Key Judicial Decisions on the Constitution Act 1889 (WA) and the *Constitution Acts Amendment Act 1899* (WA)

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The key judicial decisions on the State legislation at the heart of the Western Australian Constitution are small in number but provide a fascinating insight into the contrast with the approach to the rigid Commonwealth Constitution. They also reveal the reluctance of the courts to intrude into the highly sensitive and inevitably controversial subject of electoral boundaries. Whilst always consistent on that subject (which also brought the constitutional implication process to a halt), there are clear differences in approach to the construction of entrenchment provisions in State legislation. Moreover, there are important outstanding issues that are yet to be determined.

INTRODUCTION

This article attempts a detailed analysis of key judicial decisions on the *Constitution Act 1889* (WA) ('the 1889 *Constitution Act*') and the *Constitution Acts Amendment Act 1899* (WA) ('the 1899 Amendment Act'). This involves a fascinating tale of the intersection of politics, principle, policy and the courts, featuring some very prominent persons and personalities. Notwithstanding the passage of more than 120 years, it may surprise you, as it did me, that the number of High Court decisions on the two Acts can be counted on your fingers. I propose to focus on six decisions and to deal with them in chronological order. They are *Clydesdale v Hughes*,[1] *Burke v Western Australia*,[2] *Western Australia v Wilsmore*,[3] *Stephens v West Australian Newspapers Ltd*,[4] *McGinty v Western Australia*[5] and *Attorney-General (WA) v Marquet*.[6] Of those cases, three concern the validity of electoral distribution laws governing the election of members to the Legislative Assembly and Legislative Council of the Parliament of Western Australia.

1 (1934) 51 CLR 518 ('*Clydesdale*').
2 [1982] WAR 248 ('*Burke*').
3 (1982) 149 CLR 79 ('*Wilsmore*').
4 (1994) 182 CLR 211 ('*Stephens*').
5 (1996) 186 CLR 140 ('*McGinty*').
6 (2003) 217 CLR 545 ('*Marquet*').

THE STATUTORY FRAMEWORK

But first the statutory background. The colony of Western Australia received self-government in 1890 with the passage of the *Western Australia Constitution Act 1890* (Imp) ('the 1890 Imperial Act'). The 1890 Imperial Act authorised the Queen to assent to the bill which appeared as a schedule to the Act. That bill, which had been passed by the Legislative Council in Western Australia, became the 1889 *Constitution Act*. The 1889 *Constitution Act* has been described as the keystone of the Western Australian constitutional framework.[7] However, Imperial, colonial and/or State legislation together comprise the written provisions of the Western Australian Constitution.

The two most important provisions of the 1889 *Constitution Act* are ss 2 and 73. Section 2(1) grants plenary power to the Parliament, consisting of the Sovereign, the Legislative Council and the Legislative Assembly, to make laws for the peace, order, and good government of the State of Western Australia. That expression is to be liberally applied and legislation is valid if there is any real connection - even a remote or general connection - between the subject matter of the legislation and the State.[8] A State law with extraterritorial effect will be valid if it satisfies that test.[9]

Subject to enforceable 'manner and form' requirements, the Western Australian Constitution can be amended in the same way as ordinary legislation. As colourfully explained by the Privy Council in *McCawley v The King*, in the absence of an enforceable manner and form requirement, the Western Australian Constitution is in 'precisely the same position as a *Dog Act* or any other Act, however humble its subject matter'.[10]

Because the Western Australian Parliament has plenary legislative power, manner and form provisions are not effective in limiting the power of successor governments unless supported by a higher law. Until the commencement of the *Australia Act 1986* (Cth) and the *Australia Act 1986* (UK) ('the *Australia Acts*'), the higher law was s 5 of the *Colonial Laws Validity Act 1865* (Imp). That Act was repealed with respect to the States by the *Australia Acts* but the effect of s 5 was preserved. Section 6 of the *Australia Acts* provides that a law made by the Parliament of a State respecting the 'constitution, powers or procedure of the Parliament of the State' shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament.

Section 73 of the 1889 *Constitution Act* contains manner and form requirements. Section 73(1) provides that the legislature of the State 'shall have full power and

7 *Wilsmore* (1982) 149 CLR 79, 93.
8 *Pearce v Florenca* (1976) 135 CLR 507, 518 (Gibbs J).
9 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 14 (the Court).
10 (1920) 28 CLR 106, 116.

authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act'. However, there are two provisos to s 73(1), the first of which provides that it is not lawful to present to the Governor for assent by the Queen:

… any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

An absolute majority is half the actual membership of the Council and Assembly respectively, plus one.

