The Constitution of Western Australia – Controversial Aspects of Money and Financial Arrangements. Parliamentary Control of Revenue, Relations between the Houses and Funding Disputes

PETER JOHNSTON*

This article addresses the extent to which the Western Australian Parliament is able, in accordance with the relevant provisions of the State Constitution, to adequately supervise government expenditure, the supremacy of Parliament over the executive in such matters being a hallowed constitutional principle in British and Australian constitutional history stretching back to 1689. It does so in the comparative context of similar provisions in the Commonwealth Constitution and specifically by reference to recent High Court decisions concerned with the validity of Commonwealth appropriation and spending of public moneys. This requires attention to the role of courts, if any, in interpreting and enforcing those provisions. The article queries, critically, whether under the existing supervisory regime Parliament can adequately discharge its constitutional responsibilities to scrutinise government financial policy and in particular instances, politically contentious expenditures. It also explores the as yet unresolved issue of how disputes between the Legislative Assembly (representing the views of the government of the day) and the Legislative Council may be settled. Noting that the present lack of a constitutional mechanism to resolve such conflicts, particularly those involving disputes over financial legislation (including supply Bills) leaves open the unsatisfactory prospect of the Governor having to intervene to exercise the Crown's 'reserve powers' it concludes that a constitutional amendment is necessary to remedy that deficiency. The purpose of the amendment would be to provide a means, based on objective and ascertainable criteria, to resolve such conflicts within a reasonable time-frame, and in that process to have due regard to the democratic values that shape the relationship of the two houses.

INTRODUCTION

The scope and purpose of this article

To function effectively a State government must have authority to raise and collect revenue and to spend it for public purposes. The financial provisions of the Western Australian Constitution, comprising relevantly ss 64 and 72 of the *Constitution Act 1889* (WA) ('*Constitution Act*') and s 46 of the *Constitution Acts Amendment Act 1899* (WA) ('*CAAA*'), provide the basic framework regulating

these matters.

They operate in the first instance to ensure that both the raising and the expenditure of public revenue are subject to parliamentary approval and oversight.[1] However, because the Western Australian Parliament is not a unitary entity but comprises two Houses of Parliament, a further consequence of parliamentary control over finances is that the relevant provisions must seek to accommodate and, if possible, balance the relative interests of each House in participating in that approval process. This aspect is of crucial importance because there may be controversial circumstances in which the Government's control of the Legislative Assembly is not replicated in the Legislative Council, and this creates the prospect that financial legislation passed by the Assembly is not guaranteed passage in the Council. In those circumstances the financial provisions of the Constitution arguably should address that possibility of conflict and, ideally, provide for a reasonable and practical method of resolving such conflicts.[2]

This article is directed in the first instance to analysing the relevant constitutional provisions in terms of the assertion, ostensibly at least,[3] of parliamentary supremacy over the government in financial matters and secondly, to identifying and evaluating the means available for resolving intra-mural disputes between the Houses involving raising and disbursing public funds.

Since the relevant provisions parallel to a close degree equivalent provisions in the *Commonwealth Constitution* ('*CC*') the prospect presents itself that High Court interpretations of the latter might provide guidance about the way the Court might construe their WA counterparts. The assumption that the two sets of provisions operate substantively in the same way must, however, be approached

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* Adjunct Professorial Fellow, University of Western Australia. The writer thanks Professor Geoffrey Lindell for his many helpful and insightful comments on aspects of this article.

1 This constitutional imperative and the need for Parliamentary oversight is described by McHugh J in *Combet v Commonwealth* ('*Combet*') (2005) 224 CLR 494, 535 as follows:
> [T]he business of government, ancient and modern, requires access to a continual supply of money. Taxation of the income or property of the subject is an obvious way of raising money for the business of government. Historically, taxation and loans have been the principal means by which governments have raised money. From an early period in the history of English constitutional law, however, the House of Commons insisted on its right to control the levying of direct taxes on the subjects of the Crown and others.

2 My colleague, Geoffrey Lindell points out that conflict is not, in itself, undesirable. In the US the need for negotiated compromises forms a large part of political discourse and is part of a complicated system of checks and balances. The object of this article is to eliminate or diminish the potential for the WA Legislative Council to provoke partisan conflict over financial Bills solely for the political ends of changing governments or repeatedly obstructing fundamental policies of the elected government.

3 This article accepts the premise that the general scheme underlying the key constitutional provisions enshrines the notion of *parliamentary control of governmental expenditure*. In the light of recent High Court decisions, however, and *Combet,* n 1, in particular it may be asked if the form in which appropriation legislation is now cast obstructs the realisation of that objective. This is discussed further below.

with caution, notwithstanding their apparent linguistic similarities.[4]

In discussing the adequacy of the available State mechanisms to resolve such disputes (or rather the absence of them) the article will examine the wider ramifications of a failure to do so, including the possible involvement of the Supreme Court in determining legal aspects arising from a failure by the upper house to pass appropriation legislation and alternatively the invocation of the Governor's reserve powers.

PART A: ANATOMY OF THE CONSTITUTIONAL PROVISIONS REGULATING PUBLIC FINANCE IN WESTERN AUSTRALIA

Section 64 of the *Constitution Act* relevantly provides that 'all taxes, imposts, rates, and duties … and other revenues of the Crown (including royalties) from whatever source arising within the [State], over which the Legislature has power of appropriation, shall form one Consolidated Account together with all other moneys lawfully credited to that Account, and that Account shall be appropriated to the Public Service of the [State] in the manner and subject to the charges hereinafter mentioned.'[5] This is complemented by s 72 of that Act which relevantly provides that 'all the Consolidated Account shall be *appropriated to such purposes* as any Act of the Legislature shall prescribe.'[6]

In combination, these two provisions operate to ensure that all revenues raised by the State[7] form a *single* fund, the disbursement of which requires *legislative*

4 Recent High Court decisions regarding the role of *state courts* under Chapter III of the *CC* exhibit a tendency towards *convergence* in assimilating features of *state courts* with standards and limitations imposed on their federal counterparts. These are explored by, among others, C Steytler and I Field, 'The 'Institutional Integrity' Principle: Where are We Now and Where are We Headed?'(2011) 35 *University of Western Australia Law Review* 227; J Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113 and E Fearis, 'Kirk's New Mission: Upholding the Rule of Law at State Level' (2012) 3 *The Western Australian Jurist* 61. The same trend is not necessarily true, however, regarding the respective parliaments' *legislative powers* over financial matters in the *CC* and the various state constitutions. It is accepted orthodoxy that state legislatures may diverge in nature from each other and from the Federal Parliament

5 This is a common form characteristic of similar provisions in other state constitutions such as s 39 of the *Constitution Act 1902* (NSW).

6 Emphasis added. Curiously, s 72 is subject to the apparently unrelated proviso that 'nevertheless… the power to suspend or remove any civil servant from his office shall be vested in the Governor in Council', implying that the power of dismissal of public servants may be a matter of executive prerogative. Regarding the common law prerogative of dismissal of public officers in WA, see *R v Jones* [1999] WACA 194. Regarding the nature and sources of state executive and prerogative powers generally, and the effect of federation upon them see *Cadia Holdings Pty Ltd v State of New South Wales* (2010) 242 CLR 195, 210-11 (French CJ); also 226-7 (Gummow, Hayne, Heydon and Crennan JJ).

7 The expression 'the State' is inherently ambiguous but is here used in the sense of the polity comprising both the legislative and executive arms of government which work together to exercise the power to raise and expend state revenues. That polity may also be equated for constitutional purposes with the juristic entity designated in clause 6 of the *Commonwealth of Australia Constitution Act 1900* (UK) as 'the State of Western

appropriation by the Parliament. They ensure in effect that no money shall be withdrawn from the fund (in reality, the Treasury) except as appropriated *by law*.

Given the requirement for legislative authorisation of appropriation, s 46 of *CAAA* then provides a code regulating the powers of the two Houses of Parliament inter se in respect of financial legislation. What is now s 46 had originally appeared as s 66 of the *Constitution Act 1889* but, after amendment, was repealed in 1921 and re-enacted in the *CAAA*.[8] In terms similar to comparable provisions in the *CC*[9] and other state constitutions[10] it reads:

> (1) *Bills appropriating revenue or moneys*, or imposing taxation, *shall not originate in the Legislative Council*; but a Bill shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand of payment or appropriation of fees for licences, or fees for registration or other services under the Bill.
>
> (2) The *Legislative Council may not amend* Loan Bills, or Bills *imposing taxation*, or *Bills appropriating revenue* or moneys *for the ordinary annual services of the Government*.[11]
>
> (3) The Legislative Council may not amend any Bill so as to increase any proposed charge or burden on the people.
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> (4) The Legislative Council may *at any stage return to the Legislative Assembly* any *Bill which the Legislative Council may not amend*, requesting by message the omission or amendment of any item or

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Australia'; see also definitions of 'Government' and 'State' in s 5 *Interpretation Act 1984* (WA). In *O'Donoghue v Ireland* (2008) 234 CLR 599 the question was raised whether there was a dichotomy between Western Australia's *executive government* and its *parliamentary* component. This was in the context of whether the Governor's consent to an executive arrangement with the Commonwealth was effective, without parliamentary approval, to bind 'the State'. The issue was not resolved; G Lindell, 'Advancing the Federal Principle through the Intergovernmental Immunity Doctrine', chapter 2 in HP Lee and P Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 23, 46.

8 By Act No 34 of 1921. For doubts about whether this measure was validly enacted see P Congdon and P Johnston, 'Stirring the Hornet's Nest: Further Constitutional Conundrums and unintended Consequences arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation' (2012) 36(2) *University of Western Australia Law Review* 295 .

9 Sections 53 to 55.

10 For a detailed analysis of these legislative powers and procedures concerning financial laws in NSW and Victoria see A Twomey, *The Constitution of New South Wales* (Federation Press, 2004) chapter 19, 530-82, and G Taylor and N Economeu, *The Constitution of Victoria* (Federation Press, 2006) chapter 6, 349-72. For a general overview see G Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) chapter 3, 85-87.

