

The History, Scope and Prospects of Section 73 of the Constitution Act 1889 (WA)

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To the extent of their application, valid and binding manner and form provisions transform state constitutions from flexible to rigid documents. The scope and efficacy of such provisions is therefore critical to the prospects of effecting certain constitutional changes at the state level. Section 73 of the Constitution Act 1889 (WA), the primary manner and form provision in Western Australia, has been the subject of relatively extensive litigation in both Western Australia's Supreme Court and the High Court of Australia. This article draws upon these cases to consider the scope and efficacy of s 73 by analysing the section's impact on three areas of prospective constitutional change.

INTRODUCTION

Section 73 of the *Constitution Act 1889* (WA) ('s 73') has been the subject of more judicial¹ and academic² exegesis than any other provision in the *Constitution Act*. The complexity and depth of the section's history and judicial interpretation means an exhaustive review and analysis of s 73 jurisprudence cannot be

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1 *Clydesdale v Hughes* (1934) 51 CLR 518; *Burt v R* (1935) 37 WALR 68; *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980); *Wilsmore v Western Australia* [1981] WAR 159; *Western Australia v Wilsmore* (1982) 149 CLR 79; A-G (WA) *ex rel Burke v Western Australia* [1982] WAR 241; *Burke v Western Australia* [1982] WAR 248; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *S (A Child) v The Queen* (1995) 12 WAR 392; *McGinty v Western Australia* (1996) 186 CLR 140; *Judamia v Western Australia* (Unreported, Full Court of the Supreme Court of Western Australia, 1 March 1996); *Yougarla v Western Australia* (1998) 146 FLR 128; *Yougarla v Western Australia* (1999) 21 WAR 488; *Yougarla v Western Australia* (2001) 207 CLR 344; *Marquet, Clerk of Parliament (WA) v A-G (WA)* (2002) 26 WAR 201; A-G (WA) *v Marquet* (2003) 217 CLR 545; *Glew v Shire of Greenough* [2006] WASCA 260 (1 December 2006); *Glew v Governor of Western Australia* (2009) 222 FLR 417.

2 Anonymous, 'Review of Legislation – Western Australia' (1957) 4 *University of Western Australia Law Review* 452; Peter Johnston, 'Freeing the Colonial Shackles: The First Century of Western Australia's Constitution' in David Black (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 313; Chief Justice David Malcolm, 'The State Judicial Power' (1991) 21 *University of Western Australia Law Review* 7; Justice Robert French, 'Manner and Form in Western Australia: An Historical Note' (1993) 23 *University of Western Australia Law Review* 335; Narelle Miragliotta, 'Western Australia: A Tale of Two Constitutional Acts' (2003) 31 *University of Western Australia Law Review* 154; Peter Johnston, 'Method or Madness: Constitutional Perturbations and *Marquet's Case*' (2004) 7(2) *Constitutional Law and Policy Review* 25.

undertaken within one article.³ This article instead incorporates aspects of this jurisprudence within a prospective analysis of s 73(2). Section 73's history and structure are outlined to provide a necessary point of reference for this analysis. The article's focus, however, is an examination of three relatively topical areas of constitutional reform to highlight the scope and limits of s 73(2). In particular, this paper considers whether the State Parliament must observe s 73(2)'s restrictive procedures when enacting laws:

1. Entrenching statutory provisions through new manner and form provisions;
2. Limiting the executive's power to dissolve the Legislative Assembly; and
3. Altering the franchise for state elections

Two questions underlie the analysis of these potential laws. First, is such legislation inconsistent with constitutional provisions s 73(2) purportedly entrenches? Secondly, does a source of legal efficacy bind Western Australia's Parliament to comply with s 73(2) when enacting such legislation? In *Attorney-General (WA) v Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ held that s 6 of the *Australia Acts* leaves no room for the operation of some other principle binding State Parliaments to comply with manner and form provisions 'at the very least in the field in which s 6 operates'.⁴ Although this does not definitively exclude other potentially binding sources,⁵ s 6 of the *Australia Acts* is now most likely the exclusive source of legal efficacy for manner and form provisions.⁶ Accordingly, this paper's entrenchment analysis focuses on whether the prospective legislation being considered would engage s 6 as a law respecting Parliament's 'constitution, powers or procedure'. It is argued that many Bills falling within the three broad categories examined must be enacted in accordance with s 73(2). However, the limits of s 6 of the *Australia Acts*, s 73(2) and the provisions s 73(2) purportedly entrenches entail that State Parliament may enact at least some Bills entrenching new manner and form provisions or altering the State franchise through ordinary legislative procedures.

3 See, for a comprehensive analysis of s 73 jurisprudence: Peter Johnston, *Manner and Form Provisions in the Western Australian Constitution: Their Judicial Interpretation* (SJD Thesis, University of Western Australia, 2005).

4 (2003) 217 CLR 545, 574 [80]. See also, (2003) 217 CLR 545, 616-7 [215] (Kirby J); *McGinty v Western Australia* (1996) 186 CLR 140, 296-7 (Gummow J).

5 See, *Commonwealth Constitution*, s 106; *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197; *Harris v Minister of the Interior* [1952] (2) SA 428, 464, 468. See, for suggestions s 106 may bind State Parliaments to follow manner and form provisions: *Western Australia v Wilsmore* [1981] WAR 179, 184 (Burt CJ); *Boath v Wyvill* (1989) 85 ALR 621, 636. See, regarding the *Ranasinghe* principle: *Victoria v Commonwealth* (1975) 134 CLR 81, 164 (Gibbs J).

6 Anne Twomey, 'Manner and Form Limitations on the Power to Amend State Constitutions' (2004) 15 *Public Law Review* 182, 185; Michael Wait, 'Representative Government under the South Australian Constitution and the Fragile Freedom of Communication of State Political Affairs' (2008) 29 *Adelaide Law Review* 247, 260.

THE HISTORY AND STRUCTURE OF SECTION 73

The *Constitution Act 1889* (WA) was enacted as a schedule to the *Western Australia Constitution Act 1890* (Imp) ('1890 Imperial Act'). Under s 5 of the 1890 Imperial Act, Western Australia's legislature was empowered to alter or repeal any of the *Constitution Act's* provisions through ordinary legislative procedures, 'subject, however, to the conditions imposed by the [*Constitution Act*] on the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature'. Section 73 of the *Constitution Act* contains the 'conditions' referred to in s 5 of the 1890 Imperial Act.⁷ Its terms were 'borrowed' from similar provisions existing in other Australian colonial constitutions.⁸ As originally enacted, s 73 consisted of three parts: a grant of power and two provisos to that power. Section 73's grant of constituent power obviated concerns that the plenary legislative power granted under s 2 of the *Constitution Act* may have been insufficient to permit the Colonial Legislature to amend the *Constitution Act*.⁹

1 First Proviso

The first proviso requires bills effecting 'any change in the Constitution of the Legislative Council or of the Legislative Assembly' to obtain absolute majorities at the second and third readings in both houses before being presented for royal assent. This proviso was inserted in the Constitution Bill 1889 in accordance with instructions from the Secretary of State for the Colonies, Lord Knutsford.¹⁰ Knutsford also considered it unnecessary to retain a clause in an earlier draft requiring absolute majorities to alter the number or apportionment of representatives in either legislative chamber.¹¹ The Legislative Council's discussion of these alterations whilst debating the Constitution Bill 1889 indicates confusion regarding s 73's scope.¹² For example, the Colonial Secretary mistakenly referred to clause 73 as requiring absolute majorities in both Houses for 'any measure affecting the Constitution itself'.¹³

One alteration to the draft clauses that went unmentioned upon was that s 73's grant of power now referred to 'this Act'. The draft clause sought to impose the requirement of special majorities more broadly.¹⁴ It is uncertain whether the reference to 'this Act' was purely for elegant expression¹⁵ or was a 'sleight

7 *Wilsmore v Western Australia* [1981] WAR 159, 171 (Smith J); *Yougarla v Western Australia* (2001) 207 CLR 344, 351 [8] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

8 *Western Australia v Wilsmore* (1982) 149 CLR 79, 88 (Aickin J).

9 *Ibid* 103 (Brennan J). See also, *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 428 (Dixon J); *McDonald v Cain* [1953] VLR 411, 433 (O'Bryan J).

10 French, above n 2, 340-2.

11 *Ibid*, 340-1.

12 Anonymous, above n 2, 455-7.

13 Western Australia, *Parliamentary Debates*, Legislative Council, March 28 1889, 167.

14 French, above n 2, 342.

15 See, Johnston, 'Freeing the Colonial Shackles', above n 2, 313, 318.

of hand'¹⁶ on the Imperial Draftsman's part. Earlier colonial secretaries had, however, expressed frustration with the 'great inconvenience' caused by manner and form provisions.¹⁷ At any rate, this alteration would significantly limit the scope of s 73's first proviso. In *Western Australia v Wilsmore*, the High Court's held s 73's first proviso was not a separate and independent provision, but merely a qualification on s 73's grant of power.¹⁸ This conclusion was partially based on s 73's reference to 'this Act' and limited the first proviso's application to amendments to the *Constitution Act* itself. Accordingly, amendments to the *Constitution Acts Amendment Act 1899* (WA) ('*CAAA 1899*') and the *Electoral Act 1907* (WA) are not subject to s 73's first proviso, even if they effect a change in the Assembly's or Council's 'Constitution'.¹⁹

2. Second Proviso

Section 73's second proviso required the Governor to reserve bills interfering with certain nominated sections and schedules of the *Constitution Act*, including s 73 itself, for Her Majesty's assent. The second proviso remains part of the *Constitution Act*'s text. However, its effect was reduced by the *Australian States Constitution Act 1907* (Imp) ('1907 Imperial Act') and eliminated by the *Australia Acts*.

Initially, this second proviso, in conjunction with Imperial legislation regulating the manner in which bills were to be reserved,²⁰ caused difficulties for Western Australia's Parliament. In particular, doubts existed whether the *Aborigines Act 1897* (WA) validly repealed s 70 of the *Constitution Act*,²¹ resulting in Parliament passing the *Aborigines Act 1905* (WA). Almost a century later, and following a number of actions and appeals in Western Australia's Supreme Court, the High Court upheld the *Aborigines Act 1905*'s validity in *Yougarla v Western Australia*.²²

As *Yougarla* demonstrates, the law regarding reservation of colonial legislation at the start of the twentieth century was confused and confusing.²³ The 1907 Imperial Act was enacted in response to this confusion and limited reservation requirements to the following three categories of bills:

1. Bills altering a State legislature's or legislative chamber's constitution;
2. Bills affecting the State Governor's salary; and

16 French, above n 2, 342.

17 DP O'Connell and Ann Riordan, *Opinions on Imperial Constitutional Law* (Lawbook, 1971) 67. See, *Western Australia v Wilsmore* (1982) 149 CLR 79, 101 (Wilson J).

18 See, *Western Australia v Wilsmore* (1982) 149 CLR 79, 83-4 (Gibbs CJ), 85 (Stephen J), 85 (Mason J), 87 (Murphy J), 91-2 (Aickin J), 98-102 (Wilson J), 104-5 (Brennan J).

19 But see, Johnston, 'Method or Madness', above n 2, 33 (discussing the broader interpretation of the phrase 'this Act' in the *Electoral Distribution Act 1947* (WA) in *A-G (WA) v Marquet* and its potential application to s 73(1)).

20 *Australian Constitutions Act 1842* (Imp), s 33; *Australian Constitutions Act (No 2) 1850* (Imp), s 32.

21 O'Connell and Riordan, above n 17, 53-5.

22 (2001) 207 CLR 344.

23 See, AB Keith, *Responsible Government in the Dominions* (Clarendon Press, 1912) 427.

3. Bills required to be reserved under state legislation passed after 1907 or by Instructions given by His Majesty to a State Governor.

Except to that extent, it was not necessary to reserve bills passed by State legislatures. As Dwyer J held in *Burt v R*, the operation of s 73's second proviso was significantly limited since pre-1907 provisions relating to reservation of bills passed by Australian State Legislatures largely 'went by the board'.²⁴ The 1907 Imperial Act was either impliedly repealed by the *Australia Acts* or expressly repealed by the *Statute Law (Repeals) Act 1989* (UK).²⁵ The *Australia Acts* also abolished residual reservation requirements, rendering the second proviso in s 73 of 'no force or effect'.²⁶ However, this resulted in s 73's second proviso being only ineffective, not invalid.²⁷ Therefore, manner and form requirements may apply to a bill repealing s 73's second proviso.²⁸ This may explain why the reservation requirements in s 73 remain part of the *Constitution Act's* text.