Section 73(2) of the 1889 *Constitution Act*, inserted by the *Acts Amendment (Constitution) Act 1978* ('1978 Amendment Act') which came into effect in December 1978, restricts the capacity of the legislature to enact a bill which expressly or impliedly: provides for the abolition of or alteration in the office of Governor;[11] provides for the abolition of either the Council or the Assembly;[12] provides that either House 'shall be composed of members other than members chosen directly by the people';[13] provides for a reduction in the number of the members of the Council or of the Assembly;[14] or in any way affects any of ss 2, 3, 4, 50, 51 and 73 of the 1889 *Constitution Act*.[15] The subsection requires that such a bill should not be presented for assent unless 'the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively'[16] and the bill has been approved by a majority of electors of the State at a referendum. Any amendment to the entrenching effect of s 73 must itself comply with the special procedures. That provides for double entrenchment.

In the second reading speech for the 1978 Amendment Act, the Premier, Sir Charles Court, identified the purpose of the amendments as being to thwart what he described as the long-term objective of the Labor Party to '[destroy] State Parliament in the interests of centralising all Government in Canberra' and to refuse to appoint State Governors.[17] My memory is that the latter proposal was a reaction to the dismissal of the Whitlam Government by the Governor-General in November 1975. The judiciary gets only a passing mention in the 1889 *Constitution Act*.[18]

11 *Constitution Act 1889* (WA), s 73(2)(a).
12 Ibid s 73(2)(b).
13 Ibid s 73(2)(c).
14 Ibid s 73(2)(d).
15 Ibid s 73(2)(e).
16 Ibid s 73(2)(f).
17 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308.
18 *Constitution Act 1889* (WA), ss 54 - 55.

The 1899 Amendment Act contains provisions that can best be described as relating to the constitution, powers and procedures of the Legislative Council and Legislative Assembly. 'Constitution' in that context means the number of elected members sitting for electoral regions (Council) and electoral districts (Assembly). Part II of the Act deals with the Executive. There are no express manner and form provisions in the 1899 Amendment Act.

Clydesdale

Clydesdale is the first High Court case on the Western Australian Constitution. It is particularly interesting to see what passed for 'reasons' in earlier times. The appellant, a member of the Legislative Council, became a member of the Lotteries Commission and was alleged to have accepted an office of profit from the Crown. The 1899 Amendment Act provided that if a member of the Legislative Council after his election accepted any office of profit from the Crown 'his seat shall thereupon become vacant'[19] and he also became liable to forfeit the sum of £200.[20] The respondent commenced Supreme Court proceedings claiming the money. While the action was pending, Parliament passed the *Constitution Acts Amendment Act 1933* (WA) ('the 1933 Act') providing that no disqualification or penalty should be incurred by a person who is both a member of Parliament and a member of the Lotteries Commission. Although the primary focus of the 1933 Act was the 1899 Amendment Act, it also amended s 6 of the 1889 *Constitution Act*. The validity of the 1933 Act was in issue, the respondent contending that the manner and form requirement in the first proviso of s 73 of the 1889 *Constitution Act* had not been complied with.

The High Court addressed the question whether the 1933 Act effected any change in 'the Constitution' of the Legislative Council. With a brevity not seen in modern times, the Court (Rich, Dixon and McTiernan JJ) gave its reasons in a single sentence:

We do not agree that it effected a change in the constitution of the Legislative Council.[21]

Clydesdale is referred to with approval in both *Wilsmore* and *Marquet*. The next case in the chronology is *Burke*, the first of the cases on the State's electoral distribution laws. The facts are best appreciated against the historical background.

ELECTORAL LAWS - BACKGROUND

In Western Australia the most politically charged and contentious aspect of representative democracy seems to be the drawing of electoral boundaries.

19 *Constitution Acts Amendment Act 1899* (WA), s 38.
20 Ibid s 39.
21 *Clydesdale* (1934) 51 CLR 518, 528.

Dr Peter Johnston has colourfully described the events leading up to and after the enactment of the *Electoral Districts Act 1947* (WA). He explained that the Labor Opposition had:

[D]eeply rooted … suspicions about what [it] saw as the Coalition parties' attempt to entrench an electoral system favourable to conservative interests. This belief focused on the electoral changes introduced by the *Electoral Districts Act 1947*. That Act altered the pattern of vote weighting from that which had existed since 1929 and … 'was pivotal in the electoral history of the post-war years'. In fact the 1947 election was fought on the grossly out-of-balance 1929 boundaries which had been formulated on a weighting of one mining/pastoral vote equalling two agricultural votes to three metropolitan votes. Attempts by Labor Governments in the 1930s to introduce revisions failed and no redistribution had occurred before 1947.