11 The meaning of the expression 'ordinary annual services of government' has not been definitively determined judicially in Australia. Broadly, it may be taken, somewhat circuitously, to denote services annually carried on and provided for by the government; that is, the normal functions for which appropriation of revenue or moneys is required; L Lovelock and J Evans, *Legislative Council Practice* (Parliament of NSW, Federation Press, 2008) Chapter 13, 395.

provision therein: provided that any such request does not increase any proposed charge or burden on the people. The Legislative Assembly *may, if it thinks fit*, make such omissions or amendments, with or without modifications.

(5) Except as provided in this section, the Legislative Council *shall have equal power with* the Legislative Assembly in respect of all Bills.

(6) A Bill which *appropriates revenue or moneys for the ordinary annual services* of the Government *shall deal only with such appropriation*.

(7) Bills imposing taxation *shall deal only with the imposition of taxation*.

(8) A vote, resolution, or Bill for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session *been recommended by message* of the Governor to the Legislative Assembly. (Emphasis supplied)

Having delineated the financial powers of the houses relative to each other, s 46 then proceeds, in a way not replicated in other state constitutions, to spell out the negative legal consequences of a breach of any of the above provisions. It continues:

(9) Any *failure to observe any provision of this section* shall not be taken to affect the validity of any Act whether enacted before or after the coming into operation of the *Constitution Acts Amendment Act 1977*.

In light of subsection (9) one can ask: Are the provisions of s 46, or at least some of them, justiciable and legally enforceable, and if so, how?[12]
The provisions in s 46 for regulating the relationship between houses over financial matters will be analysed in greater detail below,[13] including comparison with ss 53 to 55 of the *CC*.

PART B: THE FUNDAMENTAL CONSTITUTIONAL PRINCIPLE: PARLIAMENTARY CONTROL OF STATE REVENUE

The *Bill of Rights 1689* as the basic norm governing supervision of government finances

Sections 64 and 72 of the *Constitution Act* reflect constitutional principles that find their origin in the *Bill of Rights 1689*[14] (UK). That Imperial statute resulted

12 This issue is further addressed below. Section 46(9) could be viewed as equivalent to the privative clause held to invalidly preclude judicial review by the NSW State Supreme Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 and hence may be ineffective for that reason.

13 See section below headed: 'PART C: THE REGIME ESTABLISHED BY S 46 OF THE *CAAA* WITH REFERENCE TO THE RELATIONSHIP BETWEEN THE HOUSES AND THE POTENTIAL FOR DEADLOCKS.'

14 This measure is variously dated 1689 or 1688 according to, respectively, when the new English monarchs, Anne and William, subscribed to it and the measure was enacted (1689) or by reference to the date that the Convention Parliament commenced proceedings (1688).

from the triumph of the Parliamentary party, led by Prince William of Orange, over King James II, the last Stuart Monarch, who had attempted to impose levies without Parliamentary authority and to dispense with the law of the land by prerogative *fiat*.[15]

While the *Bill of Rights* may be said to be part of the 'received law' of Western Australia, it serves to reinforce what are otherwise 'settled constitutional principles'. Those principles form part of the *grundnorm* represented by the constitutional settlement achieved by the English Convention Parliament that met in 1689 following the 'Glorious Revolution'. The basic elements of that settlement have flowed through to the Australian colonies and eventually, after Federation, to the state constitutions.[16] The financial provisions of the *Constitution Act* can therefore be said to be written on the palimpsest of the *Bill of Rights*.

This assertion of Parliamentary supremacy in fiscal matters is encapsulated by French CJ in *Pape v Commissioner of Taxation* ('*Pape*'):

> Parliamentary control of executive expenditure of public funds had its origins in 17th century England…. .The needs of government before the Revolution of 1688 were "principally supplied by various ordinary lucrative prerogatives inherent in the Crown, and which had existed time out of mind". After the Revolution the public revenue of the Crown was:
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> > "dependent upon Parliament, and ... derived either from annual grants for specific public services, or from payments already secured and appropriated by Acts of Parliament, and which are commonly known as charges upon the Consolidated Fund". …
>
> The right of supreme control over taxation with the correlative right to control expenditure was regarded as the "most ancient, as well as the most valued, prerogative of the House of Commons". … The principle that the Executive draws money from Consolidated Revenue only upon statutory authority is central to the idea of responsible government …. Emerging from the *Bill of Rights* 1689 and the common law in England were what have been described as "three fundamental constitutional

15 The principal provision in this regard is article 4 which provides that 'levying money for or to the use of the Crown by pretence of Prerogative without Grant of Parlyament for longer time or in other manner than the same is or shall be granted is illegall.'

16 *Port of Portland Pty Ltd v Victoria* (2010) 242 CLR 348, 359-60 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). In *Egan v Willis* (1998) 195 CLR 424, 445, Gaudron, Gummow and Hayne JJ observed that in Western Australia it appears to have been regarded as axiomatic from the beginning of European occupation that a statute such as the *Bill of Rights* would apply under common law principles on the reception of law in settled colonies, citing *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 467. The Law Reform Commission of Western Australia in its Report on Project No 75, *UK Statutes in Force in Western Australia* (October 1994), 6 and 55, recommended the retention of the *Bill of Rights* as an historic statute representing a landmark in the evolution of the English Constitution. It further recommended, 21, that a provision similar to article 4 be enacted in the *Constitution Act*, but having regard to ss 64 and 72 such an enactment would appear to be redundant.

principles" supporting parliamentary control of finance:

(i) The imposition of taxation must be authorised by Parliament.
(ii) All Crown revenue forms part of the Consolidated Revenue Fund.
(iii) Only Parliament can authorise the appropriation of money from the Consolidated Revenue Fund.

These principles were imported into the Australian colonies upon their achievement of responsible government. A Consolidated Revenue Fund was established for each of them. The principles operate today in all States and Territories…. They are central to the system of responsible ministerial government …. .[17]

Sections 64 of 72 have their counterparts in ss 81[18] and 83[19] of the *CC*. While caution should be exercised in assuming analogies between the two sets of provisions High Court decisions construing the latter two provisions and their comparability may provide guidance where issues relating to the interpretation of the Western Australia provisions arise. Allowing for some differences in terms the same may be said of similar provisions in the constitutional legislation of the other states.

The reality of Parliamentary control questioned

While the theory of Parliamentary control may be accepted analytically as a basic constitutional principle several recent High Court decisions have raised significant questions about the way the principle operates in the modern political and legislative context. Admittedly, these decisions are concerned with the relevant financial provisions in ss 81 and 83 of the Commonwealth Constitution so, so as noted in the previous paragraph a separate issue arises as to the extent to which they are analogous to the equivalent provisions in the State Constitution. The relevant decisions are *Combet*,[20] arguably departing from the Court's strict scrutiny of expenditure items in the earlier decision of *Brown v West*,[21] and

17 (2009) 238 CLR 1, 36-8.

18 Section 81 reads: 'All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.'

19 Section 83 relevantly provides: 'No money shall be drawn from the Treasury of the Commonwealth except under appropriation *made by law*.' It is arguable that when compared to the formula in s 72 *CA* ('shall be appropriated to such purposes as *any Act* of the Legislature *shall prescribe*') there may be less scope for delegation of the authority to appropriate under the *Constitution Act* than under the *CC* since in WA the appropriation must be statutorily 'prescribed'.

20 (2005) 224 CLR 494.

21 (1990) 169 CLR 195. In *Brown v West* the High Court ruled that a postal allowance paid to Members of Parliament at the direction of the Commonwealth Treasurer was unlawful because it was not supported by either a *standing appropriation* by the Parliament (one not requiring annual renewal) or an *annual appropriation* for the 'ordinary annual services of government' (the recurrent expenditures under established government programmes that

the more recent twin decisions in *Pape*[22] and *Williams v The Commonwealth* (*Williams*).[23]

1. Combet: The High Court's deference to Parliament's supervisory primacy

In general terms *Combet* was concerned with the issue of whether many millions of dollars spent by the Commonwealth on an advertising campaign to promote public acceptance of, and counter trade union opposition to, controversial proposed industrial legislation, had been authorised with sufficient specificity in a Commonwealth Appropriation Act.[24] The action was brought by the President of the Australian Council of Trade Unions, Greg Combet, and a Labor Opposition Member of Parliament, Nicola Roxon. While their standing to bring the action was questioned no final ruling was made on their competence to do so.[25]

Rejecting the challenge the majority held that, as a matter of statutory construction,[26] and having regard to the way in which Appropriation Acts had come to be framed in accordance with contemporary public accounting methods, the source for the expenditure of the relevant amount could be traced to an item in the Act that satisfied the constitutional requirement of a valid appropriation by Parliament. This was notwithstanding the fact that the relevant item was expressed in terms of a general administrative outcome which could not be read to indicate, prescriptively, any specific purpose to which monies under that item had been allocated.[27]

The challenge was premised on the proposition that, for Parliament to approve programmes of expenditure, members need to know with some degree of certainty what they are in fact approving.

For the majority, Gleeson CJ was satisfied that topics of appropriation could be described in broadly expressed terms indicating *departmental outcomes*. In the result, he held that where an outcome was designated as pursuing 'higher productivity, higher pay workplaces' it was sufficient to cover an advertising campaign designed to inform the public and gain their acceptance of such a policy. This was because that informative objective was capable of falling within the description of 'providing policy advice and legislative services'. Despite their

need annual authorisations). The postal allowance was a *new kind of payment t*o members that required specific parliamentary endorsement. Executive authorisation by the Treasurer could not make up for legislative approval under an Appropriation Act.

22 (2009) 238 CLR 1.

23 2012) 86 ALJR 713.

24 *Appropriation Act No 1*, 2005-2006.

25 As the case was decided on constructional grounds it was unnecessary to determine whether the plaintiffs had standing; n 1, 578-9 (Gummow, Hayne, Callinan and Heydon JJ), 580 (Kirby J).

