

Issue spotting; planning

- *Who* the parties are and who your client is.
- *Which level* of government is acting (Commonwealth or State).
- *Which arm* of government is acting (Legislature, Executive or Judiciary).
- ISSUE; RULE; APPLICATION; CASE
- **ANALYSE ACT SECTIONS SEPARATELY**
 - Each and every provision in a Cth Act needs a head of power

Commonwealth legislation

1. Identify the head of power (eg. external affairs s 51(29), corporations s 51 (20), s 96 grants). Consider its scope.
2. Characterise the law and see if it comes within the head of power.
3. Are there any express or implied limits to Commonwealth legislative power in the Commonwealth *Constitution*?
 - a. Implied - State Immunity from Commonwealth Laws (topic 7)
 - b. Implied - Chapter III of the Constitution (Separation of Judicial Power) (topic 10(1))
 - c. Implied - Implied Political Freedoms (topic 11)
 - d. Express - Section 92 – Freedom of Interstate Trade and Commerce (topic 12)
4. If no Commonwealth law, consider Inherent Executive Power (topic 9(3)) – nationhood, appropriation and spending

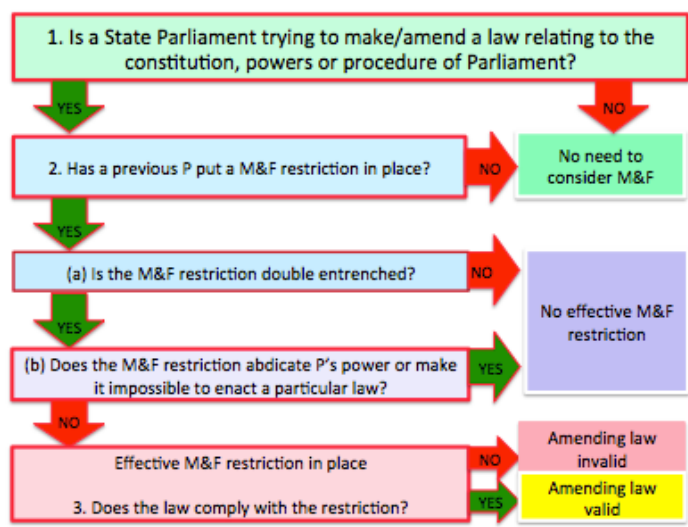
State legislation

1. States have plenary power to legislate, hence not need for HoP but...
2. Are there any State or Commonwealth constitutional limitations or prohibitions on the State's plenary power?
 - i. Is there a manner and form/restrictive procedure that must be followed (topic 3)?
 - ii. Are there any implied limits on State legislative power in the Cth *Constitution*?
 - a) State Legislative Power over the Commonwealth Executive (topic 9(4)),
 - b) Institutional Integrity of State Courts (topic 10(2))
 - c) Implied political freedoms (topic 11)
 - iii. Are there any express limits on State legislative power in the Cth *Constitution*?
 - a) Section 92 – Freedom of Interstate Trade and Commerce (topic 12)
 - b) Section 109 – Inconsistency (topic 13)

TOPIC 3 – MANNER AND FORM REQUIREMENTS (M&F reqs)

- A Manner and Form Requirement or a restrictive procedure (RP) is a condition which existing legislation imposes upon the process of lawmaking (*AG for NSW v Trethowan*)
 - E.g. *Trethowan* - NSW legislated to protect its legislative council from reform except after approval at a referendum under s7A of the constitution, referendum requirement valid and entrenched
- Although State Parliaments enjoy residual plenary power (**s 2(1) AA; s 16 Vic Constitution**), they cannot ordinarily legally bind successive Parliaments or this would undermine Dicey's constitutional pillar of parliamentary sovereignty (*Union Steamship*).
- This is subject to the ability of Parliaments to bind successors by way of restrictive procedures (*McCawley*).
- [LAW] may constitute a valid restrictive procedure under **s 6 of Australia Act** (which replaced **s 5 of Colonial Laws Validity Act**).