> On winning the 1947 election the Liberal-Country Party Government led by Sir Ross McLarty proceeded with a radical reform of the pre-existing system. This had two elements. The first concerned the issue of rebalancing the relative proportionality between voters in electoral districts in different areas of the State; the second, introducing provisions to ensure that regular electoral redistributions would be systematically carried out. The first resulted in a reduction of the four North-West electorates, whose boundaries were statutorily delimited irrespective of voter numbers, to three. The rest of the State was then divided into two areas, the metropolitan and the agricultural/mining/pastoral with a vote weighting of 1:2.[22]

The second reform provided, by s 12, that when the Chief Electoral Officer reported that the number of voters in a specified number of electorates diverged by more than 20% from the quota of voters determined for the respective areas, the Governor should automatically institute a new electoral redistribution by issuing a proclamation and appointing three electoral commissioners for that purpose. After losing the general election in March 1959 the caretaker Labor Government determined that a proclamation under s 12 should be issued. That was done by the Governor-in-Council on 1 April 1959. An ensuing court battle was resolved in the Full Court in *Tonkin v Brand*.[23]

The consequences of malapportionment (disparity in voting power) or a gerrymander (malapportionment for the purpose of giving one party an unfair advantage) can be magnified in a party political system. A party, or coalition of parties, can secure government with less than 50% of the total popular vote. In the United Kingdom there are now steps afoot to change constituent boundaries to correct a bias in its electoral system that favours the Labor Party.[24] However,

22 Peter Johnston, '*Tonkin v Brand*: Triumph for the Rule of Law' in HP Lee and George Winterton (eds), *State Constitutional Landmarks* (Federation Press, 2006) 211, 215.

23 [1962] WAR 2.

24 'Suicide Pact', *The Economist* (11 August 2012) 14.

there can be a gerrymander even with equality in numerical size of electoral districts. This is an area where democratic principle meets party self-interest and advancement.

Burke

The insertion of s 73(2)(c) in the 1889 *Constitution Act* provided the foundation for the challenge in *Burke* to the validity of amendments to the *Electoral Districts Act*. Mr Burke, the then leader of the Labor Opposition, challenged the validity of the *Acts Amendment (Electoral Provinces and Districts) Act 1981* (WA) ('the 1981 Amendment Act'). As a result of the 1981 Amendment Act it was possible that, upon an electoral redistribution, the ratio of the number of electors in an electoral district for the Legislative Assembly in the Metropolitan Area to the number of those in an electoral district in the Agricultural, Mining and Pastoral Area would be 2.45:1; the ratio of electors in an electoral province for the Legislative Council in the Metropolitan Area to those in an electoral province in the Agricultural, Mining and Pastoral Area, 6.11:1; and the ratio of those in an electoral province in the Metropolitan Area to those in the Lower North and the North-West-Murchison-Eyre Area, 15.67:1 and 4.28:1 respectively.[25] The weighting in favour of country electorates tended to favour the conservative political parties.

Not deterred by the outcome in *Attorney-General (Cth) ex rel McKinlay v Commonwealth*[26] (or perhaps encouraged by the judgments of McTiernan and Jacobs JJ, Stephen J, Mason J and Murphy J)[27] Mr Burke claimed the 1981 Amendment Act was invalid because it fell within s 73(2)(c) of the 1889 *Constitution Act* and had not been passed in the required manner and form. The argument was that the expression 'composed of members other than members *chosen directly by the people*' entrenched a system of representative democracy and that it was an essential requirement of that concept that, in the choice of a member, each of the people participating in the choice should have a vote of equal value. The claim was unanimously dismissed. Chief Justice Burt did so in the following terms:

> The argument is that A means B and C is within B and hence must be within A. It is the first step in the argument which I am unable to take …
> In my opinion the plaintiff's argument distracts attention from the essential question, it being whether the contended for conclusion can be sustained as a matter of construction of the words used. 'The problem is not to be resolved by resort to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy': Barwick CJ in *McKinlay's* case.[28]

25 *Burke* [1982] WAR 248, 248.
26 (1975) 135 CLR 1, 35-6.
27 Ibid 36-7, 57, 61, 65.
28 *Burke* [1982] WAR 248, 252.

It may be inferred from the colourful language deployed in the characterisation of the proposition (which became identified by the catchphrase 'one vote one value') that Chief Justice Barwick (a former Liberal Attorney-General) and Chief Justice Burt were not just rejecting its merit as a constitutional proposition. Indeed, from the passage of the *Electoral Districts Act* in 1947 until its repeal in 2005, the Chief Justice of the Supreme Court of Western Australia was chairman of the Electoral Commissioners whose functions included making recommendations about and adjusting districts and provinces respectively.[29] *Burke* was a full dress rehearsal for *McGinty*, some 14 years later.

Wilsmore

The next case in the sequence is *Wilsmore*. The High Court appeal was conducted on the basis that it concerned the construction of s 73 of the 1889 *Constitution Act* as it stood prior to the passage of the 1978 Amendment Act. However, s 73(1) is in materially the same terms as that considered by the High Court in *Wilsmore*. Mr Wilsmore was detained in Fremantle Prison at the Governor's pleasure under s 653 of the *Criminal Code* (WA) ('the Code') after having been found not guilty of wilful murder by reason of insanity. In July 1979 the electoral Registrar for the Fremantle District, in accordance with the provisions of the *Electoral Act 1907* (WA), entered Mr Wilsmore's name on the roll of electors for the Legislative Assembly and the Legislative Council. Later in 1979 the legislature passed the *Electoral Act Amendment Act (No 2) 1979* (WA) ('the 1979 Amendment Act'), s 7 of which had the effect of disqualifying from voting any person detained in custody under s 653 of the Code. The 1979 Amendment Act had not been passed in accordance with the manner and form requirements of s 73 of the 1889 *Constitution Act*. Mr Wilsmore sought a declaration that the 1979 Amendment Act was invalid. The High Court held that s 73 had no application to the 1979 Amendment Act.

