

UNIVERSITY OF NEW SOUTH WALES
Faculty of Law & Justice

Term 3, 2021
Mid-Term Take-Home Assessment

PLEASE NOTE:

The following specific instructions supplant the Faculty's general policy on these issues:

Word Limit: The maximum word limit for your answer to the Mid-Term Take-Home is **1200 words. There is no 0-10% tolerance regarding word length in this course.** Citations in footnotes or endnotes are not counted as part of the word length, but substantive text in footnotes or endnotes is counted.

Referencing: Incomplete or inaccurate referencing will attract a penalty. Students should follow the advice on referencing found in the Australian Guide to Legal Citation (4th edition, 2018) which can be downloaded for free at <https://law.unimelb.edu.au/mulr/aglc/about>.

Research: In answering the question, students should only draw upon material covered in weeks 1-3 of the course (classes 1A-3B). No additional research needs to be conducted.

Submission: Your answer to the Mid-Term Take-Home is to be submitted electronically via the Turnitin submission point located in the section of the Moodle site marked 'Mid-Term Take-Home'. The Turnitin software picks up excessive similarity between papers and acts as a check on student plagiarism.

Papers must be loaded on to Moodle no later than **4.00pm on Wednesday 20 October 2021**. To submit assignments via Turnitin, please follow the instructions here. The cover sheet for electronic submission via Turnitin is available here under the heading 'General'.

A penalty of 5% of the mark awarded will be deducted for every day (or part thereof) of lateness.

Request for special consideration: If you are asking for Special Consideration (eg for an extension), please follow the procedure outlined at: <https://student.unsw.edu.au/specialconsideration>

Problem Question:

It is June 2022:

Following the UN Climate Change Conference (COP) in 2021, a group of concerned nations, including the UK, the US, Germany and Japan, agreed to meet to discuss how they might be more explicit, and resolute, in their commitments under the *Paris Agreement*. They are concerned about providing greater clarity and concreteness to the Nationally Determined Contributions, the individual climate action pledges made by each state under the *Paris Agreement*.

The Australian Government is a reluctant attendee at this meeting, under significant diplomatic pressure from the US, in particular. This meeting results in a new, multi-national treaty: *A Convention on the Achievement of the Commitments of the Paris Agreement 2021*. Australia signs and ratifies the treaty, and is present at the press conference with the other signatories celebrating it as a major show of leadership towards achieving the Paris Agreement commitments.

The 2021 Convention contains the following preambular clauses and articles:

The Parties:

Recognizing that the commitments of the parties under the *Paris Agreement 2015* are a response to the urgent and potentially irreversible threat of climate change, and thus must be the highest priorities for governments worldwide,

Also recognizing that to achieve the commitments of the *Paris Agreement* there needs to be significant and concrete actions taken by governments to meet their targets set in the Nationally Determined Contributions under the Paris Agreement,

Have agreed as follows:

Article 2:

- (a) To meet their quantified mitigation targets in their Nationally Determined Contributions under the Paris Agreement, the parties agree to implement strategies, plans and actions across a number of sectors, including in relation to energy supply, transport, agriculture, industry, land-use and forestry, and waste. These should include commitments, strategies, plans and actions on:
 - (i) halting investment in unabated coal (coal power generation without carbon capture and storage equipment) by 2025;
 - (ii) expanding renewable energy generation to 100 per cent national power generation by 2035, and shifting to net zero emissions in industrial settings by 2040;
 - (iii) phasing out of sales of fossil-fuel passenger vehicles by 2035;

- (iv) requiring newly constructed buildings to be near zero energy by 2025;
and
- (v) expanding forest cover by 2030.

During the federal election in March 2022, Australia's commitments on climate change again became an important political issue. In the lead-up to the election, and following the announcement of the new Convention, one of the policies that the Australian Labor Party (ALP) decided to rekindle was its commitment to electric vehicles. It committed to a national electric vehicle target of 50 per cent of new car sales by 2030, and an electric vehicle target of 50 per cent of the Commonwealth government's car fleet by 2025. The ALP announced monetary incentives, and in particular upfront tax deductions for businesses purchasing electric vehicles.

At the election the ALP was successful. A number of senior members from the environment and electric vehicles lobbies have come and met with the new government, as have senior executives from some of the largest car manufacturers in the world. They are all very concerned that the actions that have been taken in states such as Victoria, to impose a targeted tax on the drivers of electric vehicles, will undermine the ALP's policies to make electric vehicles "more affordable", at a time when the market is not yet firmly established in Australia. They urge the ALP to do more: to commit to legislating the requirement that not only the Australian government, but *all businesses* operating in Australia have an electric vehicle target of 50 per cent by 2025.

You are a lawyer working for the Australian Government Solicitor. You have been asked by the new Minister for the Environment to review a draft Bill to give effect to such a policy. In particular, the Minister's office asks for your advice on whether sections 4-6 of the Bill will be supported a combination of the territories power, the corporations power, and the external affairs power:

Electric Vehicles 2025 Bill

1 Long title

An Act to mandate the adoption of a 50 per cent target for electric vehicles for governments and businesses across Australia by 2025.

2 Definitions

Business means any corporation that is engaging in commercial activity in Australia, including foreign businesses and State-owned or controlled corporations and any corporation operating in an Australian territory.

Department means the federal Department for the Environment.

Electric Vehicle 2025 Target means the target submitted under s 4.

...

4 Target Setting

(a) Every business must submit an Electric Vehicle 2025 Target by 30 June 2022 to the Department.

(b) The target in sub-section (a) must be at least 50 per cent of vehicles that are used for business purposes.

(c) Penalty for failing to submit an Electric Vehicle 2025 Target: Up to \$50,000 fine.

5 Reporting

Every business must report every 6 months to the Department as to the actions taken for their progress towards their Electric Vehicle 2025 Target.

Penalty for failing to submit 6 monthly report: \$10,000 fine.

6 Penalties

Unless an exemption in s 7 applies, a business that is assessed by the Department to have failed to have met its Electric Vehicle 2025 Target will be penalised for every six months that they fail to meet its Target.

Penalty: \$50,000 fine.

Your advice on whether the corporations power (s 51(xx)) is likely to support the provisions is worth 15 marks.

Your advice on whether the external affairs power (s 51(xxix)) is likely to support the provisions is worth 15 marks.

Additional instructions/clarifications:

- (1) Please do not provide advice on the territories power (s 122).
- (2) Please do not engage with severance or reading down in answering your question, as they have not been covered in depth in this course. These are techniques that the Court uses to avoid invalidating entire provisions where parts of it, or particular applications of it, are unconstitutional. For the purpose of this assessment, please simply assume that a finding of invalidity of one part or application of the provision would not necessarily invalidate other aspects of it.