HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ATTORNEY-GENERAL FOR WESTERN AUSTRALIA & ANOR — APPLICANTS

AND

LAURENCE BERNHARD MARQUET — RESPONDENT

Attorney-General (WA) v Marquet [2003] HCA 67
13 November 2003
P114/2002 and P115/2002

ORDER

In each of Matters No P114 and P115 of 2002, order:

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter but dismissed.

On appeal from the Supreme Court of Western Australia

Representation:

R J Meadows QC, Solicitor-General for the State of Western Australia with D F Jackson QC and R M Mitchell for the applicants (instructed by Crown Solicitor for the State of Western Australia)

No appearance for the respondent

S J Gageler SC with B Dharmananda for the amici curiae (instructed by Mallesons Stephen Jaques)

Interveners:

D M J Bennett QC, Solicitor-General of the Commonwealth with G M Aitken intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

P A Keane QC, Solicitor-General of the State of Queensland with G R Cooper intervening on behalf of the Attorney-General of the State of Queensland (instructed by Crown Solicitor for the State of Queensland)

M G Sexton SC, Solicitor-General for the State of New South Wales with M J Leeming, intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor for the State of New South Wales)

CATCHWORDS

Attorney-General (WA) v Marquet

Constitutional law (WA) – State Parliament – Powers – Manner and form provisions – *Electoral Distribution Act* 1947 (WA), s 13.

Parliament – Parliament of a State – Constitutional law (State) – Justiciability – Whether questions arising out of parliamentary consideration of Bills in the Chambers of a State Parliament appropriate for review by courts and judicial determination.

Statutes – Construction – *Electoral Distribution Act* 1947 (WA), s 13 – Any Bill to "amend" that Act to be passed by a special majority – Whether s 13 applied to either the Electoral Distribution Repeal Bill 2001 (WA) or the Electoral Amendment Bill 2001 (WA) or both – Whether either of those Bills was a Bill to "amend" the *Electoral Distribution Act* 1947 – Meaning of "amend" – Significance of distinction between "amend" and "repeal".

Statutes – Construction – Whether terms of statute ambiguous – Where different interpretations in contention – Applicable interpretative principles to resolve ambiguity – Whether construction favouring the grant of legislative power and protection of civil and human rights available and applicable.

Statutes – Manner and form provisions – Power of a State parliament to bind its successors – Whether s 6 of the *Australia Act* 1986 (Cth) applied so as to require compliance with s 13 of the *Electoral Distribution Act* 1947 – Whether the two Bills affected "the constitution, powers or procedure" of the Western Australian Parliament.

Constitution (Cth) – Provisions concerning Constitution of a State and Parliament of a State – Manner and form provisions – Whether provisions of State law "entrenched" – Effect of *Colonial Laws Validity Act* 1865 (UK), s 5 – Effect of *Australia Acts* (Cth and UK), s 6 – Effect of Constitution, ss 51(xxxviii), 106 and 107.

Statutes – Construction – Implied repeal – Whether the *Acts Amendment (Constitution) Act* 1978 (WA) impliedly repealed s 13 of the *Electoral Distribution Act* 1947.

Parliament – Practice and procedure – Prorogation – Effect of prorogation on Bills passed by both Houses of Parliament but yet to receive Royal Assent.

Practice and procedure – Costs – Amicus curiae – Whether order for costs in favour of amici curiae as necessary contradictor in proceedings should be made.

Words and phrases – "amend", "repeal", "constitution, powers or procedure of the Parliament".

The Constitution, ss 51(xxxviii), 106, 107 and 128.
Australia Act 1986 (Cth), s 6.
Australia (Request and Consent) Act 1985 (Cth).
Australia Acts (Request) Act 1985 (WA).
Constitution Act 1889 (WA).
Constitution Acts Amendment Act 1899 (WA).
Electoral Distribution Act 1947 (WA), s 13.
Acts Amendment (Constitution) Act 1978 (WA), s 4.
Colonial Laws Validity Act 1865 (UK), s 5.
Australia Act 1986 (UK), s 6.

GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ.

The questions argued and the answers to be given

1 The ultimate question in each of these matters is whether it was lawful for the respondent, the Clerk of the Parliaments of Western Australia, to present for Royal Assent either the Bill for an Act to be entitled the Electoral Distribution Repeal Act 2001 ("the Repeal Bill") or the Bill for an Act to be entitled the Electoral Amendment Act 2001 ("the Amendment Bill").

2 Section 13 of the *Electoral Distribution Act* 1947 (WA)[1] provided that:

> "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."

Neither the Repeal Bill nor the Amendment Bill was passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council. Did s 13 of the *Electoral Distribution Act* make it "not ... lawful" to present to the Governor for Her Majesty's assent either the Repeal Bill or the Amendment Bill? That is, did either or both "amend" the *Electoral Distribution Act*? (It is convenient to call this the "construction question".)

3 If s 13 of the *Electoral Distribution Act*, on its proper construction, did apply to either or both of the Repeal Bill and the Amendment Bill, was it necessary to comply with the manner and form provisions of s 13? (It is convenient to call this the "manner and form question".) That will require consideration of the operation and effect of s 6 of the *Australia Act* 1986 (Cth) and its provision that:

> "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

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1 The Act was originally entitled the *Electoral Districts Act* 1947 (WA). Its short title was amended by s 86 of the *Acts Amendment (Electoral Reform) Act* 1987 (WA).

time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act."