The High Court held that the first proviso to s 73 is a true qualification of the preceding sentence and thus applied only to a bill to repeal or alter any of the provisions of the 1889 *Constitution Act* by which a change in the constitution of the Legislative Council or the Legislative Assembly was effected. Wilson J, the former Solicitor-General for Western Australia, wrote the leading judgment. Counsel for Mr Wilsmore was RS French, now the Chief Justice of Australia. His junior was PW Johnston, who also was junior counsel for the plaintiff in *Burke*.

It was put on behalf of Mr Wilsmore first, that the 1979 Amendment Act interfered with the qualifications of electors and members of a House of the legislature and thus effected a change in the constitution of that House within the meaning of the first proviso to s 73 and second, that the first proviso was not confined to the repeal or alteration of the provisions of the 1889 *Constitution Act* but applied to all bills of the Western Australian Parliament that effected a relevant change. On

29 *Electoral Districts Act 1947* (WA), s 2(1)(a), s 3.

the second issue, it was said that to construe the first proviso in s 73 to refer only to a bill to repeal or alter any of the provisions of the 1889 *Constitution Act* was to 'trivialize the important concept which lies at the heart of the provision, namely, the constitution of the two Houses'.[30] Wilson J responded:

> [A] subject is not trivialized because it may be varied by law passed by an ordinary majority. The submission reflects a misunderstanding of the section as a whole. Standing behind and over s 73 is a legislature possessed of plenary powers …
>
> … This basic constitutional principle does not permit a 'manner and form' provision to be ignored, but it does emphasize the breadth of the legislative power conferred on the colonial legislature. Again, it must be remembered that, however stringent a manner and form provision may be, that plenary legislative power … is always available to remove it, subject only to the observance of such manner and form provision, if any, which is applicable to its removal. There is no such provision in the case of the first proviso in s 73. The requirement of an absolute majority in the cases prescribed may be varied or wholly eliminated by a Bill which is passed by no more than a simple majority.[31]

Of course, after the passage of the 1978 Amendment Act, s 73 could not be varied without complying with the high hurdle presented by the manner and form requirement in s 73(2).

Wilson J concluded that there was nothing in the words of s 73 or in the context in which they are found to suggest that the first proviso is other than a proviso properly so called; that is, one which limits the operation of the general words in the preceding sentence. He found support for that conclusion in s 5 of the 1890 Imperial Act which authorised the Queen to assent to the bill which became the 1889 *Constitution Act*. Section 5 of the 1890 Imperial Act relevantly provides:

> It shall be lawful for the legislature … of Western Australia to make laws altering or repealing any of the provisions of the scheduled Bill in the same manner as any other laws for the good government of that colony, subject, however, to the conditions imposed by the scheduled Bill on the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature.

As Chief Justice Gibbs observed in a separate judgment, the 'curiously weak and ineffectual' nature of the restriction was not a matter of mere inadvertence.[32] The Imperial authorities 'were unused to the notion of an entrenched constitution and … were imbued with a sense of the power of the Parliament to remould

30 *Wilsmore* (1982) 149 CLR 79, 99.
31 Ibid 99-100.
32 Ibid 84.

itself'.[33] Hence s 5 of the 1890 Imperial Act expressly adverted to the authority of the colonial legislature to reconstitute itself and to remove any manner and form provision standing in its way. The legislative history showed that s 73(1) was not intended to be 'a great constitutional safeguard'.[34]

Whereas the Commonwealth Parliament is a Parliament of limited legislative powers, the Western Australian Parliament has plenary legislative powers more reminiscent of Westminster than Canberra. The Court in *Wilsmore* therefore had no reason to give an extended operation to the restriction on State legislative power in s 73(1).

Although it was unnecessary to deal with the question whether the 1979 Amendment Act effected any change in the constitution of the Legislative Council or the Legislative Assembly, Wilson J observed that:

> the judgment of this court in *Clydesdale v Hughes* is clear authority, unless and until it is reversed or departed from by this Court, for the proposition that a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of s 73 of the 1889 [Constitution] Act'.

He continued: 'When such an authority has guided the law-making procedures of the Parliament for almost fifty years then any departure from it would require very serious consideration'.[35] He also found it unnecessary to rule on the relationship, if any, of the 1899 Amendment Act to the 1889 *Constitution Act*. However, he did express an opinion that s 73 was inapplicable, noting that it was obviously a question of great potential significance as the State had acted on the basis that bills to amend the provisions of the 1899 Amendment Act were not covered by s 73.[36] As a former Solicitor-General for Western Australia, Wilson J could be expected to have more than a passing knowledge of and involvement in such matters. *Clydesdale* remains the law and there has been no further consideration or binding determination by the High Court on whether the 1899 Amendment Act is covered by s 73.