3. 1978 Amendments

In 1978, absolute majorities in both Houses of Parliament passed the Acts Amendment (Constitution) Bill 1978.²⁹ An earlier bill containing substantially similar provisions was defeated after failing to attain an absolute majority in the Legislative Council.³⁰ Subsequent jurisprudence raises doubts whether such majorities were necessary. Prior to 1978, s 73 was not an 'entrenched provision'. As Wilson J noted in *Western Australia v Wilsmore*, s 73's requirement of absolute majorities in prescribed cases was subject to repeal by an Act passed by simple majorities in both Houses.³¹ Reservation was, however, necessary since s 73 imposed reservation requirements on bills 'which ... interfere with the operation

24 *Burt v R* (1935) 37 WALR 68, 71. See also, *Yougarla v Western Australia* (2001) 207 CLR 344, 367 [58] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

25 See, *Australia Acts 1986* (Cth) & (UK), ss 8, 9, 10. *Sue v Hill* (1999) 199 CLR 462, 494-5 [72] (Gleeson CJ, Gummow and Hayne JJ); *Yougarla v Western Australia* (2001) 207 CLR 344, 367 [58] n 68 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

26 *Australia Acts 1986* (Cth) & (UK), s 9.

27 Anne Twomey, 'One In, All In – The Simultaneous Implementation of a Republic at Commonwealth and State Levels' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010) 20, 33.

28 *Ibid.* See also, *Constitution Act 1934* (SA), ss 8(b), 10A(2); *Constitution Act 1867* (Qld), s 53(4).

29 Legislative Assembly: *Votes and Proceedings of the Legislative Assembly During the Second Session of the Twenty-Ninth Parliament (1978)*, No. 28, 10 August 1978, 407 (2nd reading); *Votes and Proceedings of the Legislative Assembly During the Second Session of the Twenty-Ninth Parliament (1978)* No. 30, 16 August 1978, 449 (3rd reading). Legislative Council: *Minutes of the Proceedings of the Legislative Council During the Second Session of the Twenty-Ninth Parliament (1978)*, No. 28, 5 September 1978, 189 (2nd reading); *Minutes of the Proceedings of the Legislative Council During the Second Session of the Twenty-Ninth Parliament (1978)*, No. 29, 6 September 1978, 195 (3rd reading).

30 Acts Amendment (Constitution) Bill 1977 (WA): Western Australia, *Parliamentary Debates*, Legislative Council, 19 October 1977, 2347. See, Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 174.

31 *Western Australia v Wilsmore* (1982) 149 CLR 79, 99-100 (Wilson J).

of ... *this section*'.³² Accordingly, the 1978 Bill was reserved for, and assented to by, Her Majesty.³³

The *Acts Amendment (Constitution) Act 1978* ('1978 Act') significantly changed s 73 of the *Constitution Act*. First, the original s 73 was carried forward as s 73(1) of the *Constitution Act* and entrenched pursuant to s 73(2)(e). Section 73's grant of power was altered to specify that it was 'subject to the succeeding provisions of this section'.³⁴ However, s 73's two provisos were neither altered nor abolished.³⁵ Secondly, the 1978 Act inserted s 73(2) which established a new manner and form requirement applying to five categories of bills. Under s 73(2), the following bills must pass both Houses of Parliament by absolute majorities and obtain electoral approval at a referendum before being presented for royal assent:

- bills expressly or impliedly providing for:
 - (a) the abolition of or alteration in the office of Governor;
 - (b) the abolition of either House of Parliament;
 - (c) either House of Parliament to be composed of members other than members chosen directly by the people;
 - (d) a reduction in the number of the members of either House; and
- bills expressly or impliedly in any way affecting:
 - (e) sections 2, 3, 4, 50, 51 or 73 of the *Constitution Act*.

The electorate for s 73(2) referendums consists of persons qualified to vote for Legislative Assembly elections. Under s 73(6), electors may bring proceedings in the Supreme Court to enforce s 73's provisions either before or after a s 73(2) bill is presented for royal assent.

ENACTING NEW MANNER AND FORM PROVISIONS

In *Western Australia v Wilsmore*, Wilson J commented that:

it may be that the [Western Australian] legislature will devise a fresh manner and form requirement for inclusion in ... new legislation; in that event, I see no reason why the observance of that requirement will not be a condition precedent to the validity of future amendments to that legislation.³⁶

However, s 73(2), which was mentioned in passing in *Wilsmore*, potentially conditions State Parliament's power to devise such new manner and form provisions. Section 73(2)(e) purportedly applies to bills 'expressly or impliedly in

32 See, *Western Australia v Wilsmore* (1982) 149 CLR 79, 100 (Wilson J). Cf Johnston, 'Manner and Form Provisions' above n 3, 21. But see, *Burt v R* (1935) 37 WALR 68; *Australian States Constitution Act 1907* (Imp), s 1(1).

33 *Minutes of the Proceedings of the Legislative Council During the Second Session of the Twentieth Parliament (1978)*, No. 36, 21 September 1978, 239.

34 *Marquet, Clerk of Parliament (WA) v A-G (WA)* (2002) 26 WAR 201, 253 (Steytler and Parker JJ).

35 *Wilsmore v Western Australia* [1981] WAR 159, 172 (Smith J).

36 (1982) 149 CLR 79, 100.

any way affect[ing]’ s 2 of the *Constitution Act*. The 1978 Act also amended s 2 of the *Constitution Act* by designating the former s 2 as subsection 2(1) and inserting two additional subsections, ss 2(2) and 2(3). Under s 2(3), every bill, after its passage through the Council and Assembly must, subject to s 73, be presented to the Governor for royal assent.

Professor Twomey has noted that s 2’s entrenchment in the *Constitution Act* may have had unintended consequences.³⁷ Bills containing manner and form provisions may be inconsistent with s 2(3). For example, a manner and form provision may require bills altering entrenched provisions to observe additional procedural requirements after being passed by both Houses of Parliament before being presented for royal assent. Laws imposing manner and form provisions most likely engage s 6 of the *Australia Acts* as laws respecting Parliament’s ‘powers’ or ‘procedure’.³⁸ The question then arises to what extent did s 2(3)’s entrenchment by s 73(2)(e) affect existing and prospective manner and form provisions outside of s 73 of the *Constitution Act*.

1. Past and Present Manner and Form Provisions Outside of Section 73

In 1978, when ss 2(3) and 73(2)(e) were inserted in the *Constitution Act*, s 13 of the *Electoral Distribution Act 1947* (WA) (‘*EDA*’) was the only manner and form provision in Western Australian legislation outside of s 73 of the *Constitution Act*. Section 13 of the *EDA* required a bill amending the *EDA* to obtain absolute majorities on both its second and third readings in both houses of Parliament before being presented for royal assent.

In *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)*, the Western Australian Supreme Court considered s 13 of the *EDA* in relation to the Electoral Distribution Repeal Bill 2001 (WA) (‘Repeal Bill’). Clause 3 of the Repeal Bill, if validly enacted, would have repealed the *EDA*. Whilst the Repeal Bill obtained absolute majorities in the Assembly, the Council passed the Repeal Bill by simple, not absolute, majorities on its second and third readings. The question arose whether the Repeal Bill was required to be passed in accordance with s 13 of the *EDA*. Parliament’s Clerk sought a determination by the Supreme Court as to whether it was lawful for him to present the Repeal Bill and another bill, the Electoral Amendment Bill 2001, to the Governor for royal assent.

37 Anne Twomey, ‘The Effect of the *Australia Acts* on the Western Australian Constitution’ (2012) 36(2) *University of Western Australia Law Review* [271].

38 *Marquet, Clerk of Parliament (WA) v A-G (WA)* (2002) 26 WAR 201, 226 (Anderson J); *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 430 (Dixon J). See, Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 163. See also, Sir Owen Dixon ‘The Law and the Constitution’ in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Lawbook, 1965) 38, 49: ‘Does not a law purporting to limit [Parliament’s] power answer the description “law respecting its powers”?’.

One argument the State of Western Australia submitted was that the insertion and entrenchment of s 2(3) of the *Constitution Act* by the 1978 Act impliedly repealed s 13 of the *EDA*. The word ‘passage’ in s 2(3), it was argued, meant a bill had received the support of not less than a simple majority of members then present and voting on the Bill. The Supreme Court unanimously rejected this argument.³⁹ Steytler and Parker JJ held that ‘passage’ requires bills to have been passed by each House in a legally valid and binding manner.⁴⁰ On appeal, the High Court also rejected the implied repeal argument.⁴¹ Gleeson CJ, Gummow, Hayne and Heydon JJ held that ‘passage through’ in s 2(3) means ‘due passage’ or ‘passage in accordance with applicable requirements’.⁴² Similarly, Kirby J interpreted ‘passage through’ as meaning passage ‘complying with any applicable requirements of law’.⁴³ Consequently, s 2(3) did not impliedly repeal the absolute majority requirement in s 13 of the *EDA*.

The *EDA* was subsequently repealed by the *Electoral Amendment and Repeal Act 2005* (WA) (*EARA*) following the Labor government securing an absolute majority in the Legislative Council supporting the *EDA*’s repeal.⁴⁴ In its place, the *EARA* amended the *Electoral Act 1907* (WA) to establish an electoral distribution broadly in accordance with the principle of ‘one-vote, one-value’, subject to certain exceptions and allowing for a $\pm 10\%$ variation. The *EARA* also inserted s 16M of the *Electoral Act* which entrenches the ‘one-vote, one-value’ principle by requiring bills repealing or altering the provisions of the *Electoral Act* giving effect to that principle to be passed by absolute majorities in both Houses of Parliament.⁴⁵ The interpretation of s 2(3) of the *Constitution Act*’s phrase ‘passage through [Parliament’s two houses]’ in *Marquet* suggests s 16M of the *Electoral Act*’s requirement of absolute majorities is not inconsistent with s 2(3)

2. Prospective Manner and Form Provisions

More broadly, it follows that Western Australia’s Parliament may, subject to compliance with pre-existing manner and form provisions, enact manner and form provisions requiring absolute majorities without observing s 73(2)’s restrictive procedures.⁴⁶ ‘Passage’ in s 2(3) of the *Constitution Act* may also encompass

39 2002) 26 WAR 201, 217-8 [52]-[62] (Malcolm CJ), 225 [93] (Anderson J), 254-7 [224]-[240] (Steytler and Parker JJ), 272 [301]-[304] (Wheeler J).

40 Ibid 255 [234].

41 *A-G (WA) v Marquet* (2003) 217 CLR 545, 568 [61] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 587 [123] (Kirby J), 634-5 [284]-[286] (Callinan J).

42 Ibid 568 [61].

43 Ibid 587 [123] (Kirby J).

44 *Electoral Amendment and Repeal Act 2005* (WA), s 8. See generally, Norm Kelly, ‘Western Australian Electoral Reforms: Labor Finally Succeeds’ (2006) 41(3) *Australian Journal of Political Science* 419, 424.

45 Section 16M of the *Electoral Act 1907* (WA) purportedly entrenches the provisions of Part 2 of the *Electoral Act* (‘Representation in Parliament’), other than Division 2, s 16G(3), (4), s 16L.

46 See eg, *Western Australian Future Fund Bill 2012* (WA), cl 10. Of course, this does not mean that such manner and form provisions will *bind* future parliaments.

special majority requirements of three-fifths or two-thirds of a chamber's membership to amend entrenched constitutional provisions.⁴⁷ Of course, at some point a special majority may constitute an impermissible substantive restraint on legislative power.⁴⁸ Extra-parliamentary requirements are also generally substantive restraints on legislative power.⁴⁹ The exception is requiring electoral approval at a referendum.⁵⁰ Every Australian state, except Tasmania, purportedly entrenches specific constitutional provisions by requiring bills amending or repealing those provisions to first obtain the electorate's approval at a referendum. It has been noted that the referendum manner and form provision in s 73(2) of the *Constitution Act* may be replicated to entrench other constitutional principles and provisions in the future, including a bill of rights.⁵¹ However, the entrenchment of s 2(3) of the *Constitution Act* raises an issue as to the manner and form required to validly enact a bill containing a referendum entrenchment provision.

