Restrictive Procedures

What are they?

- Special procedures for alteration of the State constitutions
- Used to protect the core institutions, principles and powers of constitutional system from simple amendment through to the standard legislative procedure

VICTORIA

- Victorian constitution is altered like any other piece of legislation
  - Dogs act
  - Simple majority of both houses of Victorian Parliament
    - Known as the default rule
- Hierarchy
  - Australian Constitution → Commonwealth legislation → state legislation
    - Therefore state legislation and the state constitutions are limited by s 109 of the Commonwealth Constitution
- Only some restrictive procedures are binding

**s 2 of the Australia Act 1986**

(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.

*West Lake Ltd v South Australia* (1980)

- FACTS: The SA government and West Lakes Pty Ltd had a private contact, which SA took and made into legislation
- The legislation required that the minister must inform the company and gain consent before the SA parliament could amend the legislation
  - Considered a restrictive procedure
- HELD: that the consent of the company deprives the legislative power within the SA
- The consent of the company is undemocratic- company is not elected by the people of Australia
- The potential deprivation of power is that the company could make the constant choice to never provide consent- therefore taking away complete power to amend that legislation, therefore it is not merely just making it more difficult for the parliament to amend it
- Therefore it conflicts with s 2 of the Australia Act 1986 (Cth) as it takes away the full power granted to the states for order and good government

This case also raises issues surrounding the removal of power through the process of referendum

- Deemed to be valid as the power is confined to the people that elect the government
There is no Supreme Court of Victoria or High Court decision on the validity of $\frac{3}{5}$ majority, however there is South African Court approval for $\frac{2}{3}$rd majority.

**s 6 of the Australia Act 1986**

Manner and form of making certain State laws

Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.

- Restrictive processes that do not concern parliament (e.g. courts, executive) are not caught by s 6
  - Therefore the default rule applies

**Attorney General (WA) v Marquet (2003)**

- FACTS: Two Bills in WA parliament, Repeal Bill & Electoral Amendment Act
- Attempt to repeal legislation that provided framework which divided up the electorates, providing bias for the country areas (conservative bias)
- Proposed to redraw electoral boundaries favouring ALP (more people in the city regions and less in the country regions)
- The restrictive procedure for this Bill was a requirement of an absolute majority
- HELD: Two questions: validity & binding
  - Re validity-
    - Was held to be valid
    - Absolute majority provides difficulty however it does not diminish the power of the parliament
  - Re binding-
    - s 6 of the Australia Act; ‘constitution’ refers to the representative character of the parliament
      - E.g. representative government, bi-cameral structure
    - Changing the electoral boundaries affects the composition of members in parliament
    - Both of the existing legislation concerned the constitution of the parliament, and therefore was caught by s 6
      - Therefore the absolute majority procedure had to be followed

**Process to determine if a restrictive procedure applies**

1. Is there a restrictive procedure
2. Is the restrictive procedure valid?
   a. Must make it harder to change constitution/enact legislation; BUT
   b. Must not take away legislative power (s 2 of Australia Act 1985 (Cth))
3. Is the restrictive procedure binding?
a. Must the parliament follow the restrictive procedure to enact legislation to change the constitution?

b. s 6 of Australia Act 1985 (Cth)

- Re 2- the restrictive procedure itself must also be entrenched mention where it is entrenched in the Vic Constitution (e.g. s 18(1B)(p))

WITHIN THE STATE CONSTITUTION

s 18 provides restrictive procedures

- (1B) (a)-(p) state that if you want to change or abolish them, referendum is needed:

(a) This subsection, or subsection (1BA - For the purposes of subsection (1B), a provision of a Bill is not to be taken to repeal, alter or vary Part IIA unless the Bill expressly refers to that Part in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary Part IIA.),

(1C – A Bill to which subsection (1B) applies must be submitted to a referendum on a day not sooner than 59 days after the Bill has been passed by the Assembly and the Council) or

(3 – Any Bill dealing with any of the matters specified in subsection (1B) which has not been approved in accordance with that subsection is void)

section which self entrenches referendum

(b) – region and members (ss 26-30)

(c) – proceedings of the council (ss 31-21)

(d) – districts and members (ss 34-37)

(e) – duration of the assembly (ss 38-38A)

(f) – proceedings of the assembly (ss 39-40)

(g) – sessions of Council and Assembly (s 41)

(h) – provisions relating to appropriation bills (ss 62-65)

(i) – provisions relating to disputes concerning bills (ss 65A-65G)

(j) – local government (ss 74A-7B)

