



POLITICS AND LAW

ATAR course examination 2020

Marking key

Marking keys are an explicit statement about what the examining panel expect of candidates when they respond to particular examination items. They help ensure a consistent interpretation of the criteria that guide the awarding of marks.

Section One: Short answer

30% (30 Marks)

Question 1

(10 marks)

(a) Outline what is meant by co-operative federalism.

(2 marks)

Description	Marks
Outlines what is meant by co-operative federalism	2
Makes a general statement about co-operative federalism	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> a concept of federalism whereby the Commonwealth and State governments assume shared responsibility over various issues that are not necessarily within their power in Australia today, the federal and state governments theoretically assume some shared power over various concurrent powers as outlined in s 51, such as the power to tax, building of railways. 	

(b) Distinguish between horizontal fiscal equalisation (HFE) and vertical fiscal imbalance (VFI).

(3 marks)

Description	Marks
Explains the difference between horizontal fiscal equalisation and vertical fiscal imbalance	3
States the difference between horizontal fiscal equalisation and vertical fiscal imbalance or Outlines what is meant by horizontal fiscal equalisation and vertical fiscal imbalance or Explains what is meant by horizontal fiscal equalisation or vertical fiscal imbalance	2
Makes a general statement about horizontal fiscal equalisation and/or vertical fiscal imbalance	1
Total	3
Differences include: <ul style="list-style-type: none"> VFI is referring to the fiscal imbalance between federal and state governments whereas HFE is addressing the fiscal imbalance across the states VFI is referring to an unequal distribution of funds within the federal system, whereas HFE attempts to rectify that HFE is dealing with funds collected via GST whereas VFI is referring to all funds collected by federal and state governments (e.g. customs and excise duties, income tax, payroll tax, gaming tax). VFI refers to the unequal collection of revenue between the Commonwealth and State governments, where state revenues do not meet expenditure, creating a situation in Australia in which the states are reliant on the Commonwealth government giving them funds to fulfil their responsibilities, whereas: HFE is a mechanism used to address fiscal imbalances, by currently redistributing funds collected via the GST across the states on a needs basis in order to allow them the fiscal capacity to deliver public services (conducted by Commonwealth Grants Commission).	

- (c) Discuss **two** issues associated with how the Council of Australian Governments (COAG) functioned. (5 marks)

Description	Marks
Discusses two separate and specific issues associated with how the Council of Australian Governments (COAG) functioned	5
Outlines two issues associated with how the Council of Australian Governments (COAG) functioned	3–4
States one or two issues associated with how the Council of Australian Governments (COAG) functioned or Makes a general statement about how the Council of Australian Governments (COAG) functioned	1–2
Total	5
Answers could include but are not limited to: <ul style="list-style-type: none"> • COAG was too bureaucratic in its committee structure • meetings were held too infrequently/irregularly • participants were too willing to make it a play for media attention • participants tended to be too partisan on particular policies • meetings tried to deal with too many issues at a time and these all competed for priority. 	

Question 2

(10 marks)

- (a) Outline **two** roles of a cabinet minister in the lawmaking process of the Commonwealth Parliament. (2 marks)

Description	Marks
Outlines two roles of a cabinet minister in the lawmaking process of the Commonwealth Parliament	2
Outlines one role of a cabinet minister in the lawmaking process of the Commonwealth Parliament or Makes a general statement about the role of a cabinet minister in the lawmaking process of the Commonwealth Parliament	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> • review draft legislation in consultation with Cabinet • gives written notice of intention to introduce a bill to the Clerk of the House • gives the Second Reading speech where the purpose, general principles and effect of the bill is outlined • moves the motion that 'the bill be read a third time'. 	

- (b) Explain **one** way in which a particular pressure group has influenced the lawmaking process in the Commonwealth Parliament. (3 marks)

Description	Marks
Explains one way a particular pressure group has influenced the lawmaking process in the Commonwealth Parliament	3
Outlines one way a particular pressure group has influenced the lawmaking process in the Commonwealth Parliament	2
Makes a general statement about pressure groups and the lawmaking process in the Commonwealth Parliament or Gives an example of a pressure group and its connection to a bill	1
Total	3
Answers could include but are not limited to: <ul style="list-style-type: none"> • AMA and child vaccinations campaign: Social Services Legislation Amendment (No Jab, No Pay) Act 2015 which resulted in changes to the Family Tax Benefit • the Australia Institute's National Integrity Committee made up of former judges and corruption fighters calling for the Coalition's proposed NIC to have more power in terms of public hearings and initiating investigations https://www.tai.org.au/content/national-integrity-committee-calls-bipartisan-support-integrity-plan • ClubsNSW's campaign against the Gillard/Wilkie agreement on pre-commitment technology and gambling. Gillard reneging on agreement to introduce legislation • particular methods of a pressure group could be explained but must be connected to the law making process. 	

