

TOPIC 3: MANNER AND FORM REQUIREMENTS

Is the first law doubly entrenched and mandatory? (looking at restrictive procedure itself)

Is the first law a permissible m&f restriction?

- RP cannot be too onerous to amount to curtailment of law-making ability (*Westlakes*)
- Requiring consent from extra-Parliamentary body prima facie invalid
 - o Exception: if the body is representative – e.g. referendum or majority of all councils

Is the second law regarding constitution, powers or procedures of parliament?

- Constitution = composition of Parliament, what gives it its representative character (*Trethowan*). E.g. electoral boundaries (*Marquet*).
- Powers: if law 2 seeks to restrict or expand law-making capacity
- Procedures: internal happenings in Parliament (*Trethowan*) – how laws are passed, second reading speeches etc.

If yes to all 3 questions, valid RP and Parliament bound as 2nd law relates to CPP – 2nd parliament will be bound and have to comply with RP.

If no to Q1 or 2, then restriction won't be valid, so second parliament won't be bound.

If yes to Q1 and 2, but no to Q3 then not bound.

Is L1 a true m&f provision, or is it a substantive fetter on parliament's power to legislate

- true manner and form provisions:
 - o special majorities
 - *Ranasinghe* and *Harris* – RP required 2/3 majority in both houses of parliament. HC said valid – procedural hurdle. Not too high that you cannot reach it.
 - *Marquet* case – Absolute majority – of all the people that can vote, they have to vote (76/150) – allowed.
 - King CJ in *Westlakes* – special majority – sliding scale. At some point, a special majority can become too onerous, so in truth, it is a substantive fetter on a later parliament. But it is a sliding scale. If L1 is on a fundamental or important topic, it is less likely that a high special majority will amount to a substantive restriction. For example, if L1 is about human rights, and there is an 80% requirement, may or may not be too high. But a Dog Act may not be as important of a topic to justify such a high majority requirement.
 - o Consent of an extra-parliamentary body (e.g. a department of ____, referendum, body of elders)
 - King CJ in *Westlakes* – an extra-parliamentary body in a legislature (parliament) that maintains its representative character. Can have another body provided it maintains its representative character. If not, parliament is abdicating its law-making power to another body – not allowed by s 6 AA. Consent of the electorate is OK. A referendum is direct approval – cannot get more democratic than that.
 - E.g. of extra-parliamentary body from *Westlakes* – to give legislative power to a company is a renunciation or an abdication of legislative power to the extent that the power was given to an unrepresentative body. If you require consent of a trade union, corporations, a church, a club, or a particular individual, they are all examples of unrepresentative bodies.
- Not true m&f provisions:
 - o Remove the Crown (*Re Initiative and Referendum Act 1919*) – if you try to remove the royal assent step, not valid
 - o Laws that deprive parliament of its powers by RP, not allowed; e.g. disallow repeal of law forever – substantive fetter
 - o To give Governor in Council sole power to amend legislation by regulation, not allowed as it lacks representativeness
 - o To require 99% referendum result – in truth not possible to achieve so in truth, denying parliament power to change law
 - o To give legislative power to a non-representative body is an abdication/abrogation of power – not true m&f

- *In Re Initiative and Referendum Act*: citizen-initiated referendums – invalid
Followed by *Westlakes* and *Comalco* cases

