[2009] WASC 14

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	GLEW -v- THE GOVERNOR OF WESTERN AUSTRALIA [2009] WASC 14
CORAM	**:**	HASLUCK J
HEARD	**:**	4 DECEMBER 2008
DELIVERED	**:**	30 JANUARY 2009
FILE NO/S	**:**	CIV 2107 of 2008
BETWEEN	**:**	WAYNE KENNETH GLEW Plaintiff AND THE GOVERNOR OF WESTERN AUSTRALIA Defendant

Catchwords:

Constitutional law - Manner and form provisions of s 73(2)(g) *Constitution Act 1889* (WA) - Definition of 'crown' with respect to executive government - Whether *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) effects any alteration to the Constitution - Finding that a change in terminology does not necessarily amount to a change in substantive realities underlying the Constitution and the exercise of governmental powers - Plaintiff an elector bringing proceedings for a declaration and injunction to enforce provisions of s 73(2)(g) *Constitution Act* - Order that statement of claim be struck out and action be dismissed

Legislation:

Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA)
Australia Act 1986 (Cth), s 2, s 3(2), s 6
Australia Acts (Request) Act 1985 (WA)
Constitution Act 1889 (WA)
Crown Suits Act 1947 (WA), s 3, s 5
Electoral Amendment & Repeal Act 2005 (WA)
Judiciary Act 1903 (Cth), s 78B
Rules of the Supreme Court 1971 (WA), O 20 r 19(1)

Result:

Application by defendant to strike out whole of statement of claim allowed
Action dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	In person
Defendant	:	Mr H D Leith & Ms S J Keighery

Solicitors:

Plaintiff	:	In person
Defendant	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Attorney-General (WA) v Marquet [2003] HCA 67; (2003) 217 CLR 545
Cain v Doyle (1946) 72 CLR 409
Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289
Glew v Shire of Greenough [2006] WASCA 260
Glew v Shire of Greenough [2007] HCA Trans 520 (6 September 2007)

Port MacDonnell Professional Fishermen's Association Inc v The State of South Australia (1989) 168 CLR 340

Shaw v Attorney General for the State of Western Australia [2005] WASC 149

Shaw v Attorney General for the State of Western Australia [2007] WASC 270

Shaw v McGinty [2006] WASCA 231

Town Investments Ltd v Department of the Environment [1978] AC 359

Wilson v Minister for Aboriginal & Torres Strait Islander Affairs (1996) 189 CLR 1; [1996] HCA 18

HASLUCK J:

Introduction

1 The plaintiff, Wayne Kenneth Glew, issued a writ of summons on 28 August 2008 directed to the Governor of Western Australia. I will turn to the details of the statement of claim in due course. Put shortly, the plaintiff contends that as a result of an alleged failure by governmental entities to comply with the requirements of the *Constitution Act 1889* (WA) and certain other provisions, various institutions are functioning unlawfully and the Commonwealth of Australia has been 'fractured'.

2 More particularly, it is said that the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* (WA) (the *'AARCLP Act*') was unlawfully enacted because it did not conform to the required manner and form provisions prescribed by s 73(2)(g) of the *Constitution Act*.

3 I must begin by turning to certain provisions of the *Constitution Act*. In doing so, I will draw upon the reprint dated 3 July 2000, that is to say, an authorised version of the Act as it stood on a date prior to the enactment of the 2003 *AARCLP Act* being the matter principally complained of. The plaintiff represented himself at the hearing and it therefore seems desirable that I should refer to a version of the statute which is available in hard copy.

The *Constitution Act*

4 Section 2 of the *Constitution Act* provided that it shall be lawful for Her Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly, to make laws for the peace, order and good government of the colony of Western Australia. The Parliament of Western Australia was said to consist of the Queen and the Legislative Council and the Legislative Assembly.

5 By s 2(3), every bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to s 73, be presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen.

6 As at July 2000, s 73(1) provided that the legislature of the colony was to have full power and authority to repeal or alter any of the provisions of the *Constitution Act*, provided that it was not to be lawful to present to the Governor for Her Majesty's assent any bill by which any change in the Constitution of the Legislative Council or of the Legislative

Assembly was effected, unless the second and third readings of such bill had 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.

7 Section 73(2) provided that a bill that expressly or impliedly provided for the abolition of or alteration in the office of Governor or which expressly or impliedly in any way affected certain specified sections of the Act, namely, s 2, s 3, s 4, s 50, s 51 and s 73, was not to be presented for assent by or in the name of the Queen unless the second and third readings of the bill had 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 (s 73(2)(f)) and the bill had also prior to such presentation been approved by the electors in accordance with certain following provisions (s 73(2)(g)).

8 The following provisions made provision for a referendum so that if a majority of the electors voting approved the bill it was to be presented to the Governor for assent by or in the name of the Queen.