- (c) Discuss **two** ways in which a particular minor party has influenced the lawmaking process in the Commonwealth Parliament in recent years. (5 marks)

Description	Marks
Discusses two ways a particular minor party has influenced the lawmaking process in the Commonwealth Parliament Makes reference to particular legislation in recent years	5
Outlines two ways a particular minor party has influenced the lawmaking process in the Commonwealth Parliament Makes reference to particular legislation in recent years or Discusses one way a particular minor party has influenced the lawmaking process in the Commonwealth Parliament in recent years Makes reference to particular legislation or Discusses one way and outlines the other way a particular minor party has influenced the lawmaking process in the Commonwealth Parliament in recent years	3–4
Lists one or two ways a minor party, in recent years, has influenced the lawmaking process in the Commonwealth Parliament or Makes a general statement about minor parties and the lawmaking process	1–2
Total	5
<p>Answers could include but are not limited to:</p> <ul style="list-style-type: none"> • 2011 Gillard Clean Energy Act Greens led legislation (minority government) which included a price on carbon that worked to reduce emissions • 2016 Greens with the ALP combined to reject legislation to scrap the Clean Energy Finance Corporation • March 2017 Greens, the Nick Xenophon Team and Tasmanian Jacqui Lambie Network combined with ALP to defeat the proposed legislative change to section 18C of the <i>Racial Discrimination Act (1975)</i> • 2019 <i>Migration Amendment (Repairing Medical Transfers) Bill (2019)</i> passed in the Senate with the support of Pauline Hanson's One Nation and Jacqui Lambie Network • 2019 Greens, Hanson's One Nation, Jacqui Lambie Network combined with ALP to vote down the government's <i>Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill (2019)</i>. 	

Question 3

(10 marks)

- (a) Outline the role of the Administrative Appeals Tribunal (AAT). (2 marks)

Description	Marks
Outlines the role of the AAT	2
Makes a general statement about the AAT	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> the AAT is a dispute resolution body similar to a court but not able to wield judicial power that reviews Commonwealth administrative decisions, including by Ministers, public servants and agencies the AAT reviews the merit of decisions and whether a decision was correctly based on law and government procedure the AAT can only review cases where an Act or regulation says it can. Its decisions are subject to review by the Federal Court. 	

- (b) Explain **one** way in which the Administrative Appeals Tribunal (AAT) contributes to 'natural justice' being upheld in Australia. (3 marks)

Description	Marks
Explains one way the AAT contributes to 'natural justice' being upheld in Australia The meaning of 'natural justice' is evident in the explanation	3
Outlines one way the AAT contributes to 'natural justice' being upheld in Australia An element of 'natural justice' is evident in the explanation	2
Makes a general statement about the AAT and 'natural justice'	1
Total	3
Answers could include but are not limited to: <ul style="list-style-type: none"> 'natural justice' refers to: <ul style="list-style-type: none"> the way rules and procedures are applied by any person or agency that adjudicates disputes between others about the rights of others dispute is resolved by an unbiased adjudicator in an open forum each party to a dispute have an equal opportunity to present its case the independence of the AAT and impartiality of the tribunal member hearing the matter, the relative informality of proceedings and equal opportunity for each party to present their case are also aspects of the AAT process that contributes to natural justice. (That is the AAT members adjudicating the dispute have no actual or suspected interest in the dispute.) the AAT contributes to natural justice as it ensures there is procedural fairness in the review of Commonwealth administrative decision-making the AAT contributes to natural justice being upheld by checking that due process has been followed and that a decision has been reached based on merit. All evidence that is relevant must be known and presented to the parties in the dispute. 	

- (c) With reference to **one** recent example, discuss the role of the Commonwealth Auditor General. (5 marks)

Description	Marks
Discusses the role of the Commonwealth Auditor General Discusses one recent example that exemplifies the role of the Commonwealth Auditor General	5
Outlines the role of the Commonwealth Auditor General Discusses one example that exemplifies the role of the Commonwealth Auditor General or Discusses one recent example that exemplifies the role of the Commonwealth Auditor General	3–4
Outlines the role of the Commonwealth Auditor General and/or Gives an example of the work of the Commonwealth Auditor General or Makes a general statement about the Commonwealth Auditor General	1–2
Total	5
<p>Answers could include but are not limited to:</p> <ul style="list-style-type: none"> the Commonwealth Auditor General is an independent officer of the Parliament who is charged with conducting audits of all government departments, agencies, commissions and other entities these audits can either be performance audits (efficiency and efficacy of administration) or financial audits (around spending of public money, for efficiency and, also to avoid corruption) as well as assurance reviews (government departments are compliant with policy and legislation) AGs are appointed for 10 years on the advice of the Joint Committee of Public Accounts, report back to the Parliament and are widely seen as being apolitical, ensuring both their independence and impartiality. https://www.anao.gov.au/about/the-auditor-general <p>A recent example can be seen from the ‘Sports Rorts’ affair, involving the disbursement of funds under the former Minister for Sport, Senator Bridget McKenzie. The Award of Funding under the Community Sport Infrastructure Program (Auditor General Report No. 23 of 2019-20) was a performance audit of the Australian Sports Commission’s (also referred to as Sport Australia) granting of funds under the Community Sport Infrastructure Grant Program. Under this program \$100 million of public funds was distributed to community sporting organisations.</p> <div style="border: 1px dashed gray; padding: 10px; text-align: center; color: gray;"> <p>For copyright reasons this text cannot be reproduced in the online version of this document.</p> </div> <p>There was also evidence that the Sports Minister’s office ran a parallel process that was based on other considerations, potentially political, which saw less meritorious applications receive funding. https://www.anao.gov.au/work/performance-audit/award-funding-under-the-community-sport-infrastructure-program</p> <p>Other examples that could be referenced include: Mirabella and the Wangaratta Hospital; funding arrangements between the Liberal Party and Parakeelia, an IT company; the Future Submarine Program and the effectiveness of the Ministry of Defence’s administration so far; and National Broadband Network Fixed Line Migration Service Continuity and Complaints Management processes.</p>	

