ANSWER GUIDE AND FLOWCHARTS – BY TOPIC

WEEK TWO – CONSTITUTIONAL AMENDMENT

Manner and form – amendment of state constitutions

Manner and Form Guide

Remember to constantly reflect on what the question is asking, as well as following the steps.

A. Does the **amending law** seek to amend or repeal an **entrenched provision** contrary to the requirements of the **entrenching provision**?

<Amending law> seeks to **<amend/repeal>** the **<entrenched provision>**

contrary to the requirements of the **<entrenching provision>**

because **<list ways the amending law does not meet the manner and form requirements of the entrenching provision>**

B. Is the **entrenching provision** doubly entrenched?

YES

<Entrenching provision> is protected through the double entrenchment of the manner and form requirements which protect **<entrenched provision>**,

because **<explain the words in the provision that provide double entrenchment>.**

Therefore **<entrenched provision>** cannot be **<repealed/amended>** by ordinary legislation,

because **<amending law>** cannot impliedly **<repeal/amend>** the **<entrenching provision>** without satisfying the manner and form requirements of **<list requirement needs to satisfy>.**

GO TO C

NO

<Entrenching provision> is not protected through the double entrenchment of the manner and form requirements which protect **<entrenched provision>**,

because **<explain how there is nothing in the provision that extends the manner and form requirements to the entrenching provision>.**

Therefore **<entrenched provision>** can be **<repealed/amended>** by ordinary legislation,

because **<amending law>** can impliedly **<repeal/amend>** the **<entrenching provision>** without satisfying the requirements of **<list requirement needs to satisfy>.**

McCawley v The King (1920): High Court majority held a later law must expressly repeal an earlier law in State Constitutions, because they have a higher status than ordinary laws. This was overturned by the Privy Council which found State Constitutions could be impliedly repealed because they're not rigid or controlled.

STOP

C. Is the **entrenching provision** actually a purported abdication of legislative power?

YES

<Entrenching provision> requires the permission of **<external body mentioned in entrenching provision>** to **<repeal/amend>** the **<entrenched provision>.**

West Lakes Ltd v SA (1980): A provision requiring the consent of an entity not forming part of the legislative structure (including the people whom the members of Parliament represent) does not prescribe a manner or form of lawmaking, but is rather an abdication of legislative power.

As per **<s6 of the Australia Act or s5 of the CLVA>,** the parliament needs to make has no capacity to abdicate its power, so **<entrenching provision>** is ineffective and <**entrenched provision>** can be repealed by ordinary legislation, i.e. the <**amending law>**, without having to satisfy the requirements of <**entrenching provision>**.

STOP

NO

<Entrenching provision> cultivates legislative power within the parliament (including the people they represent, i.e. a referendum) and does not purport to abdicate its lawmaking power to an external body.

This is consistent with **<s6 of the Australia Act or s5 of the CLVA>,** therefore the requirements of **<entrenching provision>** to **<repeal/amend>** the **<entrenched provision>** are true manner and form provisions and cannot be repealed by ordinary legislation, i.e. the <**amending law>**.

GO TO D

D. Does the nature of the **amending law** concern how the Parliament or its Houses are comprised?

YES

<**Amending law>** "respects the constitution, powers or procedure of the Parliament of the State", in that **<describe how the amending law concerns how the Parliament or its Houses are comprised>.**

Attorney-General (WA) v Marquet (2003)
The constitution of Parliament is likely to include provisions regarding voting systems and electoral redistributions: 'One must look to the features which go to give [the Parliament] and its Houses a representative character'.

Taylor v Attorney General (QLD) (1917)
Legislature must remain representative as per s5 CLVA or s6 AA, but High Court held that a law trying to abolish the Legislative Council was not prohibited by the Constitution's definition of 'representative', despite its reference to Houses.

Therefore, the effectiveness of the manner and form provision of **<entrenching provision>** is supported by **<s6 of the Australia Act or s5 of the CLVA>** and applies to **<amending law>.**

GO TO E

NO

<**Amending law>** does not "respect the constitution, powers or procedure of the Parliament of the State", in that **<describe how the amending law does not concern how the Parliament or its Houses are comprised, e.g. it relates only to the judiciary, or local government, or another subject>.**

South-Eastern Drainage Board (SA) v Savings Bank of SA (1939)
Amending act did not meet manner and form requirement of stating 'notwithstanding the provisions of the *Real Property Act'*, but it still applied because it was not an act with "respect the constitution, powers or procedure of the Parliament of the State".