9 By s 73(6), any person entitled to vote at a general election of members of the Legislative Assembly was entitled to bring proceedings in the Supreme Court for a declaration, injunction or other remedy to enforce the 'manner and form' provisions either before or after a bill of a kind referred to in subsection 2 was presented for assent by or in the name of the Queen.

10 In earlier discussion, I mentioned that s 2 of the *Constitution Act* provided for a legislature to be constituted in Western Australia. I note in passing that s 50(1) of the Act as it stood in July 2000 provided that 'the Queen's representative in Western Australia is the Governor who shall hold office during Her Majesty's pleasure'.

11 Section 50(2) of the *Constitution Act* provided that abolition of or alteration in the office of Governor shall not be effected by an Act of the Parliament except in accordance with s 73(2) of the Act.

The defendant's application

12 It was against this background that by an application to a case management registrar pursuant to O 29A r 12 of the *Rules of the Supreme Court 1971* (WA), the State Solicitor for Western Australia on behalf of the defendant applied for orders pursuant to O 20 r 19(1) that the

statement of claim be struck out, the action against the defendant be dismissed and that there be judgment entered for the defendant.

13 The grounds for the application were said to be (reflecting the contents of O 20 r 19(1)) first, that the statement of claim discloses no reasonable cause of action against the defendant; second, that the statement of claim is scandalous, frivolous and vexatious; third, that the statement of claim may prejudice, embarrass or delay the fair trial of the action.

14 The defendant's application came before a registrar of the Supreme Court in due course and orders were made requiring the parties to file written submissions directed to the application to strike out.

15 I note in passing that in the meantime, in the manner required by s 78B of the *Judiciary Act 1903* (Cth), the plaintiff wrote to the Attorney-General of the Commonwealth of Australia and the various state Attorneys-General advising that the proceedings gave rise to constitutional issues. Replies were received which indicated that recipients of the notice did not wish to intervene at that stage.

16 The application to strike out was then brought on for hearing before me as a judge of the Supreme Court on 4 December 2008. On that occasion, the defendant was represented by counsel instructed by the State Solicitor for Western Australia. The plaintiff appeared in person.

The hearing

17 During the course of the hearing, the plaintiff sought to place before the court a DVD. This was said to contain submissions bearing upon the matters in issue made by Brian William Shaw, being a person previously declared to be a vexatious litigant and a person who had previously been involved in litigation bearing upon the validity of the 2003 *AARCLP Act*. The indications were that Mr Shaw and the plaintiff in this matter (Mr Glew) have views in common about the validity of the 2003 *Acts Amendment and Repeal Act* and certain related matters.

18 I was not prepared to receive the DVD on the grounds that Mr Shaw was not a party to the present proceedings. Further, and in any event, it was open to the plaintiff Mr Glew to advance any arguments he wished to put to the court in opposition to the application to strike out, provided they were relevant to the issues raised by the statement of claim, and it was immaterial whether the arguments had been inspired by the thinking of Mr Shaw or others. The argument had to stand or fall on its merits.

19 It emerged also at the hearing, although this had not been mentioned in the written submissions received from the parties, that the plaintiff himself has previously been involved in litigation before this court concerning the validity and status of various governmental institutions and the validity of the 2003 *AARCLP Act*.

20 Accordingly, at the conclusion of the hearing, I gave directions whereby the State Solicitor was to file and serve further written submissions within a prescribed time directed to the applicability, if any, of the previous court decisions concerning Mr Shaw and the plaintiff. The plaintiff was then to file and serve written submissions in reply early in the new year.

21 I note in passing that in due course, in response to these directions, I received the defendant's further written submissions dated 19 December 2008 and the plaintiff's reply to these submissions dated 15 January 2009.

22 It will now be convenient to look at the plaintiff's statement of claim and the plaintiff's submissions in more detail. In that respect, I refer also to a document bearing the title 'Heads of Argument' that was handed up by the plaintiff at the hearing on 4 December 2008. It is apparent from the plaintiff's submissions that he was strongly opposed to the application to strike out the statement of claim upon any of the grounds mentioned earlier.

Statement of claim

23 The plaintiff alleged in par 1 of his statement of claim that certain acts do not conform to the prescribed manner and form provisions of s 73(2)(g) of the *Constitution Act* and being enacted unlawfully are invalid, namely, the *Australia Acts (Request) Act 1985* (WA), the *Australia Act 1986* (Cth), the so-called *One Vote One Value Act 2005* (WA) and the 2003 *AARCLP Act*. I will call this the plaintiff's par 1 plea.

24 The plaintiff pleaded in par 2 that on 1 January 2004 the Governor and the Attorney General and the Parliament of Western Australia did unlawfully enact the 2003 *AARCLP Act* that purportedly removed the crown and Monarch from all legislation within Western Australia without the formal referendum consent required under s 73(2)(g) of the *Constitution Act*. I will call this the plaintiff's par 2 plea.

