

# CONSTITUTIONAL LAW 2017

## I OVERVIEW

### Commonwealth Law/Act

- Head of power/ characterisation
  - s51(29) - External Affairs (including treaties, extra territoriality, relations with other countries, international concern)
  - s51 (20) - Corporations
  - s96 - Grants to the States
- Implied Limits/ Prohibitions
  - SOJP – Cth Level
  - IGI - Limits on Cth’s ability to bind States
  - Implied Freedom of Political Communication (IFPC)
  - Implied freedom to vote
- Express Limits
  - Ss 81, 83 - Appropriation and Expenditure

### Cth but no Act:

- Executive power or spending power s 81

### State Law

- State Legislative Power - Plenary
- Restrictive Procedures (manner and form provisions)
- IGI - Implied limits of States’ ability to bind the Cth executive
- IFPC
- Separation of powers (Kable etc.)

### Both State & Cth laws

- All the above.
- S 109 - Inconsistency

### Either

- IFPC

## II FUNDAMENTAL CONCEPTS

### **Constitutional Law**

Main body of law which regulates three arms of Government:

- i. *Executive* – administers and enforces the law i.e. Government
- ii. *Legislature* – drafts the law, pass legislation, repeal or amend i.e. Parliament
- iii. *Judiciary* – interprets the law, makes common law and decisions on validity

Role: The Constitution regulates the relationship between each arm. It also provides authority for the exercise of public power as well as limits to that power. However, it does not protect many rights

### **Parliamentary Sovereignty**

Parliament has power to make or repeal any law provided it adheres to the limitation imposed by the Cth constitution. Thus, due to the presence of the Constitution, Parliament is only partially sovereign.

- It exists because Parliament is only body elected by people and therefore is representative government.
- See long notes for detailed discussion on Dicey’s theory and criticism.

### **Rule of Law**

We live in a society governed by declared laws rather than arbitrary exercises of power (*Dicey*). Australian Constitution framed upon assumption of the rule of law (*Plaintiff s157*)

1. Absolute supremacy of laws and laws alone;
2. All are equal before the law; and
3. The constitution comes from rights of citizen

### **Constitutional Conventions**

Political customs or practises that are habitually followed by governments

- Not laws, breach does not attract legal sanction, not written.
- E.g. by convention, GG only exercises power on advice of PM or Cabinet.

### **Bicameralism**

Two houses of parliament

- Federal: House of Reps (lower), Senate (higher)
- State: Legislative Assembly (lower), Legislative council (higher)

### **Separation of Powers**

Functions of the three arms of Government are to be clearly separated to safeguard the integrity of the system.

- Note: No pure separation as Executive is chosen from the Legislature

### **Federalism**

Sharing of power between two levels, the Cth and States. Australia is a Federation, meaning power is shared.

### **Types of Power**

- Exclusive Powers: where only the Cth has power over legislative area (e.g. coining money)
- Concurrent Powers: where both States and Cth have power over legislative area
  - o Most of them set out in s 51 Cth Constitution (e.g. marriage, copyright)
- Residual Powers – legislative area left exclusively to the States
  - o Sometimes Cth constitution specifies these, sometimes silent on power
  - o Silence is taken as being a residual power (e.g. hospitals and education)

### III STATE LEGISLATIVE POWER

#### 1. Plenary Power

- Ss 15 and 16 of the Vic Constitution grants Vic Parliament **plenary law making power** (*Union Steamship*)
- Plenary legislative power includes capacity to abolish a House of Parliament (*Taylor*)
  - o This is residual power over any subject matter
- States may pass laws that are immoral or unjust (*Durham Holdings*)
- States Constitutions are inherently flexible (*McCawley*) and they may be amended by passing ordinary legislation (*Taylor*)

#### 2. Limits on State Legislative Power

- a. Constitutional Restrictions
  - The Cth has exclusive legislative power over:
    - o S 52: Seat of govt, places acquired for public purpose and department of public services
    - o S 90: customs, excise and bounties
    - o S 114: raising forces and imposing tax of property of Cth or State
    - o S 115: coining money
  - When Cth and State legislation are inconsistent over concurrent powers (s 51), the Cth law trumps State law to the extent of the inconsistency (s 109)
  - Manner and form restriction placed by previous Parliament will also apply
- b. Victoria Charter of Human Rights and Responsibilities
  - Act of Parliament so can be amended
  - Parliament may declare that an Act/provision is valid despite incompatibility (s 31(1))
  - Victorian courts and tribunals must interpret statute in a way compatible with human rights (s 32)
    - o However, Court cannot attribute a meaning to a provision that is inconsistent with both grammatical meaning and apparent purpose of the enactment (*Slaveski*)
  - All courts can do is issue a declaration of incompatibility to be reviewed by Parliament (ss 36, 37)
    - o However, parliament may regardless declare act/provision valid despite incompatibility (s 31(1))
- c. Extraterritoriality
  - State have extra-territorial powers (s 2 *Australia Act*): but need a nexus between the state and the thing outside the state it is trying to regulate (*Union Steamship*)

