

2-3. STATE LEGISLATIVE POWER

States have plenary legislative power (s16 Victorian constitution, s106 Cth constitution). However their law making powers can be limited by

- **The Australian constitution**
 - express rights of cth –s90, s114, s115
 - implied rights: political communication, voting
 - exclusive cth rights s52
 - an inconsistency between state and cth laws (inconsistency b/w concurrent laws s51) – s109
- **Human rights**
 - state laws must comply with the CHRR and state courts and tribunals must interpret statute in a way compatible with human rights – s32.
 - HOWEVER parl may declare an act is valid despite incompatibility
- **Extraterritoriality**
 - as long as there is a sufficient nexus with the subject matter of the legislation and the state, the extra-territorial law is valid – *Union steamship co*
- **Manner and form requirements (restrictive procedures on the ability for states to make/amend laws) – Trethowan**

State constitutions are flexible and can be amended by ordinary legislation and impliedly amended by inconsistent legislation without a special process. However, s6 of the Australia act states that if a state seeks to make/amend law that relates to the constitution, powers and procedures of parliament it must be made subject to manner and form requirements laid down previously.

(usually laws cannot bind future parl – s6 exception)

Does the law comply with MF requirements?

- **Is the State Parl making/amending a law relating to the *constitution/powers/procedure of parliament*? – defined by *Dixon J in Trethowan***
 - the second law must relate to the CPP of parliament.
 - if there is no second law/the second law does not relate to the CPP of parliament, the manner and form restrictions are not binding on that law.
- **If yes, has a previous parl put a MF restriction in place?**
 - MF requirements can be made by state parl – *Trethowan*
- **If yes, is the MF restriction doubly entrenched?**
 - the MF requirement must entrench relevant sections it seeks to protect and also entrench itself’.
 - if not doubly entrenched, MF provision itself is susceptible to simple amendment
 - e.g s18 of Victorian constitution, s18(1b)(a) ‘this subsection’ is the entrenching provision.
- **If yes does the MF restriction amount to an abdication of parl’s power or make it impossible to enact a particular law?**

A law will amount to an Abdication of power where:

1. **The requirement to change the law is too onerous** (law can only place procedural, not substantive restraints)
 - *A requirement for a referendum is NOT an abdication of power
 - *2/3 majority, 60% majority
 - * absolute majority (50% of all members of HOL put together)

2. **where MF requirement seeks to restrict substance, not procedure**
(e.g legislative council shall not be abolished is one of substance – not allowed)
 3. **where requirement to change the law depends on the consent of an extra-parliamentary body**
– westlakes
- **If no, there is an effective MF requirement in place**
 - **Hence it is necessary to consider whether the LATER law complies with the restriction?**
-if it does, the amending law is valid.