4 These reasons will seek to demonstrate that, on its proper construction, s 13 of the *Electoral Distribution Act* did apply to the Repeal Bill and to the Amendment Bill and that, because each of those Bills was for "a law ... respecting the constitution ... of the Parliament" of Western Australia, s 6 of the *Australia Act* required compliance with the manner and form provisions of s 13 of the *Electoral Distribution Act.*

5 Two other, subsidiary, questions were also raised by the arguments advanced.

6 Was s 13 of the *Electoral Distribution Act* impliedly repealed by s 4 of the *Acts Amendment (Constitution) Act* 1978 (WA) (the "implied repeal question")? That Act inserted s 2(3) into the *Constitution Act* 1889 (WA): "[e]very Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73 of this Act, be presented to the Governor for assent ...". These reasons will seek to demonstrate that inserting s 2(3) in the *Constitution Act* 1889 (WA) ("the 1889 Constitution") did not impliedly repeal s 13 of the *Electoral Distribution Act.*

7 The second subsidiary question may be called the "prorogation question". Between the time when the proceedings were commenced in the Supreme Court of Western Australia and the delivery of judgment by the Full Court, the Governor of Western Australia, on 9 August 2002, prorogued the Legislative Council and the Legislative Assembly. It was submitted in this Court, but not in the court below, that proroguing the Houses rendered the questions moot because, so it was submitted, even if it were otherwise lawful to present either Bill for assent, they could not be presented for Royal Assent after the proroguing of both Houses. Although it is not necessary to decide the point, these reasons will seek to show that proroguing the Houses did not have the effect asserted. Had it otherwise been lawful to present the Bills for Royal Assent, that could have been done notwithstanding the prorogation.

8 Finally, it should be noted that one matter dealt with at length in the judgments of the Full Court[2] was not agitated in this Court. No party to the

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2 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 209-210 [17]-[23] per Malcolm CJ, 223-224 [84]-[85] per Anderson J, 230-244 [119]-[169] per Steytler and Parker JJ, 270 [296] per Wheeler J.

proceedings (the Attorney-General for Western Australia and the State on the one side and the Clerk of the Parliaments on the other) and none of the Attorneys-General who intervened (the Attorneys-General for the Commonwealth, New South Wales and Queensland) contended in this Court that the issues tendered in the present proceedings were not justiciable. The respondent, the Clerk of the Parliaments, played no active part in the proceeding in this Court or in the court below. Those who appeared in this Court, as amici curiae, to contradict the arguments for the applicants (the Liberal Party of Australia (WA Division) Incorporated, the National Party of Australia (WA) Incorporated, the Pastoralists and Graziers Association of Western Australia (Incorporated), The Western Australian Farmers Federation (Inc), One Nation (Western Australian Division) Incorporated and Judith Ann Hebiton) likewise did not seek to contend that the issues were not justiciable. That question need not be considered.

The essential facts

9 On 19 December 2001, the Legislative Council of Western Australia completed its consideration of the Repeal Bill. In the Legislative Assembly an absolute majority of members had voted in favour of the Bill. In the Legislative Council a majority of the members of that House, then present and voting, voted for the Bill but it was not passed by an absolute majority of the members of that body.

10 On the next day, 20 December 2001, the Legislative Council completed its consideration of the Amendment Bill. The Bill had been passed by an absolute majority of members of the Legislative Assembly but it, too, secured only a majority of those members then present and voting. It did not secure an absolute majority of the Legislative Council.

The proceedings below

11 On 21 December 2001, the respondent commenced proceedings in the Supreme Court of Western Australia seeking declarations. A separate proceeding was commenced concerning each Bill. In each, the respondent asked the Court, in effect, to determine whether it was lawful for him to present the relevant Bill to the Governor for assent. The proceedings were referred to the Full Court of the Supreme Court of Western Australia. A majority of the Court (Malcolm CJ, Anderson, Steytler and Parker JJ) answered the questions in the

negative[3]. The fifth member of the Court (Wheeler J) dissented, being of the opinion that it was lawful to present the Repeal Bill to the Governor for assent and that the lawfulness of presenting the Amendment Bill for assent "would depend upon whether the Repeal Bill [had] been assented to at the relevant time"[4].

12 The applicants sought special leave to appeal to this Court against the declaratory orders which the Full Court made. That application for special leave was referred for consideration by the Full Court of this Court.

The construction question – the contentions

13 Section 13 of the *Electoral Distribution Act* spoke only of a "Bill to amend this Act". It did not refer to a Bill to *repeal* the Act. Central to the applicants' contentions was the contention that s 13 should not be construed as extending to a Bill which itself did no more in relation to the *Electoral Distribution Act* than repeal it. The applicants submitted that, in considering whether s 13 was engaged, attention must be confined to the Bill in question and that it was not relevant to ask whether, at the same time or later, the Parliament was considering some other Bill dealing with subjects with which the *Electoral Distribution Act* dealt. That is, the applicants' argument was that in s 13 "amend" meant "amend", not "change" or "repeal", and that attention must be confined to the particular Bill.

14 The amici submitted that "amend" must be understood in the light of the history of what became s 13 of the *Electoral Distribution Act*. It is a word which in its context, they submitted, included "change", and extended to include the Repeal Bill no matter whether that Bill was considered in isolation from the Amendment Bill or, as their submissions tended to suggest was the preferable course, in conjunction with it.