Question 4

(10 marks)

- (a) Outline what is meant by 'open government' in Australia's political system. (2 marks)

Description	Marks
Outlines what is meant by 'open government' in Australia's political system	2
Makes a general statement about 'open government'	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> • transparent processes within the political system • mechanisms for public scrutiny and oversight • emphasis on governmental accountability. 	

- (b) Distinguish between 'political representation' and 'popular participation'. (3 marks)

Description	Marks
Explains the difference between 'political representation' and 'popular participation'	3
States the difference between 'political representation' and 'popular participation' or Outlines what is meant by 'political representation' and 'popular participation' or Explains what is meant by 'political representation' or 'popular participation'	2
Makes a general statement about 'political representation' and/or 'popular participation'	1
Total	3
Answers could include but are not limited to: <ul style="list-style-type: none"> • both can involve voting-participation is the act of voting whilst representation is who is elected to the legislature through that vote • representation is in terms of reflecting the will of the electorate whilst participation is the diverse range of views apparent through political activities especially with political parties and pressure groups in the electorate • 'Political representation': ability of the individual to influence the political system through their vote; the extent that the local representative(s) in the legislature reflect the will of the electorate • 'Popular participation': the active involvement of citizens in the political system which can include: voting in elections, active involvement in political debate and/or protest, involvement in pressure group activity, involvement with a political party and its activities. 	

- (c) Discuss **two** ways in which Cabinet solidarity undermines 'open government' in Australia. (5 marks)

Description	Marks
Discusses two ways Cabinet solidarity undermines 'open government' in Australia	5
Outlines two ways Cabinet solidarity undermines 'open government' in Australia or Discusses one way and outlines the other way Cabinet solidarity undermines "open government" in Australia or Discusses one way Cabinet solidarity undermines 'open government' in Australia	3–4
Lists one or two ways Cabinet solidarity undermines 'open government' in Australia or Makes a general statement about Cabinet solidarity and/or 'open government'	1–2
Total	5
Answers could include but are not limited to: The conventions associated with Westminster and Cabinet government such as: <ul style="list-style-type: none"> • secrecy of all Cabinet discussions and proceedings • Cabinet documents only released after 20 years (down from 30) • the support of Cabinet decisions by all even when a Minister disagrees strongly • PM makes a public decision which Cabinet are then forced to publicly support. 	

Section Two: Source analysis

20% (20 Marks)

Question 5

(20 marks)

- (a) Outline what is meant by constitutional reform. (2 marks)

Description	Marks
Outlines what is meant by constitutional reform	2
Makes a general statement about constitutional reform	1
Total	2
The answer could include but is not limited to: <ul style="list-style-type: none"> • changes to the wording of the Commonwealth Constitution in order to change its operation • change that follows the formal process set out in s 128 of the Commonwealth Constitution. 	

- (b) With reference to **Source 1**, explain in your own words, **two** suggestions to end the 'cycle of constitutional misadventure' in Australia. (4 marks)

Description	Marks
Identifies two suggestions to end the 'cycle of constitutional misadventure' in Australia Explains each suggestion in candidate's own words with direct reference to the source	4
Identifies two suggestions to end the 'cycle of constitutional misadventure' in Australia Explains one suggestion and outlines the other suggestion Answer is mostly in candidate's own words with some reference to the source	3
Identifies two suggestions to end the 'cycle of constitutional misadventure' in Australia or Identifies and explains one suggestion to end the 'cycle of constitutional misadventure' in Australia Attempts to explain in the candidate's own words	2
One or two suggestions are cited verbatim from the source	1
Total	4
Answers could include: <ul style="list-style-type: none"> • changes to the existing ad hoc approach to constitutional reform by 'adopting a new method of generating debate and reform' • ending the existing paradigm dominated by political parties that 'has been directed by political opportunism and ad hoc initiatives' • establish new organisations and institutions that reflect 'systematic, community-based processes' • 'establish a small, ongoing Constitutional Review Commission' such as existed in the 1890s and 1980s. 	
Note: ways must be drawn from the source	

- (c) Discuss **two** barriers posed by party politics to constitutional reform in Australia. (6 marks)

