How to Use this Script:
These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore DO NOT use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so YOUR MARK WILL PROBABLY END UP BEING WORSE! The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

Please do not use them for any other purposes - otherwise you are putting your academic future at risk.
PART A, QUESTION 2

It is first necessary to establish if there is a valid Act and valid executive power.

Executive Power

Is there a head of power?
There is a prerogative head of power to protect the Commonwealth and thus this act of the
Minister is an established executive prerogative.

Part (a) Smallpox Containment Act

Does the Act have a valid head of power?
The Cth Legislature has a valid head of power here to legislate on health under s51
(Constitution) and can legislate incidentally with executive power (s51xxxix),
Here the Legislation created a Statutory Authority which gives advice to the executive to act
upon. Thus the next question is whether the statute covers the prerogative established above.

Act vs Prerogative
Where the statute and the prerogative power cover the same material, the statute rules (De
Keyser’s Royal Hotel).

Does the statute cover the prerogative?
If the Act covers the whole ground of the prerogative then the executive act must be done under
the statute (thus subject to an invalidity of the Act). The acts of the minister of detaining the
Chief Scientist and his family and closing the Wollongong laboratory are precisely the powers
given to the minister under s5 and s6 of the Small Pox Containment Act. Thus the statute covers
the prerogative and the Minister’s act was done under the Act.
In this way, the executive power is subject to the validity of the Act since it’s prerogative was
overridden.

Chief Scientist
The Chief scientist will attempt to show that the Act was invalid by either establishing the
invalidity of the report of the taskforce because of the principle of personae designate or by
establishing the Act authorises an infringement of an established Cth Cnal right.
Task Force and Personae Designata
It is an established principle that while a federal court cannot exercise non-judicial power
(Boilermakers Case), a federal judge can do so if they are acting in their personal capacity
(Hilton v Wells) provided they are not acting incompatibly with their role as a judge (Grollo v Palmer).

Does the incompatibility doctrine apply to a state judge?
In Kable v DPP, the HCA extended the incompatibility doctrine to state courts exercising federal judicial power. Does that apply to state judges? McHugh J found state courts were part of an integrated system, so judges of state courts must also be seen to be independent. Thus the doctrine will likely apply to Justice Eases.

Was Eases acting incompatibly with his role as state judge?
He was acting incompatibly if his integrity was likely to be compromised or his actions are likely to diminish public confidence in the judiciary (Grollo v Palmer). The factors to consider are the way in which the task force made their decisions, the political nature of the decision and the degree of political influence (Wilson v Minister for ATSI Affairs). Examining the statute, there appears to be a slight degree of politics involved, as public submissions are given and it is working closely with the executive government. However, the statute also provides the judge is fully independent, and breaches are considered in relation to existing legislation, it would be a largely judicial decision. However, despite this, the judge is working with the executive quite closely in the decision and thus is likely going to diminish public confidence in his role as independent, because of such close proximity.

Thus the Act may be invalid in that regard, however, if it isn’t the Chief Scientist would challenge the validity of the Act on infringement of constitutional right.

Constitutional Right

Does the Act infringe on any constitutional right?
In Lim v MILGEA, the HC established that citizens of the Cth have a constitutional immunity from detention from the executive. Here the act of the executive was to detain the family, and this infringes on the constitutional right and hence invalidates the Act. Thus the three orders of the executive are likely to be unlawful because they are were not done under the prerogative, but under the statute, which would be found invalid because of the judicial appointment is incompatible with federal judicial power AND the Act infringes on a Constitutional right to non-detention from the executive.

Part (b) Clerk of Upper House

MLC
MLC need to establish if the parliament has a right to the documents.
In Egan v Willis, the HC found the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions. This includes conducting reviews on the executive. However, in Egan v Chadwick, the court found that actual...
cabinet deliberations are protected by public interest immunity. Thus, the MLC will likely not have to give records of the Cabinet deliberations BUT will be required to give the documents prepared for cabinet.

**MLA**
Similarly here, the LA has such powers to reasonably exercise their functions (*Willis*), this includes the principle of responsible government and conducting reviews into the executive. Thus the minister will be required to honestly answer questions relating to his involvement.  

*Legal Remedies?*

Are these issues justiciable? Internal affairs of parliament are generally considered NON-justiciable unless arising under a controversy under the general law (*Egan v Willis*). In relation to the MIL thus there is no such issue under the general law and is not justiciable. In relation to the MLA, the court can only review actions of LC if it is under general law, which may be the case here if the financial connections is a breach of the general law. Thus these issues are generally not justiciable, so the legal remedies would be limited for the MLA or MLC.