26 The decision did not directly engage the interpretation of ss 81 and 83 of the *CC*.

27 The relevant item appropriated funds to the Department of Employment to achieve an outcome, among others, identified in budget papers as higher productivity or higher pay. The Commonwealth as defendant claimed that the advertising was incidental to achieving that aim.

highly abstract quality, he saw these descriptors as entailing political judgments on which minds may differ. So long as it was open for the Court to discern a reasonable connection between the expenditure and the stated outcome the Court should not intervene.[28]

The other members of the majority, Gummow, Hayne, Callinan and Heydon JJ, while acknowledging the constitutional context, approached the matter as one that could be decided by close reference to the statutory text. They drew on a distinction made in the *Appropriation Act* between 'departmental items' and 'administered items', the former being expenditures to be made by the departmental agency, the latter covering items of a more diverse nature which could not be attributed to any single government department. While the validity of expenditures on administered items was to be determined by reference to the stated *purposes* of the appropriation, departmental items were not to be regarded as tied to specific outcomes. Hence, the latter need not be defined in terms of any particular purpose that might otherwise restrict the scope of the expenditure. In the case of the advertising campaign, the only question was whether it constituted departmental expenditure, irrespective of its purpose.[29] That question was resolved in the affirmative.[30] Their Honours' flexible approach effectively left the propriety of the expenditure on advertising to be judged by Parliament.[31]

McHugh and Kirby JJ dissented. For McHugh J, a particular departmental expenditure did not have to be specifically designated but whether any such expenditure was lawfully authorised was to be judged *by reference to a* specified controlling *purpose*. The issue then became whether an expenditure on something like an advertising campaign could be seen to have a rational connection with a specified outcome. His Honour concluded there was no such connection.[32]

For Kirby J the ultimate question was whether a new expenditure on the advertising campaign could be seen to be approved by Parliament with the necessary clarity to identify that purpose.[33] Relying on the Court's decision in *Brown v West*[34] and earlier precedents he recognised that an Appropriation Act has both a positive

28 (2005) 224 CLR 494, 530.

29 Ibid 564-568, 577-578.

30 Both the joint judgment and Gleeson CJ held that it was for Parliament to determine the specificity of purpose set out in the appropriation; see C Lawson, 'Re-Invigorating the Accountability and Transparency of the Australian Government's Expenditure' (2008) 32 *Melbourne University Law Review* 879, 903-7.

31 This conclusion, the writer concedes, is problematic. It implies the statutory outcome still preserves the principle established by the 1689 English settlement and enshrined in s 83 *CC*. Geoffrey Lindell has argued that given the extent to which the Commonwealth Parliament is subject to government dominance it leaves the matter of appropriation largely to be determined by the relevant Commonwealth departments; see G Lindell, 'The *Combet* Case and the Appropriation of Taxpayers' Funds for Political Advertising - An Erosion of Fundamental Principles?' (2007) 66 *Australian Journal of Public Administration* 307, 316-17.

32 (2005) 224 CLR 494, 552-3 and 554-5.

33 Ibid 580, 584.

34 (1990) 169 CLR 195

and negative effect.[35] An appropriation *authorizes* the Crown to withdraw moneys from the Treasury while *restricting* the expenditure to a particular purpose. His Honour quoted the principle stated by Latham CJ in *Attorney-General (Victoria) v The Commonwealth*[36] that there cannot be 'appropriations in blank' authorizing expenditure with no reference to a designated purpose. Kirby J accepted that given the exigencies of modern government, such purposes can be declared at a high level of generality, but drew the line where an appropriation was cast in such vague and meaningless terms as to negate the significant constitutional consequences that attach to the identification of the appropriation's purpose. In his view the provisions in the *Appropriation Act* did not cover the advertising campaign.[37]

2. Assessing the effect of *Combet's* case

How is one to account for the differences between the majority and the dissentients in *Combet*? Undisputedly, the decision allows Appropriation Acts for the ordinary annual services of the Commonwealth to be expressed in very broad terms. The effect is that control and supervision of government financial policy and implementation is left very much in the air. This has not escaped critical comment.[38]

For the minority, the constitutional framework was paramount. It required that the appropriation legislation governing the relevant government expenditures (including the function performed by designating items by reference to outcomes) be construed to ensure that Parliament could identify the policy underlying a new kind of expenditure with sufficient clarity to debate and endorse that policy. The constitutional principle of preserving executive accountability to Parliament in financial matters was the imperative consideration.

For the majority, on the other hand, whether spending on the advertising campaign was lawfully authorised was essentially a question to be resolved by statutory interpretation of the relevant legislation.[39] The two majority judgments

35 (2005) 224 CLR 494, 494, 597.

36 (1946) 71 CLR 237, 253. McHugh J in *Combet*, ibid 553, also invoked the statement of Latham CJ.

37 224 CLR 494, 605-7. In his opinion, to permit unspecific general statements of outcomes would ignore the constitutional text and the long struggles that preceded it, impermissibly diminish the role of the Senate, undermine transparency in government, diminish the real accountability of Parliament to the electors, and frustrate the steps taken by successive governments and Parliaments to enhance transparency, accountability and good governance in the legislative (and specifically financial) processes of the Parliament.

38 Lovelock and Evans, above n 11, 399, comment that the Clerk of the Senate (Senate Finance and Public Administration References Committee, Transcript, 8 December200, 1) is on record as stating:

> The system which has now been put in place – of appropriations and funding at the Commonwealth level – has had the effect of reversing the results of the English Civil War and the revolution of 1688 because the parliament now, in passing the appropriation bills, no longer determines how much money will be available or what it will be spent on.

For a critical assessment of *Combet* see Lindell, 'The Combet case', above n 31.

39 This predisposition to determine public law actions primarily as issues of construction,

can readily be understood as seeking to avoid embroiling the Court in issues that primarily entail political judgment rather than strict judicial enforcement.[40] The minority and majority judgments therefore represent the polarities of the tension between upholding the *CC*'s mandate of preserving parliamentary control over government expenditure and the role of the High Court in exercising restraint before intervening in financial matters that are properly the province of parliamentary discretion.

One can attempt to reconcile, it is suggested, the apparently divergent approaches exhibited in *Combet* as follows. One should not see the majority opinions as a repudiation of the constitutional principle that has stood since the Glorious Revolution in 1688. Once it is accepted that parliamentary appropriations can take different legislative forms, the responsibility then falls on Parliament itself to ensure that the relevant measures provided in that legislation are sufficiently indicated to enable proper parliamentary scrutiny of proposed expenditures. Whether the legislation is expressed in terms of specific purposes or more general objectives defined broadly in terms of particular 'outcomes' is, in the end post-*Combet*, for Parliament to determine. The area of contention then becomes whether the outcome is nevertheless described with *sufficient specificity* to allow members to identify the objectives of an authorised expenditure.[41]
One further comment can be made. As Charles Lawson has argued, cases such as *Combet* focus unduly on the traditional aspects of appropriation, whereas in the modern economy it is just as important for Parliament to exercise *continuing*

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avoiding constitutional questions, could be said to be characteristic of the Gleeson Court: see *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 553 (Gleeson CJ).

40 L Ziegert, 'Does the Public Purse Have Strings Attached? *Combet v Commonwealth of Australia*' (2006) 28 *Sydney Law Review* 387, 397-400. The 'practical impossibility' of judicially supervising the complexities of a myriad of expenditure items in appropriation legislation was recognised by Jacobs J in *Victoria v The Commonwealth and Hayden* (*AAP case*) (1975) 134 CLR 338, 411, and Mason CJ, Deane and Gaudron JJ in *Davis v The Commonwealth* (*Bicentenary case*) (1988) 166 CLR 79, 96.

41 It is on this point that Lindell, 'The Combet case', above n 31, 321-2, demurs, given the actual decision in *Combet*. To permit an appropriation to be described in such vague terms as the relevant 'outcome' was there designated effectively defeats the role of s 83 *CC* and arguably removes the matter from judicial scrutiny altogether. He maintains that if in *Combet* more specificity had been required in describing items of appropriations it would arguably not have been necessary for the High Court in *Williams* (2012) 86 ALJR 713 to attempt to compensate for the democratic deficit by cutting back on long held assumptions about Commonwealth (and perhaps also state?) executive power. It may be noted that in the Commonwealth of Australia Discussion Paper, 'Is Less More? Towards Better Commonwealth Performance' (March 2012) 21-2, the Commonwealth Department of Finance and Deregulation recognises that, while providing for a measure of management flexibility in dealing with Commonwealth finances, outcome statements themselves have been criticised as being too high level so that such flexibility may have come at the expense of a loss of clear and specific objectives to support accountability to the Parliament. It therefore proposes that appropriation Bills be simplified by no longer appropriating to outcomes, but retaining outcomes in relation to judging performance of departments and agencies.

scrutiny and debate over expenditures *after they have been made*.[42] The systems of executive reporting to Parliament must be sufficiently prescribed to ensure compliance with accountability and transparency standards that also contribute to effective parliamentary oversight of the government's use of public moneys.[43] In that regard, ultimate parliamentary control should not be the result of a single function of policing the boundaries of appropriations but rather must entail the cumulative operation of the whole suite of legislative measures regulating the accounting and financial activities of government.[44]

3. Pape and *Williams*: *The High Court's decisions and reasoning*

In *Pape* the plaintiff argued that a Commonwealth payment to him of $250 as a 'tax bonus' (in effect a return to him of part of what he had paid in the previous year as income tax) under a Commonwealth Act[45] was unlawful because, among other things, the Act did not fall within one of the heads of Commonwealth legislative power. The purpose of the bonus payments was to inject money into the Australian economy as a stimulus against the Global Financial Crisis (GFC). He argued, further, that the payments were not authorised by a valid appropriation under ss 81 and 83 of the *CC* since they were not appropriated from the Consolidated Revenue Fund 'for the purposes of the Commonwealth' as required by s 83.

By majority, the Court rejected both objections. It held that the Bonus Act was lawfully enacted under s 51(xxxix) of the *CC* as being incidental to the exercise by the Commonwealth Government of its executive power under s 61 of the *CC*. The Commonwealth conceded the standing of Mr Pape to bring the action and accepted that the 'matter' was justiciable.[46]

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42 To argue as Lawson does, does not entail repudiating the need for adequate and effective parliamentary oversight of government policy as discernible through sufficiently described appropriations.

