

Public Law
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Final Exam Scaffolds

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Amending State Constitutions – Manner and Form

The issue is whether or not the [amending law] has validly amended the [entrenched provision], despite it being contrary to the manner and form prescribed in the [entrenching provision].

State parliaments have plenary powers to amend their constitutions using ordinary legislation ('flexible constitutions'; *Taylor v A-G*). The power to entrench provisions respecting the 'constitution, powers or procedure of parliament' comes from s 6 of the *Australia Acts*.

STEP 1: Is there double entrenchment?

The entrenching provision must itself be entrenched (double entrenchment; *A-G v Trethowan*).

- If NO: the amending law will be effective and impliedly repeal the entrenched provision.
- If YES: Move on to step 2.

STEP 2: Is the proposed 'manner and form' requirement valid?

The manner and form prescribed must be valid to be effective.

- If INVALID: the amending law will be effective and impliedly repeal the entrenched provision.
- If VALID: Move on to step 3.

VALID MANNER AND FORM REQUIREMENTS ✓

- Absolute majority in both houses (*A-G v Marquet*).
- Special majority in both houses is valid as long as the majority required isn't too high (*West Lakes v SA; Ranasinghe*).
 - If the majority is too high, it will deprive Parliament of power (*West Lakes v SA; Ranasinghe*).
- Referendum (vote of the people) (*A-G v Trethowan*).

INVALID MANNER AND FORM REQUIREMENTS ✗

- The legislation requires Parliament to use a prescribed form of words and/or to expressly declare its intention to repeal the legislation (*S-E Drainage Board v Savings Bank of SA*).
- The legislation requires Parliament to get approval from an extra parliamentary body/third party (e.g., a tribunal, council, individual, organisation, political party etc.). This amounts to an abdication of Parliament's power (*West Lakes v SA*).

STEP 3: Does the subject matter relate to the 'constitution, procedure or powers' of Parliament?

The subject matter must relate to the 'constitution, procedure or powers' of Parliament.

- If it DOES NOT: the amending law will be effective and impliedly repeal the entrenched provision.
- If it DOES: The amending legislation will be of 'no force or effect' (s 6, *Australia Acts*).

SUBJECT MATTER THAT RELATES TO THE CCPs OF PARLIAMENT ✓

- The form, nature, composition or makeup of the houses of parliament (*A-G v Marquet*).
- Features which give the house their 'representative' character (*A-G v Marquet*).
- The method of passing laws (*A-G v Marquet*).

SUBJECT MATTER THAT DOESN'T RELATE TO THE CCPs OF PARLIAMENT ✗

> Consider *Ranasinghe* case if applicable

- Court structure, local government, crimes (*A-G v Marquet*).
- The judiciary (*Taylor v A-G*).

POSSIBLE BONUS MARKS

IF THE BILL HASN'T BECOME LAW YET – CONSIDER IF THE COURT WILL INTERVENE BEFORE IT DOES ('JUSTICIABILITY')

A Court will generally not intervene before an amending bill becomes law (*Cormack v Cope*), but they may do if:

- (1) the law being amended expressly prohibits a bill being presented to the Governor for assent unless it complies with the prescribed manner and form requirements (*A-G v Trethowan*) or
- (2) where it would not be in the public interest to wait for the bill to become law (*A-G v Marquet*).

Reserve Powers

Does the Governor-General/Governor have the power to do [*particular activity*]?

Settled Reserve Powers ✓

1. COMMISSIONING A NEW PRIME MINISTER

'It is a general convention that the G-G will commission the Prime Minister. The PM will be the leader of the party or coalition that commands the support of the majority of the House of Representatives on matters of confidence and supply.'