The construction question – some matters of history

15 The construction question cannot 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

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3 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201.

4 (2002) 26 WAR 201 at 288 [371].

Australia. It is therefore necessary to begin by considering the Constitution which introduced in the Colony representative and responsible government with a bicameral legislature. It remains the "keystone of the present constitution of Western Australia"[5].

16 In its original form, the 1889 Constitution dealt with the establishment of the Legislative Council and Legislative Assembly (s 2) and provided, by that same section, that it should "be lawful for Her Majesty, by and with the advice and consent of the said Council and Assembly, to make laws for the peace, order, and good government" of the Colony and its dependencies. The 1889 Constitution provided (s 11) for how the Assembly should be constituted: there were to be 30 members elected for "the several electoral districts hereinafter named and defined". Section 37 and Sched A identified the 30 electoral districts into which the Colony was divided.

17 The members of the first Legislative Council to be constituted after the 1889 Constitution were appointed by the Governor in Council (s 6) but the 1889 Constitution provided (s 42) that, no later than six years after the summoning of that first Council, or upon the population of the Colony, "exclusive of aboriginal natives", attaining "Sixty thousand souls", whichever first happened, provisions for an elective Council were to be proclaimed. (The Governor was authorised to postpone the operation of these provisions for any period not exceeding six months.)

18 The provisions of the 1889 Constitution which provided for an elective Council included s 45 (that "[t]he Legislative Council shall consist of fifteen elected members ...") and s 52 by which the Colony was divided into five electoral divisions each returning three members to serve in the Council. The electoral divisions were described in s 52 as each comprising a number of identified electoral districts.

19 The 1889 Constitution provided for the qualifications of electors for the Legislative Assembly (s 39), for the qualifications of electors for the Legislative Council (s 53), and for the maintenance of electoral lists (s 41), but in other respects it continued in operation (s 38) the provisions of electoral laws found in other legislation (*The Electoral Act* 1889 (WA) which was enacted in anticipation of the 1889 Constitution coming into force).

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5 *Western Australia v Wilsmore* (1982) 149 CLR 79 at 93.

20 Section 73 of the 1889 Constitution provided:

> "THE Legislature of the Colony shall have full power and authority, from time to time, by any Act, to repeal or alter any of the provisions of this Act. Provided always, that it shall not 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 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. Provided also, that every Bill which shall be so passed for the election of a Legislative Council at any date earlier than by Part III of this Act provided, and every Bill which shall interfere with the operation of sections sixty-nine, seventy, seventy-one, or seventy-two of this Act, or of Schedules B, C, or D, or of this section, shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon."

21 For present purposes it is relevant to notice only that part of s 73 which provided manner and form requirements in respect of "any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected". (In *Yougarla v Western Australia*[6], this Court considered the operation of s 73 in relation to the provisions of s 70 of the 1889 Constitution dealing with sums payable to the Aborigines Protection Board.)

22 The 1889 Constitution was amended in 1893 (by *The Constitution Act Amendment Act* 1893 (WA)), in 1896 (by the *Constitution Act Amendment Act* 1896 (WA)) and again in 1899 (by the *Constitution Acts Amendment Act* 1899 (WA)). By each of those Acts changes were made to electoral divisions or provinces for elections to the Legislative Council and to electoral districts for elections to the Legislative Assembly. The numbers of members of each House were changed by each of these amending acts and the qualifications of electors were altered by the 1893 and 1899 amending acts.

23 In 1903, three Bills were introduced into the Legislative Assembly of Western Australia: a Constitution Act Amendment Bill, an Electoral Bill and a Redistribution of Seats Bill. The Houses of the Western Australian Parliament differed about these Bills. The Constitution Act Amendment Bill was eventually laid aside in the Legislative Council, the Houses being unable to agree upon its

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6 (2001) 207 CLR 344.

form. The Electoral Bill and the Redistribution of Seats Bill were passed in early 1904.

24 In the Legislative Council, while the Redistribution of Seats Bill was being considered on recommittal, an amendment to the Bill was proposed, and agreed to, to provide for the legislative precursor to what is now s 13 of the *Electoral Distribution Act*. The member who moved the amendment is reported[7] as saying that:

> "It was almost a formal matter, and simply retained the power the Constitution gave at present to insist that any Bill that fundamentally altered the Constitution should be agreed to by a majority of both Houses."

At first the Legislative Assembly rejected this amendment[8], but the Legislative Council insisted on it, and ultimately the Bill was passed in its amended form[9], including the amendment as s 6.

25 The debates in the Western Australian Parliament reveal that the three Bills introduced in 1903 – the Redistribution of Seats Bill, the Electoral Bill and the Constitution Act Amendment Bill – were intended to effect a number of interrelated changes to constitutional arrangements in Western Australia. Some of the proposed changes affected the way in which the Western Australian Parliament was constituted and elected. Electoral boundaries were to be redrawn by the Redistribution of Seats Bill; the franchise was to be altered by the Electoral Bill and the Constitution Act Amendment Bill. But the proposals made in the Constitution Act Amendment Bill were much more extensive than that, including, as they did, provisions for double dissolutions of the Houses of the Parliament and provisions giving increased powers to the Legislative Council in relation to money Bills. Because the three Bills were treated in debate as related one to another, it is as well to say something about each.

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7 Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 9 December 1903 at 2587.

8 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 December 1903 at 2869.

