

Topic 2 – Constitutions and their Amendments (Cth and State)

Commonwealth Constitutional Amendment:

- S 128 and HC interpretations apply:
 - 1) absolute majority in both houses or one house twice ('may') for referendum
 - 2) At referendum
 - Majority of people
 - Majority of people in majority of states (excludes territories)

State constitutions Amendments:

- No equivalent to s 128 and not higher form of law → State parliaments can amend through ordinary legislations and the doctrine of implied repeal (**McCawley v the King** – inconsistent judge term life v 7 years, **Taylor v AG(Qld)** – abolish qld legislative council)
- However, subject to manner and form requirements (**CLVA s5 and Australia Acts s6**)
- **Plenary powers** (Union Steamship co v King)

Manner and form requirements

- **CLVA s 5 and Aus Act s 6**
- 1) Whether the provision is double entrenched
 - Identify entrenched, entrenching and amending law
- 2) Is the manner and form requirement valid?
 - Valid:
 - Absolute majority (**Marquet's case** – 'repeal' and 'amend' Act)
 - Referendum (**AG v Trethowan** – attempt to abolish NSW legislative council)
 - Not abdication because legislature represents the people
 - Invalid:
 - Prescribing content of future law (**Drainage's case** – RPA – amending law CPPP)
 - Abdication of parliamentary power (**Westlakes** – executive contract – 'consent')
- 3) Does the **amending law** relate to the constitution, power or procedures of the parliament? (**Drainage's case** – majority error)
 - What is CPPP?
 - Has to be about parliament (not judiciary etc)
 - Constitution – composition of the parliament/houses (**Taylor v AG** – attempt to abolish qld legislative council)
 - In **Marquet**, extended to 'features which give the parliament and its houses a representative character' → electoral distribution and voting systems are now likely to be held as CPPP
 - But, disqualification or qualification of members are not.
- **Basis of manner and form** (**Marquet's case**)

- Initially, underpinnings from CLVA 1865 – colonial legislations were subordinates
- Fundamental change to Australia's constitutional arrangement – particularly after Australia Acts 1986 which made Aus legally independent (Sue v Hill). Now derived from Australian source → s 6 of Australia Acts with power derived from s 51 → still states are subordinate, s109)

Rigid (Cth) v Flexible (State) Constitutions

Topic 3 – Part 1: the Legislature

- **1) Institutions of the parliament**
- The legislative power of the Cth shall be vested in the Federal Parliament, consisting of (S1):
 - The Queen
 - A Senate
 - A House of Representatives
- GG → Per S2 → acts as the Queen's representative
 - The main role of the GG is to assent to legislations passed by both Houses of the Parliament (s 58)
 - Dissolve the House of Representatives (s 5)
 - Issue writs for general election of members of the HoR (s 32)
 - Role of **Conventions**
- **House of reps (s 24, Ch 1, part III) →** directly chosen by the people.
- **Senate (s 7, Ch 1, Part II) →** composed of senators of each state, directly chosen by the people of the state, voting, until the parliament otherwise provides, as one electorate (s 7)
 - Encapsulates federalism
 - Representation of territories
 - S 122
 - Senate (Representation of Territories) Act 1971 (cth) → NT and ACT to each have two senators
 - First Territory Senator's Case 1975
- **2) Powers of parliament**
 - Part 5, s 53
 - Both houses have equal power generally, (except money bills – only can originate in HoR)
 - Senate as check and balance
 - Deadlock between houses (s 57) → double dissolution
 - Legislative powers of Cth → s 51 Head of powers
- **3) Members of the Parliament**
 - Senators of states = 6 years, Territories, 3 year term, same as HoR.
- **Qualifications:**
 - Commonwealth Electoral Act 1918 (Cth) → 18, citizen, eligible to vote
 - S 43 → cannot sit as a member of both houses (must resign before being eligible for the other)
- **Limitations and disqualifications if a person: (s 44)**

- 1) Is a citizen or subject of a foreign power
 - If the person does not take **reasonable steps** to divest themselves from foreign citizenship, they fall within s 44 (i) and thus are disqualified from being elected.
 - What is 'reasonable' depends on the circumstances e.g. some countries don't have citizenship renunciation process (**Skyles v Cleary** – Mr D (Greek) and Mr K (Swiss) – both countries had processes to renounce citizenship)
 - **Dual citizen/UK: sue v hill**
- 2) Is attained of treason
- 3) Has been convicted and is under sentence, or subject to be sentenced , for an offence under the Cth or state law punishable by prison sentence for 12 months or more
- 4) Is an undischarged bankrupt
- 5) Holds an office of profit under the Crown (iv)
 - Refers "at least" to a person who is permanently employed by government.
 - Taking leave without pay does not alter the character of that employment (**Skyles v Cleary**)
 - For candidates, the **critical point is nomination**, which begins the process of being chosen
 - Basis is the principle of incompatibility
- 6) Has direct or indirect pecuniary interest in any agreement with the Cth Public service(except as a member of an incorporated company with more than 25 people)
 - An agreement needs to cover a substantial period of time and be one under which the Crown could **conceivably influence the contractor** in relation to parliamentary affairs (**Re Webster 1975**)
 - Does not apply to temporary contracts (Webster)
 - S 44 is phrased to exclude its operation on shareholders in large publicly listed companies which may enter into contracts with the Crown.