

## Constitution

Cth Constitution – Rigid  
s 128

A proposed law to **alter the Constitution** must be

- Passed by an **absolute majority of both Houses** of the Federal Parliament, **or by one House twice, and**
- **At a referendum**, passed by
  - A majority of the people **as a whole** (including electors in the Territories) and
  - By a majority of the people **in a majority of the States**

State Constitutions – Flexible – Parliament is legislatively sovereign and free to amend the Constitution Act by legislating inconsistently with it. A state constitution is not to be understood as a fundamental law that limits the powers of the Parliament.

Taylor v AG (Qld)

- Qld Parliament has full power over the ‘constitution, powers and procedure’ of its legislature, including its ‘composition, form and nature’, derived from the CLVA.
- Qld Parliament can legislate a procedure for bypassing the Legislative Council notwithstanding that it amended the Constitution by implication.
- However, s 5 of the CLVA cannot be used to abolish the representative character of the Parliament. The reference to the ‘legislature in s 5 does not include the Crown, which is a ‘fundamental conception’ basic to the very nature of the Constitution

**McCawley v the King**

- S 6(6) of Industrial Arbitration Act 1961 (Qld) – President of Court of Industrial Arbitration could be appointed to the Supreme Court of Qld – only for 7 years even though Supreme Court is a life-time.
- The State constitution is not a ‘controlled’ constitution. CLVA s 5 gives the State full power with respect to its judicial system. State Parliament has the power to amend the State constitution by ordinary legislation including, through implied repeal, by legislation that was merely inconsistent with the State constitution.
- Qld Parliament can validly enact legislation authorizing an appointment to the Supreme Court for a limited 7-year-period and thereby amend the State’s Constitution by implication.

**Manner and Form**

- Entrenchment does not require any particular procedure
- Entrenching provisions are restricted to manner and form
  - A procedure or a mode of amendment
- Entrenching provisions
  - Cannot prescribe the contents of future legislation
  - Cannot abdicate legislative power

Australia Act s 6

- 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.

## Double Entrenchment

### AG (NSW) v Trethowan

- S 7A Constitution Act: Council cannot be abolished except by referendum; s 7A (6): s 7A cannot be repealed except by referendum.
- S 7A entrenched the constitutional status of the Council; s 7A(6) double entrenched it.
- Steps for M&F
  - Is the amending law a law respecting the Constitution, power and procedure of the legislature? If so, subject to m&f restrictions
  - Whether there is double entrenchment?
    - Yes → m&f is effective → the law will only be effective if the amending law is passed according to the m&f requirements
    - No → single entrenchment → state can repeal the law with the m&f requirements and easily pass the law.
  - If m&f is not abided by, the law shall have no force or effect. The parliament can pass the law but it has no effect.
- NSW Parliament has the power to prescribe to their successors a particular mode by which and by which alone constitutional changes may be effected. Although the Parliament cannot limit its own sovereignty, it can confer power on a subordinate legislature to do so.

### SE Drainage Board (SA) v Savings Bank of SA

- Real Property Act “a future inconsistent Act must expressly enact that it applies notwithstanding the provisions of the Real Property Act.
- Held:
  - Entrenching provisions cannot prescribe the contents of future legislation.
  - Parliament cannot be commanded by a prior legislature to express its intention in a particular way.

### West Lakes Ltd v SA

- West Lake Ltd made a contract with SA government → Consent of West Lakes was required to any variation of the agreement.
- Bill was introduced into the Parliament to vary the agreement without company’s consent.
- Held:
  - The executive cannot fetter Parliament by entering into contractual obligations. A contractual obligation entered into by the executive gvt could not inhibit the power of Parliament to enact legislation or the right of Minister of the Crown to propose such legislation.
  - Prior consent of an extra-parliamentary body cannot control the legislature.

- A requirement of written consent by a company was not a m&f requirement within the meaning of s 5 of CLVA. It is not a law relating to the powers or procedures of the Parliament.

### **AG (WA) v Marquet**

- S 13 Electoral Distribution Act (WA) prevented the repeal of the 1947 Act by the Electoral Distribution Repeal Bill which was not passed with absolute majority.
- Held:
  - A Bill to repeal should be treated as a Bill to amend.
  - Legislation establishing a scheme for electoral distribution is a law respecting the Constitution, Powers or Procedure of the Parliament. Constitution extends to features which give Parliament a representative character.

## **Human Rights Protection**

- Human Rights in Constitution
  - Cth can only compulsorily acquire property on just terms: s 51 (xxxii)
  - Right to trial by jury (limited to Cth offences where the Cth Parliament has provided for trial on indictment: s 80)
  - Freedom of religion (only to the Cth and limited interpretation): s 116
- Can we entrench a Bill of Rights?
  - Australia Act s 6 – only confines manner and form to amending laws that deal with the “constitution, powers and procedure of the Parliament” – any purported entrenchment outside the scope of s 6 is ineffective
- Can the Cth Parliament legislate to require m&f for any future amendment inconsistent with a Human Rights Act?
  - Australia Act s 6 refers only to the States
  - Manner would be inconsistent with the Constitution
  - Form might be possible – future legislation must expressly indicate that it operates notwithstanding the Human Rights Act.

### **Coco v The Queen**

- The conviction of Coco for attempted bribery of Cth police was secured by evidence of private conversation, obtained through a listening device. Authority: Invasion of Privacy Act (Qld). This authority was negated by s 12 of the Australian Federal Police Act (Cth)
- Held:
  - Statutory Interpretation in the absence of constitutional protection of rights
    - Parliament is presumed not to have intended to limit fundamental rights, unless it indicates the intention in clear terms. Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such

an intention is clearly manifested by unmistakable and unambiguous language.

