## **Commonwealth Act regulating the State**

- 1. Is the Cth Act valid under a <u>Head of</u> <u>Power</u>? (Scope or limits within HoP)
  - External Affairs
    - Red flag: treaty
  - Corporations
    - Red flag: a body
  - Financial
    - Red flag: Cth gives financial assistance to State
- 2. Are there any <u>implied limits</u> to Cth legislative power in the Cth Constitution which would prohibit the Cth Act from being constitutional?
  - State Inter-Governmental Immunities (IGI)
    - Red flag: Cth binding State; employment – AEU
  - Cth Separation of Power
    - Red flag: Judges & exercise of power, control orders, ex-parte, a body, tenure
  - <u>Implied Freedom of Political</u> Communication (IFPC)
- 3. Are there any <u>express limits</u> to Cth legislative power in the Cth Constitution which would prohibit the Cth Act from being constitutional?
  - S92: Freedom of Interstate Trade & Commerce
    - Red flag: taxes, fees, import/export of goods, national marketing schemes
  - S109: Inconsistency

### **State Act regulating the Commonwealth**

- State's power to legislate is plenary
- Are there any State or Cth Constl limitations/prohibitions on the plenary power to legislate? No substantive limits.
- 1. Is there a <u>restrictive procedure</u> that must be followed by the State legislature?
  - M&F provisions
    - Red flag: absolute majority, referendum
- 2. Are there any <u>implied limits</u> to State legislative power in the Cth Const which would prohibit the State Act?
  - <u>Cth IGI</u> all implied powers impact on States
    - Red flag: State binding Cth's exercise of capacities & functions
  - State Separation of Power
    - Red flag: state pmt vesting NJP in court, eligible judges
  - IFPC
- 3. Are there any <u>express limits</u> to State legislative power in the Cth Const which would prohibit the State Act?
  - S92
  - S109

#### MANNER AND FORM

L1 - contains RP/M&F

L2 – Act/law allegedly bound by RP

- [X] will argue M&F is binding, but [STATE PMT] will argue M&F is not binding.
- M&F refers to "a condition and ... requirement which existing legislation imposed upon the process of lawmaking" (*Trethowan* per Rich J).
- Although State Pmts enjoy residual plenary power (s 2(1) AA, s 16 Vic Constn), they cannot ordinarily legally bind successive Pmts or this would undermine Dicer's constitutional pillar of Parliamentary Sovereignty (Union Steamship).
- This is subject to the ability of Pmts to bind successors by way of restrictive procedures (McCawley).
- [LAW] may constitute a valid restrictive procedure under s 6 AA (which replaced s 5 of CLVA; affirmed as a constl basis for RPs in Marguet).
- Restrictive procedures = more onerous than standard (simple majority in each house + assent of Crown)

#### (1) Is L1 double entrenched and mandatory?

- In order to be valid, a M&F provision/RP must itself be entrenched, or else the M&F provision can be repealed by the normal procedure (*Trethowan*)
  - o Double entrenchment doesn't affect validity
- Look for <u>self-referential language</u> (e.g. s 7A(6) in *Trethowan* "requirement that QLD LC cannot be abolished except by referendum itself may not be altered except by referendum")
- Must also be mandatory law (e.g. s 7A(1-5) in *Trethowan* "Legislative Council cannot be abolished") → look for "must" and "shall"
  - C.f. Directory law "may follow" or "can follow" procedure the Pmt can ignore it and free to do as it wishes
  - o Requirement that sounds mandatory, but is nonsensical may still be directory
  - o Failure to follow mandatory language will result in invalidity of L2
- Upon the facts, the restrictive procedure [RP], applies to both [SUBJECT MATTER] and [PROVISION] itself & thus satisfies *McCawley* test.
- The [RP] does not apply to itself and hence will be *unenforceable* (*McCawley*).

# (2) Is the L1 a permissible M&F restriction (procedural about mode & method) OR a substantive fetter on pmt's legislative power?

- In line with Pmt Sov, earlier Pmts cannot impose M&F provisions which are "too onerous" that amount to curtailment or abdication of future Pmts' substantive law-making ability (*Westlakes* per King CJ).
- L1 can do no more than prescribe the *mode, method or process* in which the law is to be passed.
- <u>Important</u>: onerousness requirement depends on how fundamentally <u>important</u> the law is (*Westlakes* per King CJ)
  - Law <u>about Constn</u> is *less likely* that a high special majority will amount to a substantive restriction and will not be too onerous.
  - o If it goes to the law-making power or to increase the restrictive power the law is likely to be important
- Upon the facts, L1 is/is not a permissible M&F restriction as it requires...

M&F provisions	Status = valid M&F or abdication of power?	Authority
Absolute majority	✓ Over 50% of all legislators = not too onerous (for law entrenching electoral boundaries)	Marquet
	, and the second	
	✓ Joint sitting = generally valid	
Referendum	✓ Simple referendum (50%+1) permissible be they seek the consent of	Trethowan
	the electorate directly	
	✗ 3:2 Majority: if 60% vote required, probably would be too onerous	
	★ 99% referendum result = denial of substantive pmt power	
	★ Citizen-initiated referendums = invalid; cannot give law-making power to a body beyond constl framework	Re Initiative and
	pondi to a coaj cojena conon namo nom	Referendum Act 1919