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.
Question 2

Mark = 70

THE VALIDITY OF THE COMMONWEALTH ACT

To be valid, the Cth law must be supported by a Constitutional head of power and not subject to any express or implied Constitutional limitations.

IS THE ACT VALID UNDER EXTERNAL AFFAIRS POWER (S51xxxix)

The law will be with respect to s51(xxxix) if it implements a bone fide treaty obligation. This treaty appears to be bone fide and not entered into as 'merely a device' for Cth to gain power (R v Burgess). Article 3 is an operative provision that requires ‘all reasonable steps’ to increase renewable energy (note: similar to Thomas in which UN SC resolution to ‘take all necessary steps’ was not sufficient’)

This could be described as aspirational as a variety of contradictory ways could be used to fulfill the aspiration (IR Case). However the recommendation about domestic residences being fitted with solar energy does increase the level of specificity re the general course to be taken (IR Act Case). This appears to be more specific than the IR Case obligation to ‘promote full employment’, however only barely so. As Pope has shown the high court’s preference for binding obligations, this may not be enough to enliven the treaty implementation aspect of the power.

However, assuming this treaty obligation is sufficient…

IS THE ACT IN CONFORMITY WITH THE TREATY OBLIGATION? 

The Cth must establish that the act is ‘reasonably capable of being considered appropriate and adapted to implementing the treaty’ (IR Case). It is up to parliament to decide the means by which it is carried into effect. The fact that parliament lists one of the acts purposes as bringing the treaty into effect is helpful but not determinative. The act under s8(b) indicates that it wishes state owned public housing to be fitted with solar energy. S9(a) and (b) are also compliant with promoting solar energy. It could be argued that the act goes beyond the requirement that solar energy be promoted by regulating wind and wave energy as ‘renewable energy standards’

INTERNATIONAL CONCERN

Could argue that renewable energy is an ‘international concern’, particularly in light of upcoming Copenhagen conference. This argument would rely in Stephen J in Koowarta who thought that these matters ‘necessarily possess the capacity to affect a country’s relationship with other nations’ and thus wrt s51(3xxi). This was also supported in Dam but is difficult to apply and has been criticized by some judges (XYZ) well done.
CONCLUSION

The act may be a valid implementation of the treaty or, less likely, of the international concern of ‘renewable energy’. [✓]

However it is possible that the act is not in conformity with the treaty obligation. [✓] s9 is too extreme by kicking people out of their houses.

VALIDITY OF S7 – APPROPRIATION OF MONIES S81

Can the Cth validly appropriate and spend money on renewable energy? [✓] s81 is a precondition for a Cth expenditure, not a substantial spending power [✓]. Expenditures must be supported by some other head of power (Pape) [✓]. S 7 validly ‘earmarks’ the money to be used by the Cth. Discussion of s8 will determine whether this spending is valid under a Cth head of power.

VALIDITY OF S8(a)

S8(a) may be a valid exercise of the nation-hood power (NHP) [✓]. The NHP is deduced from ‘the existence and character of the Cth as a national government and from the presence of s51(xxxix) and s61 (AAP per Mason J) [✓].

IS THE SUBJECT MATTER WITHIN THE SCOPE OF THE NHP?

The topic of the legislation must be within the peculiar province of the Cth (Davis). AAP and Davis both discussed pursuits relating to science, knowledge and technology. [✓] The example of CSIRO was used as an example of valid spending with respect to the NHP[✓]. As s8(a) is purely spending money on research (not regulating it) it is more likely to be valid under the NHP (Pape) [✓] This power comes from s61, amplified by NHP and s51(xxxix).

VALIDITY OF S8(b)

Financial assistance to the state may be supported by the grants power (s96) [✓]. It does not matter that the grant is not concerned specifically with a head of power (Federal Roads) [✓] or that conditions are attached (Morus). This is a valid spending of Cth moneys.

VALIDITY OF S9 (WHEN READ WITH S10) [should split 9 up into 9(a)]

Cth could argue s9 valid under external affairs power (see above) [which parts?]. Alternatively the requirement that buildings have components that are renewable energy complaint has the substantive effect of regulating Constitutional corporations [✓] and production or manufacture of building materials. [✓]

CORPORATIONS POWER

The Cth may argue that ss 9, 10 and 11 are valid with respect to s51(xx). The law must have a connection [✓] that is not insubstantial, tenuous or distant to the constitutional corporation (workchoices). [✓] The law must satisfy the ‘object of command’ test [✓] in that it ‘imposes a duty or liability, or confers a privilege or right on a constitutional corp (workchoices)[✓]. S11 creates an offence for a s51(xx) corporation to sell/offer/ donate building materials unless they have been
tested [✓]. This provision clearly singles out s51(xx) corps and is thus likely to be valid [✓]. The penalty will be valid under the incidental area of the power (Burton v Honan) [✓].

Ss9 and 20 deal with whether or not someone can live in their house and thus regulates those outside the corporation. Requiring 20% of materials in peoples houses to be produced by a cn corp could be outside this head of power. The effect of the provisions is to require people to buy materials from cn corps. This provision appears to use corporations as a ‘mere reference point’ via which to regulate areas outside of its competency (Re Dingjan) [✓].

PART II

IS THE AMENDMENT VALID?

S8 before the amendment appears to be a valid exercise of the Cth’s s96 power to give grants to the states. Despite this, the Cth cannot use grants to legally compulse states to take the money (First uniform tax case) [✓] In the First uniform tax case, the inducement was practically a coercion, but Latham J pointed out that states could refuse it if they wish. In this case, however, s8A(2) effectively makes it an offence to not fund state-owned domestic residences. This is far more likely to amount to ‘demanding obedience’ as per Dixon J in the 2nd uniform roads case.

For this reason, the grant under s8 is likely to become invalidated.

A further issue arises as to whether the Cth has a valid head of power to implement these amendments. It could use External Affairs, as discussed earlier.

[Pt 1 covered main issues well, especially s51(xx). Could have had discussion of s51(xix). Pt II started well. Didn’t discuss implied immunities, perhaps ran out of time].