9 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 15 January 1904 at 3207.

26 It appears that the measures were put forward as three Bills on the basis that it was "the function of Constitutions to be as immutable as possible"[10]. The Redistribution of Seats Bill was seen as containing provisions which were very likely to be varied[11] as the State developed.

27 Two issues dominated the debates about the three Bills: first, the number of members to be in each House and the relationship between the numbers of members in each House, and, secondly, the detailed consideration of electoral boundaries. (The record of debate in the Assembly in committee considering those provisions of the Redistribution of Seats Bill which defined the boundaries occupies many pages of Hansard and the debate proceeded seat by seat.)

28 The effect of the Redistribution of Seats Bill was to move from the 1889 Constitution (as it had been amended from time to time) those provisions governing elections to the Western Australian Parliament which drew the electoral boundaries. But the Bill, as ultimately enacted, did not alter the number of members of either House of the Western Australian Parliament. There were still to be 50 electoral districts, each returning one member to the Legislative Assembly. The provisions of s 6 of the *Constitution Acts Amendment Act* 1899 dividing the Colony into 10 electoral provinces, each returning three members of the Legislative Council, were ultimately unaffected by the legislation which was passed in 1904, except to the extent to which the boundaries of the component electoral districts were changed.

29 The Electoral Bill was seen as containing machinery provisions. Its effect was to make some relatively minor changes to the franchise – essentially by removing the previous requirement that an elector had to be registered to vote for at least six months before becoming eligible to vote. By contrast, the Constitution Act Amendment Bill would have made significant changes to constitutional provisions regulating voting. Plural voting in elections for the Legislative Council would have been abolished. This and the other proposals advanced in the Constitution Act Amendment Bill failed.

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10 The Colonial Secretary, the Hon W Kingsmill, moving the second reading of the Redistribution of Seats Bill in the Legislative Council, Western Australia, Legislative Council, *Parliamentary Debates* (Hansard), 14 October 1903 at 1545.

11 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 January 1904 at 3167.

30 The inclusion, in the Redistribution of Seats Bill, of the legislative precursor to s 13 of the *Electoral Distribution Act* might be seen as contrary to the intentions of those who divided the legislation proposed in 1903-1904 into three Bills. That may explain the reluctance with which the Legislative Assembly embraced the Council's amendment. But whether contrary to the original structure which the framers of the Bills envisaged or not, the amendment was made. As the then Premier said[12], when explaining his government's decision to accept the Council's amendment to the Redistribution of Seats Bill:

> "That is inserted by the Council to require of both Houses the same majority as must now be obtained if we are to pass any amendment which involves a redistribution of seats. By agreeing to that clause we place ourselves in no different position from that which we occupy to-day. The Council say to us, 'If you take from the Constitution Act those sections which deal with the redistribution of seats, and which in the past have always formed part of the Constitution Act, you must take with them the obligation imposed on you by the Constitution Act, that whatever amendments you make shall be passed by a certain majority.' We disagreed with that amendment, but the Council insist on it."

31 As is demonstrated later in these reasons, the view expressed in this passage as to the meaning of manner and form provisions in the Constitution was correct. Further, the prediction that redistribution of electoral boundaries would be a matter of frequent parliamentary consideration proved to be correct. A further redistribution of seats occurred in 1911. The *Redistribution of Seats Act* 1911 (WA) was passed with an absolute majority at all relevant stages of its passage through both Houses. The Act redrew the boundaries of electoral provinces and electoral districts but did not alter the number of members of either House. Section 6 of that Act was in terms substantially identical to those of s 6 of the 1904 Act and those now found in s 13 of the *Electoral Distribution Act*.

32 In 1923, assent was given to the *Electoral Districts Act* 1922 (WA). That Act provided for the appointment of Electoral Commissioners whose duty would be to divide the State into 50 districts for the election of members of the Legislative Assembly. The Act prescribed (ss 4-7) the criteria to be applied in making that division and provided (s 9) for the introduction of a Bill for redistribution of seats in accordance with the report of the Electoral Commissioners. Such a Bill would have been subject to the manner and form

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12 Western Australia, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 January 1904 at 3168.

requirements of s 6 of the 1911 Act. The criteria specified in the 1922 Act were altered by the *Electoral Districts Act Amendment Act* 1928 (WA) but the detail of those changes is irrelevant.

33 In 1929, a new Act for redistribution of seats was enacted: the *Redistribution of Seats Act* 1929 (WA). It, too, was passed with an absolute majority in both Houses. It repealed the 1911 Act (s 5) and provided for new boundaries for the 50 electoral districts and 10 electoral provinces. Section 4 of the Act was in substantially identical terms to those of s 6 of the 1904 Act, s 6 of the 1911 Act and s 13 of the *Electoral Distribution Act*.

34 The *Redistribution of Seats Act Amendment Act* 1929 (WA) made some amendments to the description of boundaries of some electoral districts but again the detail does not matter for present purposes.