**IV MANNER & FORM REQUIREMENTS**

**STEP 1:** “An RP is a “condition and ... requirement which existing legislation imposed upon the process of lawmaking” (*Trethowan per Rich J*), being more onerous than the standard requirement of simple majority and royal assent. Ordinarily, restrictive procedures (RP) are not binding on subsequent parliaments. This is consistent with the notion of parliamentary sovereignty and the states residual plenary legislative power (*s 2(1) of the Australia Act, s 16 Constitution*).”

Note:

- Parliamentary sovereignty: parliament cannot bind its successors
- State plenary power (*s 2(1) AA*): not words of limitation (*Union Steamship*). State parliaments have powers in making laws.

**STEP 2:** “However, RP’s are enabled by s 6 AA, superseding Colonial Laws Validity Act s 5, which advises that “a law ... respecting the constitution, powers and procedure of the Parliament of the State shall be of no force unless it is made in such M&F as may from time to time be required by a law made by that Parliament”.”

- Law 1: contains the restrictive procedure
- Law 2: attempts to repeal Law 1 or is in contradiction with.

**STEP 3: Identify the RP contained in [Law 1]**

- \*Anything more onerous than a normal procedure (simple majority in both houses and royal assent)\*
- 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*)

**STEP 4: Is [Law 1] doubly entrenched and mandatory?**

**Double Entrenched:**

- The provision of the Act containing the RP must itself be covered by the RP in order for the RP to be effective (*Trethowan*)
  - o Note: phrases like “this Act/ any provision in this Act/ this section may not be amended unless ...”

Example:

Case	Illustrative Facts
Trethowan	S 7A(6) provided 7A may not be modified except for referendum, hence, protecting itself.

**Mandatory:**

- RP can’t be merely directory (i.e. “may” and “can”)
- Note: look for phrases like “this Act mandates” or “may not be amended without”

**Consequence:**

- If the RP is singly entrenched = it can be amended by any ordinary act of parliament, not a valid RP.
- If RP is doubly entrenched, may consider following factors.

**STEP 5: Is it a permissible RP?**

“The RP cannot curtail future Parliaments’ law-making ability with too onerous an RP (*West Lakes*)”

**RP must not be too onerous**

- More important than the subject matter, more onerous the procedure can be (*Westlakes*)
- Permitted RPs:
  - o Referenda permissible for abolition of legislative council (*Trethowan*)
  - o Absolute Majority permissible for a law to change electoral boundaries (*Marquet*)
  - o Special majority in joint sitting permissible to change voting rights (*Harris*)
    - The validity of a special majority depends on the percentage and the subject matter (*West Lakes per King CJ in obiter*)
  - o 95% majority probably never okay – clearly fettering parliaments capacity

**RP must not be an abdication of parliament’s power**

- Prima facie, a requirement for the consent of a non-representative extra-parliamentary body is not a valid RP (*West Lakes per King CJ*)
- **Exception 2:** where the EP body is a representative (e.g. local council) so that the legislature maintains its representative character.

Case	Illustrative Facts
Westlakes	Law provided that amendments could not be made w/o seeking the consent in writing of of private Westlakes Corp. Not held. Not representative.

- **Exception 3:** Referenda can be distinguished as representative, thus not an abdication on power of Parliament. Thus, it is confined to obtaining direct approval from people whom legislature represents (*Westlakes*)
  - o Must be sufficiently representative, even if it involves those who are most effective (restrictive referendum). E.g. 30% majority not representative.

**Consequence:**

- If RP is too onerous or abdication of parliamentary power, invalid.
- If RP is not, it is valid.

**STEP 6: Is [Law 2] a CPP law?**

“Only laws “respecting the constitution, powers and procedures of parliament” are subject to manner and form requirements (*s 6 AA; Trethowan*).”

The second law must be a CPP law to be constrained by the aforementioned RP.

(See next page →).

**Constitution**

- Composition of parliament and its own nature

Case	Illustrative facts
Trethowan	Law abolishing the upper house was a CPP law as the number of houses in Parliament affects its constitution.
Marquet	Law re the distribution of electorates was a CPP law as it affects the election of MPs (who constitute Plmt).