43 Lawson, n 30, 913-7.

44 For Commonwealth purposes, Lawson, ibid, includes in the class of accountability legislation the following: the *Public Accounts and Audit Committee Act 1951* (Cth), the *Auditor-General Act 1997* (Cth), the *Financial Management and Accountability Act 1997* (Cth), the *Commonwealth Authorities and Companies Act 1997* (Cth) and the *Public Service Act 1999* (Cth). To these may be added the *Federal Financial Relations Act 2009* (Cth) giving effect to the Intergovernmental Agreement on Federal Financial Relations which deals with the financial relations between the Commonwealth and the states. A similar regime under Western Australian legislation would include the *Auditor General Act 2006 (*WA) and the *Financial Management Act 2006* (WA). The latter provides for allocation of departmental funds in the Consolidated Fund (defined referentially in s 3 as the *Consolidated Account* being 'the account of that name established by the *Constitution Act 1889* s 64') as separate bank accounts. These two Acts replaced the *Financial Administration and Audit Act 1985* (WA). Maintaining separate accounts for discrete amounts of revenue required to form part of the consolidated fund is arguably not inconsistent with the Commonwealth practice endorsed in *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

45 The *Tax Bonus for Working Australians Act (No 2) 2009* (Cth) (***Bonus Act***).

46 (2009) 238 CLR 1, 23, 36 (French CJ), 68-9 (Gummow, Crennan and Bell JJ), 98-9 (Hayne and Kiefel JJ), 137-8 (Heydon J). For a view that it would have been preferable not to entertain the suit see P Johnston, 'Pape's Case: What Does It Say about Standing as an

With respect to the necessity for a valid *appropriation*, the Court held, also by majority, that under separate legislation[47] the Commissioner of Taxation was authorised to make refunds of amounts paid as taxation and that the effect of the Bonus Act was to increase the amount that could be withdrawn from the Fund. Central to the majority reasoning, ss 81 and 83 were held not to authorise actual expenditures to recipients; rather they mandated that the *spending* of government funds be authorised by Parliament.

In the majority French CJ, addressing whether the payments were validly authorised, took a cautious view of the Commonwealth's executive power. He held, narrowly, that the Commonwealth could legislate to authorise the bonus payments in order to combat the GFC as a short-term, immediate response to a national emergency.[48] Gummow, Crennan and Bell JJ, taking a wider view, held that the payments could be supported as an exercise of the Commonwealth's power attributable to its status as a national government.[49] Contrary to earlier dicta in the *AAP case*, while accepting that expenditure must be for a 'purpose of the Commonwealth' no Justice was prepared to uphold the payment of the bonus simply as an exercise of the appropriation power under s 81.[50]

In *Williams*[51] the High Court, building on the foundation of *Pape*, was called upon to determine whether a funding agreement between the Commonwealth of Australia and the Scripture Union Queensland (SUQ) for the provision of chaplaincy services at a State school in Queensland was not lawful because it entailed the making of payments from the Commonwealth Consolidated Revenue Fund that were not supported by legislation authorising the Commonwealth to enter into the funding agreement. Absent that statutory authorisation the Commonwealth relied on its executive power under s 61 of the Commonwealth Constitution to enter into contractual arrangements with the SUQ and to make payments to it. By majority the Court held that statutory authorisation was necessary; hence the Commonwealth's reliance on the executive power alone or the common law

Attribute of "Access to Justice"?' (2010) 22(3) *Bond Law Review* 2.

47 *Taxation Administration Act 1953* (Cth) s 16.

48 (2009) 238 CLR 1, 60-4.

49 For an analysis of the decision see A Twomey, 'Pushing the Boundaries of Executive Power - *Pape*, The Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313; A McLeod, 'Case Note: The Executive and Financial Powers of the Commonwealth: Pape v Commissioner of Taxation' (2010) 32 *Sydney Law Review* 123; G Appleby and S McDonald, 'The Ramifications of *Pape v Federal Commissioner of Taxation* for the Spending Power and Legislative Powers of the Commonwealth' (2011) 37 *Monash University Law Review* 162.

50 (2009) 238 CLR 1, 55 (French CJ), 73-5 (Gummow, Crennan and Bell JJ), 103-5 (Hayne and Kiefel JJ), 211-2 (Heydon J).

51 (2012) 86 ALJR 713. See also K Foley, 'What is the relevance of the *Williams* and *Plaintiff M61* for the Exercise of State Executive?' (2012) 36(2) *University of Western Australia Law Review* 167. Although there is some overlap between our two views concerning the relevance of *Williams* the present article concentrates particularly on the extent to which parliamentary control over government expenditure can be effectively exercised under the statutory regime constituted by ss 64 and 72 of the *CA* and s 46 of the *CAAA*. See also G Donaldson, 'Aspects of State Executive Powers' (2012) 36(2) *University of Western Australia Law Review* 144.

power to enter into contracts was misplaced. In so doing, the Court recognised both that the plaintiff had a sufficient interest, as a father whose children attended a school where chaplains employed by the SUQ provided counselling services, to establish standing, and that the issues were justiciable.[52]

The Court affirmed that the executive power of the Commonwealth did not extend generally and without qualification to enable it to enter into contracts and undertake expenditure of public moneys relating to any subject matter falling within a head of Commonwealth legislative power. Expenditure on the chaplaincy scheme had to be authorised by a law within its power. As an alternative, s 81 did not provide a source of the Commonwealth's power.[53] As Lindell observes by disposing of the matter on the spending limits imposed on s 61 the Court avoided having to address the full scope of ss 81 and 83.[54]

In reaching these conclusions members of the Court place special emphasis on the *CC's* requirement to submit governmental expenditures to parliamentary scrutiny, including that of the Senate, and to ensure that when exercising its executive or prerogative powers the Commonwealth stayed within the limits indicated by the distribution of legislative powers and the *CC*.

Assessment of Pape and Williams: implications for limiting government spending in Western Australia

The significance of these two cases lies in two separate factors that informed the High Court's approach to the constitutional and statutory issues they presented. The first was the priority the majorities placed on *federalism* as an interpretive construct, particularly as a restraining influence on Commonwealth spending of

52 (2012) 86 ALJR 713, 721 [9] (French CJ), 745 [111]-[112] (Gummow and Bell JJ), 754 [168] (Hayne J), 811 [475] (Crennan J); 823 [557] (Kiefel J). Heydon J dissented, holding at 782-3 [319]–[325] that the plaintiff had no standing to challenge the appropriation of funds for the chaplaincy scheme. The suggestion by Gummow and Bell JJ that it may not matter whether the particular plaintiff has standing to sue so long as the issues constituting the 'matter' could be agitated by States intervening through their Attorneys-General arguably goes beyond the current understanding of standing and may not be accepted by the High Court in future: see G Appleby, 'The High Court's New Spectacles: Re-envisioning Executive Power after Williams v Commonwealth' (26 July 2012, University of Adelaide Law School,) <http:blogs.adelaide.edu.au/public-law-rc/2012/07/26/the-high-courts-new-spectacles-re-envisioning-executive-power-after-williams-v-commonwealth/>.

53 (2012) 86 ALJR 713, 720 [2] (French CJ), 751 [138], 753-4 [156]-[159] (Gummow and Bell JJ), 755 [172], 759 [191]-[193] (Hayne J), 818 [520]-[524] (Crennan J), 824 [559], 830 [594]-[595] (Kiefel J).

54 *Williams v Commonwealth* - How the School Chaplains and Mr Pape destroyed the "common assumption" regarding executive power' (Paper delivered at a seminar organised by the Australian Association of Constitutional Law, Sydney, 13 August 2012 (to be published in the *Monash University Law Review*) 5-6. As he points out, *Williams* still left open the ability of the Executive to make payments and enter into the kind of contracts described in *New South Wales v Bardolph* (1934) 52 CLR 455 as not requiring parliamentary appropriations, and a fortiori, statutory approval or ratification, for the contract to be valid (that is, contracts that are part of or are incidental to carrying out the 'ordinary and well recognised functions of government' – itself a somewhat open-ended criterion).

public moneys. The second was the Court's concern to maintain the *accountability of the executive* to Parliament under the system of *responsible government*.[55]

Pape and *Williams* represent a triumph for federalism insofar as the High Court was not prepared to concede to the executive power of the Commonwealth an unqualified reach into matters beyond the scope of the Commonwealth's legislative powers. The latter, though broad and not capable of precise demarcation, should be seen as signposts marking the boundaries of Commonwealth fiscal responsibilities. The results in the two cases regarding whether the various expenditures fell within Commonwealth competence might seem at first glance diametrically opposed, the majority upholding the spending arrangements in *Pape* while rejecting that in *Williams,* but it needs to be recognised that in *Pape* the survival of the Commonwealth's scheme was, in the words of the Duke of Wellington, a 'close-run thing'.

On the other hand, while the High Court in both cases was prepared to enter the lists and make declarations of substantive invalidity, one must hesitate before making any qualitative comparison with *Combet*. The latter was a case more directly concerned with the accountability of governments to Parliament regarding the allocation of specific amounts of revenue towards achieving policy goals, and hence the principle of responsible government. One should not therefore expect the degree of scrutiny and vigilance shown by the High Court, and its willingness to intervene in *Pape* and *Williams* in the case of *actual expenditure* of moneys, to be symmetrical with the relaxed treatment of the government's *proposed expenditure*, as indicated in a *statutory appropriation*, in *Combet*. While the justiciability of the issues in the two more recent cases was readily apparent[56] the more deferential approach in *Combet* is consistent with the High Court's disinclination to be involved in matters of an essentially political nature that it considers are best left to Parliament itself to police.

Are *Combet*, *Pape* and *Williams* relevant to Western Australia?

One can ask: if a challenge were made to government expenditures in Western Australia would the High Court follow *Combet* and dismiss the claim? This is a complex matter and depends on a number of variables.

First, there is the inevitable matter of a change of membership in the High Court

55 There is no single conception of 'responsible government'. For a discussion of the variations and the central requirement that government be accountable to the parliament see G Lindell, 'Responsible Government' in P Finn (ed), *Essays on Law and Government — Volume 1: Principles and Values* (Law Book, 1995) 75; M Aldons, 'Responsible, Representative and Accountable Government' (2001) 60 *Australian Journal of Public Administration* 34.

