

宪法考试笔记

只涉及州	<u>一部州法律试图修改州宪法，州法律是否有效</u>	州立法权：manner and form 【只有限制性程序条款不能改】
	<u>州法院和州议会（机构完整性）</u>	Institutional integrity of the courts
只涉及联邦	<u>联邦法律是否有效</u>	定性，head of power
	<u>联邦法律是否能管公司的某个行为</u>	Corporation power s51(xx)
	<u>联邦法律是否遵守了国际条约</u>	External affairs power s51xxix
	<u>宪法没明文授权但看起来是国家级的事情，涉及配套立法</u>	Nationhood power
	<u>联邦直接花钱</u>	Appropriation, expenditure
	<u>一个很像法院但不是法院的 tribunal 在做决定：一段立法包含好几种权力</u>	Separation of judicial power
同时涉及州和联邦	<u>联邦给州花钱</u>	Grant s96
	<u>一个联邦法，一个州法看是否冲突【可能需要先定性】</u>	Inconsistency
	<u>一部法律能不能约束另一级政府（州法约束联邦；联邦法约束州）</u>	Intergovernmental immunities
其他	<u>限制某种表达/沟通/行为</u>	IFPC

一、state legislative power 【manner and form】

题目通常是：第一部州法律规定了限制性程序条款，第二部州法律试图修改第一部法律。问题是，第二部州法律是否有效？

1. 第一句话

Ordinarily, restrictive procedure not binding. But can be made binding if 【second law】 relates to 'constitution, power or procedures of Parliament' (*Australia Acts 1986 s6*) 【第一部通常与程序无关，只有第二部与程序有关才 binding，否则不 binding】

2. Manner and form

(1) 第一部法律的条款是否 doubly entrenched 【看措辞】【有没有锁住自己？】

措辞	结论
"this Act shall not be amended unless..."	✓ 设防 ("this Act" 当然包含本条)
"section 10... or this Act"	✓ 设防 (她说这是"藏在里面为难读得太快的人"的)
"s 7A(6): 本条要求非经公投不得废除"	✓ 设防 (NSW 的标准写法)
"非经三分之二多数不得修改 s 23" (只提 s 23)	✗ 未设防

如果满足该条件往下走:

Section [X] provides that "[quote the operative words]". The phrase "[key words]" extends the requirement to s [X] itself. Section [X] is therefore doubly entrenched

不满足停止:

Section [] restricts only amendments to s []; it says nothing about itself. Parliament could therefore repeal s [] by ordinary process and amend s [] in the same Bill.

(2) 第一部法律是否 impose mandatory manner and form requirements (Clayton)

- ◆ Dose the restrictive procedure not amount to an abdication of power? 是否构成权力的放弃
 - Consent of extra-parliamentary body prima facie abdication: *West Lakes* 一旦出现议会以外的第三方机构的同意就构成【公投不算】

未构成 (议会内部程序)

The procedure requires only [an absolute majority / a special majority of 60% / a referendum]. It operates within the parliamentary process and does not require the consent of any extra-parliamentary body. No abdication arises.

构成 (第三方同意)

The procedure requires the consent of [X]. Consent of an extra-parliamentary body is prima facie an abdication of power: *West Lakes*.

公投的区分 (出现公投就写这句)

A referendum requirement is not an abdication: Parliament represents the people, so the requirement returns to the source of its authority rather than conferring a veto on an outside body: *West Lakes*.

- ◆ 是否苛刻到剥夺议会实际对第二部法律的立法权 Procedure so restrictive as to deprive Parliament of power 【可以考虑这个要求针对的是什么内容，如果是议会的组成要求公投比较正当，如果关于一份商业合同则要求公投难以正当化】

- 特别多数 (60%)、绝对多数 → 一般没问题，她说这些“相当标准”
- 全体居民 90% 多数 → 技术上不可能，无效

通过

A [60% special majority / absolute majority] is a standard restrictive procedure. It makes amendment harder but not impossible, and does not deprive Parliament of effective legislative power.

不通过

The procedure requires [90% of all residents]. This could not realistically be satisfied, and so deprives Parliament of effective power to legislate. A procedure may be onerous but not impossible.

灰色地带 — 加相称性论证 【主要看是针对什么事项】

a more onerous requirement is more readily justified for a fundamental democratic feature than for [a commercial contract / a minor administrative matter]: *West Lakes*. Here the subject is [X], and the requirement is therefore [defensible / difficult to justify].

- ◆ 限制的是过程还是内容
 - 若要求第二部法律必须使用特定措辞才生效——这不是限制性程序，而是在改变法律本身。
 - 这一支在题目里出现频率较低，但看到“必须包含以下文字”之类的要求就要警觉。

The requirement regulates how the amending law must be passed, not what it may contain. It is procedural.