Therefore, the effectiveness of the manner and form provision of **<entrenching provision> is** not supported by **<s6 of the Australia Act or s5 of the CLVA>** and does not apply to **<amending law>**, so **<entrenched provision>** can be repealed by ordinary legislation, without having to satisfy the requirements of <**entrenching provision>**.

STOP

E. When was the **amending law** made and what are the **consequences** of a breach of the manner and form provision?

*NB Doesn't matter when **entrenched provision** or **entrenching provision** were enacted or entrenched.*

BEFORE 3 MARCH 1986

Section 5 of the Colonial Laws Validity Act 1865 (Imp) applies because **<amending law>** was made before 3 March 1986.

Because **<amending law>** breaches the manner and form provision of **<entrenching provision>** as previously established, the State Parliament has no power to enact **<amending law>** in its entirety, as per s5 Colonial Laws Validity Act 1865 (Imp).

Therefore, **<amending law>** is invalid.

ON OR AFTER 3 MARCH 1986

Section 6 of the *Australia Act 1986* applies because **<amending law>** was made on or after 3 March 1986.

Because **<amending law>** breaches the manner and form provision of **<entrenching provision>** as previously established, the entire **<amending law>** is of 'no force or effect', as per s6 *Australia Act 1986*.

Therefore, **<amending law>** is invalid.

F. Justiciability: when should the court intervene?

The limit of the court's ability to exercise its judicial authority in regards to invalid legislation is not undoubtedly stated.

In *Cormack v Cope*, the court declined to intervene before the completion of the legislative process, observing that a law passed by the Parliament could be declared invalid.

This could have been perceived as an issue of jurisdiction or discretion, but….

BEFORE BILL BECOMES LAW

…in this instance there is no reason for court to intervene before the Governor gives assent to **<amending law>**, because:

- There are no provisions in **<entrenching provision>** that expressly prohibit **<amending law>** being presented to the Governor unless it complies with the manner and form procedure of **<requirement in entrenching provision>.**

In *Attorney-General (NSW) v Trethowan* (1931), the entrenched and entrenching provisions could not be repealed 'except by a Bill approved at a referendum before it is presented for the royal assent'.

- It would not impinge the public interest to wait until **<amending law>** received assent.

AFTER A BILL BECOMES LAW

…in this instance there is prevailing case law that would compel the court to intervene before the Governor gives assent to **<amending law>**, because:

- There are provisions in **<entrenching provision>** that expressly prohibit **<amending law>** being presented to the Governor unless it complies with the manner and form procedure of **<requirement in entrenching provision>.**

In *Attorney-General (NSW) v Trethowan* (1931), the entrenched and entrenching provisions could not be repealed 'except by a Bill approved at a referendum before it is presented for the royal assent'.

- It would impinge the public interest to wait until **<amending law>** received assent.

This is unlike *Attorney-General (WA) v Marquet* (2003), where the court agreed to hear a challenge regarding an electoral redistribution Bill before it was presented to the Governor for assent, because of the public interest in certainty in electoral laws and validly elected Parliaments. Also, all parties agreed to the challenge.

- Remedies are easily available if **<amending law>** is enacted and repealed, namely **<list potential remedies, i.e. state how everything the amending law would enact is reversible without lasting consequence>**.

This is again in contrast to *Marquet*, where a potentially invalid, uncertain and costly election would have been held if the court hadn't interfered before the Bill became law.

This is similar to *Attorney-General (WA) v Marquet* (2003), where the court agreed to hear a challenge regarding an electoral redistribution Bill before it was presented to the Governor for assent, because of the public interest in certainty in electoral laws and validly elected Parliaments. Also, all parties agreed to the challenge.

- Remedies are not easily available if **<amending law>** is enacted and repealed, namely **<list barriers to potential remedies, permanent consequences>.**

This is in accordance with *Marquet*, where a potentially invalid, uncertain and costly election would have been held if the court hadn't interfered before the Bill became law.

G. Are there any **other sources** of entrenchment?

The grounds on which provisions of state constitutions can be effectively entrenched, other than s6 of the Australia Acts, is unclear.