**Part (c)**
The facts here are analogous to *ACCC v Baxter Healthcare* where the *Trades and Practices Act* bound the Crown if it was conducting business. Firs it is necessary to establish here if the company “Flubegone” is immune from the Statute. It is clear on the facts that “Flubegone” is not part of the Crown and would thus be claiming derivative immunity.

*Can “Flubegone” claim derivative immunity?*

Crown immunity can extend to trading partners of the Crown where it is necessary to protect the Crown and its own immunity (*ACCC v Baxter*). Here the Crown is not bound but not because they are immune but because they are not conducting business. While it is true that the bundled price would result in considerable cost savings, the fact that the Crown could be found if it conducted business but “Flubegone” be immune would set a “remarkable precedent” (*Baxter*). Thus Flubegone cannot likely claim derivative immunity simply because the Crown is not immune from the TPA. Thus ViralFree can challenge the purchase of the NSW Govt. on the basis that Flubegone are conducting unfair trading under the TPA and are hence not immune.

*Slow start, exceptional finish.*

2(a) – 46/60
PART B, QUESTION 5

While s6 of the Australia Act is a restriction on state parliamentary power, it is not an unreasonable restriction to legislate for the good of the citizens. Section 6 of the Australia Acts states that any Act relating to the Constitution, powers and procedures of Parliament MUST comply with earlier valid manner and form provisions. While this section does pose some risks to effective functioning of democracy, the courts management of these risks has meant the justifications under that manner and form provision have far outweighed the risks it poses.

Justifications

These justifications of the manner and form provision centre around the restricted applicable powers and the need for stability of law and parliament structures. The fact that the provision only applies to legislation related to the constitution, powers and procedures of Parliament AND is protected by a judicially imposed threshold means that it is not an unreasonable restriction of power but a necessary one in the interests of the stability of government.

This justification of the need for a stable government was demonstrated in A-G(NSW) v Trethowan. The Labor government had attempted to abolish the NSW Upper House unsuccessfully, and the current government prevented future attempts by doubly entrenching s7A and s7B of the NSW Constitution. The court allowed this (per s5 CLVA) because it essentially allowed stability of government. If the subsequent Labor party could abolish the upper house with a simple majority vote and then Liberal regained power in Parliament and reimposed it, the degree of uncertainty and costs of governmental change would be too high. The Commonwealth constitution by imposing s128, the referendum provision, is an example of the success of having a degree of rigidity in Parliament to assist the stability of government.

Furthermore, to assist the general public who in a parliamentary democracy are being represented by parliament, they need a degree of certainty in their voting procedure and understanding of parliament. IN A-G(WA) v Marquet, the court concluded that electoral boundaries are essential to the Constitution of Parliament, and this is further indicative of the need for stability of government.

Thus the operation of s6 greatly assist in achieving this stability. It is not unreasonably restricting the parliament’s power to legislate for good of the people because it only relates to the CPP of Parliament. In A-G(NSW) v Trethowan, the court defined ‘constitution’ as the nature and composition of parliament, ‘procedures’ as the prescribing of rules of Parliament’s conduct and ‘powers’ relating to own authority within Parliament. Thus the scope of the relevant rules are quite narrow and are centred around the specific issue of structure and practicalities of the Parliament. The general legislative power to legislate for the good of citizens is thus not affected,
with Parliament still unable to bind its successor (*South East Drainage Board*). In this way, the narrow scope of legislation within s6 justifies the reasonable restrain of power in relation to Parliament itself.

**Judicial Supervision**

Furthermore, the courts have been astute in limiting the extent to which Parliaments can constrain future parliaments under s6. In *Westlakes v SA*, the Parliament made subsequent legislation requiring consent of an extra-parliamentary authority before being allowed. The court struck this down as a necessary component to passing legislation because they concluded a manner and form provision must not *unnecessarily constrain* power of later parliaments to pass laws. So essentially, any manner and form provision is not valid unless it is only a reasonable constraint on legislative power. Thus the courts have played a major role in establishing that s6 does not operate as an unreasonable constraint on Parliamentary power to legislate for citizens by creating a ‘threshold’ of reasonableness in the exercise of s6.