**Powers**

- Powers = a law that regulates Parliament’s law-making (legislative authority)
- E.g. changing majority requirement to pass legislation, other types of M&F

Case	Illustrative facts
McCawley	Law proposing a change to judicial tenure affects Parliament’s powers.

**Procedures**

- The rules and procedures regulating the Parliament’s internal conduct
- E.g. the role of the speaker, the no. of times a Bill needs to be read, internal procedures, regulating standing orders of parliament, question time, parliamentary privileges, standing orders

**STEP 7: Conclusion**

- If the second law does not relate to the CPP of Parliament, it is not bound by the M&F requirement and hence the second law will be valid.
- If the second law does relate to the CPP of Parliament, it is bound by the M&F requirement and its failure to follow the RP makes the second law invalid.
  - o It will be of “no force or effect” as it is not made in a manner and form as required by Parliament’s RP.

**V GENERAL PRINCIPLES OF CHARACTERISATION**

**Introduction:** “The Cth’s power is enumerated rather than plenary. On the facts, Cth is seeking to enact [law] under [HoP]. In examining the validity of the Cth law, the test varies on whether it is a purposive power or non-purposive power.”

List of HoP’s:

- Defence power (s 51(vi))
- Incidental power (s 51(xxxix))
- Treaty implementation of limb of external affairs (s 51(xxix))
- Race power (s 51(xxiv))
- Corporations power (s 51(xx))
- Grants power (s 96)
- Taxation power (s 51(ii))
- Interstate trade and commerce power (s 51(i))

Either way, the subject matter of the law must be identified, and it must have a sufficient relationship between the subject matter and the legislation.

**Note re State Power:**

- Party X will argue that in Barger, the Court held that in interpreting the scope of Cth powers, the court should be influenced by an assumption that certain subject matters of legislation were reserved for the State Parliaments’ exclusive power. (E.g. labour making practises)
- However, Party Y will argue this is not applicable as the Engineers case has subsequently rejected the doctrine of Reserved State Powers. Clear words in text suggest no limitation on Cth to make laws.
  - Party X – does not want law; Party Y – wants law

**PURPOSIVE POWERS**

Selected Commonwealth HoP’s are purposive, in that they describe a specific purpose.

- Example: Defence power, Incidental power, External Affairs power.

**Test:** A law will be valid under a purposive power where it is proportionate (*Leask per Dawson J*). Proportionality is relevant when considering direct or incidental exercises of power under purposive powers (*Leask*).

Relevant considerations outlined in *Leask* include:

- Determining whether the law is a law for the specified purpose of the Cth HoP; and
- Inquiring into whether the law goes further than is necessary to achieve that purpose.

**Consequence:** Thus, the law is/[is not] appropriate and adapted to fulfilment to the end of the power. Therefore, it is valid/[invalid]. \*The law will be struck down, as disproportion may indicate a lack of sufficient connection.\*

\*Only use if not proportionate.

Case	Illustrative facts
Communist Party case	Law banning communist party was disproportionate to protecting the nation
Thomas v Mowbray	Making control orders proportionate to purpose of defending the nation (expansion of notion of war as including combatting terrorism at home as well abroad)

**XVI IMPLIED FREEDOM OF POLITICAL COMMUNICATION**

**Step 1: Nature of the Freedom**

The freedom enables courts to strike down Governmental legislation (Cth and State) where they believe it is invalid under the IFPC and not to provide protection for individual rights (*Lange*)

Case	Illustrative facts
ACTV	<ul style="list-style-type: none"> <li>- Act prohibited advertising during elections for unions/ industry organisations</li> <li>- Held: unjustifiably overrode the IFPC hence invalid</li> </ul>
Nationwide News	<ul style="list-style-type: none"> <li>- Act made it an offence to bring the industrial relations commission into disrepute (you cannot say anything bad about it)</li> <li>- Held: section invalid because it overrode the protection</li> </ul>

**Step 2: Source of the Freedom**

[X] will argue that the freedom comes from s 7, 24 (representative government), 64 and 128 of the Consti as per *Lange*; *ACTV*; *Nationwide news*. Further, they will argue that the freedom of discussion is essential to sustain representative (*Brennan J in Nationwide News*).

- s 64 – *GG appointing ministers*
- s 128 – *referendum is required to change the constitutions*

However, [Law-maker] will argue that the source of implied freedom is not in the constitutional text itself (*Deane & Toohey JJ*) and they must appear from terms of the instrument and not extrinsic circumstances (*Dawson J in ACTV*).