Description	Marks
Identifies two barriers posed by party politics to constitutional reform in Australia Discusses each of these barriers or Discusses one barrier posed by party politics to constitutional reform in Australia and outlines the other barrier posed by party politics to constitutional reform in Australia	5–6
Identifies two barriers posed by party politics to constitutional reform in Australia Outlines each of these barriers or Discusses one barrier posed by party politics to constitutional reform in Australia	3–4
Outlines one or two barriers posed by party politics to constitutional reform in Australia or Makes a general statement about party politics and constitutional reform or Lists two barriers posed by party politics to constitutional reform in Australia	1–2
Total	6
Barriers posed by party politics include: <ul style="list-style-type: none"> • it can split the support of the vote along party lines; each major party has sufficient support to undermine the achievement of a double majority or even national majority • political parties' ideologies can undermine the consensus needed to achieve constitutional reform, with the ALP's centralising tendency at odds with the Liberal Parties historical commitment to federalism and conservative approach to changing the Constitution – voters tend to veto handing the Commonwealth more power • political parties can often focus on short-term political victories rather than the long-term benefits a constitutional reform may deliver • political party leaders can manipulate the nature of the referendum to deliver a particular result • State political parties can stymie constitutional reform by eroding a bipartisan approach nationally • political partisanship can be held as a significant factor that prevents referenda being held more often as the politics of proposed referenda are blocked in the Parliament, preventing the legislation required for a referendum from being passed, essentially stopping the process before it really gets started. 	

Question 5 (continued)

- (d) Outline **one** current reform proposal to change the Commonwealth Constitution and analyse its possible effect on the Australian political and legal system. (8 marks)

Description	Marks
Outlines one current reform proposal to change the Commonwealth Constitution Analyses the possible effect of the proposed reform on the Australian political and legal system Incorporates detailed relevant evidence in the analysis	7–8
Outlines one current reform proposal to change the Commonwealth Constitution Describes the possible effect of the proposed reform on the Australian political and legal system Incorporates some relevant evidence in the analysis	5–6
Outlines one current reform proposal to change the Commonwealth Constitution Makes a statement concerning its possible effect on the Australian political and legal system	3–4
Identifies one current reform proposal to change the Commonwealth Constitution and makes a general statement on its effect or Makes a general statement about constitutional reform	1–2
Total	8
Current reform proposals include: <ul style="list-style-type: none"> • recognition of Aboriginal and Torres Strait Islander Australians in the Commonwealth Constitution • an Australian Republic • the inclusion of a Charter of Rights • s 44 in regards to dual citizenship. Analysis of the possible effect would include: <ul style="list-style-type: none"> • what exists/does not exist at the moment • what changes would be made • how it would possibly effect the Australian political and legal system. 	

Question 6

(20 marks)

(a) Outline what is meant by the rule of law.

(2 marks)

Description	Marks
Outlines what is meant by the rule of law	2
Makes a general statement about the rule of law	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> • no-one is above the law • everyone is equal before the law • the law must be applied to everyone equally, regardless of their status • the law is clear and understandable • the law is essential in restricting the use of arbitrary power. 	

(b) With reference to **Source 2**, explain in your own words, **two** reasons why judicial independence is important.

(4 marks)

Description	Marks
Identifies two reasons why judicial independence is important Explains each reason in candidate's own words with direct reference to the source	4
Identifies two reasons why judicial independence is important Explains one reason and outlines the other reason Answer is mostly in candidate's own words with some reference to the source	3
Identifies two reasons why judicial independence is important or Identifies and explains one reason why judicial independence is important Attempts to explain in the candidate's own words	2
One or two reasons are cited verbatim from the source	1
Total	4
Reasons why judicial independence is important include: <ul style="list-style-type: none"> • the ability of the courts to 'independently and objectively determine the intention of parliament' • 'to serve and protect the governed' • to reinforce people's confidence in the exercise of the power of judgment • rights and freedoms cannot be protected without an independent judiciary. 	
Note: issues must be drawn from the source.	

Question 6 (continued)

- (c) Discuss **two** ways in which Australia upholds judicial independence. (6 marks)

Description	Marks
Identifies two ways Australia upholds judicial independence Discusses each of these ways or Discusses one of the ways Australia upholds judicial independence and outlines the other way	5–6
Identifies two ways Australia upholds judicial independence Outlines each of these ways or Discusses one way Australia upholds judicial independence	3–4
Outlines one or two ways Australia upholds judicial independence or Makes a general statement about how Australia upholds judicial independence or Lists two ways Australia upholds judicial independence	1–2
Total	6
Answers could include but are not limited to: <ul style="list-style-type: none"> • rights of appeal which may be limited • tenure of judges • remuneration of judges • clear separation of judicial and non-judicial power. These powers cannot generally be mixed in the same institution. 	

- (d) With reference to a country other than Australia, analyse the extent to which judicial independence is undermined by the executive **and/or** the legislature in that country. Include specific examples in the analysis. (8 marks)