- Must be mandatory
- Must be doubly entrenched

a) L2

- i) Is L2 = c, p, p of pmt? – a later law respecting constitution, powers and procedures of parliament (cpp of parliament)
- iii) “C, P, P” definition: Dixon J in *Trethowan*
 - a) ‘constitution enables the legislature to deal with its own nature and composition’ (composition of parliament (structure of Parliament, not the paper document that is the Constitution);
 - b) ‘procedure enables it to prescribe rules which have the force of law for its own conduct’ (internal procedures – standing orders, position of the speaker, the way Parliament runs itself (not normally described by statute);
 - c) ‘Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws.’
 - d) ‘powers ... mean that it might deal with its own legislative authority’ (regulation of law-making power – not any law within the power of parliament, a law about P’s actual law making power).
 - (1) ‘Under such a power a legislature, whose authority was limited in respect of subject matter or restrained by constl checks or safeguards, might enlarge the limits or diminish or remove the restraints. We already have a parliament whose authority is somehow constrained. If attempt in L2 to make the constraint harder or easier, that L2 is getting at the powers of parliament.
 - (2) ‘Conversely, the power might be expected to enable a legislature to impose constl restraints upon its own authority or to limit its power in respect of subject matter.’ Previously, if there were no constraints whatsoever, and in L2 you try to introduce a constraint on P’s authority to legislate
- iv) “C, P, P” Examples...
 - a) L2 changes bi-cameral to uni-cameral – yes, affects the constitution, affects the composition of parliament (Taylor v A-G (QLD)) - *Constitutional*
 - b) L2 changes majority requirement – yes, procedure of parliament, the rule that prescribes itself, may fall under the powers – might deal with its own legislative authority
 - c) L2 addresses the composition of the Houses
 - (1) Example 1: direct (preferential voting) vs indirect (proportional voting) election – what if L2 attempts to change the mode of election – e.g. first past the post? – Constitution of parliament – it will impact on who sits in parliament, will impact on constitution of parliament.
 - (2) Example 2: Royal Assent – let’s say L2 tries to remove the need for royal assent – is royal assent a function of law making? If so, it is constitution. Or is it an executive function? If so, no a CPP law
 - d) L2 affects pmtary privilege – if it altered parliamentary privilege, may impact on the way parliament conducts itself (few slinging matches), and that is the procedure of parliament. May even tap into powers.
 - e) L2 repeals/relates to L1
 - (1) Example: L2 expressly repeals/alters a valid m&f provision in L1? Impacts on power or procedure of parliament
 - (2) Example 2: L2 inconsistent with Vic *Constn*? If L2 is operating on a RP in L1, including RPs in the constitution, have CPP of parliament. If L2 is merely operating on other areas of parliament, it may not be a CPP of parliament.
 - f) Subject matter of L2 regards “cpp” - easy
 - (1) E.g.: abolishes the Legislative Council – subject matter of L2 is consti (Trethowan)
 - (2) E.g.: electoral distribution – changes composition of parliament (Marquet)
 - (3) E.g. change to judicial tenure – if L1 is about how long judges can be appointed or how they can be removed, if L2 tries to change the rules about judges – it’s a cpp of parliament, altering procedures of parliament as the rule gives parliament the power to dismiss judges in the first place

- (4) Cf e.g. of death penalty – not a cpp of parliament. If in L2 it says cannot re-impose death penalty, subject matter is not about a cpp of parliament, death penalty may be a subject matter that parliament chooses to legislate on, but it is not about the constitution, powers or procedures of parliament. Powers not given that broad of a definition.

g)

c) Concln – Assuming L1 is a RP

iii) If L2 is c, p, p...must follow RP in L1 to achieve L2

If L2 is *not* c, p, p...don't have to follow. S 6 AA states that you must follow m&f if L2 concerns the constitution, powers and procedures of the parliament. If it doesn't, can ignore L1.

TOPIC 4: EXECUTIVE POWERS

- 1) Section 61
a) 'The executive power of the Cth is vested in the Queen and is exercisable by the GG as the Queen's representative and extends to the execution and the maintenance of this Constn, and of the laws of the Cth.'

THE SCOPE OF THE POWERS

First Focus of s 61: Execution and Maintenance of the law

- 1) Delegated legislative capacity
a) Delegated power – parliament often delegates power to the executive – go make rules and regulations which make the primary law operate. These are called – regulations, rules, delegated legislation
b) Sep of powers? Law making power of parliament is getting mixed in with the executive power of the executive. No perfect separation of parliament. Parliament still technically stays sovereign given they can repeal the law and take the power away. Primary law tells the executive what it can/can't do. The delegated law must be consistent with the primary law. If not, it is invalid.
- 2) To what extent can L power be conferred on the E?
a) First Case: Vic Stevedoring and General contracting Co PL and Meakin v Dignan
b) Legism
i) *Transport Workers Act*: - gives GG extensive powers to make regulations; and 'notwithstanding anything in any other Act of Pmt, ...shall have the force of law.'
- Held:
- Dixon J: s 3 legislative in nature. Giving powers to GG to make laws. SoP no restraint, So long as any delegation of power is "With respect to" one of the HoP in s 51. If a law delegating power to E is so extensive or vague/uncertain subject matter = not "wrt", invalid.
 - Evatt J: Pmt has power to delegate law-making power to E - Otherwise would be impossible to run a country. Need a supplementary law-maker to be able to function. Primary law-maker can always revoke that power if the delegated law-maker screws up. Exception: Abdication of L power – cannot abdicate law making power:
 - Continuous contact with Pmt? How far removed is the delegated legislature from continuous contact with P? the more further removed, more likely abdication. E is close to P.
 - Extent of power conferred? Greater the extent of law-making power given away, the less likely it would be a law with respect to any subject matter assigned to P
 - Laws "with respect to"? must be able to be described under a HoP – about characterisation – under s 51. Both the primary law and delegated law must be wrt a head of power under 51.
 - Can regulations override prior legislation? If the express will of P is that the regulations should prevail over statutes passed by P itself, then prevail they do.

P must always retain its ability to divest the executive of its legislative powers in all delegated areas (*Dignan*).

Parliament cannot abdicate its powers because each and every one of its laws must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all of its law-making authority to another body would be bad merely because it would fail to pass the test above.

- Second case: Workchoices case (2006)
- "prohibited content" in workplace agreements – were to be specified by regulations. E could decide what could be agreed/couldn't be to in contracts
- Majority = Delegation is valid.