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Topic 3: MAKING STATE CONSTITUTIONS RIGID – MANNER AND FORM REQUIREMENTS

- **Definition:** A manner and form (M&F) requirement or a restrictive procedure (RP) is a condition which existing legislation imposes upon the process of lawmaking (*Trethowan*)

Is the Restrictive Procedure binding?

1. Does the first Act (RP) purport to control the future passage of legislation?

- RPs are ordinarily not binding due to the ideas of Parliamentary Sovereignty and the plenary power of the States (*Union Steamship; Australia Acts s2*)
- EXCEPT RPs are binding where **s6 of the Australia Acts** applies; that is, s6 allows for a limit on the plenary power of a state parliament by requiring laws that have been stated that can only be amended by way of satisfying specific manner and form requirements, can only be amended by satisfying such manner and form requirements

2. Is the RP provision (in the first law) doubly entrenched?

- The provision of the Act containing the RP must itself be covered by the RP in order for the RP to be effective (*Trethowan*)
 - Double entrenchment is required otherwise due to the plenary power of state parliaments, there could be implied repeal of earlier contradictory pieces of legislation, so the entrenchment would be of no value (*McCawley*)
 - Look for phrases like “... this Act/ any provision in this Act/ this section may not be amended unless...”
- The RP must also be mandatory (*Trethowan*)
 - Look for phrases like “this Act mandates” or “may not be amended without...”
- NO: the RP can be repealed by using standard legislative procedures and the RP will not be binding
- YES: RP MAY be binding

3. Is it a permissible RP? (i.e. Is the RP truly a M&F provision or is it an abdication of Parliament’s power?)

- Ask: Could this section ever realistically be changed?
- The RP cannot curtail future Parliaments’ lawmaking ability with too onerous of a RP
 - If the M&F is so onerous that a later parliament could not alter the provisions at all, the courts will strike out the provision as it offends Parliamentary Sovereignty (*Trethowan*)
- Permitted RPs include:

- Referenda (as the people are the source of parliament's legitimacy) (*Trethowan*)
- Absolute majority (*Marquet*)
- Special majority (*Harris*)
 - The validity of special majorities could be an issue as a M&F requirement (*Westlakes per King CJ in obiter*) as it may be tantamount to a permanent constraining of legislative power as it could not be realistically amended
 - However, a more onerous special majority may be tolerated for a more "important" issue (i.e. look at the subject matter) (*Westlakes per King CJ in obiter*)
- A M&F requirement that requires the consent of an extra-Parliamentary body in order to pass certain legislation will NOT be effective, as it would amount to an abdication of power (*Westlakes per King CJ*)
- True M&F: MAY be binding
- Abdication: NOT binding as it offends Parliamentary Sovereignty

4. Is the RP binding because of s6 of the Australia Acts or as a "pure procedure or form"?

- Law 1: must contain a restrictive procedure (manner and form provision); and
- Law 2 (the law that the M&F seeks to restrict the amendment of): must be about the 'constitution, powers or procedure' of Parliament (*Trethowan; Australia Act s6*)
- The meaning of a CPP law: (*Trethowan*)
 - Constitution refers to Parliament's own nature and composition (*Marquet; Trethowan; Taylor*)
 - Laws dealing with elections (i.e. electoral boundaries, voting techniques) affect the constitution of the parliament (*Marquet*)
 - The "constitution" of the Parliament extends to features which go to give it, and its houses, a representative character (*Marquet*)
 - Includes the composition of the Parliament
 - Powers refers to a law concerning Parliament's own legislative authority
 - Procedure refers to the rules and procedures relating to Parliament's own internal conduct
- YES: Law 2 must comply with the RP, otherwise it will be invalid
- NO: RP is not binding