Furthermore, on the periphery of the issue, the cases relating to s6, principally *Westlakes* and *Comalco* have also established manner and form cannot be used to abdicate legislative power. Both in *Westlakes* and *Comalco*, the courts found that extra-parliamentary approval as a manner for amending Acts amounted to a ‘renunciation of legislative power’ and was thus not allowed under the respective State constitutions. So in effect, the courts continued to manage the operation of s6AA to prevent it being an unreasonable constraint on legislative power. Thus, while there is a prima facie restriction on legislative power, the aggregate effect is to prevent the incessant and largely unproductive ‘chopping and changing’ of government to detriment of the state citizens. In this way, the narrow scope of the relevant Acts (CPP) and the judicially imposed thresholds (“not unreasonably”) has actually operated to assist the Parliament in making laws for the good of citizens and is thus has a necessary place in parliamentary democracy.

**Major Risks**

However, the system is not without the potentiality of Parliaments being unreasonably constrained. The essential concept at risk here is representative democracy within parliamentary democracy which faces threats from the practicalities of modern state government. The central idea behind the state parliament is representative democracy. Although *McGinty* found that “directly chosen by the people” and Cth representative democracy did not trickle down to the states, the process of state elections is largely built on the premise of representative democracy. The power of state parliaments, and indeed the state constitutions is ‘ultimately derived from the people themselves’ (Deane and Toohey JJ in *Nationwide News v Wills*). Thus those in state parliaments are representatives of the people who idealistically represent the people’s will and the operation of s6 has the potential to infringe on that concept through the practicalities of modern government.
Party Politics and Prior State Parliaments
The risks and implications of the operation of s6 is the extent of party politics involved which may prevent a parliament realistically complying with manner and form provisions. To illustrate through an example, suppose a liberal NSW government imposed a law relating to CPP of parliament requiring a two thirds majority in BOTH houses. Then at the subsequent election, the Labor Government is voted in, but have a slim majority in the H of R but the Liberals have a majority in the senate. The implication is that this new parliament, representing the true “will of the people” will not logically be able to overturn a previous law, because of their lack of support in the senate. To this extent, party politics can pose a great imposition on the “will of the people” because a law cannot be amended, even though it may not represent what the democratic process should achieve, that is, that will of the people.
Such an imposition of s6 may be struck down by the courts as ‘unreasonably constraining’ future parliament. However, the risk lies in that the Court may not do so, and this will compound the effect of party politics, preventing representative democracy from being adequately in place. Furthermore, there is the issue that with a simple majority vote the state constitutions can impose a referendum for an amendment. Although stated at the Commonwealth level, Deane J argued the present legitimacy of the Constitution lies in the acquiescence of the Australian people (Theophanous v Herald & Weekly Times), but this is likely to be the same for states. The citizens of the state by recognising their constitutions essentially give it legitimacy. So what if such as in Trethowan, party politics changes the structure of the constitution into something not recognised by the people? This ultimately would not be the will of the people and hence the major risk in the operation of s6 – party politics preventing the repeal of past Acts which no longer reflect the interests of the people.

Constitutionality
The operation of s6 has also received judicial criticism. This was principally raised in A-G(WA) v Marquet, where Kirby J argued s6 was a restraint of legislative powers contrary to s106 and s107 of the Constitution, that is to save state’s powers. Since this changes the Constitution without a referendum, he argued, then s6 was unconstitutional. However, as the majority found, s6 and the relevant manner and form provision did not unreasonably constrain the state parliament’s power, and was necessary to the CPP of parliament in order to achieve stability of government. Thus, despite Justice Kirby’s criticism, s 6 is NOT unconstitutional because it does not conflict with state powers contrary to s106, s107.

Conclusion
Essentially, the above risks do pose a threat to effective functioning of parliamentary democracy. However, due to the fact that s 6 is in place for the justifiable reason of stability in parliament, and has narrow scope and judicial supervision of the extent of the restriction, each of these risks
can be effectively managed to prevent unreasonable restriction of legislative power. In essence, the operation of s6 is not so much a restriction but an overall protection of the legislative power of the parliament and thus enhances a state parliament’s ability to legislate for the good of citizens and certainly has a place in parliamentary democracy.

This essay shows a strong understanding of the purpose and operation of manner and form provisions. It addresses each element of the question asked. The essay is structured well with the use of headings, an introduction that sets out the argument and a strong conclusion. The “example” was a useful illustrative tool that assisted the development of the argument. An excellent job.
80/100.