to the legislation the Parliament has passed; the Court is not asking whether it thinks the Parliament should have passed that legislation and whether it wants for subjective reasons to stop it.*

b. Examples of points that could be made:

- *As Chief Justice Gibbs suggests in the source quotation, the High Court has the power to determine the scope of the constitutional legislative powers, and therefore what areas the federal and state parliaments can make laws on. In the Tasmanian Dams Case the High Court had the power to determine whether the dam proceeded according to Tasmanian Law, or whether it should be governed by the federal law and stopped.*
- *Chief Justice Gibbs, in source #1, is referring to the fact that it was a purely legal decision, and not a subjective values decision, whether the power over dams and heritage and electricity generation and the environment was a concurrent power (and therefore decided ultimately by Commonwealth law through the operation of s109) or a residual one (and therefore governed by Tasmanian law).*
- *When deciding what law-making powers the Commonwealth should have versus which powers the states should have, the High Court since 1920 has gone against the intentions of the framers to protect the power of the states and have awarded more power to the Commonwealth.*
- *The High Court gains the power to interpret the Constitution, and to apply it to law or policy, when a case comes before it. Anyone affected by the law or policy has the ability in Australia to challenge the validity of that law in the federal courts, and the courts can declare the law invalid if it goes outside the scope of the legislative power given to the body or infringes on a restriction or rights protection. The decision on the scope of the legislative power is what potentially changes the division of power – and we give the Court this ability by bringing a case to it.*

- *The High Court cannot initiate its own review of legislation to decide whether or not it is valid under the Constitution, and bills cannot be challenged before they have passed through parliament. Rather, the Court can only interpret the Constitution and powers or restrictions when someone challenges a law and brings the case to the Court – this can be a federal law, or a state one. Once the validity of legislation or executive policy is challenged and a constitutional argument is made by one of the parties to the case, the Court gets the power to look at the text of the Constitution and decide whether the law is valid or invalid according to the Constitution’s meaning.*
- *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 international treaty to which it is a signatory, 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. The Commonwealth could then override state law in that area pursuant to s109 in relation to anything covered by a treaty or an international concern.*
- *In the Roads Case the High Court found that the Commonwealth tied grants power in s96 could be used to compel the states to legislate in residual areas by tying the legislation to grants of money as compulsory conditions. The Commonwealth gained power at the expense of the states because they could indirectly affect policy the way in which residual powers were used – this enabled the division of powers to be altered by the vertical fiscal imbalance, which is disempowering for states.*
- *In Brislan’s Case the High Court held that the specific power of “telegraphic, telephonic and other like services” included the power to legislate regarding radios. The Commonwealth gained power at the expense of the states because new communications technologies not mentioned in the Constitution could be controlled by the Commonwealth as they were invented. They would become concurrent, and would therefore give the Commonwealth the ability to override state law in the area pursuant to s109. This altered the division of powers prospectively, for any new technologies.*