

# State Legislative Power

**Constitution Act 1975 (Vic) s 16: "The Parliament shall have the power to make laws in and for Victoria in all cases whatsoever"**

State have plenary law-making powers, subject to:

- Limits set out in the Cth Constitution
  - Exclusive power of the Cth
  - S 109 inconsistency

## STEP 1: Scope of Plenary Legislative Power

**Write in exam:** *The legislative capacity of the State Parliaments is to 'make laws for the peace, order and good government (or welfare) of the States.'* Resulting in the State Parliaments having plenary legislative powers (s 16 Vic Cons; s 2AA). However, this is subject to limits in the Com Const (s 106; s 107) and any Restrictive Procedures.

- These provisions confer plenary power, that is, the power to 'complete and unrestricted power to make laws with reference to the State concerns' (Union Steamship)
- The words 'peace, order and good government' are not words of limitation, the court cannot invalidate legislation on the grounds it does not promote this (Union Steamship)
- State legislatures have the power to pass a law which may be immoral or unjust (Durham)
  - I.e. unlike Cth (s 51xxx), no requirement to acquire property on just terms
- State cons are flexible, whereas Com Const is rigid (McCawley)
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## STEP 2: Limitations to Plenary Legislative Power

**1<sup>st</sup> Limitation: Cth Exclusive law-making power:**

**Write:** *State legislative power is subordinated to/subject to the Australian Constitution, which imposes limitation over topics which the Cth has exclusive law-making power*

**Commonwealth exclusive powers**

**States cannot make laws on these matters:**

- **S 52:** Cth has exclusive leg power over seats of government, matters relating to dep of public service, etc.
- **S 90:** customs and excise and production or export bounties
- **S 114:** States may not raise forces, taxation of property of Cth or State
- **S 115:** State not to coin money

**Express limitations on state power**

**Look at the words of the act to; find in notes if applicable:**

- Freedom of interstate trade and commerce

	<ul style="list-style-type: none"> <li>○ <b>S 114:</b> A State shall not impose any tax on property belonging to the Cth</li> </ul>
<b>Implied limitation on state power</b>	<b>Find in notes if applicable:</b> <ul style="list-style-type: none"> <li>○ Freedom of political communication</li> <li>○ The institutional integrity of State courts</li> </ul>
<b>2<sup>nd</sup> Limitation: Inconsistency:</b>  <i>Write: If there is an inconsistency between State and Commonwealth laws, Commonwealth shall prevail to the extent of the inconsistency (s 109)</i>	
<b>3<sup>rd</sup> Limitation: Extra-territorial require nexus</b> <ul style="list-style-type: none"> <li>- <b>S 2(1) of the AA confers power on the states to make ET laws for the peace order and good government of the state</b></li> </ul> <i>Write: State extra-territorial law making is subject to nexus requirement (weak connection is sufficient) (Union Steamship)</i> <ul style="list-style-type: none"> <li>○ States have ET legislative power ( registration of the ship in NSW was a sufficient nexus for the NSW Act to apply to the ship in other waters)</li> </ul> <p><b>Victorian Charter of Human Rights and Responsibilities 2006 (Vic)</b>  Coverage is based on the ICCPR.  An ordinary piece of legislation that is subject to change by parliament and is not entrenched.  Features that safeguard the Charter:</p> <ul style="list-style-type: none"> <li>• Statement of compatibility: s 28(1);</li> <li>• Scrutiny of Acts and Regulations Committee: s 30;</li> <li>• Overriding Charter requires express justification: s 31(1), (2);</li> <li>• Statutory interpretation in line with HR: s 32;</li> <li>• Supreme Court may make declaration of inconsistency: s 36;</li> <li>• Parliament must respond to declaration: s 37;</li> <li>• Public authorities take HR into consideration: s 38.</li> </ul> <p>Features that undermine the Charter:</p> <ul style="list-style-type: none"> <li>• Statement of compatibility not binding: s 28(3);</li> <li>• Parliament can pass legislation even if it contravenes the Charter: s 31(1);</li> <li>• Inconsistency does not impact validity: s 32(3);</li> <li>• Declaration of inconsistency by SC does not create cause of action: s 36(5).</li> </ul> <p>The Charter should be considered in governmental processes in Victoria, however it is a <b>preservation of parliamentary sovereignty</b> as parliament are not bound by it and no repercussions arise if rights are breached.</p>	
<b>STEP 3: Nature of Constitutions</b>	
<i>Write: The Com Const is rigid and difficult to amend, whereas the State Const is flexible and easy to amend through an ordinary amendment bill (Taylor). However, this is subject to any Restrictive Procedures.</i> <ul style="list-style-type: none"> <li>○ <b>McCawley v The King</b> → State Const place only minor constraints on State Parliaments</li> <li>○ <b>Taylor</b> → Plenary legislative power includes the capacity to abolish a House of Parliament</li> <li>○ Legislative Charter of Rights  → Contains Civil and Political Rights</li> </ul>	