Manner and form provisions requiring a successful referendum before a bill may receive royal assent affect s 2(3)'s requirement that every bill, subject to s 73, must be presented for royal assent following its 'passage through the Legislative Council and the Legislative Assembly'. Such provisions introduce additional procedures between a bill's passage and its assent. Additionally, bills defeated at a referendum are not presented for assent. The phrase 'passage through' may also be contrasted with the reference in s 5 of the *Colonial Laws Validity Act 1865* (Imp) ('*CLVA*') to 'passed in such manner and form'. In *Attorney-General (NSW) v Trethowan*, the appellant argued the term 'passed' restricted manner and form requirements to conditions relating to a bill's passage through a colonial legislature's house(s). Rich J, with whom the Privy Council agreed on this point, rejected the appellant's argument, holding that 'passed' was equivalent to 'enacted' and related to the entire process of turning a bill into a legislative enactment.⁵² The extra-parliamentary requirement that a bill be submitted to and approved by the electorate at a referendum fell within s 5 of the *CLVA*. *Trethowan* is distinguishable as s 2(3) of the *Constitution Act* refers specifically to passage through Parliament's

47 See eg, *Constitution Act 1975* (Vic), s 18(2); *Constitution Act 1934* (Tas), s 41A. Section 41A of the *Constitution Act 1934* (Tas) is of doubtful efficacy since it is not doubly entrenched: Peter Hanks, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (LexisNexis, 7th ed, 2004) 316.

48 *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397 (King CJ). See also, Carolyn Evans, 'Entrenching Constitutional Reform in Victoria' (2003) 14 *Public Law Review* 133, 134-5; W Friedmann, 'Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change' (1950) 24 *Australian Law Journal* 103, 105-6.

49 *Commonwealth Aluminium Corporation Ltd v A-G (Qld)* [1976] Qd R 231, 236-7 (Wanstall SPJ); *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 396-8 (King CJ).

50 See, *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 418 (Rich J), 431-2 (Dixon J); *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 397 (King CJ). Cf *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 413-4 (Gavan Duffy CJ), 443 (McTiernan J).

51 See, French, above n 2, 346.

52 *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 418-9 (Rich J), affd [1932] AC 526, 541. See also, (1931) 44 CLR 394, 432-3 (Dixon J). *Contra*, (1931) 44 CLR 394, 414 (Gavan Duffy CJ), 444-5 (McTiernan J). Section 6 of the *Australia Acts* forestalls this argument by using the phrase 'made in such manner and form'.

two houses and not to a bill's passage more generally. Therefore, a manner and form provision requiring a referendum after a bill's passage through both houses of Parliament most likely *affects* s 2(3). Section 73(2)(e) requires bills containing such provisions to first be approved at a referendum themselves.

Paradoxically, this reasoning draws on traditional views of manner and form provisions to *effectively* limit the traditional position regarding the enactment of manner and form provisions. Under orthodox analysis Parliament may enact manner and form provisions through ordinary legislative procedures, subject to compliance with pre-existing valid and binding manner and form provisions.⁵³ Conversely, Gummow J in *McGinty v Western Australia* considered legitimate manner and form provisions must be 'made with observance of that manner and form which is thereafter to apply'.⁵⁴ As a practical matter, s 73(2)(e)'s entrenchment of s 2(3) establishes a requirement of symmetric entrenchment in respect of referendum requirements. Prospective manner and form provisions purportedly requiring electoral approval at a referendum as a condition precedent to amending entrenched provisions must themselves be approved at a referendum.

Restricted by s 73(2) in this respect, by what other methods may State Parliament entrench legislation through ordinary legislative procedures? One possibility may be for an entrenching provision to provide that the Governor must not proclaim legislation amending or repealing entrenched provisions unless an electoral majority approves that legislation at a referendum. Proclamation is often made contingent upon a particular event occurring. For example, s 6 of the *Daylight Savings Act 2006* (WA) was to commence the day after the gazetting of a referendum writ on daylight savings if a majority of electors voted 'yes' to daylight savings at the referendum.⁵⁵ An entrenching provision drafted as follows might circumvent s 2(3)'s entrenchment by s 73(2)(e) of the *Constitution Act 1889* (WA):

- (1) For the purposes of this section –
- 'Amending or Repealing Act'** means, any Act which amends or repeals the provisions of this Act, including this section.
- 'Amending or Repealing Bill'** means, any Bill which, if enacted, would amend or repeal the provisions of this Act, including this section.
- (2) An Amending or Repealing Bill must not be presented to the Governor for Her Majesty's assent unless the second and third readings of the

⁵³ *McCawley v The King* [1920] AC 691, 704 (Lord Birkenhead); *Clayton v Heffron* (1960) 105 CLR 214, 249 (Dixon CJ, McTiernan, Taylor and Windeyer JJ); Carney, above n 38, 194.

⁵⁴ (1996) 186 CLR 140, 297 (Gummow J). See also, *A-G (WA) v Marquet* (2003) 217 CLR 545, 617 [216] (Kirby J). Applying Gummow J's view, s 73(2)'s referendum requirement may be invalid: Alex Gardner, 'Musings on *Marquet*: The Distribution of Electoral Districts and Natural Resources Rent' (2004) 93, *Samuel Griffith Society* <<http://www.samuelgriffith.org.au/papers/pdf/vol16.pdf>>.

⁵⁵ *Daylight Savings Act 2006* (WA), s 2(2). I am indebted to Mr Greg Calcutt SC for informing me of this provision. See also, *Australia Acts (Request) Act 1999* (WA).

Amending or Repealing Bill have been passed by absolute majorities in both the Legislative Assembly and Legislative Council.

- (3) After an Amending or Repealing Bill passed pursuant to (2) receives Royal Assent, a referendum must be held in relation to the Amending or Repealing Act.
- (4) A referendum held for the purposes of (3) must be held in the same manner, and is subject to the same rules, as a referendum held under section 73(2) of the *Constitution Act 1889* (WA).
- (5) If a majority of the electors at a referendum held pursuant to (3) approve the Amending or Repealing Act then the Governor must proclaim the Amending or Repealing Act to commence from the date of the referendum.
- (6) The Governor must not proclaim an Amending or Repealing Act except in accordance with (5).
- (7) An Amending or Repealing Act has no force or authority until proclaimed in accordance with this section.

Such a provision would arguably not *affect* s 2(3) of the *Constitution Act*, and thereby engage s 73(2), since assent is a distinct gubernatorial act to proclamation. Legislation may be assented to without being proclaimed. However, a provision requiring a referendum as a condition precedent to proclaiming an Act arguably may not constitute a manner and form provision for the purposes of s 6 of the *Australia Acts*. In *Trethowan*, Dixon J held that manner and form provisions include all the conditions Parliament prescribes ‘as essential to the *enactment of a valid law*’.⁵⁶ Conditions precedent to an Act’s proclamation are not essential condition in relation to that Act’s *enactment*. Bills become Acts upon receiving Royal Assent.⁵⁷ Proclamation merely affects an Act’s commencement.⁵⁸ However, His Honour also noted that provisions governing the reservation of Bills were ‘matters prominently in view when s 5 [of the *CLVA*] was framed’.⁵⁹ One such example, s 33 of the *Australian Constitutions Act (No 1) 1842* (Imp), provided that no Bill reserved for the signification of Her Majesty’s pleasure:

[S]hall have any force or authority ... until the Governor ... shall signify, either by speech or message to the Legislative Council, or by proclamation, as aforesaid, that such Bill has been laid before Her Majesty in Council, and that Her Majesty has been pleased to assent to the same.

In *Yougarla*, both the High Court and Western Australia’s Supreme Court characterised s 33’s proclamation requirement as a manner and form provision.⁶⁰

⁵⁶ (1931) 44 CLR 394, 432-3.

⁵⁷ Anne Twomey, ‘The Refusal or Deferral of Royal Assent’ [2006] *Public Law* 580, 585.

⁵⁸ *Ibid.*

⁵⁹ (1931) 44 CLR 394, 432.

⁶⁰ *Yougarla v Western Australia* (1999) 21 WAR 488, 506 [60] (Ipp J), 513-6 [96], [98], [102]-

On this basis, requirements following royal assent, including requirements as to an Act's proclamation, may be 'manner and form' provisions falling within s 6 of the *Australia Acts*. Such a manner and form provision does not in any way affect s 2(3) and may be enacted without observing s 73.

LIMITING THE EXECUTIVE'S POWER TO DISSOLVE THE LEGISLATIVE ASSEMBLY

Section 3 of the *Constitution Act* provides: 'It shall be lawful for the Governor ... to dissolve the Legislative Assembly by Proclamation or otherwise whenever he shall think fit'. The phrase 'it shall be lawful' denotes a gubernatorial discretion,⁶¹ reflecting the dissolution power's status as a reserve power. Constitutional systems of Westminster heritage have, however, increasingly placed limits on the Crown's dissolution power. Other Australian states have, to some extent, limited their respective State Governors' power to dissolve Parliament prior to a fixed date.⁶² In Western Australia, legislation similar to that existing in those states must be enacted in accordance with s 73(2). Such legislation would engage s 73(2) by altering the Governor's Office, and, or, affecting s 3 of the *Constitution Act*.

Laws limiting the Governor's exercise of the dissolution power engage s 6 of the *Australia Acts* as laws respecting Parliament's 'constitution' and 'powers'.⁶³ In this latter respect, Dixon J in *Trethowan* held that laws imposing, removing or diminishing constitutional checks, safeguards or restraints on the Legislature were laws respecting a legislature's 'powers' under s 5 of the *CLVA*.⁶⁴ The Governor's dissolution power is one such constitutional check on Parliament's power.⁶⁵ Restricted by s 73(2) in that respect, this article examines what, if any, limitations may be imposed on the dissolution power in Western Australia without holding a s 73(2) referendum. Two distinct types of limitations are considered. First, legislation restricting when the Premier or Executive Council may advise the Governor to exercise the dissolution power. Secondly, limiting independent gubernatorial discretion by either amending the *Letters Patent* or enacting

[103], [105], [108], [110], 518 [119]-[120], 522 [136] (Anderson J), 539 [214] (White J); *Yougarla v Western Australia* (2001) 207 CLR 344, 349 [1], 353-4 [14] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 370-1 [70]-[72], 388 [125] (Kirby J). See also, Joshua Thomson, 'The One-Percent Case (*Yougarla v Western Australia*)' (2001) 1(2) *Oxford University Commonwealth Law Journal* 269, 271.

See, *Julius v Lord Bishop of Oxford* (1880) 5 App Cas. 214, 235 (Lord Selborne); *Smith v Watson* (1906) 4 CLR 802, 811, 820 (Barton J).

61 See, *Constitution Act 1902* (NSW), s 24B(1); *Constitution Act 1934* (SA), ss 28, 28A; *Constitution Act 1975* (Vic), s 8(2)-(3).

62 See, for a detailed analysis, Peter Congdon, *Can We Fix It? Fixed-Term Parliaments in Western Australia and the Governor's Dissolution Power* (LLB(Hons) Thesis, University of Western Australia, 2011).

63 (1931) 44 CLR 394, 430.

64 See, *Stockdale v Hansard* (1839) 112 ER 1112, 1128 (Lord Denman): '[T]he House of Commons, if it persist[s] in an excess of authority, may be dissolved'. See also, Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308 (Charles Court - Premier).

65 BS Markesinis, *The Theory and Practice of Dissolution of Parliament* (Cambridge University Press, 1972) 121.

legislation relying upon the principle of parliamentary supremacy and s 73(2)'s limitations. It is argued that these alternatives are unlikely to circumvent s 73(2)'s procedures.