25 The plaintiff pleaded in par 3 that by purportedly removing the crown and the Monarch without observing the referendum process, the Parliament of Western Australia, with the apparent consent and agreement

of the courts of the State of Western Australia and of the Commonwealth of Australia, have, in effect, created an illegal state and have fractured the Commonwealth. I will call this the plaintiff's par 3 plea.

26 The plaintiff pleaded in par 4 that the office of Governor has been altered by the substitution of the Governor for the Monarch and sovereign in the 2003 *AARCLP Act*. I will call this the plaintiff's par 4 plea.

27 It was said finally in par 5 that the 2003 *AARCLP Act* has created breach of allegiance, being treason and misprision of treason. I will call this the plaintiff's par 5 plea.

28 The plaintiff sought a declaration that the Acts mentioned earlier are void and of no effect. He sought also an injunction pursuant to s 73(6) of the *Constitution Act* in order to enforce the provisions of s 73(2)(g) of that Act.

29 Further, the plaintiff sought an injunction to prevent the purported state election scheduled for 6 September 2008. I note in passing that it was common ground at the hearing before me that the state election in question has in fact or has purportedly now taken place, having been held on 6 September 2008.

The Shaw litigation

30 It emerges from an examination of the plaintiff's Heads of Argument document and other materials before me that in certain respects the plaintiff's statement of claim and related submissions reflect a line of argument advanced by Mr Shaw in the earlier Shaw litigation. Various themes were reflected in the Shaw position in that earlier litigation.

31 The first of those themes was that the 2003 *AARCLP Act* was not validly passed which has had the effect of subverting the State and/or Commonwealth Constitutions, and has had the result that many persons, including Ministers of the crown and judges of the Supreme Court, have been involved in offences such as treason and attempts to pervert the course of justice.

32 Thus, it was argued, the 2003 *AARCLP Act* replaces various references to Her Majesty or the crown with references to the state or the Governor so that, for example, prosecutions brought by the DPP of Western Australia on indictment are now entitled 'The State' against the accused person rather than 'The crown' against the accused person.

33 In ***Shaw v Attorney General for the State of Western Australia*** [2007] WASC 270, EM Heenan J noted that the basic proposition underlying Mr Shaw's contentions was that the 2003 *AARCLP Act* contained provisions in which references to Her Majesty or to the crown had been removed from certain legislation, notably the *Supreme Court Act 1935* (WA) (but not only from that Act), and which had been replaced by references to the state or to the State of Western Australia or other cognate descriptions. The substance of the argument advanced by Mr Shaw was that this amendment constituted a repudiation of allegiance to the crown and had several far-reaching consequences. First, it was, on this argument, a major and unacceptable change to the Constitution of the State of Western Australia. Second, because there is a repudiation, as Mr Shaw put it, of allegiance, it constitutes treason.

34 All of this was said to go to the very root of the State Constitution. That is, it was a change to the Constitution which required, if it was to be achieved at all, compliance with the special manner and form requirements of s 73(2) of the *Constitution Act* including, among other things, approval of the electors of the state by referendum.

35 Mr Shaw submitted, and it was not contested, that the passage of the 2003 *AARCLP Act* did not involve or comply with those alleged manner and form requirements. Accordingly, on this view of the matter, the 2003 *AARCLP Act* was invalid and the effect of the passage of the invalid Act is to deprive the Supreme Court and all of its judicial officers of further jurisdiction.

36 However, in the end, Heenan J held that decisions given respectively by McKechnie J in ***Shaw v Attorney General for the State of Western Australia*** [2005] WASC 149 and by the Court of Appeal on an application for leave to appeal from McKechnie J's reasons in ***Shaw v McGinty*** [2006] WASCA 231 had the effect of dismissing and rejecting Mr Shaw's principal argument that the 2003 *AARCLP Act* was invalid, void and of no effect.

37 Further, the Court of Appeal rejected Mr Shaw's subsequent arguments that other decisions of the Supreme Court were void and, indeed, that the jurisdiction of the court and of all judges and registrars had been removed, destroyed or significantly diminished by the alleged invalid amendment to the *Supreme Court Act 1935* (WA) effected by the 2003 amending legislation.

38 Justice Heenan went on pursuant to provisions of the *Vexatious Proceedings Restriction Act 2002* (WA) to refuse leave to Mr Shaw to institute further proceedings. Against the background I have described, his Honour made these observations:

> It is therefore the situation that the critical point (and, all the subsidiary points flowing from it) which Mr Shaw seeks to raise in the presently proposed litigation has already been determined against him in final judgments of this court. This court, being a court of general jurisdiction, cannot have its decisions impeached by collateral proceedings for alleged want of jurisdiction. The only avenue of challenge is by process of appeal to a higher court.
>
> An application for special leave to the High Court of Australia was apparently made by Mr Shaw from the decision of the Court of Appeal but, for some procedural reason, did not continue or succeed. The situation, therefore, is that, subject to any possible further grant of special leave to appeal, the decision of the Court of Appeal remains binding upon him and cannot be attacked or impeached in collateral proceedings brought by Mr Shaw. [8], [9]

The plaintiff's litigation

39 As I have indicated, much of Mr Shaw's stance is reflected in the litigation commenced by the plaintiff (Mr Glew) in previous cases and in the present case. It will therefore be convenient to look briefly at the ruling of the Court of Appeal in ***Glew v Shire of Greenough*** [2006] WASCA 260.