Description	Marks
Identifies and discusses how judicial independence has been undermined by the executive and/or legislature in a country other than Australia Uses relevant and detailed evidence in the analysis to show the extent judicial independence has been undermined	7–8
Identifies and discusses how judicial independence has been undermined by the executive and/or legislature in a country other than Australia Uses relevant evidence in the analysis in an attempt to show the extent judicial independence has been undermined	5–6
Outlines how judicial independence has been undermined by the executive and/or legislature in a country other than Australia Provides some evidence to support statements of the undermining of judicial independence	3–4
Makes general statements about judicial independence in a country other than Australia	1–2
Total	8
<p>Answers could include:</p> <p>USA:</p> <p>Executive:</p> <ul style="list-style-type: none"> • Presidents openly criticising particular Judges because of certain judgments including: Theodore Roosevelt’s criticism of Justice Oliver Wendell Holmes Jr.; Eisenhower asserting that the appointment of Chief Justice Earl Warren was the biggest mistake he had ever made; Trump’s criticism of various Judges after particular decisions including Judge Gonzalo Curiel; Trump’s tweets about Supreme Court Justices Bader Ginsburg and Sotomayor. • Presidential appointments can influence the bench and maybe tip the balance, e.g. the most recent appointment of Justice Amy Coney Barrett, and thus undermine judicial independence. • <div style="border: 1px dashed gray; padding: 5px; text-align: center;">For copyright reasons this text cannot be reproduced in the online version of this document.</div> <p>Justice Sandra Day O’Connor to say that ‘the single greatest threat to judicial independence ... is the flood of money coming into our courtrooms by way of increasingly expensive and volatile judicial elections.’ https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/</p> <p>Legislature:</p> <ul style="list-style-type: none"> • <div style="border: 1px dashed gray; padding: 5px; text-align: center;">For copyright reasons this text cannot be reproduced in the online version of this document.</div> 	

Section Three: Essay

50% (50 Marks)

Marking guide to essay answers

Questions 7–10

Description	Marks
Explains relevant terms and outlines parameters of discussion	
Explains all relevant terms and outlines parameters of discussion	5
Explains some of the terms and outlines parameters of discussion	4
Indicates what will be addressed in the discussion	3
Attempts to provide a focus for discussion	2
Makes a general statement concerning the topic/claim	1
Subtotal	5
Discussion of relevant issues including pertinent examples	
Discusses comprehensively relevant issues using a well-structured format and supportive examples in a cohesive, logical sequence and uses relevant political and legal terminology	9–10
Discusses some relevant issues incorporating some examples in a cohesive, logical sequence and uses relevant political and legal terminology	7–8
Limited discussion with limited examples in a logical sequence and uses relevant political and legal terminology	5–6
Limited discussion of the issues with limited political and legal terminology	3–4
Makes general statements concerning the topic	1–2
Subtotal	10
Evaluation/assessment/analysis	
Evaluates/assesses/analyses the claim using specific evidence which demonstrates a comprehensive understanding of the topic	7
Evaluates/assesses/analyses the claim using appropriate evidence which demonstrates an understanding of the topic	6
Evaluates/assesses/analyses the claim using some evidence which demonstrates some understanding of the topic	5
Constructs a relevant but weak evaluation/assessment/analysis	4
Constructs a weak evaluation/assessment/analysis	3
Limited evaluation/assessment/analysis	2
No evaluation/assessment/analysis. A statement only	1
Subtotal	7
Conclusion	
Draws together the argument linking the evidence	3
Summarises the argument	2
Makes general/superficial statements	1
Subtotal	3
Total	25

Section Three: Part A

Question 7

(25 marks)

With reference to the Commonwealth Constitution, analyse executive and judicial powers in Australia and compare these executive and judicial powers with those of **one** non-Westminster political and legal system.

Relevant terms and parameters of discussion:

- Commonwealth Constitution (Commonwealth of Australia Constitution Act 1900) – the formal document that outlines the powers, processes and procedures of our government, including the powers of the three arms of government: executive, legislative and judicial
- executive powers: outlined in 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*
- executive power: central to responsible government, power of the Prime Minister (PM) and Cabinet within the political system
- judicial power, 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*
- non-Westminster system – a system of government that was not derived from the Westminster (British) system of government (of which a defining feature is responsible government, where the executive is a part of, and kept accountable by, the legislature)
 - Examples of non-Westminster systems could include (but are not limited to): USA, China, Russia, Indonesia, France.

Issues including pertinent examples could include:

Executive power in Australia – according to the Constitution, the Governor-General (GG) (on advice of the Federal Executive Council (FEC), and by convention the PM) has the power to:

- appoint ministers to administer government departments (s 64 – this section also states that ministers must also be elected members of parliament – thereby installing responsible government)
- appoint civil servants (s 67)
- Commander-in-chief of naval and military forces (s 68) – e.g. Howard's decision to commit troops to war in Iraq
- execute and maintain the Constitution, and the laws of the Commonwealth (s 61). This section also allows the executive to enter into treaties and international agreements.

The importance of conventions in regulating the exercise of executive power:

- GG and acting on advice of the FEC
- Ministers and responsible government means that the executive is limited by the legislature, especially the House of Representatives.

The central role of the PM and Cabinet in exercising executive power in Australia.

The scope of executive power has come into question at times:

- Williams (2012) case, whereby the High Court (HC) rules that the executive did not have the constitutional power to enter into an agreement with the Scripture Union of Queensland
- Whitlam Dismissal. An aberration?

Judicial power in Australia – the HC has the power to:

- hear appeals (s 73) – the finding of the HC shall be final and conclusive
- Original jurisdiction (s 75)
 - arising under any treaty
 - affecting consuls or other representatives of other countries

- in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party
- between States, or between residents of different States, or between a State and a resident of another State
- in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

Additional original jurisdiction (s 76):

- arising under this Constitution, or involving its interpretation
- arising under any laws made by the Parliament
- of Admiralty and maritime jurisdiction
- relating to the same subject-matter claimed under the laws of different States.

