Amending the Commonwealth Constitution

- The Constitution itself incorporates, in s 128, the referendum mechanism by which it may be changed.
  - However, achieving reform has proved difficult, with the political and other obstacles often proving insurmountable. Since 1901, 8/44 proposals put to the people have succeeded.
  - ✓ The result is that the Constitution remains almost as it was in 1901, 'constitutionally speaking the frozen continent'.
- Justice John Toohey of the High Court referred to the argument that written constitution create a "two-track lawmaking system". [1]
  - Under such a system, "the normal lawmaking path" lies through Parliament, but changes to the Constitution, that is – to "the judgments previously made in the higher law accents of We the People" – must go down "a higher lawmaking track".
    - In Australia, this means a referendum under s 128.
- While Toohey claims that popular amendment means judicial enforcement of the constitution serves the popular will, the practicality is that if the model does not work, or 'the people' are reluctant or unable to use it, does it serve the popular will?
- A proposed law for the alteration of the Commonwealth Constitution must be (under s 128):
  - Involves a number of institutions / groups: both Houses of Parliament, the Governor-General, the electors
  - Double majority reflects federal concerns
    i. passed by an absolute majority of both Houses of the Federal Parliament, or by one House twice; and
    ii. at a referendum, passed by a majority of the people as a whole, **and** by a majority of the people in a majority of the states (i.e. in at least 4/6 states).
    - ★ Note: there is compulsory voting (s 45 Referendum (Machinery Provisions) Act 1984 (Cth)), pamphlets of no more than 2000 words are sent out, and assent by the G-G is required.

Amendment of State Constitutions

Each State Parliament has power to amend the constitution of its State, subject to such binding manner and form requirements as the Parliament itself has been able to impose in the exercise of that power.

- States in Empire
  - States were colonies, within the British Empire
  - States had constitutional documents (legislation) from colonial times, continuing post-federation: s 106
  - However, Imperial laws affected the powers of the colonies / States.
- The power to enact a law includes the power to repeal or amend the law.
- Can previous parliaments govern/bind future parliaments?
  - ✓ It seems **Yes** at Federal level due to the Constitution.
  - ✓ **No** at state level, because the Constitutions are pieces of legislation, and traditional Dicean theory stresses parliamentary sovereignty, or the belief in the ability of parliaments to regulate themselves.
    - But a higher authority may give a Parliament the power to do so.
- The source of power to entrench a law must therefore come from a higher source. In the case of the States it came originally from Imperial legislation, and then from the Australia Acts 1986 (Cth).
  - The Colonial Laws Validity Act 1865 ('CLVA') ceased to apply to the States upon the commencement of s 2 and 3 of the Australia Acts 1986 (Cth) and the State Parliaments were given full legislative power.

s 6 of the Australia Acts 1986 provides

> 6. Notwithstanding sections 2 and 3(2) above, a law made (THE AMENDING LAW) after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law (ENTRENCHING PROVISION) made by that Parliament, whether made before or after the commencement of this Act.

[1] Australian Constitutional Law and Theory, page 1340.

2. Constitution Amendment

Each colonial (now state) Parliament was to have a continuing power to re-enact and re-write its own Constitution Act. In other words, these were flexible, not rigid, constitutions.

1. *In 1908, after a protracted political deadlock between the two Houses of the Queensland Parliament, the Parliamentary Bills Referendum Act 1908 (Qld) was enacted as a way of resolving such deadlocks in the future.*
2. *The Act established an "alternative" legislative procedure: if a Bill was twice passed by the Legislative Assembly in two successive sessions, and twice rejected by the Legislative Council in two successive sessions, it might then be submitted to a referendum and, if approved, might then be presented for the Royal Assent.*

Issue: whether the Queensland Parliament had the power to enact the Parliamentary Bills Referendum Act, that is, to create an alternative legislative procedure bypassing the Legislative Council.

Taylor v A-G of Queensland (1917) 23 CLR 457

Injunction to stop referendum overturned by HCA on condition no action was taken on its result until constitutional issues resolved. Referendum failed, on constitutional matters the HCA held that the act was valid by relying on s5 of the Colonial Laws Validity Act.

Decided that the legislative power conferred by the CLVA did confer full constituent power 'to make laws respecting the Constitution, powers and procedure of such Legislature' (s 5), provided that such Laws shall have been passed in such Manner and Form as may from time to time be required.'

Established that the QLD Legislative Council could be abolished (and was in 1921).