40 In that case the plaintiff, in the course of resisting a claim for rates by a local authority, objected to the jurisdiction of the Fremantle Local Court. The plaintiff contended, inter alia, that since the passage or purported passage of the 2003 *AARCLP Act*, and the purported removal of Her Majesty and the crown from a large number of Acts the Local and District Courts did not have lawful authority to administer law within the State of Western Australia.

41 The Court of Appeal ruled against the plaintiff and held that he and his wife had to pay their rates. Their submissions were said to be entirely lacking in legal merit.

42 The leading judgment was delivered by Wheeler J. It contains a useful summary of the constitutional situation in this country. I will draw upon those parts of her Honour's judgment which have a particular relevance to the issues before me.

43 Her Honour noted that the Constitution of the Commonwealth of Australia is binding on all Courts and Parliaments throughout the country. To the extent that State or Commonwealth law is inconsistent with it, that State or Commonwealth law is invalid. She noted also that the power of the Parliament in Western Australia stems from the *Constitution Act 1889* (WA) which includes in s 2 a broad power to make laws for the peace, order and good government of Western Australia.

44 Her Honour then made these observations:

> That broad legislative power in the State Constitution is qualified in only three ways. First, as I have noted, in some very limited areas the Commonwealth Constitution provides that the Commonwealth's legislative power is exclusive. That prevents the State from validly legislating at all in that area. Secondly, in some cases, as I have noted, the State can validly legislate, but if there is a valid Commonwealth law inconsistent with the State law, then the Commonwealth law will prevail while it is in operation. Thirdly, some State Constitutions have some restrictions relating to the way in which legislation concerning particular subject matters can be passed, such as s 73 of the State Constitution.
>
> So far as the State Constitutions are concerned, unless there is some particular provision in the State Constitution prescribing the 'manner and form' for amending particular parts of the Constitution, then the State Parliament is free to amend the State's Constitution in any way it sees fit. That is, the State Constitutions can generally be amended as easily as any other Act. As the Privy Council has said, they occupy 'precisely the same position as a Dog Act or any other Act, however humble its subject matter' (***McCawley v R*** [1920] AC 691 at 704). [10], [11]

45 Later, her Honour made these observations concerning Mr Glew's principal ground of appeal (being the contention I mentioned earlier):

> This ground is concerned with the passage of the abovementioned 2003 Act. It is contended by the appellants that the Local and District Courts of Western Australia do not have lawful authority to administer law within the State since the passage of that Act. The concern appears to be that the Act has 'removed Her Majesty and the Crown' from a large number of Acts within Western Australia, including the *District Court of Western Australia Act 1969* (WA) and the *Local Courts Act 1904* (WA).
>
> The Act referred to changes the terminology in a large number of statutes of Western Australia. In broad terms, references to the Crown or to her Majesty are changed to references to the Governor or the State. The first observation to be made about the Act is that it purports to change terminology only, not constitutional reality. That is, it does not attempt to alter the relationship between the Crown and the various bodies contained within the Acts amended.

> There is no constitutional prohibition upon the alteration of the terminology which refers to the Crown or to her Majesty. Further, the changes of terminology contained within the *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* are consistent with constitutional reality. The Governor is, for constitutional purposes, effectively the Queen's representative in Western Australia (s 50 State Constitution) and so is, for practical purposes, 'her Majesty' within Western Australia. The 'State' is simply another way of referring to the executive power of the Crown in right of the State of Western Australia. Parallel terminology can be found in the Commonwealth Constitution. For example, although the Commonwealth Constitution provides, by s 61, that the executive power of the Commonwealth is 'vested in the Queen and is exercisable by the Governor-General as the Queen's representative', a number of sections of the Constitution refer simply to 'the Commonwealth' as a shorthand expression for the entity exercising that executive power. A striking example is s 119, which provides that 'the Commonwealth shall protect every State against invasion ... '.
>
> As is explained in a text book popular in constitutional law courses, 'when we talk of the Crown in the context of Australian government in the late twentieth century, we refer to a complex system of which the formal head is the monarch. We do not refer to a replica of sixteenth century English government, where real power was vested in and exercised by the monarch personally. Rather, we mean that collection of individuals and institutions (Ministers, public servants, a Cabinet, the Executive Council, a Governor or Governor-General, and statutory agencies) which exercise the executive functions of government' (Hanks & Cass, 'Australian Constitutional Law: Materials and Commentary', 6th ed (1999) at [7.1.6]).
>
> The *Acts Amendment and Repeal (Courts and Legal Practice) Act 2003* effects no constitutional alteration. [16] - [20]

46 For the sake of completeness I note that Mr and Mrs Glew brought an application for special leave to appeal to the High Court from ***Glew v Shire of Greenough***. That application was dismissed in ***Glew v Shire of Greenough*** [2007] HCA Trans 520 (6 September 2007). Gummow and Heydon JJ held that:

> In turn the Court of Appeal of the Supreme Court of Western Australia dismissed a further appeal as 'entirely lacking in legal merit'. We agree, and the same expression applies to the prolix, offensive and vexatious documents filed in support of the special leave application.