Relevant cases for discussion could include (but not limited to):

- Mabo/Wik as an example of appeal – although limited by parliamentary sovereignty
- Williams (2012) as an example of power to interpret constitution in regards to executive power
- Williams (2014) example of deciding on constitutional validity of laws made by parliament
- Tasmanian Dams (1983) – example of HC deciding on Commonwealth power due to treaties.

Judicial power in Australia is protected by judges' tenure (s 72), meaning that it is quite difficult for HC justices to be removed unless there is proven misbehaviour or incapacity. Judicial power is limited by parliamentary sovereignty except in constitutional matters.

Candidates must analyse the executive and judicial powers of a non-Westminster system.

Analysis:

In order to answer the question, candidates must make comparisons between Australia and a non-Westminster system by identifying any relevant similarities and differences between executive and judicial powers with some reference to the Commonwealth Constitution.

Question 8

(25 marks)

Analyse the extent to which recent Commonwealth Parliaments have been dominated by competing mandates.

Relevant terms and parameters of discussion:

Competing mandates: doctrine stating that the electorate has given the governing party the right to govern and to implement through legislation, particular policies. Whilst particular minor parties especially in the Senate, which the government does not control, claim that they have a mandate to review legislation and by inference have their own mandate which they campaigned on and were elected.

Dominated: controlled

Recent years: last 10 years which include the following governments and/or elections:

- 2010 Gillard (minority) government – 3 Independents, 1 Green (Rudd government June to Sept 2013)
- 2013 Abbott government (Turnbull government September 2015 – July 2016)
- 2016 Turnbull government (July double dissolution election) (Morrison government August 2018 – May 2019)
- 2019 Morrison government

Note: no government has controlled the Senate in recent years.

Issues including pertinent examples could include:

- introducing legislation: legislation can be introduced in either House not necessarily by the government of the day
- passing legislation: legislation needs to pass both Houses, the Senate is not necessarily controlled by the government, and the House of Representatives had a minority government under Gillard and Rudd
- Gillard (minority) government (2010–13): election policy not to introduce a Carbon tax, but minority government dictated otherwise and it was introduced and passed the Senate with ALP and Greens combining
- Abbott government: election policy to repeal carbon tax. Introduced legislation to repeal Carbon Tax in November 2013 bill was passed July 2014 after third attempt in Senate with support especially of PUP
- Turnbull government: Election policy was to legislate a plebiscite on same sex marriage (2016) claiming a mandate. Senate's response was to deny this – competing mandate idea
- Morrison government (2019–) \$156b tax cuts pledge as promised. Opposition stated it was mandated only for the current parliamentary term. Stage 3 was due in 2024.
- PHON 2019: Hanson stated Senate was elected to hold government to account, inferring its own mandate.

Analysis:

- certain PMs were not 'elected' by the people at an election
- claims for a mandate for a particular governmental policy more of a political argument to persuade opponents (H of R/Senate) to allow the legislation to pass
- Governments do not necessarily introduce legislation for all party policies taken to the electorate
- Governments introduce legislation on policy areas not raised during an election campaign
- Senate minor parties argue that certain policies were endorsed by the electorate and hence the right to oppose, amend, approve legislation
- candidates will ultimately assess the degree to which competing mandates have dominated the agenda of recent parliaments.

Section Three: Part B

Question 9

(25 marks)

Governors-General play a vital role in the Australian political and legal system but ultimately there are few constraints and no accountability.

Evaluate this claim with reference to particular Governors-General.

Relevant terms and parameters of discussion:

Governor-General: the Queen's representative as stated in s 2 of the Constitution.

Has a role in both the legislature (s 1) and the executive (s 61).

Role is mainly bound by conventions.

GG's role: constitutional and ceremonial, such as:

- presiding over FEC
- dissolving parliament, issuing writs for election
- commissioning PM and other ministers
- Commander-in-Chief duties such as visiting military units, commissioning officers, presenting awards.

Constraints: restrictions

Accountability: to be held responsible for decisions/actions

Issues including pertinent examples could include:

Arguments for the claim:

- role is vital as Australia is a constitutional monarchy, therefore Queen needs a representative. Although in practice it is mainly a symbolic role, it is still important. Reserve powers are useful mechanisms in case of breakdown or deadlock in government.

However, there are few constraints and no accountability due to the following:

- GG is not elected, therefore not representative of the people and not able to be held to account by the people
- although the PM has the power (through convention) to dismiss the GG this has never happened
- GG 'serves at the Queen's pleasure' – but the Queen does not get involved in political matters therefore would never dismiss a GG
- the Freedom of Information Act has a restricted application to the Office of GG (only in regards to matters of administrative nature) – this was upheld in the High Court case Kline (2013). Implicitly, the Act does not apply to requests for access to documents that relate to the Governor-General's discharge of official functions conferred by the Constitution or an enactment. <https://www.gg.gov.au/office-official-secretary-governor-general/freedom-information>
- Constitution gives GG 'reserve powers' – such as the power to dissolve parliament, dismiss the PM and withhold assent to bills. Whilst convention does constrain the GG in using these powers, conventions are not legally enforceable.
- Examples:
 - 1975 crisis – Sir John Kerr did not act on the advice of the PM and instead used his reserve powers to dismiss the PM Gough Whitlam in order to resolve deadlock between upper and lower house. Consultation with former Chief Justice Barwick 1964–81 and Justice Mason regarding the dismissal. This was seen by many as a gross misuse of power especially seeing as the GG is not elected therefore not accountable to the people. There was no legal ramification to breaking convention and there was no immediate impact on his position as GG. He continued in his role until 1977. Technically the Constitution could still allow the GG to exercise this power.
 - Hollingworth affair – in 2001 GG Peter Hollingworth was accused of not dealing appropriately with sexual abuse allegations during his time as Archbishop. Despite the media and the public calling for his resignation, he initially refused. PM Howard also refused to dismiss him. It was not until 2003 that he finally resigned. He still receives tax-payer funded pension and entitlements every year.

Arguments against the claim:

- role is not vital – mainly symbolic and has no real power due to convention. The idea of an unelected Queen as our head of state (and GG as her representative) is outdated and not reflective of most modern day Australians.

However, there are some constraints and there is some accountability.

- whilst convention is not legally enforceable, it is widely upheld due to the potentially negative political outcomes
- Office of GG required to submit annual report to PM in accordance with Section 46 of the Public Governance, Performance and Accountability Act 2013 – this helps with transparency and accountability
- Freedom of Information Act applies to the Office of GG in regards to matters of an administrative nature
- media and public pressure can have an impact and eventually result in a GG to resign, therefore achieving accountability (albeit rather delayed)
 - Sir John Kerr resigned before his term ended due to public pressure.
 - If gross misconduct did occur in the future, it is likely that the PM would call for GG's resignation, as otherwise the PM's popularity could decline (this played a part in Hollingworth's resignation).
- Hocking vs Director-General of the National Archives of Australia (2019) – 'Palace letters' considered commonwealth record rather than the personal property of the Governor-General.

Evaluation:

Candidates are expected to address all three aspects of the question (although not necessarily equally) and come to a judgement:

- is the role of the GG vital?
- are there few constraints?
- is there any accountability?

Question 10**(25 marks)**

International covenants, protocols and treaties play a significant role in the protection of human rights in Australia.

Evaluate this claim with reference to the status of international covenants, protocols and treaties in protecting human rights in Australia

Relevant terms and parameters of discussion:

International covenants, protocols and treaties include: International Covenant on Civil and Political Rights (ICCPR), International Convention for the Elimination of All Forms of Racial Discrimination (CERD), Optional Protocol to the Convention Against Torture (OPCAT).

Significant role: international covenants, protocols and treaties are fundamental to the protection of human rights in Australia.

Ways human rights are protected in Australia: express and implied rights of the Commonwealth Constitution, common law and statutory law.

Issues including pertinent examples could include:

- the status of these treaties/covenants and protocols: generally Australian courts have denied that these international obligations can have any effect for domestic legal purposes until they are given effect through legislation, or ratification, such as through the Racial Discrimination Act (1975) for the CERD
- the status of international treaties/covenants and protocols in Australia could be developed with an examination of the Toonen, Teoh and/or Lam cases in the High Court.

Other ways rights are protected could be examined through:

- Commonwealth Constitution and express rights e.g. s 116 and religion
- Commonwealth Constitution and implied rights e.g. ss 7 and 24 and voting rights Roach (2007) and Rowe (2010) cases
- Common law cases and protection of rights e.g. Mabo and land rights
- statutory protections of rights e.g. Racial Discrimination Act (1975)
- the role of the Australian Human Rights Commission in upholding rights.

Evaluation:

Candidates should address the following aspects in their evaluation:

- do international covenants, treaties and protocols play a fundamental role in protecting human rights in Australia?
- conclude that the international covenants, protocols and treaties covers quite a narrow group of rights within Australia. Most rights are protected by other means.

Note:

- this is not an evaluation of the methods of rights protection but an evaluation of the significance of international covenants, treaties and protocols to human rights protection in Australia.