→ Legislation can still be passed even if it contravenes the Charter (Override clause s 31(1))

**STEP 4: Restrictive Procedures (Manner and Form)**

*Write: One of the rules of Parliamentary Sovereignty is that Parliament cannot bind its successors, however this is the aim of restrictive procedures. Although the Vic Parliament has plenary legislative power (S 16), s 6 of the Australian Act (AA) provides that laws respecting the constitution powers of procedure (CPP) of Parliament are no effect unless made in such manner and form (M&F) as required.*

**Examples of Restrictive Procedures:**

- Special majority → more than 51% in each house (s 18 (2) VC)
- Referendum requirement → federal constitution (S 18 1B VC)
- Express words → ordinarily you can impliedly amend a law but doesn't expressly do so. Sometimes laws will say parliament can only do so by express words
- Absolute majority → 51% of those eligible to vote, not those who turn up on the day like special majority or simple majority. If you're sick or away you'll be counted as a no (S 18 (2AA) VC)

**Does it meet the manner & form requirement?**

- **First law = the one with the M&F (Restrictive Procedures)**
- **Second law = the one proposing to amend/repeal first law**

**Step 1:**

**Is the first law doubly entrenched and mandatory?**

- In order to be valid, a manner and form provision must itself be entrenched or else the provision can be repealed by the normal procedure (Trethowan)
  - Look for self-referential language (e.g. S7A(6) in Trethowan): "requirement that QLD LC cannot be abolished except by referendum itself may not be altered except by referendum"
  - NSW Consti added s7A which declared legislative council could not be abolished without referendum and 7a(6) said that 7a could not be repealed without referendum
  - This is an example of double entrenchment
  - **Another example is 'no bill to amend or repeal any provision in this act may be presented for Royal Assent unless approved at referendum'**
  - **S 128 Cth Const protects entire constitution, thereby protecting itself**
  - **If not entrenched, can be amended by ordinary procedure**

**Step 2:**

**Is the first law mandatory or merely directory?**

- If directory, compliance with RP not required
- If mandatory, compliance required
- Usually inferred from language: "must/shall v may/can"
- Not directory: "may/can"

**Step 3:**

**Is the RP valid (not too onerous or an abdication of legislative power)?**

**Not an abdication of power (Westlakes)**

	<ul style="list-style-type: none"><li>○ Cannot amount to deprivation of power or an abdication of power (<b>West Lakes</b>)</li><li>○ Must retain the representative character of the legislature: i.e. not assent of private corporation</li></ul> <p><b>Not too onerous</b></p> <ul style="list-style-type: none"><li>○ Cannot be so strict that it prevents compliance (<b>West Lakes</b>)</li><li>○ A requirement for a referendum is a valid RP. Most democratic way to pass legislation (<b>Trethowan</b>)</li><li>○ Requirement for the consent of a non-representative extra-parliamentary body is not a valid RP- unjustified fetter on parliamentary power (<b>West Lakes</b>)</li><li>○ If too onerous- compliance not required</li></ul>
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