- (3) **第二部州法律: is it with respect to the composition, powers or procedure of parliament?**

Composition includes representative nature of parliament: Marquet

类别	涵盖	题目里的样子
Composition	院数、组成、各院成员数	废除上议院、改变议员人数
Composition (扩展)	议会的代表性特征: Marquet	选区划分、选举法 (须显著改变代表性, 细微变更不算)
Powers	议会的立法权	最容易判断的一项
Procedure	议会内部程序	议事规则 (standing orders)

The later law [] . It does not touch the number of Houses, their composition, Parliament's legislative powers, or its internal procedures. It therefore falls outside s 6, and the s[] requirement cannot bind Parliament

(4) Did **第二部州法律** comply with the manner and form requirement?

图上把它放在最后, 但她课上说过: 这其实可以放到最前面当捷径——如果第二部法律实际上已经遵守了程序要求, 那前面全部无关紧要, 法律有效

即使已遵守, 通常仍值得简要论证该程序是否有效——因为如果程序无效, 遵守与否根本不重要, 结论的理由不同。视分值决定写多细。

二、【某个行为是否可以被 corporation power 支持】corporations power 【s 51(xx)】

1. 识别是否为 corporation power, 所有与 corporations power 相关的法律条文列出来一条条分析属于 core 还是 incidental

[s X] might be supported by the corporation power (s 51(xx)). Heads of power are construed broadly (Jumbunna).

Here, [法律条款] requires [公司]to[义务责任/权利], which might fall within the corporations power. (Fairfax)

【立法目的的不相关】Although the purpose of [法律条款] is [], it is irrelevant to characterization (Murphyores).

2. constitutional corporation? 【一个公司可以同时满足以下好几个】【事实不足的时候可以说不需要什么】

- 【无需是 trading 或 financial】Foreign corporation (Queensland Rail)

[] is a corporation, as it has the legal attributes of a legal person (Queensland Rail). As it is incorporated overseas, it is a foreign corporation.

- 【活动测试不一定超 50%, 20%也可】Trading corporation (Tasmania Dams)

[] is a corporation (Queensland Rail). As [], its trading activities are likely a 'substantial' or 'sufficiently significant' part of what it does, so it is a trading corporation (Tasmania Dams).

- **【必须涉及交换钱，金融咨询不算】 Financial corporation (State Superannuation Board)**

[] is a corporation (Queensland Rail). As [], its transactions involve financial exchange, and these are likely a 'substantial' or 'sufficiently significant' part of its activities, so it is a financial corporation (State Superannuation Board).

- **Shelf company (Fencott)**

[] carries on no activities and is a shelf company. Where there are no activities, character is determined by purpose (Fencott). As [], the objects in its constitution are likely [], so it is a [trading/financial] corporation.

- **不是明显的公司但有特征，即便立法否认也属于公司**

Capacity to sue and be sued

Capacity to enter into contracts

Capacity to own property

Even if legislation purports to deny it status as a body corporate: **Queensland Rail**

3. core scope? **【条款直接作用于公司吗?】**

- **WorkChoices (直接指向)**

As [the law] singles out [the subject] as the object of command, it is valid regardless of what it regulates (**WorkChoices**).

- **Actors Equity (间接义务，直接作用于法人) 【和 incidental 有一点重合】**

Although [the law] does not single out [the subject], it directly operates on [the subject] by regulating [], and is therefore valid (**Actors Equity; WorkChoices**).

【比如不允许工会组织活动抵制法人】

如果被管理的主体对法人影响不大，直接看下一步，比如管理承包商之间的合同

4. Incidental scope? **【是 incidental power 吗】**

As [the law] does not directly target [the subject], the incidental power must be considered, and it must be reasonably connected to the core power.

- **法律作用到人: 【内部事务，人员组成，或者其他对公司有影响的人】**

As [the person's] conduct affects the corporation's activities, functions, relationships or business, [the law] falls within the incidental power (**WorkChoices**).

- **法律作用到合同:**

As [], [the law]'s regulation of the contract has a definite significance for the corporation, unlike **Dingjan**, so it falls within the incidental power.

- 用来对比的案例:

Actors equity: 行为直接损害法人

Fencott: 受害者直接向公司背后的高管（自然人）追讨损失

Dingjan: 法律试图管辖任何“涉及到公司利益”的合同，哪怕合同双方都是普通人（无效）

Work choices: **【read down】** 联邦想管那些给公司提供服务的独立承包商。如果承包商正在为公司干活，那联邦就能管；如果承包商回自己家干私活，联邦就不能管。只要把它限制在“为公司提供服务期间”，就属于附带权力。

As []'s effect on the corporation is limited to the period of working with it, the provision may be valid if read down per Work Choices, and invalid otherwise.

5. **【不能管的内容】 formation or incorporation of companies?**

Invalid: incorporation cases

公司设立不能管——**incorporations case**

6. **Consequence? 如果该条款违宪怎么办**

If [s X] is beyond power it is void ab initio (though presumed valid until so held). It may be saved by [reading down — if it has a valid and an invalid meaning, the valid one is adopted / severance — if [s X] can be removed without affecting the rest / partial disapplication — if its invalid application can be read out]. Here [____].