**Step 3: Scope of the Freedom**

1 Burden:

Test: Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? (*Lange; McCloy*)

Political communication is: “[the ability of] the people to communicate with each other with respect to matters that could affect their choice in *federal* elections or constitutional referenda or that could throw light on the performance of [*federal*] Ministers of State and the conduct of the executive branch of government” (*Lange*)

- Includes verbal and non-verbal (*Levy- Brennan CJ, Toohey, McHugh, Gummow and Kirby JJ*) - “symbols, gestures and images and in an appropriate context any form of expressive conduct is capable of communicating a political or government message to those who witness it.”
- Insulting words included (*Coleman in obiter*)

A very broad test as to what political communication is (*Lange; Theophanous; Stephens*)

- *Theophanous* (1994): extended to shape common law; very broad scope
- *Stephens* (1994): extended to fetter State laws; very broad scope
- *Lange* – communication about member of NZ parliament effected Australia’s parliament.

Identify: what is the limit/burden to this freedom?

- Does the directly or incidentally impose the burden = Act will be valid (*Wotton*)
- If direct, more likely to be an unacceptable burden (*Wotton*)

If it does not burden the freedom of this communication, the law does not exceed implied limitation and the enquiry as to validity ends. If yes, consider next question.

## 2 Compatibility

Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative [and responsible] government? (*Lange; Coleman; McCloy*)

- Does it detriment the democracy of Australia?

If “no”, the law does exceed implied limitation and the enquiry as to validity ends. If yes, consider next question.

Case	Illustrative facts
Coleman	<ul style="list-style-type: none"> <li>- Coleman: “this is constable Brendan Power, a corrupt police officer” in pamphlet (w other derogatory terms)</li> <li>- Act: any person who uses threatening, abusive, insulting words to any person - \$100 fine or 6 months imprisonment</li> <li>- Held: appropriate and adapted. Police officers concerned representative and responsible government.</li> </ul>

## 3 Proportionality

Is the law reasonably appropriate and adapted to advance that legitimate object? (*McCloy*)

1. Suitable – as have rational connection to the purpose of the provision and what the law is actually doing?
  - o *Unions NSW* – No connection between broad anti-corruption purpose & only allowing those enrolled to make donations – no legitimate end
2. Necessary – is there no obvious and compelling alternative, reasonable practicable means of achieving same purpose which has less restriction on the freedom?
3. Adequate in its balance – this requires value judgement, consistently within the limits of the judicial function, describing the balance between the importance of the purpose served by restrictive measure and the extent of the restriction on the freedom.

Note: Can be read down to fall within limits of freedom (i.e. prohibiting offensive speech applied only where it would provoke physical retaliation (*Coleman*)).

If the measure does not meet all criteria, answer to question 3 will be “no” and the measure will exceed the implied limitation on legislative power.

Case	Illustrative facts
ACTV	<ul style="list-style-type: none"> <li>- Act eliminated political advertising on radio/television</li> <li>- Each political party was given free time slots on TV and radio</li> <li>- Purpose of the Act was to even out playing field between rich and poor candidates and eliminate trivial ads and misleading propaganda</li> <li>- Majority: breached IFPC</li> <li>- Dissent (Dawson and Brennan JJ): law valid due to proportionality</li> </ul>
Lange	<ul style="list-style-type: none"> <li>- Aim of law was to protect people in the public light from having wrong unfair things said about them = legitimate end</li> </ul>
Coleman	<ul style="list-style-type: none"> <li>- Preserving an ordered society for individuals to live peacefully = legitimate (i.e. insulting words inconsistent with this) – per Gleeson, Callinan and Heydon J</li> </ul>
Levy	<ul style="list-style-type: none"> <li>- To stop individuals without a license from entering an area, so they would not be shot = legitimate end</li> <li>- Political speech: displaying carcasses of animals as protest.</li> </ul>
Monis	<ul style="list-style-type: none"> <li>- Protecting the privacy of a recipient of offensive mail = legitimate (Crennan, Kiefel and Bell JJ)</li> <li>- Elimination of offensive communication = not legitimate end (French CJ, Hayne and Heydon JJ)</li> <li>- Held on statutory majority: Act was valid.</li> </ul>
Unions of NSW	<ul style="list-style-type: none"> <li>- Act prohibited non-enrolled members to donate to political campaigns (and unions), this included organisations, not enrolled citizens.</li> <li>- Purpose: broad anti-corruption purposes.</li> <li>- No legitimate end by either section. Could not identify how anti-corruption would be met with these laws.</li> </ul>