ACKNOWLEDGEMENTS

- Question 2(b)** Dot point 2 information from: The Australia Institute. (2018). *National Integrity Committee calls for bipartisan support of integrity plan* [Media release]. Retrieved August, 2020, from <https://www.tai.org.au/content/national-integrity-committee-calls-bipartisan-support-integrity-plan>
- Question 3(a)** Dot points information from: Administrative Appeals Tribunal. (n.d.). *About the AAT*. Retrieved August, 2020, from <https://www.aat.gov.au/about-the-aat>
- Question 3(c)** Dot points information from: Australian National Audit Office. (2020). *The Auditor-General*. Retrieved August, 2020, from <https://www.anao.gov.au/about/the-auditor-general>
- Paragraph 1 (sentences 2–3 and 6) information from: Hehir, G. (2020). *Award of Funding under the Community Sport Infrastructure Program* (Auditor-General Report No. 23 2019–20). Australian National Audit Office. Retrieved August, 2020, from https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_23.pdf
- Used under a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence.
- Paragraph 1 (sentences 4–5) adapted from: Hehir, G. (2020). *Award of Funding under the Community Sport Infrastructure Program* (Auditor-General Report No. 23 2019–20). Australian National Audit Office. Retrieved August, 2020, from https://www.anao.gov.au/sites/default/files/Auditor-General_Report_2019-2020_23.pdf
- Used under a Creative Commons Attribution-NonCommercial-NoDerivatives 3.0 Australia licence.
- Question 5(b)** Dot point 1 quote adapted from: Williams, G. (2016). Our nation's rulebook is showing its age: We desperately need a review of the Constitution [Quote]. *The Sydney Morning Herald*. Retrieved May, 2020, from <https://www.smh.com.au/opinion/our-nations-rulebook-is-showing-its-age-we-desperately-need-a-review-of-the-constitution-20161229-gtjf7l.html>
- Dot points 2–4: Williams, G. (2016). Our nation's rulebook is showing its age: We desperately need a review of the Constitution [Quotes]. *The Sydney Morning Herald*. Retrieved May, 2020, from <https://www.smh.com.au/opinion/our-nations-rulebook-is-showing-its-age-we-desperately-need-a-review-of-the-constitution-20161229-gtjf7l.html>
- Question 6(b)** Dot point 1 quote adapted from: Bathurst, T. F. (2013). [Quote]. In *Why a separation of power in government? Its importance to constitutionalism*. Retrieved May, 2020, from <https://www.lawcouncil.asn.au/docs/14a6fc48-5bea-e911-9400-005056be13b5/Why%20a%20separation%20of%20power%20in%20government%20Its%20importance%20to%20constitutionalism.pdf>
- Used under a Creative Commons Attribution 4.0 International licence.
- Dot points 2–3 adapted from: Brennan, G. (1996). [Quote]. In *Why a separation of power in government? Its importance to constitutionalism*. Retrieved May, 2020, from <https://www.lawcouncil.asn.au/docs/14a6fc48-5bea-e911-9400-005056be13b5/Why%20a%20separation%20of%20power%20in%20government%20Its%20importance%20to%20constitutionalism.pdf>

Question 6(b)
(continued) Dot point 4 adapted from: Moses, A. (2019). *Why a separation of power in government? Its importance to constitutionalism*. Retrieved May, 2020, from <https://www.lawcouncil.asn.au/docs/14a6fc48-5bea-e911-9400-005056be13b5/Why%20a%20separation%20of%20power%20in%20government%20its%20importance%20to%20constitutionalism.pdf>

Question 6(d) Dot points 1 and 2 (sentence 1) information from: Friedman, P. L. (2019). *Threats to judicial Independence and the rule of law* [Speech transcript]. American Bar Association. Retrieved August, 2020, from <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/>

Dot point 2 (sentence 2): Friedman, P. L. (2019). *Threats to judicial Independence and the rule of law* [Speech transcript]. American Bar Association. Retrieved August, 2020, from <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/>

Dot point 3 adapted from: Families Against Mandatory Minimums. (n.d.). *Mandatory sentencing was once America's law-and-order panacea. Here's why it's not working* [Primer]. Retrieved August, 2020, from <https://www.prisonpolicy.org/scans/famm/Primer.pdf>

Question 7 Dot points 2, 4 and 15–19 from: Office of Parliamentary Counsel. (2013). *Commonwealth of Australia constitution act*. Federal Register of Legislation. Retrieved November, 2020, from <https://www.legislation.gov.au/Details/C2013Q00005> (Original work published 1900)

Used under a Creative Commons Attribution 4.0 International licence.

Dot points 6–9 and dot point 14 adapted from: Office of Parliamentary Counsel. (2013). *Commonwealth of Australia constitution act*. Federal Register of Legislation. Retrieved November, 2020, from <https://www.legislation.gov.au/Details/C2013Q00005> (Original work published 1900)

Used under a Creative Commons Attribution 4.0 International licence.

Question 9 Dot points 9 (sentence 1) and 15 information from: The Governor-General of the Commonwealth of Australia. (n.d.). *Freedom of information*. Retrieved August, 2020, from <https://www.gg.gov.au/office-official-secretary-governor-general/freedom-information>

Used under a Creative Commons Attribution 3.0 Unported licence.

Dot point 9 (sentence 2): The Governor-General of the Commonwealth of Australia. (n.d.). *Freedom of information*. Retrieved August, 2020, from <https://www.gg.gov.au/office-official-secretary-governor-general/freedom-information>

Used under a Creative Commons Attribution 3.0 Unported licence.

This document – apart from any third party copyright material contained in it – may be freely copied, or communicated on an intranet, for non-commercial purposes in educational institutions, provided that it is not changed and that the School Curriculum and Standards Authority is acknowledged as the copyright owner, and that the Authority's moral rights are not infringed.

Copying or communication for any other purpose can be done only within the terms of the *Copyright Act 1968* or with prior written permission of the School Curriculum and Standards Authority. Copying or communication of any third party copyright material can be done only within the terms of the *Copyright Act 1968* or with permission of the copyright owners.

Any content in this document that has been derived from the Australian Curriculum may be used under the terms of the Creative Commons [Attribution 4.0 International \(CC BY\)](https://creativecommons.org/licenses/by/4.0/) licence.

An *Acknowledgements variation* document is available on the Authority website.