违宪: void ab initio **【法院作出裁决之前法律被推定有效】**

Reading down 限缩解释: 如果存在两种或以上可能的解释，其中一种合宪、一种不合宪，那么你就采取使它合宪的那种解释。

Severance: 不影响其他条款的情况下切除某个条款

Partial Disapplication: 部分不适用。对某些事实或情形部分地不适用该含义

三、external affairs power (s 51 (xxix))

external affairs power 包括什么

- ◆ 识别是否为 external affairs power，所有与 external affairs power 相关的法律条文列出来一条条分析属于 core 还是 incidental

[s X] might be supported by the external affairs power (s 51(xxix)). Heads of power are construed broadly (Jumbunna).

Here, [法律条款] requires [] to [义务责任/权利], which might fall within the external affairs power. (Fairfax)

Although the purpose of [法律条款] is [], it is irrelevant to characterization (Murphyores).

◆ 开头句: Under Tasmanian Dams, the Commonwealth can implement any treaty regardless of subject matter.

◆ 第二步: 考虑所有涉及的 external affairs power。先考虑前三条是否用得上, 简要说明后再转向国际条约的分析。

1. relations with other countries: 和其他国家/国际组织/国际法人的关系 Sharkey

2. Extraterritorial power: 有一方在澳洲境外【地理位置】。

Polyukhovich: 澳洲移民在乌克兰

XYZ: 澳大利亚人在其他国家性犯罪

3. Matters of 'international concern'? 没有签国际条约, 发生在澳洲境内, 国际关切。全球变暖, 基本人权, 国际反恐等

4. Implementation of treaties【重点】

● Are【题目中的联邦法律】'bona fide'?【快速带过】

Although a treaty entered into merely as a means of conferring legislative power is not bona fide, there is no evidence that this requirement is unmet here (Koowarta).

通常没问题, 但可以考虑法律通过的时间和州法或者其他被限制事件的时间, 也许有问题

● Does【题目中的法律】contain an obligation?

the High Court has not decided definitively that the treaty must impose so-called obligations. (ILO)

a) 是否是 treaty 或 convention, 其他一律推定无 obligation

b) 是否有相关词汇, shall (但是 shall endeavor 是愿景性的), must, should, 没有很可能无义务

c) 有义务—有效 Dams, Richardson

d) 无义务/无 treaty 或 convention—分析【此时题目一般有至少三个文书, 一个需要分析的法律, 一个 soft law, 一个背后的条约】

➤ 【incidental】虽然不是条约, 但有紧密联系, 实质上是在解释, 细化, 辅助保障条约内容—有效 Richardson [前提是背后的条约有义务]

Richardson: 世界遗产公约没有囊括进来的森林, 联邦政府是否有义务保护, 既然不是在履行条约, 则通过的法律就无法获得 external affairs power 的支持

Although [] is not a treaty or convention, its requirement to [] assists in securing the implementation of [], and the treaty imposes an obligation on [], so [] may fall within the incidental power.

➤ 【不构成 incidental—unsettle】没有义务, 且与条约没有紧密联系—分歧 Dams

The [recommendation] is soft law and imposes no obligation; nor is there any underlying treaty to connect it to, so it neither constitutes an obligation nor falls within the incidental scope.

Whether it is still supported by the external affairs power turns on an unsettled question. The High Court split 3:3 on this in *Dams*, and the ILO case avoided resolving it.

The outcome is therefore uncertain and depends on the position the Court takes. On the "obligation required" view, the law is invalid; on the contrary view, it may be valid.

● **Is 【题目中的 treaty】 'sufficiently specific'? ILO case 【重点】**

- a) Must be some direction in treaty on how to achieve aims of treaty.
- i. Look at the language of the treaty 条约的措辞是笼统的宣示，还是有具体的行动指引？
 - ii. How much discretion is given to signatories? 裁量越大 → 条约越不具体 → 越可能不够 specific。
 - iii. how many ways are there to implement the obligation? 实现方式越多 → 条约越不具体。
 - iv. Is there international consensus on how to achieve the obligation? 如果国际社会对实现方式已有共识，即使条约文本本身较宽，也可能补足特定性。

● **Conformity 【重点】 题目分析的法律和条约是否一致 【引言不违反 preamble】**

第一步：找到条约中被援引的具体条款 → 条约要求做什么？禁止什么？

第二步：逐条对照国内立法的具体条款 → 这部立法的每个条款是否都能在条约中找到对应的依据？【看是否与条约有充分联系，比如关于保护世界遗产地的国内立法，禁止砍树和建坝关联明显，但是禁止举办商业活动就没什么联系】

第三步：对每个条款问： → 这条立法是否 "reasonably capable of being considered appropriate and adapted" to implementing the treaty? Deane J in *Dams and majority in ILO*

第四步：注意部分落实的可能性 → 不需要全部落实，但已落实的部分 必须与条约保持一致 → 超出条约范围的条款 → 可能无效

第五步：结论 → 哪些条款有效，哪些可能超出权力范围 → 这是整个答案中最需要细节分析的部分

◆ 第三步：如果无效怎么办

If [s X] is beyond power it is void ab initio (though presumed valid until so held).