1. *When Thomas McCawley was commissioned as the first President of the new Industrial Court, his commission purported to appoint him to the SC "during good behaviour".*
2. *However, when he presented himself at the SC to take the judicial oath, members of the bar objected.*
3. *It was argued that s 6(6) of Industrial Arbitration Act 1916 (Qld) was unconstitutional if it was capable of authorising an appointment of SC for a seven-year term.*
4. *Section 15 of the Constitution Act 1867 (Qld) declared that the commission of all present and future judges "shall be, continue and remain in full force during their good behaviour".*

Issue: whether the Industrial Arbitration in s6(6) impliedly limited a Supreme Court judge's term to seven-years, contrary to s15 of the Constitution Act 1867 (QLD).

The Privy Council affirmed the powers of the Queensland legislature to pass S 6 (6) thereby effectively to amend the state's constitution.

McCawley v The King [1920] AC 691

Privy Council affirmed the power of the QLD legislature to pass s 6(6), and thereby to effectively amend that State's Constitution.

This power (to amend Constitution) could be exercise impliedly, that is, even in the absence of an express intention in s 6(6) to amend the Constitution Act.

Lord Birkenhead

It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control in the matter suggested the legislative powers of the nascent Australian legislatures.
What was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.

➡ *This case illustrates that a state could amend its state legislations through an act that is inconsistent but nevertheless, provides implied meaning that it could repeal a legislation.*

Manner and Form Requirements

- *Manner and form requirements are restrictive procedures.*
- *They restrict the legislative powers of the Parliament by requiring that laws on certain topics may only be enacted by a special and more difficult procedure.*

There are usually three elements to any manner and form problem.

1. *There are the '**entrenched provisions**'.*
   - *For example, ss 8 and 9 of a hypothetical Constitution Act 1950 might provide:*
     a. *There shall be a Legislative Council comprised of 30 Members chosen directly by the electors.*
     b. *It shall be compulsory for all electors to vote in elections for the Legislative Assembly and the Legislative Council.*
2. *There are the '**entrenching provisions**' (or the 'manner and form' provisions).*
   - *These provide that certain sections cannot be amended or repealed, or laws on certain matters cannot be enacted without following a particular 'manner' (eg a special majority or referendum) or a particular 'form' (eg a law that contains a particular form of words). For example, s 32 of the hypothetical Constitution Act 1950 might provide:*
     - *A Bill that abolishes the Legislative Council or expressly or impliedly repeals or amends sections 9-15 or this section shall not be presented to the Governor for assent until it has been approved by the electors in a referendum.*
3. *There is the '**amending law**' (or 'repealing law')*
   - *This seeks to amend or repeal the 'entrenched law'. For example, the Constitution Amendment Act 2008 might provide:*
     a. *The Legislative Council shall be abolished.*
     b. *Voting for the Legislative Assembly shall be voluntary.*

Manner and Form Troubleshooting

Constitution
- *Composition of parliament – NOT the written Act*
- *Does include the method of electoral distribution, for example, subject to the absolute majority manner and form requirement, AG (WA) v Marquet (2003)) – it held that "constitution" is broader than just abolishing/changing houses – but did no specify just how broad.*
- *Powers – legislative power and Parliamentary power (eg. contempt)*
- *Procedure – Procedure for reading Bills*

1. Nature of amending law

Is the amending law one respecting the 'constitution, powers or procedure' of the Parliament? Eg does it concern how the Parliament or its Houses are comprised?

- *If it relates only to the judiciary, or local government or some other subject, then the effectiveness of the manner and form provision will not be supported by the Australia Acts.*
- *(Query whether there is any other source of entrenchment – s 106 of the Commonwealth Constitution or the Ranasinghe principle).*

*2. Does the **amending law** seek to amend or repeal an **entrenched provision** contrary to the requirements of the entrenching provision?*

3. Double entrenchment

If yes, then is the entrenching provision doubly entrenched? This means, can the entrenching provision itself be amended by ordinary legislation, or does it protect itself by requiring that the manner and form requirement it imposes also applies to amendments or repeals to itself.

- *If it is not doubly entrenched, then the amending law will also have the effect of impliedly amending the entrenching provision so that it does not need to comply with manner and form requirements.*
- *If it is double entrenched, then go to 4.*

4. Abdication

Is the entrenching provision

- *really a purported abdication of legislative power?*
  - *Any provision that says that the Houses of Parliament cannot enact a law without getting the permission of some external body (eg a tribunal, a company, a local council) other than the people in a referendum, is a purported abdication of legislative power. The Parliament has no capacity to abdicate its power, so such a provision would be ineffective.*
  - *Also if the manner and form requirements are too stringent or the special majority is too high. 'There must be a point at which the special majority provision would appear as an attempt to deprive the Parliament of powers rather than as a measure to prescribe the manner and form of their exercise.' (Westlakes)*

5. Consequences

Consider the consequences of a breach of the manner and form provision.