"A law respecting the constitution, powers or procedure of the Parliament of the State shall be of no force of 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."
- **Restrictive procedures** = more onerous than standard (simple majority in each house + assent of Crown).
- E.g. Absolute majority – every Member of Parliament must be present to have majority.
- Special majority – defined as 3/5th of each house + assent (**s 18, Constitution Act 1975 (Vic)**).
- Form requirements – express amendment only (no implied repeal). Required to alter VicSC's jurisdiction per **s 85, Constitution Act 1975 (Vic)**.
- If the RP is so onerous that a later Parliament could not alter the provisions at all, the courts will strike out the provision as it offends Parliamentary Sovereignty (*Trethowan*)



<p>Is [first law] double entrenched and mandatory?</p>	<ul style="list-style-type: none"> • The provision of the Act containing the RP must itself be entrenched in order for the RP to be effective, or else the M&F provision can be repealed by normal procedure (<i>Trethowan</i>) <ul style="list-style-type: none"> ◦ Manner and Form requirements must be 'doubly entrenched' to be effective ◦ If failure to entrench then the RP is 'ineffective' because later legislation can be passed using standard procedure overriding the RP ◦ N.b. look for phrases like "...this Act/any provision in this Act/ this section may not be amended unless..." • The RP must also be mandatory (<i>Trethowan</i>) <ul style="list-style-type: none"> ◦ N.b. look for phrases like "this Act mandates" or "may not be amended without..." • <u>Upon the facts</u> <ul style="list-style-type: none"> ◦ 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 (<i>McCawley</i>) as M&F provision itself susceptible to simple amendment
<p>Is it a permissible RP?</p> <p>*is law 1 truly an M&F requirement or is it an abdication of parliament's power?</p>	<ul style="list-style-type: none"> • True M&F – may be binding → give reasons why not abdication • Abdication – not binding → give reasons, e.g. impossible to meet, gives power to an extra-parliamentary body, attempts to fetter substance not procedure • The RP cannot curtail future Parliaments' law-making ability with too onerous an RP (<i>West Lakes v SA</i>) <ul style="list-style-type: none"> ◦ Onerousness requirement depends on how important the law is ◦ E.g. Referendum to get rid of upper house of Parliament not too onerous. However, a referendum to change an act about dog ownership would be too onerous ◦ E.g. <i>West lakes- Westlakes and the SA government entered a contract which provided that a law would not be amended without the company's consent, breach of parliamentary privilege to purport to impose such a limit on parliament and it is not a 'manner and form' requirement</i> • Permitted RPs include:

	<ul style="list-style-type: none"> ○ Referenda (<i>Trethowan</i>) – s128 Cth constitution, s18(1B) Vic Constitution ○ Absolute majority (<i>Marquet</i>) <ul style="list-style-type: none"> ▪ <i>E.g. Marquet - The electoral distribution Act 1947 (WA) was entrenched, EDA part of the constitution of the state, EDA affected the constitution of the WA parliament, thus valid M&F</i> ○ Special Majority (<i>Harris</i>) <ul style="list-style-type: none"> ▪ Absolute majority – s18(2AA) Vic constitution ▪ 3/5 majority – s18(2) Vic Constitution ▪ The validity of a special majority depends on the percentage and the subject matter (<i>West Lakes</i> per King CJ in obiter) • Invalid RP <ul style="list-style-type: none"> ○ RP is prima facie invalid as it offends Parliamentary Sovereignty and amounts to “abdication” of power ○ A requirement for the consent of a non-representative extra-parliamentary body is not a valid RP ○ Where it purports to completely prevent the law being amended ○ Where it has an overly onerous supermajority ○ Where amendment requires the consent of an extra-Parliamentary entity (<i>Westlakes</i>) other than a referendum of all electors
<p>Is [second law] a CPP law?</p> <p>*subsequent law wishing to amend law covered by M&F</p>	<ul style="list-style-type: none"> • For [first law] to be enforceable and restrict [second law], [second law] must be about the constitution, powers or procedure (CPP) of parliament (<i>Trethowan</i>; s6 Australia Act) <ul style="list-style-type: none"> ○ S6 provides the constitutional basis for manner and form requirements • If no second law – if M&F is valid, an amending law would have to be made with regard to the Constitution, powers or procedures of parliament to meet the standard set in s 6 AA (<i>Marquet</i>) • The meaning of a CPP law: <ul style="list-style-type: none"> ○ <u>Constitution</u> refers to parliament’s own nature and composition (<i>Marquet</i>; <i>Trethowan</i>; <i>Taylor</i>) ○ <u>Powers</u> refers to a law concerning Parliament’s own legislative authority ○ <u>Procedure</u> refers to the rules and procedure relating to Parliament’s own internal conduct
Conclusion	<ul style="list-style-type: none"> • Ultimately, the [FIRST Act] constitutes a valid manner and form restriction per s 6 AA. Therefore, Parliament will be bound by that restriction when seeking to pass [2nd law] as [2nd law] relates to CPP; or • M&F restriction invalid. Parliament not bound; or • M&F restriction valid. Parliament <u>not</u> bound because [2nd law] does not relate to CPP.