35 In 1947, the *Electoral Distribution Act* repealed the *Redistribution of Seats Act* 1911, the *Electoral Districts Act* 1922, and the *Redistribution of Seats Act* 1929 and made new provisions for the subjects with which those Acts had dealt. Like the 1922 Act, the *Electoral Distribution Act* provided for the appointment of Electoral Commissioners to recommend the division of the State into electoral districts and electoral provinces. It provided criteria by which that was to be done. Those criteria have since been amended and now provide (s 6) that there shall be 34 electoral districts in the "Metropolitan Area" (defined, in effect, as Perth and Rottnest Island) and 23 districts in the area comprising the remainder of the State. The number of enrolled electors in a district must not be more than 15 per cent greater, or more than 15 per cent less, than the quotient obtained by dividing the total number of enrolled electors in the area of the State concerned by the number of districts into which that area is to be divided. (The operation of this criterion was considered by this Court in *McGinty v Western Australia*[13].) The *Electoral Distribution Act* has been amended in a number of other respects since it was first enacted but nothing was said to turn on those changes.

36 One other piece of legislative history should be noticed but may then be put aside. In 1907, the Imperial Parliament enacted the *Australian States Constitution Act* 1907 (Imp) to deal with what then was seen as the inconvenience and difficulty presented to the Imperial authorities by provisions of State constitutions requiring reservation for Royal Assent of Bills dealing with the alteration of the franchise and the system of election. Bills for altering the

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13 (1996) 186 CLR 140 at 225-226.

constitution of the State legislatures were seen as falling in a different category which did merit the attention of the Imperial authorities. But in order, so it seems, to confine the classes of Bills that would have to be reserved, s 1(2) of the *Australian States Constitution Act* made elaborate provision for whether a Bill was to be treated as a Bill altering the constitution of the legislature of a State or of either House. The particular detail of those provisions is not now important. The statute is no longer in force[14].

37 It may be that the inconvenience of reserving Bills was a matter of concern in relevant colonial and Imperial circles by late 1903, when the Constitution Act Amendment Bill, Redistribution of Seats Bill and the Electoral Bill were being prepared. But even if that were so (and we were taken to nothing that would show whether it was) nothing suggests that the introduction of those Bills in 1903 was connected with the matters which were later to be dealt with in the *Australian States Constitution Act*.

The construction question – what history shows

38 The history of the legislation reveals that provisions governing electoral redistribution were always treated as requiring special consideration by the colonial, later State, Parliament. At first, they were set out in the 1889 Constitution itself. When it is observed that the 1889 Constitution provided (s 11) that the 30 members of the Legislative Assembly were to be elected for "the several electoral districts hereinafter named *and defined*" (emphasis added), it is evident that the definition of the districts returning members to sit in the House was then a defining element of the constitution of the Parliament. (The equivalent provisions of the 1889 Constitution dealing with an elective Legislative Council were of the same character.) When it is also recalled that the number of districts identified the number of members that were to be elected to the Legislative Assembly, the conclusion that definition of electoral districts was then a matter affecting the constitution of that House is reinforced.

39 It therefore follows from s 73 of the 1889 Constitution that the definition of electoral districts set out in the 1889 Constitution (as amended to 1904) was amenable to change only by the absolute majorities referred to in that section. It also follows that the member of the Legislative Council who proposed the amendment to the Redistribution of Seats Bill in 1903, by including the legislative predecessor of what is now s 13 of the *Electoral Distribution Act*, was right to describe it as "retain[ing] the power the Constitution gave ... to insist that

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14 *Yougarla v Western Australia* (2001) 207 CLR 344 at 367 [58].

any Bill that fundamentally altered the Constitution should be agreed to by a majority of both Houses".

40 The applicants rightly pointed out that neither s 6 of the 1904 Act nor s 13 of the *Electoral Distribution Act* used the same verbal formulae that were used in s 73 of the 1889 Constitution. Section 6 of the 1904 Act and its legislative descendants have all used the expression "any Bill to amend this Act". Section 73 of the 1889 Constitution gave power to the legislature "to repeal or alter" any of the provisions of the Act, subject to the proviso that "any Bill by which any change in the [c]onstitution" of either House of the legislature was made had to secure an absolute majority in each House. No doubt the difference in language ("amend" rather than "repeal or alter" or "change") provides a firm foothold for the argument that "amend" may be read more narrowly than "change". But the difference in language cannot be treated as determining the issue which now arises. It remains necessary to construe the expression which was used in the 1904 Act and now appears in s 13 of the *Electoral Distribution Act*.

41 Moving the provisions defining electoral districts into a separate Act, and later providing the mechanism for regular redistributions, obviously separated the provisions dealing with these subjects from Acts that were called "Constitution" Acts. But neither the title of an Act nor the division of State constitutional provisions between separate pieces of legislation is a matter of determinative significance to the present issues.

42 All who presented arguments on the hearing of the applications in this Court accepted that legislative provision for the definition of electoral boundaries was essential to the holding of an election for either House of the Western Australian Parliament, whether that was a general election, or a by-election consequent upon a vacancy in the lower House. (Vacancies in the upper House can now be filled by re-count[15].)

43 Saying that such legislation is "essential" may be ambiguous. For present purposes, what is important is that defining electoral boundaries is not only politically necessary, it is legally essential. Of course there would be irresistible political pressure to produce legislation defining electoral boundaries if the existing provisions were removed from the statute book. But not only would there be political pressure, the provisions of the Western Australian Constitution, particularly Pt I of the 1889 Constitution (ss 2-36) and Pt I of the *Constitution*

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15 *Electoral Act* 1907 (WA), Pt IVA (ss 156A-156E).

Acts Amendment Act 1899 (ss 5-42), which deal with the Parliament of that State, cannot work except by reference to defined electoral districts and provinces. It follows that, if the *Electoral Distribution Act* were to be repealed, some replacement provisions would have to be made, at least to the extent of defining electoral boundaries. If that was not done, there could be no election.