There are three possible legal grounds (other than s6) for enforcing a manner and form provision:

1. **Reconstituted Legislature**

A State Parliament has the power to reconstitute itself for special purposes.

Attorney-General (NSW) v Trethowan (1931)
Rich J relied on s5 of the CLVA to hold: "The constitution of the legislative body may be altered; that is to say, the power of legislation may be reposed in an authority differently constituted". Today, this power is found in found in s2(2) of the Australia Acts 1986, in the general grant of State Parliaments to make laws for the "peace, order and good government of the State".

There is judicial support for the idea that laws may be entrenched by vesting the power to repeal or amend them in a reconstituted legislature.

Attorney-General (NSW) v Trethowan (1931)
Rich J at [420]: "…a legislative body has been created for the purpose of passing or co-operating in passing a particular law… The electors are called upon to approve or not of a certain class of Bill. In so doing they discharge a function of law-making."

Explanation: Where there is a referendum requirement, the legislature is reconstituted so that the newly constituted legislature comprises both houses (or one in Queensland) of the original legislature, the electorate and the Governor. The electorate is added as if it were another chamber. The original legislature no longer possesses the necessary power to enact relevant laws and, provided the requirement is doubly entrenched, cannot recall the power. Thus there is an argument this is a source of manner and form.

2. The Ranasinghe Principle

The Privy Council held that once there is a written constitution with a special amendment procedure, the constitution, not the Parliament is supreme. This was in relation to the Constitution of Ceylon, a unitary state, to which the CLVA did not apply.

Bribery Commissioner v Ranasinghe (1965)
[197] 'a Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'.

Gibbs J suggested this might be a source of manner and form in 1975.

But since the Australia Acts, this has become doubtful.

McGinty v Western Australia (1996)
Gummow J: "the propositions that a manner and form provision which appears in the written constitution of a unitary State where no paramount law, such as s5 of the 1865 Act, remains in force, continues to place a restraint upon law making, and that the question of the observance of the restraint is justiciable."

Justiciable in this instance: arguable.

3. s106 of the Commonwealth Constitution

Section 106 of the Commonwealth Constitution provides:

> *The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.*

There are two possible interpretation of the last phrase:

1. That it provides a constitutional guarantee that any manner and form provision prescribed by a State Constitution for its own amendment, must be observed whether or not any other legal basis exists for its enforcement.
    - This interpretation would only make manner and form provisions binding if:
        - □ The entrenching provision is in the state constitution; and
        - □ The amending law is seeking to repeal/amend elements of the constitution itself and not some other piece of legislation.
2. That it merely ensures the maintenance of state constitutions as they exist from time to time and subjects them to the Commonwealth Constitution.
    - This interpretation of s 106 does not provide an independent basis for enforcing entrenching provisions in state constitutions.

McGinty v Western Australia (1996)
Gummow J argued that s106 meant until so altered as not to contravene any otherwise binding requirements of the Constitution of the State. If a manner and form provision is not made binding by a higher law, such as s6 of the Australia Acts, then s106 gives it no greater force.

Attorney-General (WA) v Marquet (2003)
The majority noted that s106 was "subject to this Constitution" and therefore subject to s51(xxxviii), which supports s6 of the Australia Act.

The purpose of s51(xxxviii) is to ensure that residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States.

Because section 106 is subject to the rest of the Constitution, the Court regards s106 by the guiding principle of s51(xxxviii), i.e. to preserve of the States and their capacity to function as independent units of the federation, rather than limiting Commonwealth powers.

s51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xxxviii): The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Court of Australasia.

Essentially, if s6 covers all cases in which a manner and form provision is binding, then s106 cannot be used to supplement it.

Other sources of entrenchment are not certain

Recent case law has made it very clear that other legal grounds for enforcing a manner and form provision (reconstituted legislature, Ranasinghe, s106) cannot supplement the Australia Acts in the field in which they operate.

Attorney-General (WA) v Marquet (2003)
Gleeson CJ, Gummow, Hayne and Heydon JJ: "the express provisions of s6 [of the Australia Acts] can leave no room for the operation of some other principle, at the very least in the field in which s6 operates, if such a principle can be derived from considerations of the kind which information the Privy Council's decision in *Bribery Commissioner v Ranasinghe*and can then be applied in a federation."