56 Justiciability as such was not a strongly contested issue in either case and in *Brown v West* (1990) 169 CLR 195 its acceptance as justiciable was necessarily implicit in the result. The justiciability of State legislation possibly violating other principles established by the *Bill of Rights 1689* was also accepted in *Yougarla v Western Australia* (2001) 207 CLR 344 by Kirby J at 374-5**.** The latter case concerned a standing appropriation of 1% of public revenue to the aboriginal inhabitants of WA.

itself. Under French CJ, the Court has shifted its emphasis from focusing narrowly on issues of statutory construction, as demonstrated by the majority in *Combet*, to ensuring in *Pape* and *Williams* that the Commonwealth executive operates within what it sees as the bounds of legality in substantive terms of spending money. For the reasons given above, however, there is no reason to expect that the French Court would approach appropriations under ss 64 and 72 of the *Constitution Act* substantially differently from that adopted in *Combet*. Demarcation by reference to broad policy goals would most likely pass judicial scrutiny. The fact that, in verbal terms, ss 64 and 72 are expressed differently in some regards from ss 81 and 83 of the *CC* should not affect that general conclusion.[57] Sections 64 and 72 provide respectively that funds may be appropriated from the Consolidated Account 'to the *Public Service* of the State' or 'to such purposes as any Act of the Legislature shall prescribe'. Commonwealth appropriations under s 81 are authorised 'for the purposes of the Commonwealth'. It is submitted that the different terms should be taken to be equivalent, though not identical.[58] In any event, under both constitutions, mere appropriation would appear to be non-justiciable.

It is also the case that although federal limitations operate in relation to the Commonwealth executive power to spend moneys under s 61 *CC*, State expenditures are subject to no such kind of restriction that is apt to attract judicial review.[59]
Finally, there is a further difficulty in attempting to draw any direct parallel between ss 81 and 83 under the *CC* and the State provisions in ss 64 and 72. Under the former, appropriation legislation must conform to such requirements, if any, as those sections stipulate. The operation of those provisions cannot be modified except by the constitutional amendment under s 128 of the *CC*. Whether ordinary *State* appropriation laws can affect and even alter the operation of ss 64 and 72 is a more open question. It turns on whether the latter can be said to be entrenched by a relevant legislative procedural protection in the *Constitution Act*.[60] This entails

57 Subject to the comment at n 19 above.

58 See *Pape*, (2009) 238 CLR 1, 81 (Hayne and Kiefel JJ).

59 Again, I am indebted to Geoffrey Lindell for noting that this is subject to the following exceptions:

(i) if they are in some way affected by *inconsistent* valid federal legislation;

(ii) involve expenditure on matters which relate to Cth executive and prerogative powers associated with legislative powers that are *exclusively* assigned to the Commonwealth (such as aspects of defence); eg *Joseph v Colonial Treasurer (NSW)* (1918) 25 CLR 32; or

(iii) involve the exercise of any executive powers which exceed those which accompany the legislative powers enjoyed by each of the states *vis a vis* each other under the uncertain *territorial limitation* which constrains the scope of state legislative powers *inter se*: see eg *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

60 A specific issue may arise from the way the *Financial Management Act 2006* (WA) (*FMA*) provides that under State levy recovery Acts special accounts may be established into which such levies are to be paid. Pursuant to this faculty, a number of State Acts (see for example s 240 of the *Fish Resources Management Act 1994* (WA), s 26 of the *Energy Safety Act 2006* (WA) and s 110B of the *Gaming and Wagering Act 1987* (WA))

whether they fall within a relevant category of legislative provisions that are *required to be passed according to some more restrictive legislative procedure*, commonly designated as 'manner and form' provisions, instead of simply being passed by ordinary majorities in each house of the West Australian Parliament.[61] This translates into the specific question: does s 73(1) of the *Constitution Act* impose a requirement of absolute majorities that applies to implied amendments to s 64? Section 73(1) applies to any Bill that alters a provision of the *Constitution Act* 'by which *any change in the Constitution of the Legislative Council or of the Legislative Assembly* shall be effected.' If so what makes that manner and form provision binding upon the Western Australian Parliament?

Three things may be noted. First, s 73(1) applies only to amendments of 'this Act'; that is, it applies only to provisions that are found in the *Constitution Act* itself.[62] Since ss 64 and 72 still remain in the Act s 73(1) ostensibly is applicable.

Secondly, for s 73(1) to apply any later legislation must be said to alter the relevant provisions in a way that could be said to *affect* the 'Constitution' of each house. Section 64 is concerned with Parliamentary control and regulation of monies '*over which the Legislature has power of appropriation*.' Whether s 73(1) is concerned to regulate the houses' *power* over financial matters is an open question.[63] A tentative view, based on current authority, seems to be: 'No'.
Thirdly, s 73(1) only applies if s 64 falls within s 6 of the *Australia Acts 1986* (Cth) ('*AA*'). That section provides that where a manner and form requirement relates to the '*constitution, powers or procedure*' of the state Parliament that special legislative procedure must be observed if a subsequent amendment or repeal of the protected provision is to be legally effective. Section 64 therefore would be covered by s 6 *AA* if initially it is concerned with the 'constitution' of

commonly provide for separate funds along the lines: 'Any levy is to be credited to an operating account of the Department established under s 16 of the *FMA*'. The question is: Is this arrangement arguably inconsistent with s 64? In that regard it may be noted that s 4 of the *FMA 2006* provides that subject to another Act expressly stating it has effect notwithstanding the *FMA the latter prevails to the extent of any inconsistency with another written law.* On one view these discrete levy recovery Acts can be said to contradict s 64 of the *Constitution Act* on the basis that they depart from the requirement under s 64 that there be a single consolidated fund. For a contrary contention see n 44 above and *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555. If such allocations of revenue to separate accounts are incompatible with s 64 the issue then is: Are there any manner and form provisions that protect s 64 from simple amendment (direct or implied)?

61 This aspect is further explored in a separate note in this Review; see P Congdon and P Johnston, 'Stirring the Hornet's Nest: Further Constitutional Conundrums and unintended Consequences arising from the Apllication of Manner and Form Provisions in the Western Australian Constitution' (2012) 36(2) *University of Western Australia Law Review* 295.

62 See *Western Australia v Wilsmore* (1982) 149 CLR 79.

63 Relevantly, 5(1) of the *FMA 2006* provides that the Legislative Assembly and Legislative Council are each to be taken to constitute a 'department' for the purposes of that Act thus appearing to affect the constitutional nature of each of the houses of Parliament by treating them as something subordinated to the operation and administration of the *FMA* in relation their the financial dealings. Query if that is sufficient to represent a change to the houses' 'constitutions'.

each house of the West Australian Parliament. As noted above, that is debatable.

The same considerations would apply in the case of s 72. It is therefore doubtful that appropriation legislation inconsistent with ss 64 and 72 requires compliance with s 73(1). Curiously, it is specifically designated in s 73(1) that amendments to s 72 require reservation by the Governor.[64] The requirement, however, is no longer effective since any requirement for reservation has been negated by s 9 of the *AA*.[65]

Conclusion: whether appropriation and spending provisions under the State Constitution are justiciable?

Having regard to the various matters discussed above, it would seem there is little scope for the courts to intervene and declare unlawful any appropriation legislation that they might determine inconsistent with ss 64 and 72 of the *Constitution Act.* Further, s 46(9), in so far as it purports to render breaches of s 46 non-justiciable should be regarded, it is submitted, as effective to *exclude* judicial review where the *appropriation* provisions of s 46 are concerned. The same is arguably though less certainly true of *spending* aspects of public financing. These are apparently now seen by the High Court as political matters which are better left to the political process. Parliamentary oversight of such spending is, on that view, best secured through the mechanisms, including scrutiny by parliamentary committees, available under audit and financial legislation.

PART C: THE REGIME ESTABLISHED BY S 46 OF THE *CAAA* WITH REFERENCE TO THE RELATIONSHIP BETWEEN THE HOUSES AND THE POTENTIAL FOR DEADLOCKS

Identifying the nature of deadlocks

The commonly used expression 'deadlock' refers generally to impasses between the two houses over legislation.[66] An important factor when considering the

64 It further provides, relevantly, that 'every Bill which *shall interfere with* the operation of *section .... 72* shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon.' This is equivocal, indicating inferentially that s 73(1) is in other respects *inapplicable*, or, conversely, if it is, imposing the *additional* requirement of reservation to that of statutory majorities.

65 It provides relevantly: '(1) No law or instrument shall be or any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State.'

66 A full discussion of deadlock provisions in state constitutions may be found in J Waugh, 'Deadlocks in State Parliaments' chapter 7 in G Winterton (ed), *State Constitutional Landmarks* (Cambridge University Press, 2006) 185, especially 190 regarding money Bills, and at 195 regarding attempted resolution through use of committees of managers of both houses. J Waugh, 'Australian State Constitutions, Reform and the Republic' (1996) 3 *Agenda* 59, 60, notes that only WA and Tasmania lack a procedure for resolving deadlocks between the houses. See also Carney, above n 10, 89. For a Western Australian analysis,

propriety of an upper house like the Legislative Council preventing or defeating government legislation is that the Council is not a mere instrument or appendage of the executive. While the Legislative Assembly may be controlled by the government, the two houses perform distinctive functions and legislative roles. Conflicts between the two houses can either relate to clashes over specific pieces of ordinary legislation, in which case the Council's main objective may be the modification to a Bill. Or a conflict may manifest a more pervasive hostility of a political nature between government and opposition. A third generic category is proposed legislation having a particularly special impact on the community such as may be required in emergency situations. This is also relevant regarding supply Bills.[67]

Accordingly, distinctions need to be observed between various kinds of legislative measures. Supply Bills should be seen as comprising a distinct category. This is because special constitutional procedures may be justified to limit the powers of the Legislative Council in respect of them. Such restrictions can take various forms. These include measures for the dissolution of one or both houses in the event of persistent and enduring conflict, joint sittings of both houses, or the passage of a contested financial Bill following a second rejection by the upper house after a specified period, say one month, between its successive passage by the lower house. A combination of these features is incorporated in s 57 of the *CC* but that method is arguably too elaborate, cumbersome and time consuming to provide an appropriate model for amendment of the State constitution.