44 Neither the applicants nor the amici suggested in argument that, if the provisions defining electoral districts and provinces were repealed, those electoral boundaries would have had some continued operation (apart from the operation which transitional provisions gave them) until different provision was made. Perhaps those provisions of Pt V of the *Interpretation Act* 1984 (WA) (ss 33-39) which deal with the effect of repealing Acts might have been said to have some relevant operation in such circumstances. Much might then have depended on examining whether such of the legislation governing elections as remained unaffected by the repeal could be given sensible meaning and effect despite the repeal. None of these questions was explored in argument and it is, therefore, not appropriate to pursue them. Rather, significance must be attached to the fact that the definition of electoral boundaries now is, and in 1904 was, essential to the election of the Parliament.

45 Because the definition of electoral boundaries was, and still is, essential, repealing the *Electoral Distribution Act* must sooner or later be succeeded by the enacting of other statutory provisions which will themselves define or provide for the definition of electoral boundaries.

The construction question – "amend" and "repeal"

46 In the course of argument we were taken to various decisions both in this Court[16] and in other courts[17] which have considered the meaning of the words "amend" and "repeal". It may readily be accepted that the central meaning of "amend" is to alter the legal meaning of an Act or provision, short of entirely rescinding it, and that the central meaning of "repeal" is to rescind the Act or provision in question. The cases reveal, however, that the words can be used in

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16 *Goodwin v Phillips* (1908) 7 CLR 1 at 7; *Mathieson v Burton* (1971) 124 CLR 1 at 9-12; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 353-354 [9]-[10], 375-376 [66]-[68].

17 For example, *Beaumont v Yeomans* (1934) 34 SR(NSW) 562 at 568-570.

ways in which there appears to be some overlapping in their meanings. Thus, as was pointed out in *Kartinyeri v Commonwealth*[18]:

> "An amendment may take the form of, or include, a repeal. Thus, if a section is deleted it can be said that it has been repealed whilst the statute itself has been amended." (footnote omitted)

47 It may also be accepted that "amend", "repeal" and cognate terms were used in the Western Australian interpretation legislation in force in 1904 (the *Interpretation Act* 1898 (WA)) and in 1947 (the *Interpretation Act* 1918 (WA)) in ways which suggested that the words were considered to have different meanings. (Neither of those Interpretation Acts sought to define either "amend" or "repeal" as the current interpretation legislation does[19].) But concluding that the words have different meanings is not to say that the distinction between them always depends upon the *form* in which a particular piece of legislation is cast. The distinction must depend upon considerations of substance not form.

48 The applicants rightly pointed out that the expression in s 13 of the *Electoral Distribution Act*, "any Bill to amend this Act", had first to be applied in a parliamentary, not a curial context. Each House of the Parliament would have to consider whether a Bill being considered in the House met the description of being a Bill to amend the *Electoral Distribution Act*. That reinforces what the words of s 13 would convey in any event: that the critical question is one requiring characterisation of a particular Bill, regardless of what other Bills are then under consideration by that or the other House.

49 But to decide that, when considering the operation of s 13 of the *Electoral Distribution Act*, it is necessary to confine attention to the Bill to which it is said to apply does not conclude the question which s 13 presents. It does not shed light on what is meant by "amend" in the expression "any Bill to amend this Act".

50 It would be question-begging to commence with an assumption that there is an opposition between the concepts of amendment and repeal, and to ask which of the two better fits the present case. A question to be decided is whether the legislation, on its true construction, distinguishes between those two

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18 (1998) 195 CLR 337 at 375 [67].

19 *Interpretation Act* 1984 (WA), s 5.

concepts. The issue is whether what occurred in the present case falls within the concept of amendment in s 13.

51 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?

52 Because definition of electoral boundaries is 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 that subject of electoral boundaries. To read "any Bill to amend this Act" as confined to a Bill which will leave at least one provision of the *Electoral Distribution Act* remaining in force, whether with the same or different legal operation, would defeat the evident purpose behind the introduction of the provision in 1904. That purpose was to ensure that no change could be made to electoral districts save by absolute majority of both Houses. And when identical provision was made in subsequent legislation there is no reason to read the phrase more narrowly. The evident purpose of the provision should not be defeated by preferring form over substance[20].

The construction question – irrelevant considerations

53 Section 13 of the *Electoral Distribution Act* must be given the same meaning no matter whether the proposed legislation would advance or diminish the rights of particular electors. The construction question cannot be resolved by classifying the particular proposals that are made for new electoral boundaries as "desirable" or "undesirable", or as advancing human or other rights of electors in Western Australia. The content of the Bills which it is said have not validly been passed is irrelevant to whether either was a Bill to amend the *Electoral Distribution Act*. To assign a different meaning to s 13 according to the

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20 *Bropho v Western Australia* (1990) 171 CLR 1 at 20. See also *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 145-146 [82].

qualitative assessment that is made of the desirability of the proposed laws under consideration constitutes fundamental legal error.

54 It was decided in *McGinty v Western Australia*[21] that the Constitution contains no implication affecting disparities of voting power among the holders of the franchise for the election of members of a State Parliament. That outcome is not to be gainsaid by reference to international instruments and their elevation to control constitutional interpretation, including that of "manner and form" provisions[22].

