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.

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Question 2

80/100

[Marker’s comments in brackets]

Part (i)

Intro:
For the REAH Act to be valid it must be with respect to a constitutional head of power [{\checkmark}] and be free from any express or implied constitutional limitations. The validity of each section will be examined individually [{\checkmark}{\sqrt{good}}].

Sections 7 and 8(a):
As s7 and 8(a) both deal with appropriations they may be dealt with concurrently [{\checkmark}]. Appropriations made from the consolidated revenue fund rely on s.81 and s.83 [{\checkmark}]. However these sections are not a source of substantive power (Pape) and the appropriation will only be held valid if it can be supported by another source of Cth legislative power (Pape) [{\checkmark}]. Potential heads of power include:

External Affairs
The Cth has power to legislate with respect to any binding international treaty made in good faith (s.51(xxix), Tas Dam Case) [{\checkmark}]. Thus the REAH Act may be supported as an implementation of the Solar energy convention[\checkmark]. There is nothing to suggest the treaty was not made in good faith satisfying the first element [{\checkmark}]. However, some treaties will not give rise to binding obligations capable of being implemented (IR case)[\checkmark]. Laws that are aspirational or do not prescribe a sufficiently specific regime [{\checkmark}] for implementation may not be clear enough to create a binding obligation [{\checkmark}]. The Solar Energy Convention urges parties ‘to take all reasonable steps to pursue policy to promote greater use of solar energy’. This article provides no direction as to what would amount to reasonable steps [{\checkmark}], what kind of policy would achieve its end [{\checkmark}] and it provides no target as to what would amount to a greater proportion [{\checkmark}]. Thus the article may leave room for conflicting approaches to be taken [{\checkmark}] and does not appear to be sufficiently specific.

However, treaty recommendations may also provide a basis for legislation [{\checkmark}{\sqrt{}}] where they are appropriate and adapted to giving effect to the terms to the treaty to which they relate (IR Case) [{\checkmark}]. The recommendation provides clear a clear way of increasing solar energy use by mandating
solar energy systems in new domestic residences [✓]. This appears appropriate and adapted [✓] to an aim of increasing solar use and may provide a legislative basis for s.7 and 8(a).

A law must also be reasonably capable [✓] of being considered reasonably appropriate and adapted to the purpose of the treaty (Tas Dam) [✓]. As mentioned the general terms of the treaty are probably not specific enough to support s8(a) [✓] so it must be seen as appropriate and adapted to the recommendation. Creating research bodies for solar, wind, wave and other renewable energies goes far beyond initiatives to ensure domestic residences have solar systems [✓✓✓✓✓] and is unlikely to be seen as capable of being appropriate and adapted to this recommendation [✓]. Thus, it seems unlikely that s.7 and 8(a) can rely on external affairs to support an appropriation [✓].

Nationhood
A power of nationhood is derived from the dual operation of s.61 and s.51(xxxix) (Pape) [✓] and may poten5tially be implied from the nature of the constitution as a document establishing a nation (AAP, Barwick) [✓]. It will support legislation providing for the capacity to engage in enterprises and activities peculiarly adapted to the government of a nation. (AAP, Mason) [✓]. Examples [✓] of such enterprises have included national research of scientific initiatives (AAP, Barwick, Tas Dam, Brennan). However the research bodies in schedule 1 have already been established by states [✓] or private bodies and therefore cannot be considered as peculiarly national enterprises, [✓] that aren’t otherwise able to be carried out. Thus s.7 and 8(a) are unlikely to be supported by the nationhood power [✓✓].

Hence, it appears and appropriation under s.8(a) has no other source of power and will not be valid [✓].

s.7 and 8(b)
As s.7 provides the mechanism for 8(b) it may be valid to the extent s8(b) is. Again, an appropriation will need and independent head of power (pape). S.8(b) may be able to rely on the grants power in s.96 [✓].