There remains a small possibility that these other legal grounds for enforcing manner and form provisions could operate outside that field (whatever that may be), although probably not in Australia because it's a federation and we don't have unitary States.

EXTENDED MANNER AND FORM CASE LIST

B. Double entrenchment

McCawley v The King (1920): A later law that is inconsistent with an earlier law impliedly repeals or amends the earlier law.

Background: A High Court majority held a later law must expressly repeal an earlier law in State Constitutions, because they have a higher status than ordinary laws. This was overturned by the Privy Council which found State Constitutions could be impliedly repealed because they're not rigid or controlled.

C. Abdication

West Lakes Ltd v SA (1980)*:* A provision requiring the consent of an entity not forming part of the legislative structure (including the people whom the members of Parliament represent) does not prescribe a manner or form of lawmaking, but is rather an abdication of legislative power.

A bill was prepared to amend an Act to state that a developer's consent was not required. The developer sought an injunction. Supreme Court held that contracts cannot bind a Minister or MP to prevent them introducing bills or voting on legislation. The requirement of consent was not a manner and form provision, it was a purported abdication of power.

D. Nature of amending law

Attorney-General (WA) v Marquet (2003): The constitution of Parliament is likely to include provisions regarding voting systems and electoral redistributions: 'One must look to the features which go to give [the Parliament] and its Houses a representative character'.

Background: WA law about electoral redistributions could only be amended by a law passed with absolute majority in both Houses.

Taylor v Attorney General (QLD) (1917): Legislature must remain representative as per s5 of the CLVA or s6 of the Australia Acts, but the High Court held that a law trying to abolish the Legislative Council was not prohibited by the Constitution, despite its reference to Houses.

Background: Queensland set up a deadlock procedure allowing bills that are blocked by the Legislative Council to be put to a referendum. A Bill to abolish the Legislative Council was duly blocked and the Bill failed at referendum. High Court held that the abolition of the Legislative Council was a matter relating to the Parliament and therefore afforded the protection of manner and form constraints. Legislature must remain representative as per s5 of the CLVA or s6 of the Australia Acts, but the High Court found that a law trying to abolish the Legislative Council was not prohibited by the Constitution's definition of 'representative'.

South-Eastern Drainage Board (SA) v Savings Bank of SA (1939): An amending law does not need to comply with manner and form provisions if it is not with "respect the constitution, powers or procedure of the Parliament of the State".

Background: Amending act did not meet manner and form requirement of stating 'notwithstanding the provisions of the Real Property Act', but it still applied because it was not an act with "respect the constitution, powers or procedure of the Parliament of the State". Important to apply this test to the amending law only, not the entrenched or entrenching provisions.

F. Justiciability

Cormack v Cope: The Court can decline to intervene ahead of the completion of the legislative process, observing that a law passed by the Parliament could then be declared invalid.

Background: Two senators in the High Court asked for an interlocutory injunction to restrain a joint sitting, which the court declined to interfere with for the above reason. Additionally, the State of Queensland issued a separate writ seeking a declaration that the Petroleum and Minerals Authority Bill was not a proposed law under s57, which was refused for lack of standing.

Attorney-General (NSW) v Trethowan (1931): The Court can agree to hear a challenge to a potentially invalid law ahead of the completion of the legislative process, if there are provisions that expressly prohibit a Bill being presented to the Governor unless it complies with a manner and form procedure.

Background: NSW government entrenched the Legislative Council in 1929 so it could not be abolished without a referendum. The next government sought to abolish the Legislative Council without a referendum. The entrenching provision explicitly included a requirement that the entrenched and entrenching provisions could not be repealed 'except by a Bill approved at a referendum before it is presented for the royal assent'.

Attorney-General (WA) v Marquet (2003): The Court can agree to hear a challenge to a potentially invalid law ahead of the completion of the legislative process, if:

- It would not be in the public interest to wait until the Bill received assent; or
- If there would be no easily accessible remedy; or
- If all parties agree to the challenge.

Background: WA law about electoral redistributions could only be amended by a law passed with absolute majority in both Houses. Court agreed to hear a challenge to a Bill passed without an absolute majority before it was presented to the Governor for assent, because of the public interest in certainty in electoral laws and validly elected Parliaments. Additionally, remedies would not have been easily accessible if an invalid, uncertain and costly election was held. Also, all parties agreed to the challenge.