55 There is, moreover, a logical difficulty as to the use of such instruments in the present case. The question is one of the construction of s 13 of the *Electoral Distribution Act*. The section is to be construed in the context of the whole Act. It stipulates a special procedure for the alteration of the substantive provisions of the Act. The meaning and effect of the stipulation is in dispute, but at least that much is clear. Let it be assumed, for the purposes of argument, that the substantive provisions of the Act are antithetical to the standards of representative democracy established by international instruments. If the purpose of s 13 is to make it more difficult to change a system of electoral distribution that is contrary to international norms, then an argument that the section itself should be construed by reference to such norms is self-contradictory.

The construction question – applying s 13

56 It follows from what has been said about the proper construction of s 13 that it applied to the Repeal Bill. That was a Bill for an Act to "amend" the *Electoral Distribution Act*.

57 It also follows that s 13 applied to the Amendment Bill. It, too, was a Bill for an Act which would amend the *Electoral Distribution Act* because it was a Bill to make provision for the several subjects with which the *Electoral Distribution Act* dealt. Although the Amendment Bill was introduced and dealt with separately from the Repeal Bill, a Bill dealing with these subjects had to be passed.

58 The conclusions just expressed do not depend upon treating the two Bills as forming a "scheme". That the two Houses dealt with the Bills separately

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21 (1996) 186 CLR 140.

22 See *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 383-386 [95]-[101].

might suggest that the word "scheme" was inappropriate, as a matter of ordinary language, to describe or identify some relationship between them. Moreover, an argument founded on identifying two Bills as a scheme may be thought to encounter particular difficulty if the Bills had been considered at more widely spaced intervals than was the case here, or if the promoters of the Bills had differed. To treat one Bill promoted by government as forming part of a scheme constituted by that Bill and another promoted by the opposition, or one of several alternative proposals before the Parliament, would stretch the meaning of "scheme" beyond its breaking point. More fundamentally, however, it is by no means clear what legal criteria were to be applied in order to attach the description "scheme". Nor was it clear what legal consequences were said to follow from the application of the term[23]. At base the contention seemed to amount to no more than that some legislation defining electoral boundaries was necessary to permit election of the Parliament. That contention is accepted but it neither needs, nor makes useful, the attribution of the term "scheme" to the two Bills now in question in order to draw a conclusion about the application of s 13.

59 Nor do the conclusions expressed depend upon attributing particular significance to some transitional provisions that were contained in cl 5 of the Repeal Bill. By those provisions the existing electoral divisions made under the *Electoral Distribution Act* would have continued to apply in respect of by-elections held before the first general election to be held after the commencement of the Act (cl 5(2)(a) and (b)), and would have applied for the purposes of filling casual vacancies in the Legislative Council by re-count under Pt IVA of the *Electoral Act* 1907 (WA) (cl 5(2)(c)). The amici submitted that these transitional provisions would have given an altered temporal dimension to the *Electoral Distribution Act*, and thus have amended it, in the sense of altering its legal meaning in that respect[24]. In view of the conclusions earlier reached, it is unnecessary to consider the validity of this contention.

The implied repeal question

60 It is convenient to deal at this point with the applicants' contention that s 13 of the *Electoral Distribution Act* was impliedly repealed by the enactment

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23 cf *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735; *W R Moran Pty Ltd v Deputy Federal Commissioner of Taxation (NSW)* (1940) 63 CLR 338; [1940] AC 838; *Logan Downs Pty Ltd v Federal Commissioner of Taxation* (1965) 112 CLR 177.

24 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 375 [67].

(by s 4 of the *Acts Amendment (Constitution) Act* 1978) of s 2(3) of the 1889 Constitution. Section 2(3) provides that "Every Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73 of this Act, be presented to the Governor for assent by or in the name of the Queen".

61 It was said that this provision is directly inconsistent with s 13 of the *Electoral Distribution Act*. That is not right. The two provisions can be readily reconciled. Where s 2(3) speaks of "passage through" the Houses of the Parliament it necessarily means "due passage" or "passage in accordance with applicable requirements". It does not mean, as the implied repeal argument necessarily entailed, passage in accordance with the requirements for Bills to which no manner and form provision applied.

62 The reference in s 2(3) to its terms being "subject to section 73" requires no different conclusion. In 1978, when s 2(3) was inserted in the 1889 Constitution, s 9 of the *Australia Act* had not been enacted. Reservation of Bills for the Royal Assent was still required by s 73. It was to that question that the express subjection of s 2(3) to s 73 was directed, not to the proper understanding of the expression "passage through" the Houses.

Section 13 of the *Electoral Distribution Act* as a manner and form provision

63 Discussion of the application of manner and form provisions has provoked much debate about the theoretical underpinnings for their operation. Thus, to ask whether a Parliament has power to bind its successors by enacting a manner and form provision has, in the past, lead into debates cast in the language of sovereignty or into philosophical debates about whether a generally expressed power includes power to relinquish part of it. Neither the language of sovereignty, nor examination in the philosophical terms described, assists the inquiry that must be made in this case. Sooner or later an analysis of either kind comes to depend upon the content that is given to words like "sovereignty" or "general power". It is now nearly 50 years since H W R Wade convincingly demonstrated[25] that the basal question presented in a case like the present, when it arises and must be considered in a British context, is about the relationship between the judicial and legislative branches of government and, in particular, what rule of recognition the courts apply to determine what is or is not an act of the relevant legislature. When Diceyan theories about the role of the Parliament at Westminster held sway the answer which Wade identified as having been

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25 H W R Wade, "The Basis of Legal Sovereignty", (1955) *Cambridge Law Journal* 172.

given in England to the question of what rule of recognition an English court would apply in relation to the Acts of that Parliament was: any Act enacted in the ordinary way by that Parliament *regardless* of any earlier provision about manner and form[26].