Stephens

33 Ibid.
34 Ibid 85.
35 Ibid 102-3.
36 Ibid 101-2.

Stephens (decided at the same time as *Theophanous v Herald & Weekly Times Ltd*)[37] was the third in a line of cases recognising the existence in the *Commonwealth Constitution* of an implied guarantee of political communication which derived from the notion of representative government (or democracy). In *Stephens*, six members of the Western Australian Legislative Council sued the publisher of the West Australian newspaper for damages for defamation. The newspaper pleaded a defence based on the implied freedom of communication about political matters. The High Court held that a freedom of communication about political matters was also implied in the Western Australian Constitution and extended to criticism of the performance, conduct and fitness for office of a member of Parliament. The plurality (Mason CJ, Toohey and Gaudron JJ) said:

We do not consider that s 73 provides a foundation for any suggestion that the Western Australian Constitution contemplates the possibility that it will be amended in such a way that representative democracy will be abolished. On the contrary, s 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are 'directly chosen by the people', a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the *Commonwealth Constitution*, in order to protect the efficacious working of representative democracy and government.[38]

By the time *Stephens* and *Theophanous* had been decided, a division of opinion had emerged in the High Court as to the basis for the implication of the guarantee of freedom of political communication. The majority (Mason CJ, Deane, Toohey and Gaudron JJ) appeared to regard representative democracy as an underlying constitutional doctrine and the basis upon which implications could be drawn. The minority (Brennan, McHugh and Dawson JJ) confined themselves to the text and structure of the Constitution as the basis for any implication. Those advising the Labor Opposition must have seen the reasoning underpinning the implied guarantee in the 1889 *Constitution Act* as justifying a rerun of *Burke*.

McGinty

By the time *McGinty* was heard, Mason CJ and Deane J were no longer on the High Court and Gummow J had been appointed. The plaintiffs were Mr McGinty, then shadow Attorney General, Mr G Gallop, then Opposition Leader and Mr Halden, a member of the Legislative Council.

The plaintiffs challenged ss 2A(2), 6 and 9 of the *Electoral Distribution Act 1947* (WA) (formerly the *Electoral Districts Act*) which had been inserted by the *Acts Amendment (Electoral Reform) Act 1987* (WA). As at November 1987, the

37 (1994) 182 CLR 104.

38 *Stephens* (1994) 182 CLR 211, 233-4.

challenged legislation had the effect that 74% of voters in the metropolitan area would elect 60% of the members of the Legislative Assembly and 26% of the voters outside of the metropolitan area would elect 40% of Assembly members.[39] Further, metropolitan electors totalling 74% of the State's voters were to elect the same number of Legislative Council members as the non-metropolitan electors who comprised 26% of the State's voters. McHugh J said that it was beyond question that the distribution of voters in the electoral districts and regions of Western Australia for both the Legislative Council and the Legislative Assembly resulted in the vote of some voters, particularly non-metropolitan voters, having a greater value than that of others.[40] He continued:

The [statutory] scheme … arbitrarily distinguishes between metropolitan and non-metropolitan voters. On no rational basis can the special needs of electors in areas outside the non-metropolitan areas justify such large disparities as exist between particular electoral districts and regions.[41]

The plaintiffs claimed the legislation was invalid because the disparities in voting power were inconsistent with both the *Commonwealth Constitution* and the Western Australian Constitution, relying on s 73(2)(c) of the 1889 *Constitution Act*. By a majority (Brennan CJ, Dawson, McHugh and Gummow JJ; Toohey and Gaudron JJ dissenting) the High Court rejected the plaintiffs' claims. I will focus on the claim under the Western Australian Constitution.

Brennan CJ maintained his reasoning in *Stephens*. No implication can be drawn from either Constitution which is not based on its text or structure. [42] He rejected the notion of representative democracy as a freestanding concept providing the basis for an implication. The system of government mandated in Western Australia by s 73(2)(c) was a legislature 'chosen directly by the people'. However, it did not follow that there must be equality of voting power. Whether such a requirement was implicit in the 1889 *Constitution Act* depended on the context of s 73(2)(c) and the circumstances in which it was enacted.[43] The Chief Justice observed that, throughout its history, Western Australia's electoral system had been made up of geographical districts, provinces or regions which were characterised by disparities in voting power. He said it was 'impossible to suppose' that the Parliament in enacting s 73(2)(c) had intended to override what was then, and always had been, the electoral framework of the State and that s 73(2)(c) had to be 'construed in the light of the constitutional history of the State and the circumstances existing when that provision was introduced'.[44] He also relied on the preamble to the 1978 Amendment Act to show that the purpose