In the past a complicating feature in Western Australia was the fact that malapportionment distorted the democratic basis of the Parliament, including the Legislative Council. Consequently, until recently, it was dominated by conservative interests.[68] The constitutional amendments of 2005[69] reducing the more extreme distortions of electoral distribution have arguably changed the character of the upper house to a more democratic foundation. This should modify some of the conservative hostility to governments that marked relations between the houses between 1890 and the end of the 20th century. Nevertheless, even under the existing arrangements there is no guarantee that the elected government's views will prevail in a particular matter nor are there any safeguards against continuing and long drawn out obstruction. As will be analysed in the following four sections, the long-standing ambiguities about the lack of a constitutionally provided mechanism for resolving inter-house legislative disputes still requires to

see D Black, 'Financial Relations between the Two Houses, 1890-1990' in D Black (ed), *The House on The Hill: A History of the Parliament of Western Australia 1832-1990* (Parliament of WA, 1991) 429.

67 Otherwise referred to as Bills 'appropriating moneys for the annual services of government.' The meaning of that expression is open to debate and is insusceptible of a precise meaning: see above n 11.

68 Successive attempts to remove large discrepancies in electorates in WA are described in P Johnston, 'Method or Madness: Constitutional Perturbations and *Marquet's* case' (2004) 7 *Constitutional Law and Policy Review* 25.

69 *Electoral Amendment and Repeal Act 2005* (WA).

be addressed.

Essential features of s 46: comparison with ss 53 to 55 of the *Commonwealth Constitution*

Section 46 is expressed in terms that are similar to those in other state constitutions. It also exhibits features that it appears to share with ss 53 to 55 of the *CC*. This is true of both the *powers* of the respective houses and the *form of and procedures for passing* financial legislation. One may therefore ask: how exact is the analogy between s 46 and the provisions of the *CC*? As a general proposition, putting aside for the moment the extent to which they are justiciable, the State and Commonwealth provisions are sufficiently close to warrant comparison.

Taking a comprehensive overview of the three central financial provisions of the State Constitution identified above[70] a single common purpose can be seen to permeate and connect them. Individually and collectively they are, as is the case of the *CC*, directed to give effect to the higher principle of *responsible government*. Section 46 is formulated to ensure that in matters concerning the raising and disbursement of public revenue, the executive is ultimately *responsible to the people of the State* whom they represent, particularly in the Legislative Assembly, the house in which the choice of government is determined.

The powers of the houses *inter se*

Consistent with the principle of responsible government, the superiority of the lower house is recognised insofar as ss 46(1) and (2), paralleling s 53 *CC*, stipulate that financial measures can *only originate* in that house.[71] It is for the government to initiate taxation and determine expenditure policy. There is, however, potential for *serious conflict* between the houses *over financial matters*. This is because of the ambiguous relationship between ss 46(2), (4) and (5). By virtue of s 46(2), the Legislative Council may not amend Bills imposing taxation, or appropriating moneys for the annual services of government. Under s 46(4) the Legislative Council may, notwithstanding, request *amendments* to any Bill that it may not amend.

Section 46(5) provides the basic rule that the Legislative Assembly and Legislative Council, except as otherwise provided in s 46, have equal powers over legislation. Hence, in respect of financial legislation, it is ostensibly within the power of the Legislative Council to refuse or fail to pass financial measures.[72]

70 That is, ss 64 and 72 *CA* and s 46 *CAAA*.

71 The exceptions to equal power between the houses with respect to financial legislation under s 53 CC are:

(i) Money Bills (Bills *imposing taxation* or *appropriating* revenue) must originate in the lower house;

(ii) The Senate cannot amend Bills *imposing taxation* or *appropriating revenue for 'the ordinary annual services of Government'*; and

(iii) The Senate may *request* amendment of Bills which it may not otherwise amend.

72 A fine distinction may be drawn between a positive refusal (voting to deny passage of a supply Bill) and a passive 'failure' to do so (such as by continuing to press requests

As will be indicated below, an important issue since the grant of self-government in 1890 has been: Is the Legislative Council permitted under subsection (4) to return a Bill to the Assembly with a request for amendment only once? Or can it do so repeatedly (which would be tantamount to a *failure to pass*[73] the relevant measure)? Which of these two alternative interpretations should prevail turns largely on s 46(5). Subject to the prohibition in s 46(1) requiring that financial messages originate in the lower house, just what does equality of power between the houses entail? Can an implied limitation be derived from s 46(1) the effect of which is to prevent the upper house from deferring or failing to pass financial legislation by resort to the device of repeating requests for amendment?

The crux of the matter turns on the fact that, on a proper analysis of s 46 the Legislative Council, as is the case with the Senate under s 53 of the *CC*,[74] has (on the face of s 46) equal power not only with respect to *passing* any proposed measures, including a financial Bill, but also with respect to *rejecting*. Of concern to West Australians, the potential for political disruption inherent in this ambiguity was dramatically realised in the Federal sphere in 1975 in relation to the Senate's *refusal*[75] to pass the supply legislation of the Whitlam Government until a general election of the House of Representatives was instituted.[76]

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for amendment). Substantively both have negative outcomes insofar as each denies Government supply.

73 Unlike s 57 *CC* the WA Constitution nowhere uses the expression 'fails to pass'.

74 Regarding the two houses' powers under s 53 over supply see B O'Brien, 'The Power of the House of Representatives over Supply' (1976) 3 *Monash University Law Review* 8. *The Report of Standing Committee D of the Australian Constitutional Convention* (Commonwealth Government Printer, 1980), [4.6.3], [24], noted that the Senate frequently had repeated or pressed requests for amendment of money Bills notwithstanding denials by the House of Representatives that the Senate has any such power. Aspects of s 53 have also been extensively analysed in the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *The Third Paragraph of Section 53 of the Constitution* (Australian Government Publishing Service, 1995).

75 'Refusal' is here used to cover deferral of voting on the motion to pass supply Bills; see above n 72. At no time in 1975 did the Opposition in the Senate actually vote to reject the motion. Arguably the same tactic of deferral is open in WA.

76 For a range of views concerning the blocking of supply and the Governor General's use of the reserve power in 1975 see M Coper and G Williams (eds), *Power, Parliament and the People* (Federation Press, 1997); G Sawer, *Federation under Strain: Australia 1972-1975* (Melbourne University Press, 1977) 136, 141, 203-11; C Howard and C Saunders, 'The Blocking of Supply and the Dismissal of the Government' in G Evans (ed), *Labor and the Constitution 1972-1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam years in Australian Government* (Heinemann, 1977) 251; D Markwell, 'The Dismissal: Why Whitlam Was to Blame', *Quadrant* March 1984, 1; G Winterton, '1975: The Dismissal of the Whitlam Government' in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229; P Gerangelos, 'Parliament, the Executive, the Governor General and the Republic' in *Constitutional Development in a Frozen Continent*, above n 7, 189, 212-16, and B Selway, *The Constitution of South Australia* (Federation Press, 1997) 40.

The history and background of s 46 as a guide to its constitutional interpretation: whether its operation is still, in part, inconclusive and unresolved

In 1984 a Royal Commission constituted by Emeritus Professor Eric Edwards was established to examine the problems arising from the fact that there was no defined method of resolving disputes between the houses of the Western Australian Parliament.[77] It presented a comprehensive analysis of the history of inter-house relations. Much of the following commentary draws upon it.

With the enactment of the *Australian Colonies Act 1850* (Imp) the possibility that the Western Australian legislature could move from a fully appointed Legislative Council to a Council with a partly elective membership of a bicameral system became a reality. This then foreshadowed the eventual prospect of the Council evolving into a fully elected bicameral Parliament in accordance with the system of responsible government.[78] In the latter event it would become necessary to determine how the relationship of the two houses regarding their powers over the passage of legislation should be governed.

Fundamental to resolving that issue was the question: What role should the 'upper house' exercise under the new Constitution? Although it was not envisaged that the Western Australian system would radically diverge from models adopted in other colonies, Stephen Parker, who can claim to be one of the founders of the Western Australian Constitution,[79] anticipated the need for a means of resolving disputes between the houses if they shared coordinate powers and equal authority over the passing of laws. Parker generally supported a proposal of Governor Broome that where there was a dispute over financial legislation one method would be to allow an interval of several months after passage in the Legislative Assembly, and after further rejection in the Legislative Council, for the Governor to assent to a new Bill passed by the Assembly without the consent of the Council. This solution did not find favour with the British authorities who thought the matter was better left to negotiations between the houses. In the event, Conservative members of the

77 WA Royal Commission *Report on Parliamentary Deadlocks* (1984-1985), see relevantly Volume 2 ('***RC'***). Dr James Thomson was counsel assisting the Commissioner. The Royal Commission is discussed in B De Garis, 'The History of Western Australia's Constitution and Attempts at its Reform' (2003) 31 *University of Western Australian Law Review* 142, 149-150.

78 When self-government was conferred under the *Constitution Act 1889* (WA) the principle of responsible government was impliedly recognised in s 74 which somewhat obscurely vests the power of appointing *'officers liable to retire from office on political grounds'* exclusively in the Governor. The reference is to the Ministers of the Crown who form the Government. This is complemented by what is now s 43 of the *CAAA* which specifies the number of '*principal executive offices of the Government liable to be vacated on political grounds*'. The liability to be 'vacated' is an indirect reference to elections which determine the fate of governments. The Ministers can sit in either house but it is unclear whether they are part of the 'Constitutions' of those houses; see *Attorney General for Western Australia (ex rel Burke) v WA* (Honorary Ministers Case) [1982] WAR 241.

79 S Murray and J Thomson, 'A Western Australian Constitution?: Documents, Difficulties and Dramatis Personae' (2012) 36(2) *University of Western Australia Law Review* 1

Legislative Council of the time considered the Parker-Broome proposal would detract from the equal right of that house over legislation.[80]

The scene was thus set for two contrary proposals; first, that some provision should be made for a prescribed legislative process to apply to ensure an objective mode of ensuring that the intentions of the 'lower house' should prevail, as against, secondly, a recognition that the wishes of the upper house should prevail even if it meant that a Bill concerning revenue could not be passed. The second view has been accepted in practice and, as formulated in s 46 of the *CAAA*, still operates to this day. Remarkably, no amendment has been made in the State's Constitution to provide a legislative mode of resolving inter-house disputes over money Bills. The only process for possible reconciliation of differences is that available under the Standing Orders[81] of the respective houses for a conference of Managers from both houses to attempt to overcome their differences.[82] That process is not open to judicial enforcement as the Standing Orders are not legally binding. Similarly, while there were some expectations that the Legislative Council members might have regard to United Kingdom Parliamentary conventions and practices whereby the House of Lords normally deferred, in the end, to the wishes of the House of Commons in financial matters,[83] it soon became apparent that those conventions would not be followed in Western Australia.[84] In any event, as with the Standing Orders, those conventions are not justiciable.