A grant made by the Cth to the states unders.96 may be made for any purpose and on any conditions which Parliament considers fit (WR Moran, Latham) [✓]. Thus, as long as the states are not legally coerced to accept the grant [✓] and the grant does not provide for regulatory or coercive laws, it will be valid (First Uniform Tax Case) [✓] you could also mentions DOGS Case restriction here. S.8(b) provides no mechanism for forcing the states to accept the grant [✓] – it applies only to the states, so it has no coercive effect and does not provide for a regulatory scheme. Thus, a grant to the states under s.96 in s.8(b) will be valid [✓]. S7 will be valid to the extent it appropriates money for the purposes of s.8(b) [✓].
s.9(a)
Again, s.9a may rely on the external affairs power for its legislative ability. As noted the Cth has the power to enact laws relating to the convention, but the convention does not appear specific enough to create the degree of specificity necessary. However, the recommendation, as it is appropriate and adapted to the treaty, may provide a legislative basis [√]. A law must be reasonably capable of being seen as appropriate and adapted to the purpose of the treaty (Tas Dam) [√]. S.9a directly implements the recommendation, creating a mechanism for ensuring all new houses have solar systems [√]. Directly corresponding to the recommendation, thus suggests sufficient conformity [√] and s.9a is likely to be valid [√].

s.9(b)
Again, s.9b may rely on the external affairs power, but only to the extent it implements the recommendation. As s.9b has no relation to solar energy systems, instead looking to regulate building material, it is unlikely to be appropriate and adapted [√].

s.9b may however be sufficiently connected to the corporations power s.51(xx) [√]. The Cth has the power to make laws of general application that have a practical discriminatory effect on corporations (Fontana, Brennan, WorkChoices) [√]. As renewable materials are only built by constitutional corporations, mandating their use would have a significant impact on the business of constitutional corporations [√]. It will also impact other parties involved in building such as owners and builders to a large extent so the discriminatory operation on constitutional corporations may not be quite enough to support s.9b [This conclusion doesn’t quite follow].

s.11
s.11 seeks to rely on the corporations power. The Cth has power to make any laws where a constitutional corporation is the object of command (Work Choices) [√]. As s11 directs the ‘business functions’ (Re Pacific Coal) [√] of constitutional corporations and directly addresses them, it will clearly be within the core of the corporations power and will be valid.

The penalty is also likely to fall within the incidental area of s.51(xx) [√] as it is reasonably necessary for the fulfilment of s.11 [√].

Conclusion
It appears ss.8b, 9a and 11 will be valid and s7 will be valid to the extent it provides money for s.9b. As s.10 is a definition provision it will also be valid [√].

[This was extremely well argued. You covered all points in the question.]
Part (ii)

S8A may be challenged on the grounds it breaches the constitutional limitation of state immunity [√HOP?]

s.8A(1)
The law must bind the state crown. As 8A expressly indicates its intention to do so (Bropho)[√], s8A will affect the state crown.

A Cth law will breach state immunity if it places a special burden on the state or limits its capacity to undertake essential state functions (Austin) [√]. Clarke outlines factors to consider the extent of this curtailment:

Is the law discriminatory? [√]
Applies only to state owned domestic residences, having clear discriminatory operation [√]
Particular burden or disability?
Cost of fitting solar systems
Affect on States exercising Const functions? [to function as govt]
While public housing is an important governmental role it is not necessarily a constitutional function [√]. Limiting a state’s ability to provide public housing is unlikely to impact on its integrity as a distinct government [√].

Thus, while s.8A(1) is discriminatory, it spears not to involve a curtailment of state essential functions [√]. As both elements must be satisfied (Austin) [√] the law appears valid.

s.8A(2)
The same state immunity test applies as above: [√]
Discriminatory operation: applies only to states
Particular burden: having to pay for solar or face legal costs [√]
Effect on essential functions:
This law again inhibits state public housing capacities but by creating the right to sue it also impacts significantly on costs the state will have to face. It limits state decision making [√], penalising them for a failure to comply [√]. However, while this right to sue may be more offensive it still goes to the states’ capacity to provide public housing, which is unlikely to be essential [√√].

Thus s8A(2) is also unlikely to be valid.

[Your points on state immunities were well argued. However you needed to consider whether s8A was valid under a head of power s.51(xxix)]