39 Peter Gerangelos, '*McGinty v Western Australia*: Electoral Equality and the Demise of the "Implied Rights Venture"' in HP Lee and George Winterton (eds), *State Constitutional Landmarks* (Federation Press, 2006) 416, 418-9.
40 *McGinty* (1996) 186 CLR 140, 226.
41 Ibid 226-7.
42 Ibid 168.
43 Ibid 176-7.
44 Ibid 178.

of s 73(2)(c) was not the creation of a new electoral regime but was privative of the uncontrolled or partly-controlled power of constitutional amendment vested in the Parliament by s 73(1).[45] Section 73(2)(c) entrenched election by direct, popular vote and no more.[46] Dawson J agreed with the Chief Justice's reasons for dismissing the claim based on the Western Australian Constitution.[47]

McHugh J accepted that s 73(2)(c) entrenched a system of representative government in Western Australia but said it did not follow that it also required equality of numbers in the electoral districts and regions of the State.[48] The natural and ordinary meaning of the words 'chosen directly by the people' had nothing to say about *how* the members of the Legislative Council or Legislative Assembly were to be elected. The words could only have the effect contended for if they bore that meaning when enacted.[49] All the evidence was that they did not. When the section was enacted, there already existed significant disparities in the sizes of the various electoral districts and provinces in Western Australia. Such disparities were not an historical aberration but commonplace. That being so, the words meant what they said and no more and no change in electoral distribution was intended.[50] That conclusion was confirmed by the extrinsic materials which accompanied the 1978 Amendment Act.[51] Having reached this conclusion, it was unnecessary to go further and consider whether a principle of representative democracy was to be found elsewhere in the 1889 *Constitution Act*. Absent entrenchment, the legislature of Western Australia had the constitutional power to legislate inconsistently with any provision of the 1889 *Constitution Act*, including any implied principle of representative democracy.[52]

The final member of the majority was Gummow J. His focus was on the text of s 73(2)(c) and on extrinsic materials, including the constitutional history of the State, which showed that the enactment of s 73(2)(c) was not accompanied by an intention to alter electoral boundaries. The only intention was to forestall any attempt to by-pass the electorate altogether.[53] On the subject of representative government, Gummow J said:

> It may readily be conceded … that the Western Australian Constitution provides for representative government. However, in the absence of any relevant entrenchment, effect is given to that doctrine by a fluid rather than a fixed constitution. In that respect there is a marked difference between the position in Western Australia and that which obtains under the Australian Constitution.[54]

45 Ibid.
46 Ibid.
47 Ibid 189.
48 Ibid 252-3.
49 Ibid 253.
50 Ibid 253-4.
51 Ibid 254.
52 Ibid.
53 Ibid 299-300.
54 Ibid 299.

His Honour accepted the State's submission that this fluidity permitted a process of legislative change to the franchise and to the methods for composition of each chamber of Parliament.[55] Consequently, s 73(2)(c) was to be construed as entrenching 'only so much of the full elements of the system of representative government in the State of Western Australia as provide for popular election of members of each chamber in contrast to a process of nomination by the executive or of indirect election'.[56] He concluded:

> The phrase 'chosen directly by the people' was selected rather than 'directly chosen by the people' as it appears in ss 7 and 24 of the Australian Constitution. This emphasises that the phrase is inseverable and conveys the one concept. That is, the entrenchment of the present system of popular selection of legislators by direct vote rather than by other indirect methods.[57]

Gummow J observed that the significance of the notion of 'one vote one value' reflected the concerns of the established political parties as much as any doctrinal solicitude for the true and proper nature of the franchise.[58] However, he accepted that variation in the numbers of electors in single-member divisions could be so grossly disproportionate as to deny ultimate control by popular election, which is at the core of the concept of representative democracy.[59]

It is clear that the judges forming the majority did not accept that equality in voting power was an essential requirement of representative democracy, it being only one (albeit an important one) of a multitude of factors to be weighed. McHugh J described the identification of the ingredients of a representative democracy to be a political question.[60] The Chief Justice agreed, saying that the question whether differences in voting power can be justified does not admit of a definitive answer.[61]

Toohey J, in dissent, accepted that s 73(2)(c) did not, by itself, go far enough to require equality of voting power. But that was not the end of the matter. It was also necessary to consider the separate question whether there was to be found in the 1889 *Constitution Act* generally a concept of representative democracy and, if so, whether its integrity required equality of voting power.[62] Toohey J answered both parts of the question in the affirmative. His Honour said the 1889 *Constitution Act* embodied the concept of representative democracy because (1) the legislative power of the State was vested in the Parliament; (2) electoral approval was required for some amendments; and (3) the people of the State were given control over the composition of the Parliament. He also relied on the

55 Ibid.
56 Ibid 300.
57 Ibid.
58 Ibid 258.
59 Ibid 286.
60 Ibid 235-6, 250.
61 Ibid 168.
62 Ibid 197.

express language of s 73(2)(c).[63]