- There is no unambiguous intention to authorise entry on to premises to install the device. Therefore the evidence was unlawfully obtained.
  - No unmistakable statutory authority to authorise conduct which would otherwise be tortious and interfere with a fundamental common law right.

### The UK Model

- The Supreme Court if satisfied that the law is not consistent with a human right, may make
  - A declaration of incompatibility (ACT)
  - A declaration of inconsistent interpretation (Vic)
- The declaration does not affect the validity, operation or enforcement of the law, or the rights or obligations of anyone.
- The AG must present a written report to Parliament
- Parliament may expressly declare in an Act that the Act or a provision has effect despite being incompatible with human rights. An override declaration will only be made in exceptional circumstances.
  - Consequence: court not required to interpret legislation consistently with human rights and cannot make a declaration of inconsistent interpretation.
- Human Rights Act (ACT) and Victorian Charter of Rights and Responsibilities Act (Vic) expressly state that breach of human rights is an independent ground of judicial review (of administrative action).
  - It is unlawful for a public authority to act in a way that is incompatible with a human right.
  - In making a decision administrators must give proper consideration to a relevant human right.
  - Any qualification/limit on a human right must be reasonable and demonstrably justified in a free and democratic society – whether the decision-maker struck the right balance
- Federal Human Rights Act
  - All bills and legislative instruments to be accompanied by a statement of compatibility with the list of rights.
  - Applied only to the Cth and those public authorities exercising functions under Cth law
- Cth Human Rights Act
  - Definition of human rights
    - The rights and freedoms recognized or declared by the ICCPR and the ICESCR plus five other key international human rights conventions
  - Requirements:
    - MPs who introduce a Bill to cause a statement of compatibility with human rights to be presented to Parliament.
      - The statement of compatibility does not affect the validity, operation or enforcement of the Act or any other law.

## **Momcilovic v The Queen**

- Drug trafficking – s 5 of Drugs Act – imposing a legal onus of proof on the defendant - is incapable of being interpreted consistently with the presumption of innocence guaranteed by s 25(1) of the Charter.
- Questioning the validity of Victorian Human Rights Charter
- Re the provision of interpretation
  - s 32 (1) – do consistently with their purpose in a way that is compatible with the various human rights guaranteed by the Charter
  - Valid at State + Federal
    - It requires the interpretation to be consistent with legislative purpose.
    - It requires statutes to be construed against the background of human rights set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights
- Re the provision empowering the court to make a declaration of inconsistent interpretation
  - S 36 (2) if a statutory provision cannot be interpreted consistently with a human right, the consequence is an obligation under the Charter to lay before both Houses a written response.
  - Valid at State level
  - Invalid at Federal level
    - It is a non-judicial function.
    - It did not involve the exercise of a judicial function and was not incidental to judicial power, it did not surpass the constitutional limitations on the Court’s role; it merely provides a mechanism by which the Court directs the legislature to a disconformity between State law and Human Right in the Charter, and it remains parliament’s ultimate responsibility to determine the laws it enacts.

## **Representative Democracy**

- Chapter 1 ‘The Parliament’
  - S 1: vests legislative power in Parliament consisting of
    - The Queen
    - Senate
    - House of Representative
  - S 7: The Senate
    - Composed of senators for each State ‘directly chosen by the people’ of the State
    - Equal number of senators for each State
    - The Parliament may make laws increasing or diminishing the number of senators for each State, but must maintain equal representation of the original States at no less than six
  - S 24: House of Representatives
    - The House of Representatives shall be composed of members ‘directly chosen by the people’ of the Cth.

- The number of members chosen in the States shall be in proportion to the respective numbers of their people.
  - S 53: Senate has equal legislative power with the House of Representatives, except
    - Proposed laws appropriating revenue or moneys, or imposing taxation, cannot originate in the Senate and the Senate cannot amend such laws.

### **Langer v Cth**

- Cth Electoral Act
  - S 240: House of representative election a person shall mark his or her vote by numbering 1,2,3,4
  - S 329A: offence to publish any matter or thing with the intention of encouraging persons to fill in a ballot paper otherwise than in accordance with s 240
- Langer:
  - S 240 invalid – inconsistent with s 24 Constitution ‘directly chosen by the people’ – the people if choosing freely must be free not to choose by not numbering every square
  - S 329A invalid because it infringes the implied constitutional freedom of political communication
- Held: Both valid
  - Compulsory voting is not inconsistent with s 24 – compulsory preferential voting = give the voter a free choice – it is not to the point that if a ballot paper were filled in otherwise than in accordance with s 240, the vote would better express the voter’s political opinion. The prescribed method of voting permits a free choice among candidates for election, therefore it is within the legislative power of the Parliament.
  - S 329A offence was appropriate and adapted to a legitimate legislative purpose. The restriction on freedom of speech is to protect the s 240 method of voting, not to repress freedom of political discussion. It is to further the democratic process because it operated to prevent conduct intended to encourage voters to vote in such a way that their votes would not be effective or as effective as the votes of other voters. If the impairment of the implied freedom of political communication is reasonably capable of being regarded as appropriate and adapted to the achieving of the legitimate legislative purpose and the impairment is merely incidental to the achievement of the purpose, the law is within power.
- “One vote one value” is not a constitutional requirement between electorates within States.
- But the Constitution expressly requires quantitative equality between States
- Judges of the High Court have kept open the possibility that electoral laws may be invalidated on account of
  - Extreme quantitative voting inequality and / or
  - Disproportionate or arbitrary qualitative criteria