1. Restricting the Premier's and Executive Council's Advisory Powers

In 1972, BS Markesinis opined that contemporary constitutional lawyers:

need not bother with [limiting the Crown's reserve powers] but instead should try to formulate new principles regulating the prime-ministerial powers [to advise dissolution].⁶⁶

The Premier's power to advise the Governor to dissolve the Assembly confers significant political advantages on incumbent executives. Dissolution may be advised so that the resulting election occurs at a politically opportune time. Additionally, the dissolution power enables the executive to exert political influence over the Assembly by vesting it with the power to shorten parliamentarians' tenure. Accordingly, one potential constitutional change is to enact legislation prohibiting the Premier or Executive Council advising the Governor to dissolve the Assembly, except in limited circumstances, such as when the Premier loses the Assembly's confidence. As a matter of statutory interpretation, specific and explicit language is necessary to restrict the Premier's or Executive Council's power to advise the Governor.⁶⁷ Whether such legislation would be required to observe s 73(2) depends on whether restricting the Premier's advisory role affects the Governor's dissolution power under s 3 of the *Constitution Act* or alters the Governor's Office itself under s 50.

Constitutional developments in comparative jurisdictions provide some assistance in answering this question. In New South Wales, recent constitutional amendments restrict when the Premier or Executive Council may advise the Governor to prorogue Parliament, but expressly preserve the Governor's reserve powers to prorogue Parliament.⁶⁸ However, New South Wales' Governor's prorogation power was not specifically protected by manner and form provisions. Canada is perhaps a better example since, similar to Western Australia, special legislative procedures⁶⁹ must be followed to amend Canada's Governor-General's Office⁷⁰ or power to dissolve Canada's House of Commons.⁷¹ In 2007, amendments to Canadian legislation fixed election dates, subject to the Governor-General's dissolution power.⁷² In *Conacher v Canada (Prime Minister)*, these amendments

66 *Conacher v Canada (Prime Minister)* [2010] FCA 131, [5]; *Wrathall v Fleming* [1945] Tas SR 61, 63.

67 See, *Constitution Act 1902 (NSW)*, s 10A inserted by *Constitution Amendment (Prorogation of Parliament) Act 2011 (NSW)*, s 3.

68 *Canada Act 1982 (UK)* c 11, sch B ('*Constitution Act 1982*'), part V.

69 *Constitution Act 1982*, s 41(a).

70 *Constitution Act 1867 (Imp)*, 30 & 31 Vict, c 3, s 50.

71 *Canada Elections Act* S.C. 2000, c 9, s 56 inserted by 2007, c 10, s 1.

72 [2008] FC 1119; [2009] FC 920, [49], [53]; [2010] FCA 131, [5]. See also, Edward McWhinney, 'Fixed Election Dates and the Governor-General's Power to Grant Dissolution'

were held to be constitutional, leaving the Governor-General's discretion unamended.⁷³ The *Conacher* Court noted the possibility of legislation restricting the Prime Minister's power to advise the Governor-General to dissolve the House of Commons, but expressly declined to comment on such legislation's constitutionality.⁷⁴

Does the posited legislation alter the Governor's Office or affect the Governor's dissolution power? On one view, such legislation expands the Governor's power to refuse dissolution. If the Governor may refuse to act on 'transparently' unlawful advice,⁷⁵ the legislation provides an additional basis for the Governor refusing to dissolve the Assembly. In *Arena v Nader*, legislation expanding New South Wales' Legislative Council's powers was held not to alter the Council's powers under s 7A of the *Constitution Act 1902* (NSW).⁷⁶ 'Altered' was interpreted in light of s 7A's purpose of preventing the Council's abolition or dissolution except in accordance with s 7A.⁷⁷ Accordingly, s 7A was confined to 'alteration[s] of powers by their diminution or limitation'.⁷⁸ Similarly, ss 50 and 73(2) of the *Constitution Act's* purposes included protecting the Governor's Office.⁷⁹ Expanding the Governor's powers would not constitute an alteration for those purposes.

Restricting the Premier's or Executive Council's advisory powers may, however, affect the Governor's dissolution power under s 3 of the *Constitution Act*. In *Marquet*, Wheeler J noted that the phrase 'expressly or impliedly in any way affects' gives s 73(2)(e) 'a very broad reach'.⁸⁰ Section 73(2)(e) therefore imposes a very significant restraint upon legislation 'dealing with' or making changes in general to the particular sections to which it applies.⁸¹ As Peter Johnston notes, 'interpreted broadly, s 73(2) potentially applies to indirect, as well as direct, changes to the nominated topics, or to changes to the operation of those enumerated provisions'.⁸² The *Conacher* Court noted the Governor-General's and Prime Minister's constitutional relationship may entail that protection of the

(2008) 31(1) *Canadian Parliamentary Review* 15, 15.

- 73 [2010] FCA 131, [5]. See, Adam Dodek, 'The Past, Present and Future of Fixed-Term Elections in Canada' (2010) 4 *Journal of Parliamentary and Political Law* 215, 233-4; Guy Tremblay, 'Limiting the Government's Power to Prorogue Parliament' (2010) 33(2) *Canadian Parliamentary Review* 16, 17. See also, *Constitutional Amendments Act*, S.C 1996, c 1, s 1.
- 74 *Williams v A-G (NSW)* (1913) 16 CLR 404, 457 (Isaacs J). See also, Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, 1880) 432; Sir Ivor Jennings, *Constitutional Problems in Pakistan* (Greenwood Press, 1957) 336.
- 75 (1997) 42 NSWLR 427, 436 (Priestley, Handley and Meagher JJA).
- 76 *Ibid.*
- 77 *Ibid.*
- 78 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308-9 (Charles Court – Premier).
- 79 (2002) 26 WAR 201, 281 [344].
- 80 *Ibid.*
- 81 Peter Johnston, 'Attorney-General (WA) v Marquet: Ramifications for the Western Australian Parliament' (2005) 20 (1) *Australasian Parliamentary Review* 117, 123.
- 82 *Conacher v Canada (Prime Minister)* [2010] FCA 131, [5].

Governor-General's powers extends to the Prime Minister's advice-giving role.⁸³ Similarly, the Governor-in-Council can exercise the Governor's powers.⁸⁴ In *Wrathall v Fleming*, Morris CJ held that the Governor may exercise powers vested in the 'Governor ... not the Governor acting with the advice of the Executive Council', with the Executive Council's advice.⁸⁵ If the Governor is *obliged* to refuse a dissolution contrary to law,⁸⁶ such legislation may limit the Governor's power to grant dissolution. Additionally, such legislation potentially restricts who the Governor may consult when dissolving the Assembly. Accordingly, restricting the Premier's advisory power may affect the Governor's dissolution power.

2. Limiting Independent Gubernatorial Discretion

Following the 1975 dismissal, many Australian constitutional scholars have repudiated Markesinis and focused on limiting independent gubernatorial discretion in exercising the reserve powers. At the Commonwealth level, it has been suggested that this may be achieved via ordinary legislation or even by amending the *Letters Patent*. This section examines these arguments and considers whether they can be applied to Western Australia to limit the Governor's exercise of the dissolution power without holding a s 73(2) referendum.

(i) *Amending the Letters Patent*

Section 73(2) of the *Constitution Act* applies to 'Bills', not prerogative instruments such as *Letters Patent*. Under s 7(2) of the *Australia Acts*, Governors may exercise Her Majesty's power respecting a State to issue, amend or revoke *Letters Patent*.⁸⁷ May the Governor, acting on ministerial advice, amend the *Letters Patent* to limit or fetter independent gubernatorial discretion? Clause XXII of Western Australia's *Letters Patent* provides the '[p]ower to revoke, alter or amend these our Letters Patent is reserved'.⁸⁸ On one view, these revised *Letters Patent* limit the Governor's exercise of the powers under s 7(2) of the *Australia Acts*.⁸⁹ However, it is arguable that this instrument may itself be revoked, altered or amended pursuant to an exercise of the royal prerogative.⁹⁰ At any rate, the Queen

83 *Williams v A-G (NSW)* (1913) 16 CLR 404, 465 (Higgins J); *Wrathall v Fleming* [1945] Tas SR 61, 63 (Morris CJ).

84 [1945] Tas SR 61, 63.

85 George Winterton, *Monarchy to Republic: Australian Republican Government* (Oxford University Press, revised ed, 1994) 51.

86 Bernard O'Brien, 'The Australia Acts' in MP Ellinghaus, AJ Bradbrook and AJ Duggan (eds), *The Emergence of Australian Law* (Butterworths, 1989) 337, 348; Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 261.

87 Western Australia, *Letters Patent Relating to the Office of Governor of the State of Western Australia*, No. 25, 28 February 1986, 686.

88 See, Tony Thomas, 'A Governor for the Seventh State: Codifying the Reserve Powers in a Modern Constitutional Framework' (1999) 29 *University of Western Australia Law Review* 225, 226.

89 See, Donald Stevens, *The Crown, The Governor-General and The Constitution* (LLM, Victoria University of Wellington, 1974) 230.

90 George Winterton, 'The Role of the Governor' in Clement Macintyre and John Williams (eds) *Peace, Order and Good Government: State Constitutional and Parliamentary Reform*

may amend the *Letters Patent* while present in Western Australia and acting on the Premier's advice.⁹¹

Amending the *Letters Patent* has been considered a means of abrogating Governors' reserve powers.⁹² Indeed, some commentators suggest Victoria's previous *Letters Patent* did just that.⁹³ Does this provide a precedent Western Australia may follow? Clause III of Victoria's former *Letters Patent* provided 'The Premier ... shall tender advice to the Governor in relation to the exercise of the ... [Governor's] powers and functions'.⁹⁴ Hanks originally considered Clause III 'impos[ed] a *legal constraint* on the [G]overnor, recognised by the courts, to follow the course advised by the current government'.⁹⁵ No judicial decisions recognising this constraint were cited and Clause III's enforceability may be doubted.⁹⁶ Moreover, Clause III was 'equivocal',⁹⁷ merely identifying the Premier as the Governor's advisor. It did not state that the Governor must follow the Premier's advice.⁹⁸ At any rate, amending Western Australia's *Letters Patent* would not legally constrain the Governor's exercise of the dissolution power. The *Letters Patent* are prerogative instruments. Section 3 of the *Constitution Act* excludes the prerogative operating in this context.⁹⁹

(Wakefield Press, 2003) 209, 216. See also, *Australia Acts 1986* (Cth) & (UK), s 7(5); Commonwealth, *Parliamentary Debates*, House of Representatives, 13 November 1985, 2685 (Lionel Bowen – Attorney-General).

91 See, Alex Castles and Michael Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia 1836-1986* (Lawbook, 1987) 256-7; O'Brien, above n 87, 348; Alex Castles, 'Post-Election Constitutional Usage in the Shadow of Mount Wellington: Tasmania's Constitutional Crisis, 1989' (1990) 12 *Adelaide Law Review* 292, 304-5. *Contra* Twomey, *The Australia Acts 1986*, above n 87, 263.

92 See, Peter Hanks, 'Victoria's Liberals have a Problem' (1991) 10(3) *Australian Society* 5, 6; Brian Galligan, 'Australia' in David Butler and DA Low (eds), *Sovereigns and Surrogates: Constitutional Heads of States in the Commonwealth* (MacMillan, 1991) 61, 81, 84; Brian Costar, 'Constitutional Change' in Mark Considine and Brian Costar (eds), *Trials in Power: Cain, Kirner and Victoria 1982-1992* (Melbourne University Press, 1992) 201, 208. Hanks later modified his view of Victoria's Letters Patent: Peter Hanks, 'Victoria' (1992) 3 *Public Law Review* 33, 36.

93 Victoria, *Letters Patent Relating to the Office of Governor of Victoria*, No. 30, 30 April 1986, 1117. These Letters Patent were revoked by the *Constitution (Amendment) Act 1994* (Vic), s 7(1).

94 Peter Hanks, 'Victoria's Liberals have a Problem' (1991) 10(3) *Australian Society* 5, 6 (emphasis added).

95 See, O'Brien, above n 87, 349.

96 Peter Hanks, 'Victoria' (1992) 3 *Public Law Review* 33, 36. See also, Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Federation Press, 2008) 161.

97 George Winterton, 'The Constitutional Position of Australian State Governors' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook, 1992) 274, 288. See also, Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006), 115-20.

98 *A-G v De Keyser's Royal Hotel* [1920] AC 508, 576.

