



Constitutional Law Exam Notes

Semester 1 2019

Monash University

Disclaimers / Key

Headings: Emboldened, two case sizes higher than subject matter and centre.

Subject: All subject matter is size 11.

In-text cases: All in text case citations are emboldened. (Some: may be shortened)

Legislation: All in text legislation is emboldened.

Questions: Shortened: 'Q1.'

Answer: Shortened: 'A.'

Doctrines: Emboldened, case size: 11.

Case ex: Emboldened, size 11.

Case matter: Italicised and highlighted: yellow.

New topics: All new topics are brought to a new page, indicated by heading.

Footnotes: Expository purpose only.

Note: Topics 2 & 5 have been left out due to overlap in primary content.

I TOPIC 1: INTRODUCTION TO LEGISLATIVE POWER

PLENARY LEGISLATIVE POWERS (TOPIC 2)

States have plenary legislative power and thus can legislate over whatever they deem so (however opposed by certain limitations) **s2 (1) of The Australia Act** mandates for this, such provision is also usually legislated within each state constitution legislation by way of a 'peace, order/welfare and good government' interpreted in the **Union Steamship Case**.

Q1: Can state legislatures edit / amend their own constitutions?

A: Yes, this is a function of the plenary power states wield.

The Doctrine of Implied Repeal:

Q1. As mentioned above, states have the power to amend their constitutions as per plenary power, it is thus an *implied repeal*, meaning that new legislation parliament had created, has an implied function that suggests parliament meant to repeal old legislation upon creation of new law

Cases:

The Doctrine of Implied Repeal

Case: *R v McCawley* – New legislation impliedly repeals old legislation.

TOPIC 2: MANNER AND FORM PROVISIONS

States have plenary legislative power, except when they are bound to a *manner and form* provision set forth by a prior parliament. However, only the procedure of parliament can be changed (i.e. double majority requirements) the substance cannot be bound. (s6 of The Australia Act)

Q1. Can a parliament bind future parliament's ability to legislate?

A. Yes, but *only* in procedure, not substance.

How to: (Key)

Law 1: This law contains the restrictive procedure for Law 2.

Law 2: This law is the law that law 1 is restricting.

How to: LAW 1

1. Is the provision a restrictive procedure on parliament?
 - Does it provide a mode, method or manner in which laws changing law 1 can be made? (Per Dixon J in **Trethowan**)
2. Does the law bind parliament? (Not the executive or judiciary)
 - If it does not, parliament need not observe it.
3. Is the restrictive procedure **double or singly entrenched**?
 - Where the restrictive procedure is in itself entrenched, the procedure must then be followed. Singly entrenched provisions fail the process. (i.e. can be repealed = **McCawley**)
4. **MUST BE:** supported by a constitutional basis. (s 6 of The Australia Act)
 - The High Court of Australia held that only constitutionally valid restrictive procedures can be valid. (**Marquet**)
 - **Note:** s5 of The Colonial Laws Validity Act is now not used.

If all requirements are met it is likely a restrictive procedure.

How to: LAW 2

1. Does the second law come within the scope of the restrictive procedure? (Law 1)
2. Do the terms of the second law respect/regard or concern the Constitution, Powers and Procedures of parliament?
 - The statement Constitution, Powers and Procedures of Parliament was interpreted by Dixon J in **Trethowan**, and further linked to s6 of The Australia Act in **Marquet**.

Conclusion: If the second law concerns the constitution, powers and procedures of parliament **AND** the first law is a valid manner and form provision / restrictive procedure, **THEN** the restrictive procedure will need to be followed. **SO**, if the restrictive procedure is not met, the second law will be deemed of 'no force and or affect.'

- A. If the second law does not concern the constitution, powers and procedures of parliament the restrictive procedure need not be followed.

CASES & LEGISLATION

Restrictive Procedures:

Case: Attorney-General (NSW) v Trethowan: The restrictive procedure must concern the mode, method or manner upon which parliament may amend a law. (Double Majority, Two-Thirds Majority, ETC)

Case: Attorney-General (WA) v Marquet: Attempt to change electoral laws was subject to a restrictive procedure, had to ask whether or not there was a valid restrictive procedure, if there was, then the government had unlawfully tried to pass new law, if it was not, then the doctrine of implied repeal is drawn on and **McCawley** is applied.

Legislation:

The Australia Act (s6): Concerning the ability to enact such procedures that are restrictive. Dixon J found that the section is linked with / means the same as the constitution, powers and procedures – of parliament.