This situation has been complicated by the fact that, although under the system of government conferred on Western Australia in 1890 responsibility for legislation and political matters passed from the Governor to the elected Premier and the Ministers who commanded a majority in the Legislative Assembly, the Governor was considered to retain significant 'reserve powers' to resolve, ultimately, constitutional impasses between the houses.[85]

The inclination of the Legislative Council to adopt its own autochthonous view, based on parliamentary practices in other Australian colonies, rather than follow United Kingdom precedents, became evident as early as 1891 in differences over

80 *RC*, above n 77, [1.12.2]-[1.14].

81 These are made under s 34 of the *CAAA*.

82 The virtues of the conference system to settle disputes is advocated by R Crump, 'Why the Conference Procedure Remains the Preferred Method for Resolving Disputes Between the Two Houses of the South Australian Parliament' (2007) 22 *Australasian Parliamentary Review* 120. WA differs from South Australia, however, in that WA has no fall-back mechanism to resolve a deadlock.

83 F Beasley, 'The Legislative Council in Western Australia' (1946) 3 *Res Judicatae* 150.

84 The attitude regarding British conventions in the Australian states context prior to 1986 exhibited something of a Janus-mask quality, with the colonial/state authorities looking in some cases to UK precedents and in others developing their own practices. Comparable problems of conflicting points of reference entailed in granting self-government in the 19th century are explored by C Parkinson, 'George Higinbotham and Responsible Government in Colonial Victoria' (2001) 25 *Melbourne University Law Review* 181.

85 *RC*, above n 77, [1.18] and footnote 37. For the political background to the 1890 Act see S Murray and J Thomson, above n 7, 20

a loan Bill.[86] The potential for disagreements between the houses was exacerbated after the Legislative Council became fully elective under the *Constitution Acts Amendment Act 1893* by the introduction in that Act of a provision that enabled the Council to return to the Assembly financial Bills with which the Council did not agree, with requests for the Assembly to alter the Bill in accordance with the Council's proposed amendments. This provision still appears in what is now s 46(4) of the *CAAA*.[87]

The potential for disagreements was realised in the history of the State in the early part of the 20th century. Two discrete elements complicated relationships between the houses as a result of the development of party politics in the State. The first was that a conservative faction became entrenched in the Council. The second was that the affairs of government in the lower house took on the features of responsible government whereby the views of that house largely reflected the views of the government of the day. This often brought the houses into collision over financial policies.

Early attempts to assert the Assembly's primacy over such matters by amending the *CAAA* failed since the Council would not pass any amendment.[88] The increasing divergence between the views of the two houses about interpretation of s 46 persisted with the Council insisting it could press requested amendments, contrary to the assertion by various Speakers of the Legislative Assembly that a request for amendment could only be made once.[89] Increasingly, the Council inclined to the view that it should look to the Commonwealth Senate as a model for guidance on conventions affecting financial measures rather than accept the view of the Legislative Assembly which preferred the House of Commons model. In fact, despite protestations by Council members that they were acting independently rather than following party dictates it became increasingly evident that the contest really was *between the Government and the upper house* over issues of policy rather than simply between the houses themselves. This led to a long period of antagonism lasting decades with the upper house refusing to pass many government Bills, especially during a long period of Labor dominance up until 1947, although until 1966 disputes over money Bills were rare.[90]

Council rejection of Assembly Bills again was a feature during the period of Labor governments in the 1950s.[91] Attempts to arrive at a compromise by either amending Standing Orders or even the Constitution itself, including the repeal of s 46 and the substitution of a defined process for the passing of contentious Bills, were unsuccessful. This prompted the Clerk of the Council Mr J B Roberts as a

86 *RC*, above n 77, [1.25.1].
87 Section 46(4). See page 116-117 above
88 *RC*, above n 77, [1.37].
89 On one view, continuing to press requests for amendments effectively constituted rejection of the proposed legislation and was not open to the Council. (See *RC*, above n 75, [1.58]).
90 *RC*, above n 77, [1.88].
91 Ibid [1.81], citing F Crowley, 'The Government of Western Australia' in S Davis (ed), *The Government of the Australian States* (Longmans, 1960) 445-78.

result of a dispute over financial legislation in 1966 to present a paper in which he reasserted the Council's opinion that s 46(4) permitted that house to make repeated requests for amendment.[92]

Further attempts to compromise led nowhere but the matter became critical when, in 1973, with the Tonkin Labor Government balanced on a knife edge, the Leader of the Opposition, Sir Charles Court, moved a motion in the Assembly that passage of that year's Supply Bill should not be passed unless the Government held a General Election.[93] His motion was defeated but the incident, presaging adoption of similar measures in 1974 and 1975 by the Opposition in the Federal Parliament, exposed the vulnerability of a government to an enforced election if it could not secure passage of its supply legislation. Interestingly, as David Black comments, Sir Charles Court was unable to secure the support of some of his party colleagues in the upper house, who resisted lower house pressure to compromise their independence.[94] As a direct consequence, the Premier, Mr Tonkin, proposed to introduce legislation to overcome deadlocks between the houses, but with the election of the Court Government the proposal lapsed.

As De Garis points out, there was a serious conflict over money Bills in 1989-1990. This was in the context of the collapse of the Rothwell group of companies in which large amounts of state revenue were lost in futile attempts by the Labor Government to head off that collapse. This gave rise to what became known as the 'WA Inc' affair over various dealings of the failed companies with the Government. The then Opposition, duplicating the events of 1975, went so far as to threaten to block supply Bills unless the Government submitted itself to an election. However, in the end, the Opposition was not prepared to go to the extent of using its powers under s 46 to force the Government to an election. As summarised by De Garis:

> But on these occasions though the Liberals and Nationals each had their moments of hanging tough, they seem not to have been ready to go over the parapet at quite the same time and a constitutional crisis never resulted.[95]

Significantly, the recommendation of the Edwards Royal Commission that s 46 should be amended to provide for a suspensory veto was not accepted and has never been acted on. This would have allowed the Legislative Council to delay the passage of supply Bills for a period of one month but upon further resistance to passing the legislation, the Governor could sign it into law (as is the case in New South Wales). In the end, therefore, s 46 has with only minor verbal changes[96]

92 *RC*, above n 77, [1.90].

93 Ibid [1.96].

94 *RC*, above n 77, [1.96.5].

95 J Waugh, *Deadlocks in State Parliaments,* above n 66, at 210 comments that despite posturing from time to time opposition threats to block supply have not been serious given that they would probably engender adverse political consequences.

96 In 1977 s 46 of the *CAAA* was amended. The changes were largely grammatical although s 46(9) was repealed and a differently expressed provision inserted. According to commentary at the time 'the power of the Council to reject supply, argued for in 1973, is

effectively remains the same in form as it was in 1890.

Thus, as in the case of s 53 of the *CC* the Legislative Council, like the Senate, although denied power to amend a financial Bill, can persist with an objection by returning a Bill to the lower house with a request for amendment. The crucial point so far as deadlocks are concerned is that *the upper houses* under both the Commonwealth[97] and State Constitutions can undoubtedly *reject Bills even if they cannot amend them*. On one view the existence of a power of rejection should be taken to have determinative primacy in the sense that if a disagreement arises between the Western Australian houses, the upper house may request an amendment once but may not press the matter on further occasions.[98] On this view, it is constitutionally incumbent on the upper house in the event of disagreement to either explicitly pass or reject the contentious proposed laws but not persist with requests for amendments, particularly with respect to financial Bills.

Conclusions from history of disagreements between Houses of Parliament in Western Australia

It is evident from this historic narrative that although a possible problem was perceived at the original stage of conferring the Constitution for self-government upon Western Australia the problem has never been squarely addressed and remedied. The failure to include a provision in the *Constitution Act 1889* and later, the *CAAA*, that would operate on objective criteria to resolve disputes over passage of legislation, especially of a financial kind, means effectively that if there is a majority of members in the upper house adverse to the government of the day a failure to resolve the disagreement through a conference of managers will have the same result as a rejection of the proposed legislation. More significant, perhaps, is that where an opposition has control of the upper house it could, based solely on considerations of electoral expediency decide to defer the passage of critical supply Bills to force a premature election.

This is the direct consequence of the fact that s 46 lacks any alternative mechanism for the enactment of a Bill which is subject to an impasse arising from repeated requests by the Council.

The possibility that this may lead to an intervention by the governor exercising the 'reserve powers of the Crown' is considered in the following Part.

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not affected by the changes: see *RC*, above n 77, [1.102].

97 The power of the Senate to do so was recognised (although *obiter*) in *Victoria v Commonwealth* (*PMA* Case) (1975) 134 CLR 81, 121 (Barwick CJ), 144 (Gibbs J) and 184-5 (Stephen J). It was accepted that the Senate had equal powers with the House of Representatives in terms of rejecting Bills which it could not amend.

98 The preface 'at any stage' in s 46(4) is arguably open-ended and there is nothing else in the text to prevent repetition of requests by the Council.

PART D: LEGISLATIVE PROCEDURES FOR PASSING FINANCIAL LEGISLATION AND ITS FORM

Justiciability of the relevant provisions of s 46 compared to analogues in the *CC*

Regarding legislative procedures and the form of financial legislation, ss 46(6) and (7) have look-alike counterparts in ss 54 and 55 of the *CC* although, perhaps significantly, expressed in different terms. Both subsections are designed to prevent extraneous items being included in Bills appropriating money to the annual services of government or imposing taxation. Matters such as the collection of taxation must therefore be the subject of discrete and separate legislation. There is, notably, no restriction in s 46(7), as in s 55, to only one subject of taxation. Relevantly, it may be noted that whereas the Western Australian provisions are expressed in terms of 'bills', s 54 *CC* uses the expression 'proposed law' whiles 55 uses the term 'laws'.[99] One can ask whether these variations are legally significant.

