

Constitutional Law

LAW2111

- 1) The Parts of the Reading Guide
 - a) Part 1: Introduction (topic 1)
 - b) Part 2: State Constitutions (topics 2 and 3)
 - c) Part 3: Cth Legislative power (topics 5 to 8)
 - d) Part 4: Limits to power under the Cth Constn
 - i) Implied Limits (topics 9 to 11)
 - ii) Express Limits (topics 12 and 13)

Topic 2 – State Legislative Power

- a. Has the Victorian Pmt enacted a law?
- b. What is the Vic Pmt's law making power?
- c. What restrictions are there on the substance of the law making power?
 - i) E.g. ET legislation?
 - ii) E.g. Vic Charter?

State legislative power is plenary (*Union, Taylor, McCawley*)

- **Ss 15 & 16 Victorian Constitution Act 1975** grants the Victorian Parliament **residual plenary legislative power** re any subject matter (*Union*)
 - **Vic Constitution s 16**: 'powers in and for Victoria in all cases whatsoever'
- **Section 2(1) Australia Act 1986**: '... the legislative powers of the Parliament of each State include full powers to make laws for the peace, order and good government of that state'
- The words *Peace, Order and Good Governance* are not words of limitation (*Union*)
- Whilst a Cth law needs to be checked against a list of heads of power, for the state, power to make laws for the peace, welfare and good governance of the state is sufficient.
- State constitutions are **uncontrolled, inherently flexible** – each state can amend constitution via ordinary process, subject to any binding manner and form provision (*McCawley*)
 - 'It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom *admit no qualification whatsoever*.'
 - Controlled constis - They have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the constitution.' (cth is controlled – s128)
- Parl is permitted to change even its **structure** so long as **it remains representative** (*Taylor*)
 - HC confirmed that the state parliament's plenary legislative power included the capacity to abolish a house of parliament.
 - Retention of the crown, and the representative characters of the legislature, would probably be a fundamental constraint on this plenary power.

Extra-territorial powers (legislative outside physical borders of the state)

- States have extra-territorial powers (**s2(1) Australia Act**) – can pass extra-territorial laws.
- In order to be able to do so there needs to be some **nexus** between a law operating upon an external subject matter and the state, hence, some connection with the state
- Even a remote/general connection 'nexus' between subject matter and state will suffice (*Union*)
 - **Union Steamship** endorsement of **Gibbs J in Pearce v Florena**: Even where there is a very remote and general connection between the subject matter and the state and the legislation, then it will suffice. Fact that ship was registered in NSW was sufficient nexus.
 - **Nexus** will be interpreted **broadly and flexibly. Liberally applied**. Easily satisfied.
 - The more flexibly you interpret the connection, the greater the plenary power on the state. If you are a liberal with your limit it almost disappears.

Restrictions on State legislative power

Constitutional restrictions

- **S52** – Cth has exclusive legislative power over seat of gov & places acquired for public purpose; department of public services
- **S90**: Cth exclusive power over customs and excise duties and granting production or export bounties

- **S109**: When Cth and state legislation clash (**s51** – concurrent), Cth statute trumps state
- Any manner and form requirements

Victorian Charter of Human Rights & Responsibilities

- Ordinary act of Parliament (easily amended by subsequent parliaments)
- Not a true substantive fetter on plenary power – can still make laws that violate rights
- Charter could have been a substantive fetter on parl power – if judges could invalidate laws. Didn't get this though. Political and accountability incentives for parl not to violate rights but no legal incentive or constitutional incentive.
- Legislature
 - **S 28** – statement of compatibility must be tabled when introduce leg (not binding)
 - **S 29** – statement of compatibility doesn't affect validity, operation or enforcement of law
 - **S 30** – Parliament scrutiny – Scrutiny of Acts and Regulations Committee (SARC report) – SARC constituted by MPs from range of parties rather than executive – highlights gaps in soc. Parliament then meant to consider whether still want to pass law given it is incompatible etc.
 - **S 31(1)** - Parliament may expressly declare an Act/provision valid despite incompatibility – can override the charter Don't have to follow 28,30,32,36. Suspend it. Only operates for 5 years.
- Executive
 - **S 38** – 'public authorities' must act in a manner compatible with protected rights, and take rights into account when making decisions - s 4 list of public authorities (police, local gov etc) – not parl, not courts (except in administrative capacity)
 - **S 37** – where court has made declaration of incompatibility, responsible minister must table response in Parliament. There is an obligation to respond but there is no obligation in regards to the content of the response. Not obliged to change the law.
- Judiciary
 - **S 32** – laws must be interpreted in a way that is compatible with rights, insofar as is possible consistently with their purpose
 - If the words of a statute are clear, the court must give them that meaning, even if that meaning is contrary to the Vic Charter (**Slaveski**) - All courts can do is issue a 'declaration of incompatibility' to be reviewed by Parliament
 - **S 36** – if a compatible interpretation is not possible, the courts can make a declaration of incompatibility. This has no effect on validity of Act
 - **S 39** – no cause of action arises due to breach of Charter by public authority. No consequences

S 8 to 27: civil & political rights. Only individuals (natural persons) get benefit of rights not corps

- i) *Recognition and equality before the law (s 8)*
- ii) *Right to life (s 9)*
- iii) *Freedom from torture and cruel, inhuman or degrading treatment (s 10)*
- iv) *Freedom from forced work (s 11)*
- v) *Freedom of movement (s 12)*
- vi) *Rights to privacy and reputation (s 13)*
- vii) *Freedom of thought, conscience, religion and belief (s 14)*
- viii) *Freedom of expression (s 15)*
- ix) *Rights to peaceful assembly and freedom of association (s 16)*
- x) *Rights to the protection of families and children (s 17)*
- xi) *Democratic participation rights (s 18)*
- xii) *Cultural rights (s 19)*
- xiii) *Property rights (s 20)*
- xiv) *Rights to liberty (ss 21 and 22)*
- xv) *Court process rights (ss 23-27)*

- b) *The general limitations power*
- i) *Section 7(1) guarantees rights*
- ii) *Section 7(2) = general limitations clause - 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including (balance)—*
 - a) *the nature of the right; and*
 - b) *the importance of the purpose of the limitation; and*
 - c) *the nature and extent of the limitation; and*
 - d) *the relationship between the limitation and its purpose; and*
 - e) *any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve = a minimum impairment test. Are you sure you might need to limit this right – is the leg you're using impairing the right minimally? There may be a better option to choose. Proportionality test.*

Section 36 and Pmt/Executive?

- (1) Whilst parliament can *legally* enact rights-incompatible legislation, the threat of a declaration 'serves as a *political* and perhaps *moral* disincentive to legislate incompatibly.'
- (2) A declaration 'impl[ies] a degree of legal impropriety in what Parliament has done, even if it does not amount to illegality.'