99 George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983) 99-100.

(ii) ***Parliamentary Supremacy as a Basis for Legislation Regulating Executive Powers Conferred and Entrenched under the Constitution Act***

(a) ***Professor Winterton's Parliamentary Supremacy Thesis***

In the wake of the dismissal, Professor Winterton posited that the Commonwealth Parliament may enact legislation regulating the Governor-General's exercise of dissolution powers conferred under ss 5 and 57 of the *Commonwealth Constitution*. Winterton considered ss 5 and 57 to merely specify the formal repository of power, not those powers' substantive content.¹⁰⁰ Legislation might provide that the Governor-General must exercise dissolution powers upon advice received from ministers enjoying the House of Representative's confidence.¹⁰¹ Winterton argued s 51(xxxix) of the *Commonwealth Constitution*, principles of parliamentary supremacy and the *obiter dictum* of Jacobs J in the *AAP Case*¹⁰² would support such legislation.¹⁰³ Two Acts are cited as examples supporting Winterton's thesis. First, the *High Court of Australia Act 1979* (Cth) establishes conditions precedent to judicial appointments, notwithstanding the *Commonwealth Constitution* providing the Governor-General in Council shall appoint High Court Justices.¹⁰⁴ Secondly, the *Defence Act 1903* (Cth) vests the Defence Minister with general control of the Defence Force, notwithstanding the Governor-General's constitutional position as Commander-in-Chief.¹⁰⁵

Others doubt or deny the Commonwealth Parliament's power to regulate the Governor-General's dissolution powers.¹⁰⁶ First, such laws may not be within s 51(xxxix) if gubernatorial discretion is fundamental to the dissolution powers.¹⁰⁷

100 Geoffrey Lindell, 'Book Review: *Parliament, the Executive and the Governor-General*' (1983) 6 *University of New South Wales Law Journal* 261, 267.

101 *Victoria v Commonwealth* ('AAP Case') (1975) 134 CLR 338, 406 (Jacobs J): 'It does not follow that any subject matter of the exercise of the prerogative which is properly exercisable through the Governor General on the advice of the Executive Council cannot be the subject of legislation of the Parliament which may deny or limit or replace the prerogative by legislative provision. The same is true of any executive power expressly conferred by the Constitution, though of course the exercise of either executive or legislative power is subject to the provisions of the Constitution.'

102 See, Winterton, *Parliament, the Executive and the Governor-General*, above n 100, 98-100; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 373-4.

103 *Commonwealth Constitution*, s 72(i); *High Court of Australia Act 1979* (Cth) ss 5-10.

104 *Commonwealth Constitution*, s 68; *Defence Act 1903* (Cth), s 8. See, Geoffrey Sawer, *Federation Under Strain: Australia 1972-1975* (Melbourne University Press, 1977) 230.

105 JE Richardson, 'The Executive Power of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 50, 72; RD Lumb, 'Fundamental Law and Constitutional Change' (1978) 9 *Federal Law Review* 148, 151; Denis O'Brien, *The Powers of the Governor-General to Dissolve the Houses of Parliament* (LLM, Australian National University, 1982) 60; Lindell, above n 101, 267; Anne Twomey, 'Pushing the Boundaries of Executive Power - Pape, The Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 324.

106 O'Brien, above n 106, 60; Lindell, above n 101, 267; Australian Constitutional Commission, *Final Report of the Constitutional Commission* (Australian Government Publishing Service, 1988) 356; Zines, above n 103, 374.

107 See, for doubts: O'Brien, above n 106, 55.

Secondly, even if the cited laws are valid,¹⁰⁸ s 5 of the *Commonwealth Constitution* uses the term ‘may’, ‘vividly contrasting’ with a mandatory ‘shall’ in s 72(i).¹⁰⁹ Therefore, s 5 may grant the Governor-General a discretion, whereas s 72(i) merely outlines the formal repository of power. Thirdly, a strict separation of legislative and executive powers may undermine implications of parliamentary supremacy.¹¹⁰

(b) *Applying Professor Winterton’s Parliamentary Supremacy Thesis to Western Australia*

Is there a basis for extending Winterton’s thesis to Western Australia? The necessary conditions exist. State legislative power is plenary within limits and parliamentary supremacy is recognised at the State level. Additionally, State Constitutions do not establish an independent separation of powers doctrine.¹¹¹ However, State Parliament’s power and supremacy are subject to, amongst other things, valid and binding manner and form provisions.¹¹² In *Trethowan*, Dixon J held manner and form issues are ‘not ... determined by ... direct[ly] appl[ying] ... the doctrine of parliamentary sovereignty’.¹¹³ Section 6 of the *Australia Acts* does not extend to state executive power.¹¹⁴ Accordingly, manner and form provisions purportedly entrenching gubernatorial executive powers may not bind Parliament unless legislation regulating such powers otherwise engages s 6 or another source of legal efficacy exists. If not, State Parliament may enact such legislation through ordinary procedures. However, suggesting principles of parliamentary supremacy operate over and above valid and binding manner and form provisions involves overturning *Trethowan*. In *Glew v Governor of Western Australia*, Hasluck J held that s 73(2) does not apply to laws consistent with ‘substantive realities

108 James Thomson, ‘Appointing Australian High Court Justices: Some Constitutional Conundrums’ in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook, 1992) 251, 261.

109 Winterton, *Parliament, the Executive and the Governor-General*, above n 100, 100. However, Winterton considers this ‘too tenuous a ground on which to resist the implications of the fundamental constitutional concept of parliamentary supremacy’.

110 *Clyne v East* (1967) 68 SR (NSW) 385, 397; *Nicholas v Western Australia* [1972] WAR 168, 173 (Jackson CJ), 175 (Burt J); *South Australia v Totani* (2010) 242 CLR 1, 45 (French CJ). Cf James Thomson, ‘Beyond Superficialities: Crown Immunity and Constitutional Law’ (1990) 20 *University of Western Australia Law Review* 710, 718-20.

111 *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 425 (Dixon J); *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376, 390 (Millhouse J); *Kable v DPP (NSW)* (1996) 189 CLR 51, 66 (Brennan CJ). See also, Dixon above n 38, 50.

112 *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 425. See, regarding the distinction between parliamentary sovereignty and parliamentary supremacy: Julie Taylor, ‘Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy’ (2004) 32 *Federal Law Review* 57, 59-60.

113 *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 429 (Dixon J); *West Lakes Ltd v South Australia* (1980) SASR 389, 420 (Matheson J); *Commonwealth Aluminium Corporation Ltd v A-G (Qld)* [1976] Qd R 231, 237 (Wanstall SPJ), 260 (Dunn J). See also, RD Lumb, ‘Manner and Form in the Australian Constitutional System Post *Australia Acts*’ (1991) 12 *Queensland Lawyer* 177, 181; Carney, above n 38, 165.

114 (2009) 222 FLR 417, 428 [74], 430 [90].

underlying the *Constitution [Act]*.¹¹⁵ If the concept of ‘substantive constitutional reality’ posited in *Glew* encompasses the principle of parliamentary supremacy, laws consistent with that principle may not fall within s 73(2) of the *Constitution Act*. However, *Glew* may be more properly limited to its facts.¹¹⁶

SECTION 73 AND THE STATE FRANCHISE

High Court majorities in *Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner* held that ss 7 and 24 of the *Commonwealth Constitution* establish an implied freedom of universal adult-citizen suffrage limiting Commonwealth legislative power.¹¹⁷ Different views exist regarding *Roach* and *Rowe*’s implications for the state franchise.¹¹⁸ Significantly, Western Australia’s Attorney-General intervened in both cases in support of the impugned Commonwealth legislation. *Roach* and *Rowe* may have added significance for Western Australia given s 73(2)(c) of the *Constitution Act*.¹¹⁹ Section 73(2)(c) entrenches the requirement that Parliament’s two Houses be composed of members ‘chosen directly by the people’. In *Stephens v West Australian Newspapers Ltd*, s 73(2)(c) was held to entrench representative democracy in Western Australia and provide a basis for an implied freedom of political communication in this state.¹²⁰ The phrase ‘chosen directly by the people’ is a permutation of ss 7 and 24’s reference to ‘directly chosen by the people’ which underlies the implied freedom of universal adult-citizen suffrage established in *Roach*. This section considers whether, in light of *Roach* and *Rowe*, Western Australia’s Parliament must observe s 73’s restrictive procedures when enacting laws altering the State franchise. Consistent with *Stephens*, s 73(2)(c) may provide a basis for a freedom of universal adult-

115 Hasluck J’s reference to ‘substantive constitutional reality’ in *Glew v Governor of Western Australia* (2009) 222 FLR 417 related to changes in legislation’s terminology from ‘Queen’ and ‘Governor’ to ‘State of Western Australia’. See also, Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, *Consolidation of the Queensland Constitution: Final Report* (1999) 12: Queensland’s Crown Solicitor advised the Committee that for a subsequent Act to ‘affect’ provisions entrenched by a provision similar to s 73(2) in the *Constitution Act 1867* (Qld) that Act would have to change its meaning in some way. Accordingly, substituting the word ‘State’ for ‘colony’ would not affect the entrenched sections.

116 (2007) 233 CLR 162, 174 [7] (Gleeson CJ), 198-9 [83]-[85] (Gummow, Kirby and Crennan JJ); (2010) 243 CLR 1. See, for a detailed analysis and critique of these two cases: Nicholas Tiverios, *Remapping Political Thickets: Restraint and Judicial Review of Commonwealth Electoral Law* (LLB(Hons) Thesis, University of Western Australia, 2011).

117 Compare, Anthony Gray, ‘The Guaranteed Right to Vote in Australia’ (2007) 7(2) *University of Queensland* 178, 194-7; Wait, above n 6, 259.

118 It has been suggested references to State Parliaments in ss 9, 15, 25, 41, 51(xxxvii), 51(xxxviii), 107, 108, 111, 123 and 124 of the *Commonwealth Constitution* entrench State Parliaments’ ‘representativeness’ and limits State Parliament’s power to alter the franchise: *McGinty v Western Australia* (1996) 186 CLR 140, 216 (Gaudron J); *Egan v Willis* (1998) 195 CLR 424, 494 [135] (Kirby J); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 281-2 [197] (Kirby J). See also, *Commonwealth Constitution*, s 25; Anne Twomey, ‘An Obituary for s 25 of the *Constitution*’ (2012) 23 *Public Law Review* 125, 137-8. But see, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 201 (McHugh J).

119 (1994) 182 CLR 211, 233-4 (Mason CJ, Toohey and Gaudron JJ), 236 (Brennan J).

120 (1982) 149 CLR 79.

citizen suffrage in Western Australia. However, this is unlikely to provide as extensive protection of the franchise as ss 7 and 24 of the *Commonwealth Constitution* due to s 73(2)(c)'s context and the limits of s 6 of the *Australia Acts*.

1. *Roach v Electoral Commissioner* and Section 73(2)(c)

Wilsmore was the last challenge to the constitutionality of Western Australian laws altering the state franchise.¹²¹ However, the prospect of a challenge seemingly precipitated Western Australia's intervention in, and legislative response to, *Roach*. In *Roach*, the plaintiff challenged the constitutionality of amendments in 2006 to the *Commonwealth Electoral Act 1918* (Cth) disenfranchising all persons serving a sentence of imprisonment.¹²² The plaintiff submitted that these amendments infringed a requirement under ss 7 and 24 of the *Commonwealth Constitution* that the Commonwealth Parliament's two houses be 'directly chosen by the people'. Western Australia's Attorney-General intervened in support of the validity of the Commonwealth legislation.¹²³ When Kirby J inquired why Western Australia's Attorney-General intervened, Mr RM Mitchell noted the similarities between s 73 of the *Constitution Act 1889* (WA) and ss 7 and 24 of the *Commonwealth Constitution*.¹²⁴ Amendments to the *Electoral Act 1907* (WA) disenfranchised all prisoners in line with the impugned federal provisions in *Roach*.¹²⁵ Consequently, invalidation of the federal provisions may have resulted in a challenge to Western Australia's legislation. Ultimately, Gleeson CJ, Gummow, Kirby and Crennan JJ held that the 2006 amendments to the *Commonwealth Electoral Act 1918* (Cth) were unconstitutional.¹²⁶ Western Australia's Parliament subsequently substituted the blanket disenfranchisement of prisoners for a disenfranchisement of persons serving a sentence of imprisonment of one year or longer.¹²⁷ This amendment to the *Electoral Act* was based on the Government's acceptance that *Roach* entailed that a blanket disenfranchisement of prisoners was unconstitutional.¹²⁸

2. The Scope of Protection under Section 73(2)

In *Burke v Western Australia*, Burt CJ held that 'for the purposes of s 73(2)(c) of the *Constitution* and in the context of a universal adult franchise "the people" means ... the persons enrolled and entitled to vote: s 17 of the *Electoral Act*'.¹²⁹ Of

121 *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

122 (2007) 233 CLR 162, 163, 170, 184 [34].