47 I note in passing also that the Court of Appeal in this State ruled against Mr Glew in respect of similar issues, including in respect of an allegation of treason, in ***Glew Technologies Pty Ltd v Department of Planning and Infrastructure*** [2007] WASCA 289.

Further observations

48 Before proceeding further it will be useful to make some further observations about the role of the Monarch in the Westminster system of government and the way in which the term 'crown' is used to describe the relationship between the Monarch and the exercise of executive powers. I make these further observations in order to flesh out Wheeler J's comment that the 2003 *AARCLP Act* purports to change terminology only, not constitutional reality, and her further comment that in modern times a reference to the crown is a reference to those persons or bodies exercising the executive functions of government.

49 In *Law of the Constitution*: A V Dicey (3rd ed, Macmillan, London, UK, 1889) at 10 the learned author referred to an injurious tendency of Blackstone and other less famous constitutionalists to adhere to unreal expressions. The harm wrought was said to be that unreal language obscures or conceals the true extent of the powers, both of the King and of the government. It makes it difficult to say for certain what is the exact relation between the facts of constitutional government and the more or less artificial phraseology under which they are concealed.

50 The learned author goes on to say this:

> Thus to say that the King appoints the Ministry is untrue; it is also of course, untrue to say that he creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the government are concealed under the fictitious ascription to the sovereign of political omnipotence, and the reader of, say, the first Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression. (11)

51 Observations of this kind prompted jurists in a later age to endeavour to explore these so-called unrealities at greater length. Thus, Maitland in *Selected Essays* (ed by H D Hazeltine, G T Lapsley and P H Winfield, 1936, repr 1968) observed that 'the crown' is regarded, not merely as a chattel now lying in the dower, but as the personification of the state.

52 In *Liability of the Crown*: P W Hogg and P J Monahan (3rd ed, Carswell, Scarborough, Ont, 2000), a learned Australian author, observed at 10 that the state is a legal person. It is entirely accurate to speak simply of 'the State of Victoria', for example, as the subject of legal rights and

duties, and this usage is indeed quite common. But it is far more common, in the language of parliaments, courts and commentators, to find that 'the crown' is used as a convenient symbol for the state. According to this usage, in order to distinguish a particular state from others which recognise the same Queen, it is necessary to speak of 'the crown in right of' the particular state. Whether this is convenient or not may be debated, but it is important not to allow the symbol to raise unnecessary conceptual difficulties.

53 The same author went on to observe that Harold Laski took the mysticism out of the concept of 'the crown' with these apt words:

> Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money bags of the State behind them.

54 Hogg goes on to say that like a corporation, the crown can only act through human servants or agents. This does not usually cause difficulty in the creation of rights and duties because the doctrines of agency and vicarious liability can be used by or against the crown to hold it bound by the acts of its servants or agents.

55 It was against this background that George Winterton, the author of *Parliament, The Executive and the Governor-General* (Melbourne University Press, Melbourne, 1983), observed at 207 that 'the crown' is used in the monarchies of the Commonwealth as a shorthand expression for the executive government.

56 The learned author cited in support of that proposition these observations by Lord Diplock in ***Town Investments Ltd v Department of the Environment*** [1978] AC 359:

> My Lords, the fallacy in this argument is that it is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments. These relationships have in the course of centuries been transformed with the continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarchy of today; but the vocabulary used by lawyers in the field of public law has not kept pace with this evolution and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century. (380)

57 Lord Diplock then went on to make these further observations:

> To use as a metaphor the symbol of royalty, 'the Crown', was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of 'the Crown' as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. … I believe that some of the more Athanasian-like features of the debate in your Lordship's House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' - a term appropriate to embrace both collectively and individually all of the ministers of the Crown and Parliamentary Secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law.

58 In ***Cain v Doyle*** (1946) 72 CLR 409 Williams J observed at 431 that it is certainly most unusual if not unique for legislation to provide for the prosecution of the crown. But there is no constitutional difficulty in the law of the Sovereign binding himself and parliament. It is a question in each case of the extent to which he is intended to be bound.

59 His Honour went on to hold that the legislation before him, being the *Re-establishment and Employment Act 1945* and the *Acts Interpretation Act 1901*, were Acts binding the crown. He then observed that 'the crown means of course not his Majesty in person but the government of the Commonwealth or State of the day'.