1. Confidence: PM has the support of the majority of the House of Representatives (but doesn't require majority support in the Senate – Winterton in *Australian Constitutional Landmarks*).
2. Supply: The PM is able to obtain supply of money to fund government spending by enacting *appropriations legislation*. If PM can't get supply, it becomes *Constitutionally* relevant where:
 - a. Supply actually runs out (cf *Whitlam* – supply was going to run out, but it hadn't actually run out YET); OR
 - b. Where money is being spent without parliamentary appropriation (in contravention of s 83, *Constitution* – cf *Whitlam* – if Whitlam spent money obtained through bank loans to pay public servants (Winterton in *Australian Constitutional Landmarks*)).
 1. Note: Senate has the power to block supply, but by convention, they cannot block supply in order to force a general election (Winterton in *Australian Constitutional Landmarks*).

2. REFUSING A REQUEST TO DISSOLVE THE HOUSE OF REPS BY A PM WHO HAS LOST THE CONFIDENCE OF THE HOUSE OF REPS, WHERE THERE IS ANOTHER PARLIAMENTARIAN WHO DOES HAVE THE CONFIDENCE OF THE HOUSE.

'Where a general election has occurred, and no single party or coalition has won a majority of seats in the house of reps and [...]

1. A government is formed on the basis that minor parties and independents will support it, but the Government then loses the support of those minor parties/independents OR
2. The G-G commissions a PM to form a minority Government but the Government is unable to obtain the confidence of the House on the first sitting day

'[...] the G-G can refuse the PM's request to dissolve the house if satisfied there is an alternative viable government in the current parliament (i.e., other minor party members/independents are willing to support a different party/coalition on matters of confidence and supply).

3. DISMISSING A PM WHO HAS LOST THE CONFIDENCE OF THE HOUSE OF REPS BUT REFUSES TO RESIGN

'The Governor General can dismiss a Prime Minister who has lost the confidence of the House of Reps but refuses to resign and commission a new Prime Minister to either'

1. Form a government; OR
2. Advise the PM to dissolve the house and go to a general election.

Debated Reserve Powers ?

1. DISMISSING A PRIME MINISTER IN THE ABSENCE OF MINISTERIAL ADVICE, WHO RETAINS THE CONFIDENCE OF THE HOUSE OF REPS BUT IS (OR IS PERCEIVED TO BE) ACTING ILLEGALLY.

'However, the *Republic Advisory Committee* has stated that this may be a valid reserve power IF'

1. It is clear that the PM has persisted in breaching fundamental Constitutional principles
2. The PM has ignored calls from the Governor-General to desist (i.e., has been accorded procedural fairness)
 - a. Cf *Lang* dismissal was considered improper by the *Republic Advisory Committee* for lacking procedural fairness.
3. The question of illegality is not justiciable before a court.

2. DISMISSING A PRIME MINISTER WHO RETAINS THE CONFIDENCE OF THE HOUSE OF REPS, BUT IS UNABLE TO OBTAIN SUPPLY FROM THE SENATE AND REFUSES TO RESIGN OR ORDER AN ELECTION

For this to possibly be a reserve power, supply would probably have to actually run out (cf *Whitlam* dismissal) AND G-G would have to ensure procedural fairness and advise the PM that they need to be able to obtain supply.

3. REFUSING A REQUEST BY THE PRIME MINISTER TO PROROGUE PARLIAMENT, WHERE THE PM'S ADVICE TO DO SO BREACHES FUNDAMENTAL CONSTITUTIONAL PRINCIPLES

'However, Anne Twomey has suggested that this may be a valid exercise of reserve power where'

1. The PM is attempting to govern without the confidence of Parliament (breach of responsible government principle).
2. The PM is attempting to govern in a manner contrary to statutory requirements (in breach of the rule of law).
3. The PM is preventing the House from exercising their legislative powers with respect to matters of Constitutional significance (in breach of representative government).
 - a. Example: Boris Johnson's attempted prorogue of Parliament to prevent a vote that would delay the BREXIT deadline was held to be invalid by the UK Supreme Court. This suggests that if a matter concerned issues of confidence with respect to passing legislation that is time critical, this may be a valid reserve power if a similar approach was adopted in Australia.