123 Transcript of Proceedings, *Roach v Electoral Commissioner* [2007] HCATrans 276 (13 June 2007).

124 *Electoral Legislation Amendment Act 2006* (WA), s 18.

125 (2007) 233 CLR 162, 182 [24]-[25] (Gleeson CJ), 201-2 [92]-[95] (Gummow, Kirby and Crennan JJ).

126 *Electoral Amendment (Miscellaneous) Act 2009* (WA), s 7.

127 Explanatory Memorandum, *Electoral Amendment (Miscellaneous) Bill 2008* (WA), cl 7. Academic literature also accepts this view: Graeme Orr and George Williams, 'The People's Choice: The Prisoner Franchise and the Constitutional Protection of Voting Rights in Australia' (2009) 8(2) *Election Law Journal* 123, 134.

128 [1982] WAR 248, 251.

129 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

course, this leaves open for debate the nature and extent of exceptions to universal suffrage.¹³⁰ What constitutes universal adult suffrage is contentious and has changed throughout history. In *Attorney-General (Cth) ex rel McKinlay v Commonwealth*, McTiernan and Jacobs JJ considered the words ‘chosen by the people’ in ss 7 and 24 of the *Commonwealth Constitution* fall to be applied to different circumstances at different times.¹³¹ Their Honours held that whether a parliamentarian is ‘chosen by the people’ partially depends upon the *common understanding of the time* on those who must be eligible to vote.¹³² Gleeson CJ in *Roach* agreed with McTiernan and Jacobs JJ’s interpretation of the words ‘chosen by the people’. His Honour held that by 2007 changing historical circumstances, including legislative history, meant ss 7 and 24 limited the Commonwealth Parliament’s power to alter the franchise.¹³³ A majority in *Rowe* also interpreted ‘chosen by the people’ in light of ‘common understandings’ of the time.¹³⁴ Indeed, Heydon J colourfully noted that the Commonwealth Solicitor-General’s ‘originalist’ submission regarding the 1900 meaning of ‘chosen by the people’ stimulated ‘as much approbation as the man who asked for a double whisky in the Grand Pump Room at Bath’.¹³⁵ Does this ‘common understanding’ jurisprudence translate to the interpretation of the phrase ‘chosen directly by the people’ in s 73(2)(c)?

Wickham J in *Burke* left open the question whether the term ‘the people’ in s 73(2)(c) ‘has a changing connotation (*sic* - denotation) according to changing political and social values’.¹³⁶ An affirmative answer underlies Toohey J’s reasoning in *McGinty*. His Honour held that an implication of representative democracy in Western Australia’s Constitution, derived partially from s 73(2), was responsive to the time and circumstances in which it falls for consideration.¹³⁷ However, majorities in both *Burke* and *McGinty* interpreted s 73(2)(c) in light of Western Australia’s electoral legislation in 1978 when s 73(2) was enacted.¹³⁸ In both cases, the plaintiff argued electoral distribution laws resulted in Western Australia’s Parliament not being ‘chosen directly by the people’ contrary to s 73(2)(c). The *Burke* and *McGinty* majorities rejected this argument. One consideration in both decisions was that the challenged electoral distribution laws respectively permitted a similar and lesser degree of malapportionment than legislation in 1978 permitted. Accepting the plaintiffs’ argument would entail that the 1978

130 (1975) 135 CLR 1, 36.

131 Ibid.

132 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ). See also, (2007) 233 CLR 162, 198-9 [83] (Gummow, Kirby and Crennan JJ).

133 (2010) 243 CLR 1, 18-9 [18]-[21] (French CJ), 48-9 [122]-[123] (Gummow and Bell JJ), 116-7 [366]-[367] (Crennan J). *Contra*, (2010) 243 CLR 1, 89 [266] (Hayne J), 97 [292]-[293], 99-100 [302]-[304], 102 [310]-[311] (Heydon J).

134 (2010) 243 CLR 1, 97 [293] (Heydon J).

135 [1982] WAR 248, 256.

136 (1996) 186 CLR 140, 216.

137 [1982] WAR 248, 253 (Burt CJ), 256 (Smith J agreeing); (1996) 186 CLR 140, 178 (Brennan CJ), 189 (Dawson J), 253 (McHugh J). See also, (1996) 186 CLR 140, 299-300 (Gummow J).

138 This assumes that the phrase ‘chosen directly by the people’ has a relatively fixed content which is based on historical circumstances in 1978.

Parliament was not itself ‘chosen directly by the people’.¹³⁹

Applying a similar approach to laws altering the franchise raises doubts whether s 73(2)(c) protects post-1978 expansions of the franchise. One such expansion is the enfranchisement of expatriates under s 17A of the *Electoral Act*.¹⁴⁰ Whilst s 73(2)(c) may apply only to laws disenfranchising classes of voters enfranchised in 1978, it is unlikely to apply to all such laws. In 1978 the status of ‘British subject’ was a necessary qualification to vote under the *Electoral Act*’s provisions. Amendments to the *Electoral Act* in 1983 replaced the qualification of ‘British subject’ with ‘Australian citizen’ but inserted a grandfather clause preserving voting rights of British subjects enrolled prior to January 26 1984.¹⁴¹ *Bennett v Commonwealth* suggests Parliament may now repeal this grandfather clause through ordinary procedures without infringing s 73(2)(c).¹⁴² The High Court held that nothing in the *Commonwealth Constitution* prohibits discrimination in conferring or withholding electoral rights based on Australian citizenship.¹⁴³ Presumably this includes ss 7 and 24 which are somewhat analogous to s 73(2)(c).

There are limits, however, to the analogy. In *Rowe*, French CJ held that the validity of laws denying the franchise to a class of persons is not determined by whether an election conducted under its provisions results in members of Parliament being ‘directly chosen by the people’.¹⁴⁴ Conversely, s 73(2)(c) purportedly applies to bills expressly or impliedly providing that either house of Parliament ‘be composed of members other than members chosen directly by the people’. Hayne J’s approach in *Roach* and *Rowe* of asking whether the impugned provisions yield Houses of Parliament chosen by the people is apposite in relation to s 73(2)(c).¹⁴⁵

3. ‘The Electors’ and ‘The People’ under Section 73

In *Burke*, Burt CJ rejected the plaintiff’s submission drawing a distinction between ‘the electors’ and ‘the people’ under s 73 of the *Constitution Act*.¹⁴⁶ Similarly, upon introducing the Acts Amendment (Constitution) Bill 1978, Premier Charles Court stated the Bill proposed to protect ‘the right of the *electors at large* to

139 *Electoral Legislation Amendment Act 2006* (WA).

140 *Electoral Amendment Act 1983* (WA).

141 (2007) 231 CLR 91.

142 *Bennett v Commonwealth* (2007) 231 CLR 91, 109 [38] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), 130-1 [111] (Kirby J).

143 (2010) 243 CLR 1, 20-1 [25].

144 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 206 [112]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 64 [182]. See also, Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308 (Charles Court – Premier). Premier Charles Court stated the Amendment (Constitution) Bill 1978 proposed to protect ‘the right of the *electors at large* to elect the members of either house’.

145 [1982] WAR 248, 251. In *Rowe*, French CJ considered that universal suffrage had caused the concepts of ‘the people’ and ‘the electors’ to converge: (2010) 243 CLR 1, 19 [21]. But see, *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 44 (Gibbs J).

146 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308 (Charles Court – Premier).

select the members of either house'.¹⁴⁷ However, as a textual matter, s 73(2)(g), (3), (4) and (5) refer to 'the electors' in contrast to s 73(2)(c)'s reference to 'the people'.¹⁴⁸ Under s 73(3) and (4), bills to which s 73(2) applies are to be submitted to the electors at a referendum. The electors are those persons qualified to vote for Legislative Assembly elections under the *Electoral Act 1907*. Such a bill is to be submitted to the Governor for assent if a majority of the electors voting at the referendum approve the bill.¹⁴⁹ Section 73(6) provides that a person entitled to vote at Legislative Assembly elections (an elector) is entitled to bring proceedings in the Supreme Court to enforce s 73(2). Section 73(2)(e) entrenches s 73 itself.

As Steytler J noted in *S (A Child) v The Queen*, bills expressly or impliedly affecting the right conferred upon the persons mentioned in s 73(6) to bring Supreme Court proceedings to enforce s 73(2) must meet s 73(2)'s requirements.¹⁵⁰ However, does s 73(2) also apply to bills altering electors' qualifications and thereby affecting which persons are 'electors' and may bring proceedings under s 73(6)? Alterations to electoral qualifications and disqualifications also change the electorate for s 73(2) referendums and, potentially, even the results of a s 73(2) referendum. In *Wilsmore*, Wilson J drew a distinction between a rule and the subject matter upon which the rule operates.¹⁵¹ His Honour rejected the conclusion reached by Wickham J in the Supreme Court that amendments to the *Electoral Act* touching electors' qualifications indirectly altered sections of the *CAA 1899* requiring parliamentarians to be, or be qualified to become, an elector entitled to vote.¹⁵² The rule prescribed by the *CAA's* sections remained the same. Amendments to the *Electoral Act* merely meant that some persons who had formerly satisfied the description of an elector no longer did so.¹⁵³ However, s 73(2)(e) purportedly applies to legislation 'expressly or impliedly in any way affect[ing]' s 73 which is seemingly wider than whether legislation *alters* protected provisions.¹⁵⁴ Although this phrase gives s 73(2)(e) a very broad reach,¹⁵⁵ it is unlikely to entail that amendments to electoral qualifications and disqualifications affect ss 73(3)–(6). Under s 16 of the *Interpretation Act 1984* references in written laws to other written laws include any amendments from time to time to the latter written law. References in s 73(3) of the *Constitution Act* to the electors qualified to vote under the *Electoral Act*, therefore, encompass alterations to the franchise.

147 Cf *Commonwealth Constitution*, ss 7, 8, 24, 30, 41, 128.

148 *Constitution Act 1889* (WA), s 73(5).

149 (1995) 12 WAR 392, 400. However, Western Australia's Parliament would only be required to comply with s 73(2) if it was bound by a source of legal efficacy when enacting such a bill. (1982) 149 CLR 79, 97.

150 [1981] WAR 159, 165.

151 (1982) 149 CLR 79, 97-8.

152 Johnston, *Manner and Form Provisions in the Western Australian Constitution*, above n 3, 209.

154 *Marquet, Clerk of Parliaments (WA) v A-G (WA)* (2002) 26 WAR 201, 281 [344] (Wheeler J).

155 (2003) 217 CLR 545, 572 [74] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

4. Entrenchment Issues: The Franchise and Parliament's Constitution

Accepting though that *some* laws altering the franchise fall within s 73(2)(c), must such legislation be approved at a referendum? This raises another question: is a law altering electors' qualifications or disqualifications respecting Parliament's 'constitution, powers or procedure'? Parliament's 'constitution' is the most relevant term for present purposes and was the focus of the majority's analysis in *Marquet*.¹⁵⁶ In *Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ held that for the purposes of s 6 of the *Australia Acts* a State Parliament's 'constitution' extends, at least to some extent, to 'features which go to give it, and its Houses, a representative character'.¹⁵⁷ Accordingly, legislation dealing with matters encompassed by the general description 'representative' and which give that word its application in a particular case may engage s 6.¹⁵⁸

The franchise is critical to, and at the core of, representative democracy.¹⁵⁹ On this basis, laws altering the franchise seemingly fall squarely within the *Marquet* majority's representativeness test and engage s 6 of the *Australia Acts* as laws respecting Parliament's constitution. However, the *Marquet* majority subsequently held, citing *Clydesdale v Hughes*, that not every matter touching parliamentarians' election affects Parliament's constitution.¹⁶⁰ Their Honours noted that *Clydesdale* established that changes to the grounds disqualifying sitting members from a legislative chamber's membership do not change the chamber's 'Constitution' under s 73 of the *Constitution Act*.¹⁶¹ Yet, as Ipp J noted in *Yougarla*, Parliament's membership qualifications and disqualifications are 'a question of the utmost importance in the life of any democratic state'.¹⁶² Qualifications for, and disqualifications from, such membership are central to Parliament's representativeness.¹⁶³

The coherence of the *Marquet* majority's representativeness test is questionable if the apparent acceptance of *Clydesdale* as a limitation on the test entails that parliamentarians' qualifications constitute an exception to the test. This is especially so since *Clydesdale* has traditionally formed the reference point along a scale of importance in determining what forms part of Parliament's constitution, with matters less 'important' than parliamentarians' qualifications

156 Ibid, 573 [76].

157 Ibid.

158 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).