- *Under the CLVA there was no power to enact the entire amending law.*
- *Under the Australia Acts the entire amending law is of 'no force or effect'.*

Consider also, if relevant, the issue of justiciability.

Should the court intervene before the Governor gives assent to the amending Bill, or wait for it to be challenged once it has become a law?

- *In general, courts prefer to deal with the issue of the validity of a law after it is enacted (Cormack v Cope).*
  - *However, **exceptions** are sometimes made if the law expressly prohibits a Bill being presented to the Governor unless it complies with a manner and form procedure (Trethowan) and*
  - *where there would be no remedy or it would not be in the public interest to wait until the Bill received assent (Marquet)*

Manner Requirement

Attorney-General (NSW) v Trethowan (1931) 44 CLR 395

Reasoning in NSWSC (approved by HCA):

1. If s 7A had not been doubly entrenched, (i.e. if there was no sub-s (6)), the whole of s 7A could have been repealed.

2. On the same hypothesis, once s 7A was repealed, the Legislative Council could be abolished by an ordinary act of Parliament.

1. *Following the success of the QLD Labor Party in abolishing the QLD Upper House, the NSW Labor Party attempted to follow suit.*
2. *Section 7A of the Constitution Act 1902 (NSW) (entrenched provision) meant that the Legislative Council could not be abolished without a referendum and also, by virtue of sub-s (6) (entrenching provision), that s 7A itself could not be amended or repealed without a referendum.*
3. *sub-s (6): 'The provisions of this section shall extend to any Bill for the repeal or amendment of this section.'*
   - *Thus, if s 7A "entrenched" the constitutional status of the Legislative Council, sub-s (6) made this a "double entrenchment".*
4. *In 1930, the Legislative Council itself took the initiative and passed, without a referendum, a Bill purporting to repeal s 7A. The legislative Assembly then passed the Bill.*
5. *Two members of the Legislative Council sued in the NSWSC for an injunction to prevent the Bill from being presented to the Governor for the Royal Assent.*

Issues: can s 7A be effectively repealed without a referendum?

3. Moreover, what could thus be done in two steps could also be done in a single step. There was no need first to repeal s 7A before abolishing the Legislative Council. Parliament could simply legislate to abolish the Legislative Council, and, insofar as that legislation was inconsistent with s 7A, it would impliedly repeal that section.
4. The inclusion of sub-s (6) leads to a different result. That sub-section could not be repealed by an ordinary Act of Parliament. It could only be repealed in the manner prescribed by s 7A itself, that is, by a referendum. Section 7A thus incorporated a 'manner and form' requirement imposed by a law within the meaning of the proviso to s 5 of the CLVA.

➡ If a 'manner and form' provision is not doubly entrenched, a parliament is free to legislate to remove the entrenchment and amend the protected provision.
➡ For measures affecting the constitution, powers and procedure of the State legislature, the requirement of submission to a referendum can be a 'manner and form' requirement within the meaning of s 5 of the CLVA.
➡ The 'constitution' of a State parliament includes its own 'nature and composition'

Form Requirement

1. Section 6 of the Real Property Act 1886 (SA) stated that :"No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply 'notwithstanding the provisions of "The Real Property Act 1886"'."
2. The South-Eastern Drainage Amendment Act 1900 (SA) did not contain the 'magic formula' that s 6 above required.

South-Eastern Drainage Board (SA) v Savings Bank of South Australia (1939) 62 CLR 603

HCA held that this did not matter: the normal rule applied that, to the extent of any inconsistency, the later Act prevailed and the earlier Act was to that extent impliedly repealed.

➡ A mere requirement of a special declaratory form of words was not a 'manner and form' requirement.

Question the reasoning in this case however

> Where an issue arises under s 5 CLVA or s 6 Australia Act, the first question to be asked is
> 1. Whether the law that is later in time is a law 'respecting the Constitution, Powers and Procedure of such Legislature'.
>   - Look to the later law for its nature.
>
> If and only if it is such a law, it then becomes necessary to ask
> 2. Whether the earlier law has prescribed any 'manner and form' in which the latter law must be passed.

