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TOPIC 3 MANNER AND FORM

Manner and form provision is defined as a **'condition and ... requirement which existing legislation imposed upon the process of lawmaking'** (*Trethowan*)

A State Parliament can bind a later Parliament, but only if there is a mere restrictive procedure, not an abdication of Parliament's law making powers – 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*)

Test for a Manner and Form provision (look at the 1st law and 2nd law separately):

- **Firstly identify your 2 laws from the facts (proposed law & restrictive procedure)**
- **Say something about the role of s.6 *Australia Acts***
 - 'Law about constitution, power or procedure has no force unless it is made in such manner and form as may from time to time be required'
 - So for the law to be binding, the law must be in relation to the constitution, power or procedure

1st Law

1. Is the 1st law doubly entrenched?

- In order to be effective, the restrictive procedure (R.P) must entrench itself, or else the provision could be repealed by Parliament in the normal method (*Trethowan*)
 - Common double entrenchment terminology is 'this section' or 'this entire act' – basically just mentions itself
 - **If the law is not doubly entrenched, it can just be amended by normal procedure or impliedly repealed (*McCawley's Case*)**
 - **If it is doubly entrenched, continue**

2. Is the restrictive procedure provision valid or is it onerous/an 'abdication of parliament's power'?

- **Abdication of power** means the law confers power on a non-parliamentary body
 - A referendum is an acceptable abdication of powers
- The earlier Parliament should not impose a R.P **that is too onerous** (which means a provision that would curtail a future Parliament's law making ability) – as this offends parliament sovereignty
- There must be a substantial restraint on the law-making power (*Westlakes*)
- What would constitute a R.P being **too onerous**?
 - A **referendum** is allowed in a R.P because it seeks approval from the people directly, it is not an abdication of Parliament's power (*Trethowan*)
 - An **absolute majority** (50% + 1 of those entitled to sit in Chamber) is not too onerous (*Marquet*)
 - **Special majority** could be considered as onerous. It is a question of degree, after a certain point a special majority provision will abdicate Parliament of

its powers. This point could be reached quickly where the topic is not of fundamental constitutional importance (*King CJ in Westlakes*)

- This implies a special majority is permissible where the R.P relates to a topic of fundamental constitutional importance
- *Westlakes* suggests that the measure of onerousness depends on the subject matter
- **Consent of an extra parliamentary body** required in a R.P is prima facie invalid as if offends Parliamentary Sovereignty (*King CJ in Westlakes*)

Conclude: If it is an abdication of power or too onerous, the RP is invalid and doesn't have to be complied with

If the law is valid, move onto considering the second law:

2nd Law (amending law)

3. Is the 2nd law about the constitution, powers or procedure of Parliament? (S 5 of *Colonial Laws Validity Act* or s 6 of *Australia Act* depending on what year, use Australia Act for post 1986)

- a. **Constitution:**

- This includes:

- The nature and composition of Parliament (*Marquet*)
- Features that give Parliament and its Houses a representative character (*Marquet*). In *Marquet*, laws changing the electoral boundaries were held to change the constitution of the state Parliament
- Election of members of Parliament will be included in the constitution of Parliament (*Trethowan, Taylor*)

- b. **Powers:**

- Most likely refers to something that regulates Parliament's law making powers, e.g. if the law restricted or expanded power – (*Dixon J in Trethowan*)
- N.B.: not every law that amends a R.P section is one regarding the powers of Parliament as this would contradict the effect of s6 of A.A

- c. **Procedures:**

- This refers to the internal procedures of Parliament (*Trethowan*)
 - An example would be a law which affects how legislation is passed

Conclude: If the second law is not one of CCP, then the restrictive procedure will not be binding, and it won't bind future Parliaments.

Severance would be the appropriate remedy if the provision is invalidated.