159 (2003) 217 CLR 545, 573 [77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

160 Ibid, referring to *Clydesdale v Hughes* (1934) 51 CLR 518, 528 and citing *Western Australia v Wilsmore* (1982) 149 CLR 79, 102.

161 *Yougarla v Western Australia* (1999) 21 WAR 488, 503 [45].

162 Cf *Cheatle v The Queen* (1993) 177 CLR 541, 560-1.

163 See, Anonymous, above n 2, 455-6; Twomey, 'Manner and Form Limitations', above n 6, 184; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 330; Taylor, above n 98, 475.

excluded from Parliament's constitution.¹⁶⁴ For example, in *Wilsmore*, Brinsden J concluded that as laws altering parliamentarians' qualifications did not affect Parliament's Constitution under s 73 nor did laws varying provisions merely relating to electors' disqualifications.¹⁶⁵ Indeed, as Stawell CJ opined in *Kenny v Chapman*, 'what would be an altering of the constitution, if altering the qualifications of members [is] not'?¹⁶⁶ In *Marquet*, enacting a single State-wide electorate using proportional representation was advanced as an example falling within the representativeness test.¹⁶⁷ Proportional representation advances a 'microcosmic conception' of representation.¹⁶⁸ It generally increases minor parties' parliamentary representation¹⁶⁹ and facilitates political parties nominating candidates from broader demographics.¹⁷⁰ However, would not legislation directly determining whether candidates are eligible for parliamentary membership be more closely connected to Parliament's representativeness than laws merely indirectly facilitating higher parliamentary representation of those candidates? A close analysis of both *Clydesdale* and *Marquet* is therefore necessary to determine the coherence of the representativeness test and its application to laws altering the franchise.

(i) *Clydesdale v Hughes*

Clydesdale was the first occasion on which s 73 of the *Constitution Act* was subject to judicial interpretation and application.¹⁷¹ Previously, it was seemingly accepted that laws altering the qualifications and disqualifications for parliamentary membership were respecting Parliament's 'constitution'.¹⁷² Similarly, voters' qualifications were held to form part of Parliament's constitution in *Ex parte Driffield* and *Auld v Murray*.¹⁷³ During parliamentary debate on the Constitution

- 164 *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 23.
- 165 (1861) W & W 93, 100. See also, *McDonald v Cain* [1953] VLR 411, 441, 444 (O'Brien J); *Wilsmore v State of Western Australia* [1981] WAR 159, 164 (Wickham J).
- 166 (2003) 217 CLR 545, 573 [76] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
- 167 Iain MacLean, 'Forms of Representation and Systems of Voting' in David Held (ed), *Political Theory Today* (Polity Press, 1991) 172, 173-4. The microcosmic conception posits that Parliament should be an exact portrait, in miniature, of society. That is, it should contain members drawn from all groups and sections of society, in proportion to their size in society.
- 168 Phillip Pandal, David Black and Harry Phillips, *Parliament: Mirror of the People?* (Parliament of Western Australia, 2007) 71; Rob Salmond, 'Proportional Representation and Female Parliamentarians' (2006) 31 *Legislative Studies Quarterly* 175, 197.
- 169 *McGinty v Western Australia* (1996) 186 CLR 140, 249-50 (McHugh J); Pandal, Black and Phillips, above n 169, 149.
- 170 See, Johnston, 'Freeing the Colonial Shackles' above n 2, 318.
- 171 See, *Kenny v Chapman* (1861) W & W 93, 100 (Stawell CJ). Cf *Australian States Constitution Act 1907* (Imp), s 1(2)(d).
- 172 South Australian Register, 17 December 1862, 3 cited in Taylor, above n 98, 474; South Australian Register, 17 December 1863, 3. The precedential value of these two cases must be viewed in light of them both preceding and precipitating the *Colonial Laws Validity Act 1865* (Imp): See, DB Swinfen, 'The Genesis of the Colonial Laws Validity Act' [1967] *Juridical Review* 29, 40-1, 45, 50-5.
- 173 Western Australia, *Parliamentary Debates*, Legislative Council, March 28 1889, 169

Bill 1889, the Attorney-General, the Hon Charles Warton, stated:

So far as constitutional matters were concerned – that was to say, what kind of an Upper House they should have, what the franchise should be, or what the qualification should be, the only restriction as regards future legislation affecting the bill was that such legislation should be passed with the concurrence of an absolute majority of both Houses.¹⁷⁴

Both Houses of Parliament passed the *Parliament (Qualification of Women) Act 1920* by absolute majorities which were considered necessary to comply with s 73 of the *Constitution Act*.¹⁷⁵ Other legislation's passage also indicates Parliament operated under this assumption.¹⁷⁶ Questions regarding s 73 arose in *Clydesdale* as the Legislative Assembly assented to the Legislative Council's amendments to the *Constitution Acts Amendment Act 1933* ('*CAAA 1933*') by less than an absolute majority.

Western Australia's Parliament enacted the *CAAA 1933* whilst an action was pending between two Western Australian parliamentarians: Alexander Clydesdale MLC and Thomas Hughes MLA.¹⁷⁷ Clydesdale accepted an appointment as a member of Western Australia's Lottery Commission under the *Lotteries (Control) Act 1932*. Hughes commenced proceedings in Western Australia's Supreme Court claiming, amongst other things, that Clydesdale's membership of the Lottery Commission constituted an office of profit under the Crown. On this basis, Hughes claimed Clydesdale was disqualified from sitting or voting as a parliamentarian under s 38 of the *CAAA 1899*. Section 2 of the *CAAA 1933* provided that s 38 of the *CAAA 1899* did not apply to members of the Lottery Commission appointed pursuant to the *Lotteries (Control) Act 1932*.

At first instance, and on appeal to the Full Supreme Court, s 2 of the *CAAA 1933* was held not to confer immunity upon Clydesdale.¹⁷⁸ Clydesdale appealed to the High Court and Hughes submitted that the *CAAA 1933* had not been passed in accordance with s 73 of the *Constitution Act 1889*. As noted above, the Legislative Council's amendments to the *CAAA 1933* were assented to by less than an absolute majority of the Legislative Assembly. Rich, Dixon and McTiernan JJ, however, considered the *CAAA 1933* to have been passed in accordance with s 73. Section 73 was interpreted as recognising the 'possibility of substantial amendment in the other House after the passage of the Bill by the requisite majorities through the House where it originates'.¹⁷⁹ At any rate, their Honours rejected Hughes'

(emphasis added).

174 Legislative Assembly: *Votes and Proceedings of the Legislative Assembly*, No. 23, 28 September 1920, 119; *Votes and Proceedings of the Legislative Assembly*, No. 25, 30 September 1920, 134. Legislative Council: *Minutes of the Proceedings of the Legislative Council*, No. 22, 12 October 1920, 59-60 (2nd reading); *Minutes of the Proceedings of the Legislative Council*, No. 23, 13 October 1920, 63 (3rd reading).

175 Miragliotta, above n 2, 158-9. See eg, *Constitution Acts Amendment Act 1899* (WA).

176 However, Thomas Hughes was not a member of Parliament at the time.

177 *Hughes v Clydesdale* (1934) 36 WALR 73; *Clydesdale v Hughes* (1934) 36 WALR 78.

178 (1934) 51 CLR 518, 528-9.

179 *Ibid* 528.

argument that passage in accordance with s 73 was necessary since the *CAAA 1933* altered or changed the Constitution of the Legislative Council. Rich, Dixon and McTiernan JJ simply stated ‘we do not agree that it effected a change in the constitution of the Legislative Council’.¹⁸⁰ Unfortunately, this statement is of little assistance in determining their Honours’ reasoning as it does not explain why they disagreed with the proposition that the *CAAA 1933* effected a change in the Legislative Council’s Constitution for the purposes of s 73.¹⁸¹

A number of different interpretations of *Clydesdale* have been posited to explain their Honours’ decision. Narrow readings of *Clydesdale* suggest it does not establish that electors’ and parliamentarians’ qualifications are not part of a legislative chamber’s ‘constitution’. In *McDonald v Cain*, O’Byrne J considered *Clydesdale* was decided on the basis that the *CAAA 1933* was a declaratory Act and did not alter the law as to parliamentarians’ qualifications.¹⁸² His Honour held that the *CAAA 1933* simply removed doubts as to the disqualifications by validating *Clydesdale*’s position. Rich, Dixon and McTiernan JJ did state in *Clydesdale* that the object of the *CAAA 1933* was ‘by declaratory enactment to settle a dispute in question, not to make a mere prospective enactment’.¹⁸³ A majority of the Supreme Court in *Wilsmore v Western Australia* also interpreted *Clydesdale* narrowly. Wickham J, with whom Smith J agreed, had ‘no doubt that in general, a change in qualification or disqualification for electors or for membership of either House is a change affecting the constitution of the House(s)’.¹⁸⁴ *Clydesdale* was explicable on the basis that the *CAAA 1933* was ‘ad hoc’ and ‘temporary’.¹⁸⁵

A broader interpretation of *Clydesdale* is that the Court reached its conclusion on the *CAAA 1933* and s 73 of the *Constitution Act* based on the view that laws altering parliamentarians’ qualifications do not effect a change in either legislative chamber’s constitution for the purposes of s 73. Brinsden J adopted this interpretation of *Clydesdale* at first instance in *Wilsmore*.¹⁸⁶ His Honour rejected O’Byrne J’s interpretation of *Clydesdale* in *McDonald*, noting that whilst the *Clydesdale* Court referred to the *CAAA 1933* as a ‘declaratory enactment ... not a mere prospective enactment’, it was necessary to interpret this in light of the lower courts viewing the *CAAA* as operating only prospectively.¹⁸⁷ On appeal to

180 One possibility is that ‘Constitution’ in s 73 of the *Constitution Act 1889* (WA) was interpreted in light of s 1(2)(d) of the 1907 Imperial Act. Their Honours held that the *CAAA 1933* was not required to be reserved under the 1907 Imperial Act immediately after addressing s 73 of the *Constitution Act*.

181 [1953] VLR 411, 441 (O’Byrne J).

182 (1934) 51 CLR 518, 528.

183 [1981] WAR 159, 164, 177.

184 *Ibid* 163-4.

185 *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 23.

186 *Ibid* 22.

187 (1982) 149 CLR 79, 83 (Gibbs CJ), 85 (Mason J). Stephen J, whilst otherwise in complete agreement with Wilson J, preferred to express no view on the meaning of s 73’s phrase ‘Constitution of the Legislative Council and the Legislative Assembly’: (1982) 149 CLR 79, 85.

the High Court, Wilson J, Gibbs CJ and Mason J agreeing in this respect,¹⁸⁸ held that:

Clydesdale v Hughes is clear authority, unless and until it is reversed or departed from by this Court, for the proposition that a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of s 73 of the 1889 Act. When such an authority has guided the law-making procedures of the Parliament for almost fifty years then any departure from it would require very serious consideration.¹⁸⁹

(ii) ***Marquet, the Qualification, the Franchise and Parliament's Constitution***

The High Court *Marquet* majority referred to *Clydesdale* and *Wilsmore* specifically in relation to s 73 of the *Constitution Act*, not s 6 of the *Australia Acts*.¹⁹⁰ Ultimately, the representativeness test's coherence depends on whether this indicates equivocality to *Clydesdale* or acceptance of *Clydesdale* as a limitation on the representativeness test.¹⁹¹ Adopting the latter view requires reassessment of the exception¹⁹² or the test itself. In *Marquet v Attorney-General (WA)*, Malcolm CJ, Steytler and Parker JJ noted *Clydesdale's* scope may need reassessment.¹⁹³ Like the High Court majority, Steytler and Parker JJ applied representativeness as a determinant of Parliament's constitution whilst simultaneously accepting *Clydesdale* as a limit on constitution's meaning in s 6 of the *Australia Acts*.¹⁹⁴ Their Honours also accepted Wilson J's analysis in *Wilsmore* and rejected O'Bryan J's interpretation of *Clydesdale* in *McDonald*. However, their Honours noted that the change to qualifications in *Clydesdale* was extremely confined in scope and duration.¹⁹⁵ Would some types and degrees of change be so significant as to alter Parliament's constitution? For example, would gender-based legislative disqualifications from voting or standing for Parliament be respecting Parliament's constitution? Such disqualifications would obviously affect Parliament's representativeness. However, in *Attorney-General (WA) ex rel*

188 (1982) 149 CLR 79, 102.

