



LAW 2111: CONSTI

MONASH UNIVERSITY
2016 Sem 2

PART TWO: STATE CONSTITUTIONS

TOPIC 2: State Legislative Power

The State will argue that they had the power to enforce _____, as supported by the state's plenary legislative power

(1) STATE LEGISLATIVE POWER AS PLENARY

ss 15 and 16 of the *Victorian Constitution Act 1975* grant the Victorian Parliament residual plenary legislative power regarding any subject matter (*Union Steamship (1988)*), so long as this does not conflict with Cth Law (s 109)

- S 15 VCA: Parliament

The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria

- S 16 VCA: Legislative power of Parliament

The Parliament shall have power to make laws in and for Victoria in all cases whatsoever

- Other states' constitutions that mirror these sections refer to 'peace, order and good government' (s 2 WAC) / 'peace, welfare and good government' (s 5 NSW), to which *Union Steamship* indicates "are not words of limitation"
 - Underpins plenary state legislative power as their Honours found no

Although State Constitution are controlled by policy, politics etc... they are inherently flexible and can be changed by ordinary processes, so long as the matter being amended is not 'entrenched' (*McCawley v R (1920)*)

- Demonstrative cases

- State Parliaments have the capacity to legislate to change the structure of itself, so long as they remain representative
 - *Taylor v AG of QLD (1917)*... validly enacted legislation (*Parliamentary Bills Referendum Act 1908*) to lead a referendum for the purpose of abolishing the upper house
 - **Note:** although wasn't successful, this case demonstrates the wide scope of state legislative power
- States have extra-territorial powers that can be enforced by 'even a remote and general connection between the subject matter of the legislation and the State' (majority's ratio)
 - *Union Steamship (1988)*... affirmed Gibbs J in *Pearce v Florenca* that the power provided by s 2(1) of the *Australia Act* supports a state's exercise of extraterritorial power even if there is a remote nexus
 - *Australia Acts, s 2*

It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation
- On facts, it was sufficient that the ship was registered in NSW

(2) RESTRICTION ON STATE LEGISLATIVE POWER

(a) Constitutional restrictions on State legislative power

Exclusive Cth powers are areas that States are restricted from legislating on

- S 52: Exclusive powers of the Parliament

The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- i. the **seat of government** of the Commonwealth, and all places acquired by the Commonwealth for public purposes;
- ii. matters relating to any department of the **public service** the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;
- iii. **Other matters** declared by this Constitution to be within the exclusive power of the Parliament

- S 90: Cth exclusive power over customs and excise duties & granting production or export bounties

On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise⁷

- S 109: When Cth and State legislation clash (s 51 sets out the concurrent federal/state powers), Cth statute will trump the State

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be **invalid**

- Any manner and form restrictions placed by a previous parliament (see topic 3)

Constitutional limitations also apply, whether they are express or implied

- Express limitations...
 - S 92: Trade within Cth to be free (incl. customs, trade, commerce and intercourse)
 - S 114: States may not raise forces or take property of any kind belonging to the Cth
 - We have a national Australian military... cannot be developed within a State
 - S 115: States not to coin money (national currency)
 - S 117: Rights of residents in States
 - No discrimination
- Implied limitations...
 - E.g. implied freedom of political communication
 - In CC, and applies in States
 - Thus State can't implement contradictory laws
- **Note:** not bound by limits that apply *specifically* to Cth
 - e.g. acquisition of property on just terms only

(b) Human Rights

P may argue that State plenary power can be restricted by human rights obligations.

The P will attempt to source this either from *common law*, or source the *Charter of HRs and Responsibilities* 2006 (Vic)

- Common law:
 - Chief Justice Ellis of NZ has argued that there exists traditions embedded at CL to protect certain rights, including the preclusion of parliament from implementing contrary or contradictory laws
 - At State level, there is no strict separation of powers as compared to the Federal level
 - Thus, Parliament has the capacity to pass parliamentary power to the Courts, enabling them to reject certain laws the judiciary faces and deems incompatible with a code of rights
- The Victorian *Charter of HRs and Responsibilities* may be used as a more legitimate source for justifying the limitation of state plenary power
 - H/e the Charter's practical application is limited by CL and its own provisions
 - CL limitations:
 - S 32(1)

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights
 - *Momcilovic v the Queen* (2011) HC; applied in *Slaveski v Smith & Anor* (2012) VSCA
 - If the words of a statute are clear, the court must give them that meaning, even if that meaning is contradictory to the *Vic Charter*
 - H/e if more than one meaning is open, the court should adopt the one that best accords with the relevant human right
 - Exceptionally, a court may depart from grammatical rules if the grammatical construction **would contradict the apparent purpose** of enactment
 - Six HC judges agreeing (French CJ's judgment):
 - S 32 "does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction..." (at [20])
 - S 31(1): Parliament may expressly declare that an Act/provision is valid **despite incompatibility**
 - S 32(3): Interpretations made consistently with human rights (per sub-sec 1) are not binding

(3) This section does not affect the validity of:
 (a) an Act or provision of an Act that is incompatible with a human right

- s 7(2): There also exist significant limitations to which HRs can be applied in the first place

CASES	BACKGROUND	ISSUES	JUDGMENTS
PART TWO: STATE CONSTITUTIONS <u>Topic 2: State Legislative Power</u>			
<u>Plenary legislative power</u> <hr/> <i>Union Steamship Co v King</i> (1988) 166 CLR 1 <u>Principle/s</u> The legislative power of the States is plenary Can legislate on any matter they think fit as long as it does not conflict with Cth law (s 109) <ul style="list-style-type: none"> Defined what 'peace, order and good government' is to mean Found no historical basis or precedent for limitations For Victoria; ss 15 and 16 of the <i>Vic Cons</i> grants residual plenary legislative power	<u>FACTS:</u> Seaman employed by company in NSW; he developed boilermaker's deafness as a result of working and, under the s46 Workers Compensation Act 1926 (NSW), he wanted a compensation claim for an injury occurring on a ship anywhere in the world Since injury occurred extraterritorially, the appellant argued that the law giving the seaman a right to sue wasn't for the 'peace, wellbeing and good government of NSW '	What do the words 'peace, welfare and good government of NSW' mean in terms of granting the State powers to make laws?	<u>HELD:</u> HCA dismissed the appeal; the law was valid as NSW was able to regulate the compensation of its residents, even if this occurred extraterritorially <u>Aspects of ratio</u> "...the words 'for the peace, order and good government are not words of limitation ... Just as the courts of the UK cannot invalidate laws made by the Parliament of the UK on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of NSW is not susceptible to judicial review on that score."
<u>Plenary legislative power</u> <hr/> <i>Taylor v A-G of QLD</i> (1917) 23 CLR 457 <u>Principle/s</u> Parliament is permitted to change even its structure (abolishment of a house of parliament) so long as it remains representative Note: wasn't successful, but challenge was valid	<u>FACTS:</u> Lower house in QLD proposed to abolish the upper house <ul style="list-style-type: none"> Many of its members didn't live in QLD, from wealthy families, arguably not democratic, undermining the govs function Sought to impose the <i>Parliamentary Bills Referendum Act</i> 1908	<u>ISSUE</u> Did the State have the power to enact legislation for a referendum that could result in the abolition of the state's UH?	<u>HELD:</u> The referendum was valid Thus State legislator power was so wide to extend to the abolition of the upper house (even though seen as so fundamental in the Consti)