G. Other sources of entrenchment

1. Reconstituted Legislature

Attorney-General (NSW) v Trethowan (1931)
Rich J relied on s5 of the CLVA to hold: "The constitution of the legislative body may be altered; that is to say, the power of legislation may be reposed in an authority differently constituted". Today, this power is found in found in s2(2) of the Australia Acts 1986, in the general grant of State Parliaments to make laws for the "peace, order and good government of the State".

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Rich J at [420]: "…a legislative body has been created for the purpose of passing or co-operating in passing a particular law… The electors are called upon to approve or not of a certain class of Bill. In so doing they discharge a function of law-making."

2. The Ranasinghe Principle

Bribery Commissioner v Ranasinghe (1965)
[197] 'a Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'.

McGinty v Western Australia (1996)
Gummow J: "the propositions that a manner and form provision which appears in the written constitution of a unitary State where no paramount law, such as s5 of the 1865 Act, remains in force, continues to place a restraint upon law making, and that the question of the observance of the restraint is justiciable."

3. s106 of the Commonwealth Constitution

McGinty v Western Australia (1996)
Gummow J argued that s106 meant until so altered as not to contravene any otherwise binding requirements of the Constitution of the State. If a manner and form provision is not made binding by a higher law, such as s6 of the Australia Acts, then s106 gives it no greater force.

Attorney-General (WA) v Marquet (2003)
The majority noted that s106 was "subject to this Constitution" and therefore subject to s51(xxxviii), which supports s6 of the Australia Act.

The purpose of s51(xxxviii) is to ensure that residual legislative power is vested in and exercisable in co-operation by the Parliaments of the Commonwealth and the States.

Because section 106 is subject to the rest of the Constitution, the Court regards s106 by the guiding principle of s51(xxxviii), i.e. to preserve of the States and their capacity to function as independent units of the federation, rather than limiting Commonwealth powers.

s51 The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

(xxxviii): The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Court of Australasia.

Other sources of entrenchment are not certain

Attorney-General (WA) v Marquet (2003)
Gleeson CJ, Gummow, Hayne and Heydon JJ: "the express provisions of s6 [of the Australia Acts] can leave no room for the operation of some other principle, at the very least in the field in which s6 operates, if such a principle can be derived from considerations of the kind which information the Privy Council's decision in *Bribery Commissioner v Ranasinghe*and can then be applied in a federation."

WEEK FOUR – JUDICIAL POWER

Judicial power, independence and functions to be conferred on judges

Is it a Chapter III court?

1. Created as per s71
    - NSW v Cth (the Wheat Case)
        - Inter-State Commission could not be vested with judicial power
        - ChIII was meant to be exhaustive, only including:
            - High Court
            - Federal court created under s71
            - State Court upon which federal jurisdiction is conferred
    - *Waterside Workers' Federation v Alexander* (1918)
        - Court of Conciliation and Arbitration can only exercise arbitral power
            - Arbitral: ascertain and declare respective rights and liabilities of parties.
            - Judicial: enforcing those rights and liabilities

2. Constituted as per s72
    - Judges with life tenure
        - *Waterside Workers' Federation v Alexander* (1918)
            - Court of Conciliation and Arbitration judges only have terms of 7 years, with possibility of re-election.

3. Other sections to consider:
    - s73: High Court power to hear appeals from s71 courts
    - s75: Original jurisdictions
    - s76: Parliament can confer additional original jurisdiction on High Court, eg constitutional matters
    - s77: Power to define jurisdiction of federal courts and give State Courts federal jurisdiction

Can the court exercise judicial power?

1. Which courts can exercise judicial power?
    - *Boilermakers*
        - Judicial powers can only be vested upon a ChIII court
        - ChIII courts can ONLY exercise judicial power
            - Not administrative or executive, unless incidental or ancillary

2. What is a judicial power?
    - Lots of indicia
    - *Moorehead*
        - Griffith CJ:
        - 1) Must be a legal controversy between subjects
        - 2) The court determines it by applying the law
        - 3) Its decision is binding and authoritative
    - Thomas v Mowbray
        - Control orders are not punishment for offences, instead seek to prevent future crime.
        - That creates new legal obligations, rather than settling a controversy, so not judicial or non-judicial. Judicial if it is binding or enforceable.