60 I pause here to note in passing that shortly after the case I have just mentioned was decided, the legislature in this state repealed the *Crown Suits Act 1898* and sought to make better provision for suits by and against 'the crown' by enacting the *Crown Suits Act 1947* (WA). Having regard, perhaps, to some of the unrealities mentioned by Blackstone and Lord Diplock the term 'crown' was defined by s 3 of the Act to mean more exactly 'the Crown in right of the Government of Western Australia'. By s 5 of the Act the crown may sue and be sued in the same manner as a subject. Every proceeding should be taken by or against the crown under the title 'The State of Western Australia'. This is an example of the way in

which the sovereign power of parliament in the modern world can be used not only to bind the crown in the same manner as a citizen but also to change the description of the body exercising governmental powers.

61 It is well-known that under the Westminster system governmental powers are for conceptual and practical reasons divided between discrete branches of government. In ***Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*** (1996) 189 CLR 1; [1996] HCA 18 Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ at 10 - 11 explained the purpose of the separation of powers under the Commonwealth Constitution as follows:

> The Constitution reflects the broad principle that, subject to the Westminster system of responsible government, the powers in each category - whose character is determined according to traditional British conceptions - are vested in and are to be exercised by separate organs of government. The functions of government are not separated because the powers of one branch could not be exercised effectively by the repository of the powers of another branch. To the contrary, the separation of functions is designed to provide checks and balances on the exercise of power by the respective organs of government in which the powers are reposed. [8]

62 The separation of the judicial function from the other functions of government advances two constitutional objectives, namely, the guarantee of liberty and, to that end, the independence of the judiciary.

63 Executive powers include the power and practice of bringing prosecutions against wrongdoers. The charge against the accused is brought by the executive branch of government. In this state, prior to the amendments complained of, the prosecutor was said to represent 'the crown', the assumption being that the prosecutor represented the community, rather than any individual victim.

64 Traditionally, prosecutions were brought by the crown through the Attorney General, because prosecutors were under the control of the Attorney General. However, the trend has been to create an independent office of public prosecutions as evidenced in this state by the *Director of Public Prosecutions Act 1991* (WA).

65 In summary, then, it emerges from this discussion that a reference to the crown in legislation is essentially a shorthand way of referring to the executive government. A change in the terminology or the way in which the government can be described does not necessarily amount to a change in the structure or powers of government. Thus, as illustrated by the

observations of Wheeler J mentioned earlier, the Court of Appeal held that the 2003 *AARCLP Act* effected no constitutional alteration. I am obliged to follow that decision and, in any event, having regard to the reasoning outlined above, it conforms to my own view of the matter.

66 This brings me to another aspect of the constitutional framework within which the issues before me must be considered.

The *Australia Act 1986* (Cth)

67 Section 106 of the Australian Constitution provides that the Constitution of each State shall 'subject to this Constitution' continue as at the establishment of the Commonwealth until altered in accordance with the Constitution of the State. By s 109, as emerges from earlier discussion, when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

68 Section 51 provides that the Federal Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to various specified matters. Importantly, for present purposes, s 51(xxxviii) allows for the Federal Parliament to make laws with respect to the exercise within the Commonwealth, at the request or with the concurrence of the parliaments of all the States directly concerned, of any power which can at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia. For ease of exposition, I will call this the 'reference of power' provision.

69 In 1986, pursuant to the reference of power provision the Federal Parliament enacted the *Australia Act 1986* (Cth) in order, as its long title said, to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.

70 In order to achieve the designated purpose it was necessary for each State to enact legislation which would serve the purpose in question. In this State the relevant statute is the *Australia Acts (Request) Act 1985* (WA). It appears from the recital to that Act that each State was to request and consent to the enactment by the Parliament of the United Kingdom of an Act in the terms of the Second Schedule to the Act.

71 The effect of the *Australia Act*, described in summary form, was that thereafter no Act of the Parliament of the United Kingdom was to extend

to the Commonwealth or to a State. By s 2 the legislative powers of the parliament of each State were to include full power to make laws for the peace, order and good government of that State. By s 3(2) no law made after the commencement of the Act was to be void or inoperative on the ground that it was repugnant to the law of England and the powers of the parliament of a State were to include the power to repeal or amend any Act of the Parliament of the United Kingdom in so far as it was part of the law of this State.

72 Section 6 of the *Australia Act* was to this effect:

> Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act 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 law made by that Parliament, whether made before or after the commencement of this Act.

73 I pause here to observe that s 6 of the *Australia Act* was clearly designed to ensure that in amending its Constitution a State such as Western Australia would be obliged to continue the observance of any manner and form provisions prescribed by the *Constitution Act*. Thus, for example, having regard to s 73 of the *Constitution Act*, a bill that expressly or implicitly provided for the abolition of or alteration in the office of Governor would have to be passed by an absolute majority of the members of both parliamentary chambers and be approved by the electors at a referendum.