Toohey J rejected an argument that it was wrong in principle to draw implications from state constitutions because they are subject to amendment. He also considered the narrower point about whether implications may only be drawn from entrenched provisions in state constitutions. However, it was unnecessary to decide that point because the relevant features of the 1889 *Constitution Act* which embodied the concept of representative democracy (the Governor, Legislative Council, Legislative Assembly and manner and form requirements) were entrenched by s 73.[64]

Gaudron J was of the view that s 73(2)(c) was decisive. Absent relevant contextual differences, the expression 'chosen directly by the people' in s 73(2)(c) was to be construed consistently with the expression 'directly chosen by the people' in ss 7 and 24 of the *Commonwealth Constitution*.[65] Her Honour held that the expression must be viewed as embodying a guarantee of the type of democracy entrenched in the 1889 *Constitution Act* unless and until amended in accordance with s 73(2).[66] Critically, she said the words 'chosen directly by the people' must be applied in light of contemporary circumstances, having regard to developments which have taken place in democratic standards.[67] This was her answer to the history of electoral inequality in Western Australia. Her Honour identified the question as being 'what is required in the light of current democratic standards, including those which so recently applied in Western Australia'.[68] She considered the malapportionment so great as to be distinctly at odds with Australian democratic standards. The distinction between metropolitan and non-metropolitan areas drawn in the electoral legislation was arbitrary, inflexible, and not reasonably capable of being seen as appropriate and adapted to the dispersed nature of the population of regional Western Australia or any other matter or circumstance with a bearing on effective parliamentary representation.[69]

The explanation or reconciliation of the 'free speech' cases and *McGinty* was provided in *Lange v Australian Broadcasting Corporation*.[70] The High Court said of the *Commonwealth Constitution*:

Since *McGinty* it has been clear, if it was not clear before, that the Constitution gives effect to the institution of 'representative government' only to the extent that the text and structure of the Constitution establish it. In other words, to say that the Constitution gives effect to representative government is a shorthand way of saying that the Constitution provides for that form of representative government

63 Ibid 211.
64 Ibid 211-2.
65 Ibid 217.
66 Ibid 223.
67 Ibid.
68 Ibid.
69 Ibid.
70 (1997) 189 CLR 520.

which is to be found in the relevant sections. Under the Constitution, the relevant question is not, 'What is required by representative and responsible government?' It is, 'What do the terms and structure of the Constitution prohibit, authorise or require?'[71]

In summary, there are at least two significant differences that separate the approach of the majority and the minority in *McGinty*. Unlike the minority, the majority relied heavily on the history and extrinsic material in their analysis of the text and structure of the 1889 *Constitution Act* and (perhaps most importantly) did not regard equality of voting power as necessary or central to the concept of representative democracy.

In 2001, five years after their loss in the High Court, Mr Gallop became the State Premier and Mr McGinty the Attorney General. For the first time since self-government, Labor (with the Greens) had a majority in the Legislative Council. The Government now turned its attention to achieving 'one vote one value' through the Parliament. However, it was to suffer yet another defeat in the High Court.

Marquet

In 2001 the Western Australian Parliament passed a bill for an Act to be called the *Electoral Distribution Repeal Act 2001* (WA) ('the Repeal Bill'). If assented to, it would have repealed the *Electoral Distribution Act* in its entirety. The Repeal Bill was passed by an absolute majority in the Legislative Assembly but only by a simple majority in the Legislative Council. A second bill, for an Act to be called the *Electoral Amendment Act 2001* (WA) ('the Amendment Bill'), was passed in similar circumstances. If assented to, the Amendment Bill would have changed the criteria for the drawing of electoral boundaries to remove many of the disparities identified by McHugh J in *McGinty* and to increase the number of members of the Legislative Council. The Clerk of the Parliaments of Western Australia commenced proceedings in the Supreme Court seeking a declaration as to the lawfulness of presenting each bill to the Governor for Royal Assent. The Clerk's uncertainty was based on s 13 of the *Electoral Distribution Act* which provided:

> It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to amend this Act, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively.

The Supreme Court declared it was unlawful to present either bill to the Governor for Royal Assent. A majority of the High Court agreed. The first issue for consideration was whether s 13, on its proper construction, applied to either or

71 Ibid 566.

both of the Repeal Bill and the Amendment Bill. The plurality (Gleeson CJ, Gummow, Hayne and Heydon JJ) said that question could not be answered without understanding the legislative origins of the *Electoral Distribution Act* and the place that its legislative predecessors took in the constitutional arrangements for Western Australia.[72] Originally the matters were dealt with in the 1889 *Constitution Act*. The majority traced their removal from that Act and noted that the precursor to s 13 was introduced in 1904. What the history demonstrated, according to the plurality, was that provisions governing electoral redistribution were always treated as requiring special consideration by the colonial and later the State Parliament.[73]

It was noted that all parties before the Court accepted that legislative provision for the definition of electoral boundaries was legally essential to the holding of an election for either House of the Western Australian Parliament.[74] That conclusion is pivotal to the construction by the majority of the word 'amend' in s 13. They said it drove the conclusion that the word did not have its natural and ordinary meaning:

> The critical consideration is that defining electoral boundaries is legally essential to enable the election of the Parliament. Because that is so, 'amend' cannot be understood as restricted to legislative changes that take the form of leaving the *Electoral Distribution Act* in operation albeit with altered legal effect. 'Amend' must be understood as including changing the provisions which the *Electoral Distribution Act* makes, no matter what legislative steps are taken to achieve that end. In particular, it is not important whether the changes are made by one or more than one statute. The form in which the legislative steps to effect the change is framed is not determinative; the question is, what is their substance?[75]

Because the definition of boundaries was legally essential to the election of the Parliament, repealing the *Electoral Distribution Act* must necessarily be a precursor to the enactment of other provisions on the subject of electoral boundaries.[76] Thus both the Repeal Bill and the Amendment Bill were bills for Acts to amend the *Electoral Distribution Act*.

The next issue was whether s 13, insofar as it related to the Repeal Bill and the Amendment Bill, was supported by a higher law. That depended on whether the bills fell within s 6 of the *Australia Acts* as laws respecting the 'constitution, powers or procedure of the Parliament of the State'. The plurality accepted that not every matter which touches the election of members of a Parliament is a matter affecting the Parliament's constitution, citing *Clydesdale* with approval.

72 *Marquet* (2003) 217 CLR 545, 556-7 [15].
73 Ibid 562 [38].
74 Ibid 563-4 [42]-[43].
75 Ibid 565 [51].
76 Ibid 565-6 [52].

Moreover, the plurality said it was not necessary to trace the metes and bounds of the expression.[77] After stating the effect of the Repeal Bill and the effect of the Amendment Bill they concluded that laws concerning the distribution of electorates are laws respecting the constitution of a Parliament but did not spell out the reasons for that conclusion.[78]

Callinan J's separate judgment was broadly consistent with that of the plurality. His approach to the construction of s 13 of the *Electoral Distribution Act* was informed by his view that 'constitutional change should be a matter of careful and detailed deliberation'.[79] He said the bills were laws respecting the 'constitution' of the Western Australian Parliament because they provided criteria which would ultimately form the basis for the allocation of seats in the legislature and went to the 'core' of the 'nature and composition' of the Parliament.[80]

In his dissent, Kirby J treated s 13 of *Electoral Distribution Act* as no more than a statutory provision.[81] In contrast to the approach taken by the majority, he derived from *Wilsmore* the principle that a manner and form provision must be narrowly construed.[82] Kirby J considered that the meaning of the term 'constitution' in s 6 of the *Australia Acts* should be limited to fundamental provisions affecting the design and institutional composition of the legislature such as the abolition of a House. It did not extend to laws dealing with individual members or elections.[83] Kirby J justified this narrow construction on the basis that the wide application of manner and form requirements was 'inimical to the basic postulates of representative democracy and representative government'.[84]

The High Court in *Marquet* also addressed the question whether manner and form provisions may be supported by sources other than s 6 of the *Australia Acts*. It had been suggested previously that s 106 of the *Commonwealth Constitution* and/or the so-called '*Ranasinghe* principle'[85] may be alternative sources of effective entrenchment provisions in state constitutions. The plurality expressed doubts as to their applicability on the ground that, at least where it was applicable, s 6 of the Australia Acts covered the field.[86] Kirby J also rejected the applicability of both alternative sources.[87] Gummow J in *McGinty* suggested that if a manner and form provision is not made effective by another higher law such as s 6 of the *Australia Acts*, it was not given any additional force by s 106.[88]

77 Ibid 573 [77].
78 Ibid 573-4 [78]-[79].
79 Ibid 632 [274].
80 Ibid 636 [291].
81 Ibid 590 [133].
82 Ibid 598 [158]-[159].
83 Ibid 610-1 [197].
84 Ibid 611 [200].
85 Derived from the decision of the Privy Council in *Bribery Commissioner v Ranasinghe* [1965] AC 172.
86 *Marquet* (2003) 217 CLR 545, 574 [80].
87 Ibid 608-9 [190], 616-7 [215].
88 *McGinty* (1996) 186 CLR 140, 296-7.

THE ENDING

Some two years after *Marquet*, the Gallop Labor Government was finally successful in securing passage through the Parliament of electoral distribution legislation that satisfied the manner and form requirement in the *Electoral Distribution Act*. Two Acts were passed: the *Constitution and Electoral Amendment Act 2005* (WA) and the *Electoral Amendment and Repeal Act 2005* (WA). The latter repealed the *Electoral Distribution Act* and amended the 1899 Amendment Act. It introduced a modified version of one vote one value. In particular, it created an exception from that principle with a guaranteed five seats for the mining and pastoral areas of the State (representing 87% of the land mass of Western Australia).[89] It also contained a manner and form provision (s 16M of the *Electoral Act 1907* (WA)) of the type in the first proviso to s 73(1) of the 1889 *Constitution Act*.

89 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 April 2005, 275 (Mr McGinty, Attorney General).