

Topic 3

(State) Parliamentary Sovereignty vs Constitution

1. Subject to the *Constitution*, Australia Acts (and Statute of Westminster), state parliaments enjoy plenary power (***Union Steamship v King***)
2. Constraints on state legislative power
 - a. Exclusive Cth legislative power (***Constitution s52***)
 - b. Concurrent powers with Commonwealth (s51) + Cth prevails (s109)
 - i. s51 *Constitution*: powers enjoyed concurrently by states and Cth
 - ii. s109 *Constitution*: However, if Cth and State laws conflict, then to extent of inconsistency, Cth laws prevail over state laws.
 - c. M&F restrictions (*addressed later*)
3. Not constraints on state legislative power
 - a. 'peace, order and good government'?
 - i. NOT words of constitutional limitation, rather a conventional formula connoting widest possible discretion to parliament's law-making power (***Union Steamship v King***; reaffirmed in ***Kable and Durham Holdings***)
 - b. fundamental common law rights?
 - i. Identified but expressly reserved (***Union Steamship v King***; ***Durham Holdings***)
 - ii. no – obiter by Dawson J (***Kable***)
 - c. Courts?
 - i. state laws cannot be challenged on basis that it is contrary to interests of the people, unfair or unjust (***Durham Holdings***)
 - ii. state laws not struck down merely because it is contrary to human rights (***Australian Communist Party v Cth***)
 - iii. principle of legality – however, courts will interpret parliamentary acts under rebuttable presumption that parliament does not intend to take away fundamental rights
 - d. extra-territoriality?
 - i. Not a restriction
 - ii. states can legislate laws with extraterritorial application, but only if subject of legislation bears some connection to the enacting state (***Pearce v Florenca***; ***Polyukovich v Cth***)

Cth Parliament

1. Compared to State parliaments which enjoy plenary power, Cth parliament's powers are enumerated – Cth parliament can only legislate under one of the heads of powers in *Constitution*
2. Constraints
 - a. can only legislate under heads of powers