74 However, as to the issues raised by the plaintiff in these proceedings, the crucial question is whether the 2003 *AARCLP Act* complained of effects any alteration to the Constitution. If it does not effect any substantive change, but effects only a change of terminology, then, arguably, the manner and form provisions prescribed by s 73 of the *Constitution Act* do not apply.

***Marquet's* case**

75 The new constitutional arrangements were considered by the High Court in ***Attorney-General (WA) v Marquet*** [2003] HCA 67; (2003) 217 CLR 545. In that case, the central question before the High Court was whether it was lawful to present for Royal Assent certain bills providing for the repeal of the *Electoral Distribution Act 1947* (WA) and the amendment of electoral boundaries. These bills had not been passed in conformity with the manner and form provisions of s 13 of the *Electoral Distribution Act 1947*, which required that the bills be 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, because the bills had not been passed by an absolute majority of the members of the Legislative Council.

76 A majority of the High Court held that it was not lawful for the bills to be presented for the Royal Assent. This was because the proposed repeal amounted to an amendment to the *Electoral Distribution Act* with the result that the concurrence of an absolute majority in both Houses was necessary. As each bill was for a law respecting the constitution of the Parliament of Western Australia, s 6 of the *Australia Act 1986* required compliance with the manner and form provisions in s 13 of the *Electoral Distribution Act*.

77 It was noted in the majority judgment that no challenge was made to the validity of the *Australia Act*. In proceeding from the premise that the Act was valid the majority referred to an earlier decision of the High Court in ***Port MacDonnell Professional Fishermen's Association Inc v The State of South Australia*** (1989) 168 CLR 340 in which all seven judges constituting the High Court concluded that the continuance of the Constitution of a State pursuant to s 106 of the Australian Constitution is subject to any Commonwealth law enacted pursuant to the grant of legislative power. Section 6 of the *Australia Act* was not to be seen as some attempt to alter s 106 or s 107 otherwise than in accordance with the referendum procedures prescribed by s 128 of the Australian Constitution. Section 6 of the *Australia Act* at [70] was said to be 'enacted in the valid exercise of power given to the Federal Parliament by s 51(xxxviii)'.

78 In summary, putting to one side various issues which are not relevant to the issues before me, it emerges from the ***Marquet*** case that the *Australia Act 1986* and the related statutes such as the *Australia Acts (Request) Act 1985* (WA) can be regarded as validly enacted. The effect of s 6 of the *Australia Act* is that a State parliament is required to observe any manner and form provisions imposed by its own Constitution or similar legislation relating to the constitution powers or procedure of the parliament of the State. However, if the proposed amendment does not actually bear upon these matters then the manner and form provisions will not apply. The proposed statutory changes can be effected by legislation passed through both Houses of Parliament in the ordinary way; that is, without any requirement as to an absolute majority or a referendum.

79 Let me now return to the statement of claim in the present case and the various pleas advanced by the plaintiff.

The plaintiff's par 1 plea

80 The plaintiff's contention is that certain statutes do not conform to the prescribed manner and form provisions of s 73(2)(g) of the *Constitution Act* and being enacted unlawfully are invalid, namely, the *Australia Acts (Request) Act 1985* (WA), the *Australia Act 1986* (Cth), the so-called *One Vote One Value Act 2005* (WA) and the 2003 *AARCLP Act*.

81 Let me deal initially with the validity of the *Australia Acts*, that is, the complementary legislation passed by the parliaments of all States (including Western Australia) the Commonwealth and the Parliament of Great Britain.

82 The short answer to this facet of the plaintiff's plea is apparent from earlier discussion. The validity of the *Australia Acts* has been upheld by the High Court in the ***Port McDonnell*** case and in ***Marquet's*** case. It follows that the plaintiff's contention that s 73(2)(g) of the *Constitution Act* (WA) requires a referendum for the enactment of the *Australia Acts* has no legal merit.

83 I note in passing that the plaintiff in his written submissions gave weight to the observations of Kirby J in ***Marquet's*** case at [205] and following in which his Honour doubted the validity of the Acts. However, the fact remains that this judgment was a dissenting judgment and I am therefore obliged to give primacy to the view of the majority that the subject legislation was valid.

84 The plaintiff's par 1 plea also raises a challenge to what is described in the statement of claim as the '*One Vote One Value Act 2005* (WA)'.

85 The short title of the *One Vote One Value Bill 2005* was amended by Legislative Council Message No 3 (2005) to the *Electoral Amendment and Repeal Bill 2005*. Thus, I proceed from the premise that the plaintiff intends to refer to the latter which I will call the '*EAR Act*'.

86 The second and third readings of the bill for the *EAR Bill* were passed by an absolute majority of members of the Legislative Assembly and the Legislative Council respectively.