With respect to the Commonwealth scheme the High Court has differentiated between ss 54 and 55 holding that whereas a *proposed law* (in other words, a Bill) in s 54 cannot be the subject of a legal challenge,[100] the reference to 'laws' in s 55 contemplates that taxation *laws* enacted contrary to s 55 can be declared unlawful and of no effect.

Where does that leave the analogous Western Australian provisions? Does s 46(9) *CAAA* absolutely preclude *judicial review*? In other words, can a house of Parliament determine the legality of its own actions? Or would that entail a violation of the rule of law and the obligation of courts to exercise judicial review with respect to unconstitutional legislation? The question is: Who rules: the courts or Parliament?

Significantly, both the use of the expression 'bills' throughout s 46, in combination with s 46(9) providing that failures to observe the conditions imposed by s 46 do not affect the validity of an Act, suggest that compliance with s 46 is non-justiciable. This is bolstered by the consideration that 'bills' are the legal equivalent of 'proposed laws'.

There is, further, a reasonable argument that courts should abstain from entering the fray to enforce the ostensible prohibitions in ss 46(6) and (7) too readily.

99 In *Osborne v The Commonwealth* (1911) 12 CLR 321, at 336, the distinction is drawn between 'proposed laws' (Bills that await assent) which lie within the province of the houses to enforce and 'laws' that have completed the legislative process and are subject to review by the courts; see P Hanks et al, *Constitutional Law in Australia* (LexisNexis Australia, 3rd ed, 2012) 135. This view has prevailed; *Northern Suburbs General Cemetery Trust v The Commonwealth* (1993) 176 CLR 555, 578.

100 *Osborne v The Commonwealth* (1911) 12 CLR 321; *Western Australia v Commonwealth* (Native Title Act Case) (1995) 183 CLR 373, 482 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

This in turn entails considerations of deference and comity. In instances such as s 46, the interactions between the constitutional text and parliamentary custom and practice can be both dense and complicated. While there are grounds for maintaining that the prohibitions are justiciable, the matter should primarily be one for the Government and the Legislative Assembly to attempt to settle.
The prohibitions in ss 46(6) and (7) against including non-appropriation matters in an appropriation Bill for the ordinary annual services of the government, and matters other than the imposition of a tax in Bills imposing taxation, arguably lack the legal force that their analogous provisions have under the *CC*. One can ask, accordingly, whether this is a serious omission that requires rectification.

Further there is a good case for claiming that the Commonwealth equivalents, although they have given rise to considerable litigation, have predominantly benefited individuals such as taxpayers rather than the political process; nor have they have not really served any significant ends associated with the legislative process. Commonwealth legislation dealing with taxation is unnecessarily complicated by the fact that there must be at least two separate pieces of legislation,[101] one imposing tax and the other dealing with related matters, such as providing for the administration of the taxation scheme, including assessment, collection and provisions for penalties. Similarly, given that appropriation matters are on the current view of the High Court not susceptible to judicial review, the onus upon Parliament to provide adequate policy and political scrutiny over expenditure seems a preferable constitutional allocation of responsibility. One can ask: In what way would judicial enforceability of these provisions enhance the political process? While the fundamental principles of government accountability to the people of the State through Parliament is arguably enhanced by holding particular provisions of s 46 justiciable the ultimate answer is somewhat ambivalent and hence equivocal.

Gubernatorial intervention as an alternative

It is evident from the above analysis that the legally uncertain nature of the measures and conditions provided in s 46 creates the spectre of a viceregal intervention by the Governor, exercising the 'reserve powers of the Crown', to resolve an imbroglio over a failure to pass supply legislation.[102]
The existence of this reserve power and the conditions under which it should, in accordance with convention, be exercised has been the subject of considerable debate, particularly in light of the enactment of s 7 of the *AA*. Different views have been expressed by, among others, Sir Francis Burt and Professor Peter

101 As acknowledged in *Re Dymond* (1959) 101 CLR 11.

102 Regarding difficulties faced by a Governor in the event of blocking supply Bills: E Campbell, 'Parliamentary Appropriations' (1971) 4 *Adelaide Law Review* 145, 150. She was writing, however, before the enactment of *the Australia Acts 1986* (Cth & UK) but is nevertheless instructive. Regarding the reserve powers of the Crown generally see P Johnston, 'Tidying up the Loose Ends: Consequential Changes to Fit a Republican Constitution' (2002) 4 *The University of Notre Dame Australia Law Review* 189.

Boyce.[103] The better view appears to be that although the power to dismiss a government does reside in the Governor the circumstances in which it should be exercised would have to be most extraordinary. The general principle in such cases is that gubernatorial intervention should be the very last resort[104] and it is really incumbent on Parliament to resolve the impasse by political means.

It is further open to argument that, absent judicial intervention, it lies within the Governor's reserve powers to *refuse to assent to a Bill passed* in contravention of ss 46(6) and (7). Whether this is in fact legally feasible is highly debatable. In any event, there are the strongest policy reasons for holding that it would be quite inappropriate for the Governor to be involved in the matter, even if there is a semblance of illegality. Consistent with the historic trend that the reserve powers of state governors are diminishing in compass, with concomitant expectations that governments will assume responsibility for their decisions to democratically elect parliaments, primacy should be placed on the principle of responsible government whereby the Governor should act, with very limited exceptions, on the advice of his or her Ministers.[105] In that way, he or she would be insulated from any political repercussions. In such cases, it would ultimately fall to the electorate, consistent with the principle of representative government, to sanction any blatant non-compliance with s 46.

Because of the drastic nature of the outcome in either event, dismissal or refusal to assent, the matter is one that demands a statutory resolution based on objective criteria stipulating when the adopted mechanism comes into play. This would avoid compromising the independence of the Crown.

Recommendations regarding amendment of s 46

The critical issue in the end therefore is: Is it not clear that s 46 should be amended to achieve an objective method of resolving inter-house disputes over financial Bills? As observed above, complicated models such as s 57 of the *CC* are too prescriptive, slow and impracticable and if anything are calculated to exacerbate a political crisis by prolonging it. In the end the choice lies between formulas that partially reduce the power of the upper house to continue obstructing passage of

103 Francis Burt, 'Monarchy or Republic – It's All in the Mind' (1994) 24(1) *University of Western Australia Law Review* 1; P Boyce, 'The Reserve Powers of State Governors' (1994) 24 *University of Western Australia Law Review* 145. See also Geoffrey Lindell, 'The Role of the State Governor in Relation to Illegality' (2012) 23 *Public Law Review* 268, 275-7.

104 Lindell, 'The Role of the State Governor', above n 103, 274.

105 For an analysis of the kind of considerations and conditions that should apply if the Governor were presented with a Bill that has been passed in contravention of s 46 of the *CAAA* see Lindell, ibid 277-80 and generally the thrust of the whole article where Lindell develops his thesis regarding the primacy that should be placed on the principle of responsible government. This requires in the context of possible resort to the reserve power in situations of possible illegality that the Governor should generally act on the advice of his Ministers, including any legal advice tendered to him or her, except where the issues involved are not likely to be justiciable.

supply Bills, such as limiting requests to one, thus requiring the Council to take the drastic step of express rejection of a financial measure if it really wants to persist in its opposition to it, giving the Legislative Council a 'suspensory veto' (for example, empowering the Governor to assent to a supply Bill if the Council rejects a motion to pass the Bill after a month from an initial negative vote), or other mechanisms that entail a democratic element involving the dissolution of one or both houses and a general election in the event of a second rejection by the Council.[106]

With respect to non-financial measures the call for resolution is not so compelling and the likelihood, given the natural conservatism of West Australians, is the maintenance of the *status quo*.

PART E: GENERAL OVERVIEW OF STATE'S CONSTITUTIONAL REGIME REGULATING REVENUE

This article set out to analyse the constitutional arrangements governing the enactment of financial legislation concerned with the raising and expending of public revenue. That analysis has revealed that the relevant provisions are framed around long-standing constitutional principles the purpose of which is to ensure that the government is accountable to the Parliament in the first instance and through the Parliamentary process, to the people who constitute the electorate.

Permeating the whole discussion is whether these legislative arrangements are matters of solely *intra-mural concern* (that is, matters which wholly lie within the province of the houses of Parliament to regulate and sanction) or are they amenable to judicial review?[107] While some purists might hesitate to apply the term 'constitutional law' to arrangements which are for the most part, regulated by convention rather than statutory prescriptions there can be no doubt that Parliament is best placed to make the relevant judgments and distinctions that affect the internal lawmaking processes of the legislature. This is not to say that in a special case, such as the determination of whether a law, once enacted, concerns more than the ordinary annual services of government, a Member of Parliament might be able to seek a declaration from the Supreme Court upon the matter.

As a broad proposition, however, the better view appears to be that on the state level, the relevant provisions should mostly be regarded as non-justiciable[108] and, while there may be in the most extreme circumstances some possibility of

106 The general conclusion expressed here is consistent with the views this writer presented in a letter dated 25 January 1985 to the Royal Commission on Deadlocks: see *RC*, above n 77, Volume 2, Appendix C.

107 Similar issues arise with respect to the *Parliamentary Privileges Act 1891* (WA) and s 36 of the *Constitution Act* as noted in *Gangemi v The Western Australian Farmers Federation (Inc)* [2002] WASC 229 and *Corruption and Crime Commission of Western Australia v McCusker AO QC* [2009] WASC 44.

108 As will be evident from the discussion of justiciability in this article the position is far from conclusive.

a Governor exercising a vestige of the reserve powers of the Crown, the latter prospect is highly undesirable.

CONCLUSION

What is patently evident, and has long been recognised as a deficiency in the constitutional arrangements affecting Western Australia, is that the discretionary power of the Legislative Council to repeatedly return Bills to the Assembly with requests for amendment should be clarified. Even more so, the lack of a certain and objective procedure for the passage of supply legislation in the event of prolonged upper house obstruction, whether by repeating amendment requests or deferring consideration of supply Bills unless the Government advises the Governor to institute an election, is long overdue for rectification. Despite the failure to adopt the proposal of the Edwards Royal Commission in 1984, some limitation on the power of the upper house to obstruct such critical financial legislation is an imperative awaiting realisation.