189 (2003) 217 CLR 545, 573 [77].

190 For the former interpretation, see: Johnston, 'Method or Madness', above n 19, 42. For the latter interpretation, see: Twomey, 'Manner and Form Limitations', above n 6, 184.

191 Taylor, above n 98, 474.

192 *Marquet, Clerk of the Parliaments (WA) v A-G (WA)* (2002) 26 WAR 201, 221 [70] (Malcolm CJ), 262 [261] (Steytler and Parker JJ).

193 *Ibid* 263-4 [266].

194 *Ibid* 262 [261]. See also, *Wilsmore v State of Western Australia* [1981] WAR 159, 163-4 (Wickham J).

195 *A-G (WA) ex rel Burke v Western Australia* [1982] WAR 241, 244. See, *Western Australia v Wilsmore* (1982) 149 CLR 79, 102 (Wilson J). See also, *Wilsmore v Western Australia* [1981] WAR 159, 177 (Smith J): 'The answer to such a question [whether a legislative provision alters Parliament's constitution] does not lie in the making of an assessment on a quantitative footing of the consequences of the amending legislation'. Cf [1981] WAR 159, 165 (Wickham J).

Burke v Western Australia, Burt CJ, citing Wilson J in *Wilsmore*, considered it irrelevant the change effected in *Clydesdale* was temporary and narrow.¹⁹⁶ His Honour considered Parliament's 'Constitution' in s 73 of the *Constitution Act* to mean no more than Parliament's size and the number of electoral districts.¹⁹⁷ This analysis was seemingly predicated on the marginal notes to ss 11 and 45 of the *Constitution Act*.¹⁹⁸ In *Wilsmore*, Brinsden J considered these marginal notes of little assistance in ascertaining 'Constitution's' meaning in s 73.¹⁹⁹ At any rate, Burt CJ's reasoning does not limit the meaning of Parliament's 'constitution' in s 6 of the *Australia Acts* which is wider than s 73 of the *Constitution Act* in this respect.²⁰⁰

Accepting then that *Clydesdale's* scope is potentially open to reassessment, what legislative alterations to the franchise would change Parliament's 'constitution' under s 6 of the *Australia Acts*? Since the *Marquet* majority cited Wilson J's application of *Clydesdale* in *Wilsmore*, changes such as those to prisoners' voting qualifications considered in *Wilsmore* would seemingly not fall within s 6.²⁰¹ Wilson J also addressed the reduction in the age for voting and standing for Parliament from 18 to 21 years of age. Yet, the *Marquet* majority indicated that 'section 6 is not to be read as confined to laws which ... altogether take away [Parliament's] "representative" character'.²⁰² Intuitively, s 6 of the *Australia Acts* would catch amendments to the *Electoral Act* re-establishing gender or racial disqualifications from the franchise or making voting rights dependent on educational or property qualifications.²⁰³ Whether it also applies to more probable alterations such as to laws altering the voting rights of permanent residents and expatriates is less clear.

CONCLUSION

From its enactment in 1889 until its amendment in 1978, s 73 proved to be a 'paper tiger'.²⁰⁴ As Gibbs CJ surmised in *Wilsmore*, s 73 was a curiously weak and ineffectual provision which was not intended to be a great constitutional

196 [1982] WAR 241, 244.

197 The marginal notes to ss 11 and 45 of the *Constitution Act 1889* (WA) were respectively 'Constitution of Legislative Assembly' and 'Legislative Council to be elected'.

198 *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 26. See also, *McDonald v Cain* [1953] VR 411, 423 (Gavan Duffy J).

199 *Marquet, Clerk of the Parliaments (WA) v A-G (WA)* (2002) 26 WAR 201, 264 [268] (Steytler and Parker JJ). See, Kevin Booker and George Winterton, 'The Act of Settlement and the Employment of Aliens' (1981) 12 *Federal Law Review* 212, 228. On the other hand, Wallace J in *Wilsmore v Western Australia* characterised section 5 of the *CLVA* as the predecessor to s 73(1) of the *Constitution Act 1889* (WA): [1981] WAR 159, 169. Greg Taylor has also suggested that s 73 of the *Constitution Act* is indistinguishable from s 6 of the *Australia Acts* in regards to Parliament's membership qualifications and Parliament's 'constitution': Taylor, above n 98, 473.

200 (2003) 217 CLR 545, 573 [77].

201 *Ibid.*

202 See, *Wilsmore v Western Australia* [1981] WAR 159, 170 (Wallace J).

203 Johnston, 'Freeing the Colonial Shackles' above n 2, 325.

204 (1982) 149 CLR 79, 83-5.

safeguard.²⁰⁵ Conversely, the 1978 amendments reflected a clear legislative intention to impose very significant restraints upon certain changes to Western Australia's constitutional system. Section 73(2) imposes a stringent referendum requirement upon bills to which it applies in addition to requiring absolute majorities in both houses. Additionally, s 73(2) is not, unlike s 73(1), limited to amendments to the *Constitution Act* itself. Section 73(2)(e) is especially difficult to avoid, purportedly applying to bills 'expressly or impliedly in any way affecting' ss 2, 3, 4, 50, 51 or 73 of the *Constitution Act*. This may extend s 73(2)(e) beyond textual alterations to laws affecting the legal operation of the protected sections. For example, s 73(2)(e)'s entrenchment of the Governor's dissolution power under s 3 of the *Constitution Act* may entail that the Premier's power to advise dissolution is also entrenched. Indeed, the scope of entrenchment may be even broader than that intended by Parliament. Section 2(3)'s entrenchment entails that traditional referendum manner and form provisions must also be approved at a referendum them.

Conceivably, changes to the constitutional powers, functions and nature of the Executive Council and Supreme Court may also fall within s 73(2) as laws 'expressly or impliedly in any way affecting' ss 73(3) and (6) respectively.²⁰⁶ In light of *Marquet*, however, it is highly doubtful that an alternative source of legal efficacy requires Parliament to comply with s 73(2) when enacting laws falling outside of Parliament's 'constitution, powers or procedure'.²⁰⁷ Still, the *Marquet majority's focus on representativeness* introduces a 'new'²⁰⁸ and 'expansive'²⁰⁹

205 See, Peter Johnston, 'Going it Alone – Republican States under a Monarchical Commonwealth' in Sarah Murray (ed), *Constitutional Perspectives on an Australian Republic* (Federation Press, 2010) 82, 101-2. However, in *S (A Child) v The Queen*, the Supreme Court rejected an argument that s 73(6) entrenches the Supreme Court's independence: (1995) 12 WAR 392. This may require reassessment in light of *Kable v DPP (NSW)* (1996) 189 CLR 51; Johnston, 'Method or Madness', above n 2, 46.

206 The orthodox view is that legislation merely relating to the Supreme Court, its jurisdiction or powers does not answer the description of a law respecting Parliament's 'constitution, powers or procedure': HP Lee, "'Manner and Form": An Imbroglia in Victoria' (1992) 15 *University of New South Wales Law Journal* 516, 526. However, in *Trethowan*, Dixon J held that laws respecting a Legislature's 'powers' under s 5 of the *CLVA* included laws imposing, removing or diminishing restraints, in the form of constitutional checks or safeguards, on the Legislature's own authority: (1929) 44 CLR 394, 429-30. The Supreme Court's power under s 73(6) of the *Constitution Act* to determine legislation's validity and enforce Parliament's compliance with s 73 of the *Constitution Act* is a check on Parliament's authority. A law removing this power from the Supreme Court arguably removes a constitutional restraint on Parliament's authority. Similarly, laws interfering with the Supreme Court's independence may also diminish the Court's capacity to check Parliament's power under s 73(6). If so, then such laws may be respecting Parliament's 'powers' under s 6 of the *Australia Acts*. Dixon J held that Parliament's 'constitution, powers and procedure' did not extend to the executive power in the Constitution, but did not expressly address judicial power. However, it is also arguable that Dixon J's reference to 'constitutional checks or safeguards on a legislature's authority' should not be understood as referring to judicial checks. His Honour was addressing s 5 of the *CLVA* which conferred full power on colonial legislatures to establish, alter, abolish and reconstitute Courts of Judicature within their jurisdiction.

207 Twomey, 'Manner and Form Limitations', above n 6, 184.

208 Wait, above n 6, 263.

209 *Constitution Act 1889* (WA), s 2(1): '[T]he Council and Assembly shall, subject to the provisions of this Act, have all the powers and functions of the now subsisting Legislative

element to constitution's meaning in s 6 of the *Australia Acts*. Section 73(2), in conjunction with the *Marquet* representativeness test, may therefore significantly restrain prospective changes to Western Australia's Constitution notwithstanding the limits imposed by the *Clydesdale* exception. Legislation relating to the Legislative Council's powers,²¹⁰ resolution mechanisms for parliamentary deadlocks,²¹¹ the prorogation of Parliament²¹² and changes to the Governor's powers and appointment process²¹³ may also be required to observe s 73(2).

It is, however, important to note s 73(2)'s limits. No challenge to legislation based on non-compliance with s 73 has ultimately been successful. Parliament may also rely upon limits within both entrenched provisions and s 73(2) itself to enact constitutional amendments whilst avoiding s 73(2)'s restrictive procedures. For example, the words 'passage' and 'assent' in s 2(3) entail that Parliament may, through ordinary legislation, entrench provisions by requiring amendments to obtain special parliamentary majorities or approval at a referendum to be proclaimed. Thus, even though s 73(2)(e) applies to bills enacting traditional referendum manner and form provisions, a similar result may be achieved through legislation enacted by ordinary legislative procedures.

Of course, it is trite to note s 73(2)'s scope depends on how the section is interpreted. For example, a purposive interpretation of the term 'alters' in ss 50 and 73(2)(a) may limit those sections to laws diminishing gubernatorial powers. Similarly, s 73(2)(c)'s phrase 'chosen directly by the people' was interpreted in both *Burke* and *McGinty* in light of Western Australia's historical context and legislation existing in 1978. If this approach is applied to laws altering the franchise then fewer such laws fall within s 73(2)(c). More radical approaches, such as limiting s 73(2) and its entrenched provisions' scope by directly applying the principle of parliamentary supremacy, are unlikely to gain judicial acceptance. However, in *Glew*, s 73(2)'s scope was limited by reference to 'substantive constitutional reality'. What exactly constitutes 'substantive constitutional reality' is unclear, but, at any rate, this reasoning may not extend beyond *Glew*'s narrow facts.

Council'. Cf *Constitution Acts Amendment Act 1899* (WA), s 46.

210 See, *Constitution Act 1889* (WA), ss 2, 3; James Thomson, 'Western Australia' (1992) 3 *Public Law Review* 66, 71. See also, Western Australia, Royal Commission into Parliamentary Deadlocks, *Final Report* (1984-1985) vol 1.

211 See, *Constitution Act 1889* (WA), s 3. See also, Prorogation of Parliament Bill 1991 (WA). President Griffiths, adopting a cautious approach, ruled that s 73(2) applied to the Bill: Western Australia, *Parliamentary Debates*, Legislative Council, and 14 November 1991, 6730-1.

212 *Constitution Act 1889* (WA), ss 50, 73(2)(a).