87 It emerges from earlier discussion concerning ***Marquet's*** case that manner and form provisions must be observed (as allowed for by s 6 of the *Australia Act*) in respect of electoral matters because this relates to the structure of the parliament. However, as appears from ***Marquet's*** case also, in such circumstances the relevant manner and form provisions as at

2003 were to be found in s 13 of the *Electoral Distribution Act 1947* (WA) which required only that the proposed legislation be passed by an absolute majority of members in both parliamentary chambers. The provisions in s 73(2)(g) of the *Constitution Act* concerning a referendum does not apply in such a case. Thus, it appears that the *EAR Act* was enacted in conformity with the relevant manner and form provisions.

88 As to the *AARCLP Act* the plaintiff's position was that it is and was void ab initio and of no effect because it purportedly removed the crown and Monarch from all legislation within Western Australia without a formal referendum as required under s 73(2)(g) of the *Constitution Act*. The plaintiff contended that by purportedly removing the crown and Monarch without referendum and electoral consent, the parliament of Western Australia (with the apparent consent and agreement of the courts and the Commonwealth) has created an illegal state and has 'fractured' the Commonwealth.

89 Further, the plaintiff contended that the Office of Governor has been altered by the substitution of the Governor for the Monarch and Sovereign. It is said that the Act replaces various references to Her Majesty and the crown with references to the State or the Governor.

90 However, as I have endeavoured to demonstrate in earlier discussion, a change in terminology does not necessarily amount to a change in the substantive realities underlying the Constitution and the exercise of governmental powers. The consequence is that s 73(2)(g) of the *Constitution Act* concerning a referendum does not apply to the *AARCLP Act* because the latter did not, in a substantive manner, alter the constitutional structure of the State.

91 Further, and in any event, as I indicated in earlier discussion, the Court of Appeal has rejected the argument that the 2003 *AARCLP Act* was invalid, void and of no effect and I am obliged to follow that ruling.

92 It therefore emerges that in law the plaintiff will not be able to sustain the plaintiff's par 1 plea.

The plaintiff's par 2 - 4 pleas

93 The plaintiff pleads that on 1 January 2004 the Governor and the Attorney General and the parliament of Western Australia did unlawfully enact the 2003 *AARCLP Act* that purportedly removed the crown and Monarch from all legislation within Western Australia without the formal referendum consent required under s 73(2)(g) of the *Constitution Act*.

94 It follows from the observations I have made concerning the plaintiff's par 1 plea that there is no merit in this contention.

The plaintiff's par 5 plea

95 The plaintiff pleaded in par 5 that the 2003 *AARCLP Act* created a breach of allegiance, being treason and misprision of treason.

96 This plea depends upon the court being persuaded that the various statutes referred to in par 1 of the statement of claim are invalid. However, it follows from the reasoning I have just outlined, that I cannot arrive at such a conclusion. Accordingly, it is not open to the plaintiff to assert by his par 5 plea that there has been unlawful or untoward conduct of the kind alleged. There is no merit in the plaintiff's par 5 plea.

97 It follows also that as I have not been persuaded that the Acts in question are void and of no effect, I am not inclined to grant a declaration or an injunction of the kind sought by the plaintiff. Further, and in any event, the injunction would not have any practical effect because the election in question has now been held. This factor also weighs against the grant of an injunction in the manner proposed.

98 I pause here to add that after the hearing, and after presenting his further submissions, the plaintiff foreshadowed an application to amend the writ of summons with a view to establishing that the election held on 6 September 2008 was an unlawful election. However, in circumstances where I have found that the plaintiff's plea concerning the validity of the election is without merit, I am not prepared to allow the proposed amendment.

Application to strike out

99 The principles to be applied in considering an application under O 20 r 19(1)(a) to strike out a statement of claim as not disclosing a reasonable cause of action are well known. The rules are intended to apply only to cases which are really not arguable. However, great care must be exercised to ensure that a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal.

100 However, in cases in which it can be seen from the outset that, however the facts be found, there is no basis for the legal conclusion contended for by the plaintiff the pleading should be struck out.

101 In the present case, it follows from my observations that, in my view, the plaintiff has no real prospect of making out the claims reflected in the

statement of claim because they are without legal merit. It therefore follows that the claims should be struck out.

102 I am also of the view that in circumstances where, upon close analysis no reasonable cause of action has been demonstrated, and where there has been a previous pattern of litigation in which the plaintiff has participated or taken an interest, but with a consistent record of failure, it is open to the court to make a finding that the claim should be dismissed as frivolous and vexatious in the manner allowed for by the rules of the court. I am of the view that such a finding should be made in the present case and consider that the various paragraphs of the statement of claim should be struck out on that basis also.

Summary

103 The application by the defendant to strike out the whole of the plaintiff's statement of claim will be allowed. There will be an order that the action be dismissed pursuant to O 20 r 19(1)(a) to (c) of the *Rules of the Supreme Court 1971* (WA) on the grounds that the statement of claim discloses no reasonable cause of action, is frivolous and vexatious and may prejudice, embarrass or delay the fair trial of the action.

104 I will hear from the parties as to whether any further orders are required.