

1. Manner and Form

State legislation here appears to be subject to manner and form requirements that limit any processes of amendment per s 6 AA (previously s 5 CLVA) (Trethowan)

Certain requirements need to be met for a valid restrictive procedure (RP):

- Consider if the subject matter is important enough to justify a restrictive procedure
- Law #1 must contain a mandatory restrictive procedure (as opposed to directory) that is doubly entrenched.
- The law cannot be an abdication of power as to affect parliamentary sovereignty
 - o 4/5 majority was too onerous (Westlakes per King CJ)
 - o 2/3 majority has been held to be valid (Westlakes; Ranasinghe)
 - o Absolute majority is valid (Marquet)
- The law also cannot be an abdication of power in enabling consent from an extra-parliamentary body that is not representative of the people.
 - o Still not acceptable if it is representative of the people affected
 - o Referendum is acceptable (Trethowan)
- Law #2 must fall within the scope of Law #1
 - o This situation is analogous to Marquet where the parliament will attempt to argue that 'any amendment' did not include repealing and replacing the law, however, this argument will not be successful
- Law #2 must respect the constitution, powers or procedure (CPP) of parliament (Trethowan, s 6AA)
 - o Constitution
 - The make-up of the parliament
 - o Powers
 - The procedural law making powers of parliament
 - o Procedure
 - Internal procedures of parliament (question time, parliamentary privileges)

Conclude as to whether the restrictive procedure is valid and whether the amended legislation is valid.

8. Separation of Judicial Powers

Relevant provisions of an Act may be invalid if they confer judicial functions on a non-judicial body.

1. Is the power being exercised a judicial or non-judicial power?

Powers that are inherently judicial include:

- Deciding conclusively that someone is guilty of a crime
 - o In *ACMA v Today FM*, the regulator administering the scheme had not decided authoritatively and conclusively on guilt – they were only one step in the process of the scheme and therefore not acting judicially
- Deciding authoritatively and conclusively whether a statute or executive decision is constitutionally valid (*Australian Communist Party v Commonwealth*)
- Interpreting legislation authoritatively and conclusively
- Deciding authoritatively and conclusively whether an administrative decision-maker has acted within the limits of his or her powers
- Enforcement of witness examinations will be judicial (*Brady*)
- Control orders and bail are historically judicial powers

Indicators of judicial power include:

- Power to issue a final, binding and enforceable decision: *Brandy v HREOC*
 - o No other body can do this
- Power to declare existing rights and duties arising from past conduct
- Existence of a controversy (though not conclusive *Thomas v Mowbray*)

Indicators of administrative / non-judicial power include:

- Decision not enforceable
- Creation of new rights and duties will suggest the power is non-judicial (*Thomas*)
 - o Creation of an industrial award (*JW Alexander*)
- Broad discretion conferred upon decision maker (political considerations)
- Availability of a hearing de novo
- Considering the application in secret and not bound by the rules of evidence will suggest non-judicial (*Waniohu*)
- Issuing phone tapping warrants is non-judicial (*Hilton*)

2. Is the body exercising the power a Chapter III court?

- S 71: High Court and other courts created by statute (currently Federal and Family Courts, State Supreme Magistrates)
- The body will only be a chapter III court if it has the required tenure (*Wheat*)
 - o s 72 Judges appointed until age 70 (not otherwise limited term)