

Manner and Form Requirements (M&F)

States have power to make binding M&F requirements (*Trethowan*) = condition which existing legislation imposes upon the process of lawmaking

Background

- State constitutions are flexible, **state constitutions can be amended** by ordinary legislation or impliedly amended by inconsistent legislation, without any special process
- **Exception:** *Australia Acts s6* – if parl making law about the consti, powers or procedures of parl, must comply with manner and form requirements by previous parl (formerly in s5 of *Colonial Laws Validity Act*)
 - o Desirable to have consistency over time in these areas bc they're so fundamental they shouldn't be easily interfered with
 - o Potential conflict with parliamentary sovereignty
 - o Not conflict with plenary power bc procedural not substantive
 - o Not all CPP laws will have a M&F requirement in place

Process

>> Will prolly be given 2 laws, one with the possible M&F and the other that wants to change CPP. Have to decide whether M&F is valid and binding

1. Is State Parl trying to make/amend a law relating to the consti, powers or procedure of Parl?

- **Later law** must be about the consti, powers or procedure of parl (*Trethowan; s 6 Aust Act*)
- **Constitution** = nature and composition of legislature (*Trethowan per Dixon J; Marquet; Taylor*)
 - o E.g. composition of houses, changes bicameral to unicameral, electoral distribution
- **Procedure** = rules and procedures relating to parl's own internal conduct (*Trethowan per Dixon J*)
 - o E.g. parliamentary privilege, quorum, standing orders
- **Powers** = refers to a law concerning parl's own legislative authority (*Trethowan per Dixon J*)
 - o E.g. restricting own authority

YES? – move to next step

NO? – no need to consider M&F

2. Has a previous Parl put a M&F restriction in place?

“Ordinarily, restrictive procedures are not binding as this would undermine parl sovereignty and plenary legislative power. But *s 6 Australia Act* provides that laws relating to the constitution, powers and procedure of parl are bound by M&F requirements (*Trethowan*)”

- Absolute majority (*Marquet*)
 - o 50% + 1 (whether present or not, all members of house)
- Special majorities (*Harris*)
 - o 3/5 (60%) majority: s 18(2) Victorian Constitution (also a super majority)
- Super majority
 - o Requires percentage greater than one half (55%, 60%, 75% etc.)
- Referendum (*Trethowan*)
 - o S 18(1B) Victorian Constitution
- NB. Normal way is **simple majority** of all available members + royal assent etc.

YES? – move to next step

NO? – no need to consider M&F

3. Is the M&F requirement doubly entrenched?

- Provision of act that contains the restrictive procedure, must itself be subject to the restrictive procedure (*Trethowan*)
- Look phrases like “this Act/any provision of this Act/this section may not be amended unless”
- Parls respect that intention of double entrenchment is to be obeyed by later parliaments

E.g.

<i>Constitution Act 1902 (NSW)</i>	<i>Constitution Act 1975 (Vic)</i>
S 7A: Legislative Assembly cannot be abolished/lose its power unless by referendum	S 18(1B): not lawful to present to G for assent any bill by which (a) This subsection or ... [goes on to list other ss] may be repealed, altered or varied unless the Bill has been passed by both houses and approved by majority of electors voting at referendum
Sub-s (6): 7A itself cannot be changed/repealed unless by referendum	S 85 Constitutionally entrenches the jurisdiction and power of the Supreme Court sub-s (5) contains the entrenchment procedure

YES? – move to next step

NO? – not an effective M&F restriction – later legislation can be passed using standard procedures overriding the M&F restriction

4. Does the M&F restriction abdicate P’s power or make it impossible to enact a particular law?

- Can't amount to an **abdication of power**

- Where **extra-parliamentary approval** is required to change a law = not valid M&F
(*West Lakes* per King CJ)
- Can't attempt to fetter (restrain) **substance rather than procedure**
 - Provided M&F requirement affects only procedure and not substance then it doesn't conflict with parl sovereignty
 - E.g. 'upper house can never be abolished' v 'upper house can only be abolished by 2/3 majority'
- If requirement **too onerous** to be realistically met, may be considered an abdication of power
 - More likely it can be met, less likely to be abdication (*West Lakes*)
 - E.g. **onerous** referendum, 90% support for law to pass
 - Referendum not usually abdication bc goes to electorate and parl is responsible to electorate
 - Validity of a special majority depends on the percentage and the subject matter (*West Lakes* obiter per King CJ)
 - More important the subject matter, the harder the restriction may be but it would be difficult to justify more than 2/3 (66%) (King CJ)

YES? – not an effective M&F restriction >> give reasons why

NO? – effective M&F in place, move to next step >> give reasons why it's not abdication etc.

5. does the law comply with the restriction?

YES? – amending law valid

NO? – amending law invalid