(k) – A Court shall be held in and for Victoria and its dependencies which shall be styled "The Supreme Court of the State of Victoria" which in this Part is called "the Court" (s 75(1))

(l) – director of public prosecutions (ss 87AA-87AF)

(m) – the executive (ss 87A-88A)

(n) – auditor-general (ss 94A-94C)

(o) – special provisions (ss 94E-94H)

(p) – any matter from (a) to (o) in this subsection

- (2) (aa)-(h) that if you want to change or abolish them, a special majority is needed; that is 3/5th majority
(aa) – Recognition of Aboriginal people (s 1A)

(a) – The Crown (ss 6-14)
(b) – Constitution and powers (ss 15-17 [18 NOT INCLUDED])
(c) – sub s (4): Any Bill dealing with any of the matters specified in subsection (2) which has not been passed in accordance with that subsection is void
- sub s (6): Subsection (2) does not apply to any Bill to—
  (a) enable a public authority (within the meaning of Part VII) to enter into an arrangement of any kind with a person or body (including an independent contractor) relating to the delivery of a water service (within the meaning of that Part); or
  (b) alter the structure, composition or membership of a public authority (within the meaning of Part VII) that has responsibility for ensuring the delivery of a water service (within the meaning of that Part) if the alteration does not affect its status or the status of a successor body as such a public authority accountable to a responsible Minister of the Crown for ensuring the delivery of that service.
(d) – membership of the council and the assembly (ss 44-47)
(e) – qualification of electors for the council and the parliament (s 48)
(f) – power to houses to relieve from consequences of alleged defaults (s 61A)

(fa) – delivery of water services (ss 96-97)
(fb) – the judiciary (ss 87AAA-87AAJ)

(g) – any provision substituted for any provision specified in paragraphs (a)-(fb)
(h) – responsibility for ensuring the delivery of a water service may be transferred to a person or body that is not a public authority or the accountability to a responsible minister of the crown of such an authority for ensuring the delivery of such a service may be removed

- (2AA) state that if you want to change or abolish them, an absolute majority is needed
  (a) - This subsection or
    - sub-s (2A): A provision of a Bill by which section 85 may be repealed, altered or varied is void if the third reading of the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively
    - or (5): Any Bill dealing with any of the matters specified in subsection (2AA) which has not been passed in accordance with that subsection is void

section which self entrenches absolute maj.

(b) The supreme court of the state of Victoria (ss 75-87 [ss 75(1) & 85 NOT INCLUDED])
(c) – any provision substituted for any provision specified in paragraph (a) or (b)

- (2A)- A provision of a Bill by which section 85 may be repealed, altered or varied is void if the third reading of the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively (s 85)

- S 85(5) a provision of an Act, other than a provision which directly repeals or amends any part of s 85 is not taken to repeal, alter or amend this section unless- a) states an intention, and b) the relevant minister makes a statement at the second reading as to the reasoning

- S 85(6) a bill which repeals, varies or alters s 85 has not been done unless s 85(5) has been met

  o HOWEVER s 6 does not cover a lot of these as these sections do not concern the constitution of parliament

Examples of valid ‘manner & form’

- **Constitution of the parliament**
  o Laws which abolish a house
  o Restore a house
  o Remove the Queen or her representative as a constituent element of parliament
  o Affect the royal assent
  o Alter electoral districts
  o The number of seats
  o The system of voting
  o The duration of a parliamentary term; or
  o Concerns the relationship between the two houses

- **Procedures of the parliament**
  o Laws relating to standing orders (the rules used to manage the work of the House of Representatives and the Senate
  o The office of Speaker
  o Quorums
  o Laws respecting the powers of parliament

- **Powers of the parliament**
  o Laws which impose or expressly repeal or amend a manner and form provision
  o Concern parliamentary privilege
  o Dal with the resolution of deadlocks between the Houses

**QUESTION APPLYING THE ABOVE**

- Can the Victorian Parliament pass a law to abolish the Supreme Court? If so, what procedure must it follow before such a law becomes effective?
- Restrictive procedure exists; s 18(1B)(k) (refers to pt. 3, s 75)
  - Procedure is referendum
- West Lakes issue? Is the procedure valid?
  - Makes it harder (no depriving power) but it still allows for parliamentary power
- Is the restrictive procedure binding?
  - Is the law that seeks to abolish the supreme court a law that ‘respects the power or procedure of the parliament” (quote s 6 of Australia Act 1986 (Cth))
    - No, due to the separation of powers, the judiciary and not the parliament

THEREFORE a referendum does not have to be followed, and simple majority (default rule) applies