In South-Eastern Drainage the court should have asked whether the later act was a law 'respecting the Constitution, Powers and Procedure of such Legislature'. Since it was clearly not such a law, no question under s 5 of the CLVA should have arisen. Accordingly, it is sometimes suggested that the case is flawed and is of no value as precedent.

1. Agreement made in relation to the development of a suburb between SA Govt. and a developer.
2. 1969 Act required the consent of a corporation/company for any future amendments.
3. SA Govt. prepared draft legislation to amend the West Lakes Development Act to provide that the consent of the company should not be required for any regulation giving effect to a recommendation of the Royal Commission.
4. The company sought an injunction to prevent that Bill from being introduced into Parliament.

West Lakes Ltd v South Australia (1980) 25 SASR 389

Action failed on two grounds:

1. A contractual obligation entered into by the executive government could not inhibit the power of Parliament to enact legislation, or the right of Ministers to propose such legislation.
2. In any event, a requirement of written consent by a company was not a 'manner and form' requirement within the meaning of s 5 of the CLVA.

King CJ

The bill under consideration is not a proposed law respecting any of the topics enumerated in s 5 of the CLVA.

A question might arise whether as to whether a particular statutory provision is

- truly a manner and form provision, which must be observed as a condition of the validity of the Act, or
- a limitation or restraint of substance which would not invalidate legislation inconsistent with the limitation or restraint.

When one looks at extra-parliamentary requirements, the difficulty of treating provisions as relating to manner and form becomes greater.

- Requirements of approval by electors at a referendum (see Trethowan), although extra-parliamentary in character, is easily seen to be a manner and form provision because it is confined to obtaining the direct approval of the people whom the 'representative legislature' represents.

- If, however, parliament purports to make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation, a serious question must arise as to
  - whether the provision is truly a law prescribing the manner and form of legislation, or
  - whether it is not rather a law as to substance, being a renunciation of the power to legislate on that topic unless the condition exists.

A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure does not prescribe a manner or form of lawmaking, but rather amounts to a renunciation pro tanto of the lawmaking power.

- Such a provision relates to the substance of the lawmaking power, not to the manner or form of its exercise.

The point becomes clearer if one considers hypothetical (albeit extreme) examples such as provisions that legislation of a certain character might not be enacted without the consent of:

- the governing body of a political party, or
- an organisation of employers and employees, or
- an officer of the armed forces, or
- any other individual, office holder or body which does not form part of the representative legislative structure.

➡ You can't require an external body to approve legislation (this would be an abdication of power).
➡ The provision does not prescribe a manner or form of legislation, and Parliament may legislate inconsistently with it.

1. Section 13 of the Electoral Distribution Act 1947 (WA) (entrenching provision) required an absolute majority in both Houses of the State Parliament for 'any Bill to amend this Act'.

Attorney-General (WA) v Marquet (2003) 217 CLR 545

Held to be valid, and thus prevented the repeal of the 1947 Act by the Electoral Distribution Repeal Bill 2001 (WA) (amending law), which would have cleared the way for a new electoral distribution based on the idea of one vote-one value.

HCA had to answer

1. Whether a Bill to repeal the 1947 Act should be treated as a Bill to amend it.
   - It would be anomalous if 'amend' when used in a constitution were to be read so narrowly as to exclude, or have no application to a repeal, so as to enable a legislature, without complying with the requirements of s 13, to obliterate or extinguish entirely part of the Constitution, but not to amend it even by the addition or deletion of a mere word or phrase: that although the Parliament might not tinker with it, it was entitled to annihilate a constitution or a substantial provision of it.
   ➡ 'Amend' in s 13 should be read to include and apply to a purported 'repeal'.

2. Whether legislation establishing a scheme for electoral distribution and the bureaucratic machinery for its implementation was 'a law respecting the constitution, powers and procedure' of representative legislatures as under s 5 of the CLVA.
   ➡ The 'constitution' of a State parliament includes its own 'nature and composition' (A- G v Trethowan).
   - The contentions were that s 6 of the Australia Act should be read strictly, and as referring only the legislature's general structure as bicameral and representative.
   ✓ The reference to the 'constitution' in s 6 should not be read so confined.
   ➡ Section 6 is not able to be read as confined to laws which abolish a House, or altogether take away the 'representative' character of a State parliament or one of its Houses. At least to some extent, the 'constitution' of the parliament extends to features which go to give it and its Houses a representative character.
   - Both the Repeal Bill and the Amendment Bill were found to be laws respecting the 'constitution' for the purposes of s 6 of the Australia Act.
   ➡ Look to the later law for its nature.