64 Sir Owen Dixon explained that such an analysis proceeded from an understanding of the relationship between the judicial and the legislative branches of government that was apt to a structure of government which did not depend ultimately upon the constitutional assignment of particular powers to the legislature or provide for a constitutional division of powers between polities[27]. It was a structure of government in which the only relevant fundamental or constitutional rule engaged was the rule of recognition. This was "the pivot of the legal system"[28]. There was no other fundamental or constitutional rule which applied. And that is why a different answer was to be given when considering the legislation of subordinate legislatures where a superior legislature (the Imperial Parliament) had provided for some manner and form provision. There was a higher, more fundamental, rule that was engaged. Given such constitutional developments in Britain as devolution, and the undertaking of treaty obligations in relation to Europe, analysis of the first kind described might now be thought[29] to encounter difficulties today. It is, of course, neither necessary nor appropriate to explore those difficulties here.

65 In an Australian context it was, at first, important to recognise that the colonial legislatures stood in the second category we have identified. They were subordinate legislatures, and manner and form provisions could be and were imposed upon them by Imperial legislation. Section 73 of the 1889 Constitution can be seen as one example of such a provision. (It must be recalled that the 1889 Constitution depended for its operation upon enabling Imperial legislation –

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26 *Vauxhall Estates Ltd v Liverpool Corporation* [1932] 1 KB 733 at 743 per Avory J; *Ellen Street Estates Ltd v Minister for Health* [1934] 1 KB 590 at 597 per Maugham LJ; *British Coal Corporation v The King* [1935] AC 500 at 520 per Viscount Sankey LC; *Manuel v Attorney-General* [1983] Ch 77 at 89 per Sir Robert Megarry VC.

27 Dixon, "The Law and the Constitution", (1935) 51 *Law Quarterly Review* 590 at 604.

28 Dixon, "The Law and the Constitution", (1935) 51 *Law Quarterly Review* 590 at 593.

29 H W R Wade, *Constitutional Fundamentals*, (1989) at 40-47.

the *Western Australia Constitution Act* 1890 (Imp).) In addition, the *Colonial Laws Validity Act* 1865 (Imp) gave effect to manner and form provisions found not only in Imperial law but also in colonial law. That too was seen as the imposition of manner and form provisions by superior law.

66 Now, however, it is essential to begin by recognising that constitutional arrangements in this country have changed in fundamental respects from those that applied in 1889. It is not necessary to attempt to give a list of all of those changes. Their consequences find reflection in decisions like *Sue v Hill*[30]. Two interrelated considerations are central to a proper understanding of the changes that have happened in constitutional structure. First, constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources. Secondly, unlike Britain in the nineteenth century, the constitutional norms which apply in this country are more complex than an unadorned Diceyan precept of parliamentary sovereignty. Those constitutional norms accord an essential place to the obligation of the judicial branch to assess the validity of legislative and executive acts against relevant constitutional requirements. As Fullagar J said, in *Australian Communist Party v The Commonwealth*[31], "in our system the principle of *Marbury v Madison*[32] is accepted as axiomatic". It is the courts, rather than the legislature itself, which have the function of finally deciding whether an Act is or is not within power[33].

67 For present purposes, two changes in constitutional arrangements are critically important: first, the fact of federation and creation of the States, and secondly, the enactment by the federal Parliament of the *Australia Act*. Section 106 of the Constitution provides that "[t]he 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." Then, in 1986, pursuant to a reference of power under s 51(xxxviii) of the

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30 (1999) 199 CLR 462. See also, for example, Selway, "The Constitutional Role of the Queen of Australia", (2003) 32 *Common Law World Review* 248.

31 (1951) 83 CLR 1 at 262.

32 5 US 137 (1803).

33 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 262-263; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ; *Plaintiff S157/2002 v The Commonwealth* (2003) 77 ALJR 454 at 474-475 [104] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ; 195 ALR 24 at 52.

Constitution, the federal Parliament enacted the *Australia Act* 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". The *Australia Act*, too, is to be traced to its Australian source – the Constitution of the Commonwealth. The *Australia Act* takes its force and effect from the reference of power to the federal Parliament, made under s 51(xxxviii), and the operation that the Act is to be given as a law of the Commonwealth in relation to State law by s 109 of the Constitution[34]. Although the phrase "subject to this Constitution" appears both in s 51 and s 106, it was decided in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*[35] that "the dilemma ... must be resolved in favour of the grant of power in par (xxxviii)".

68 The *Australia Act* had two provisions of particular relevance to manner and form provisions. First, s 3(1) provided that the *Colonial Laws Validity Act* should not apply to any law made after the commencement of the *Australia Act* by the Parliament of a State and, second, the provisions of s 6 earlier set out were enacted. It is of particular importance to recognise that the *Australia Act* stands as a form of law to which the Parliament of Western Australia is relevantly subordinate. To the extent to which s 6 applies, the powers of the Parliament of Western Australia to legislate are confined. What has been seen as the conundrum of whether a body given general power to legislate can give up part of that power need not be resolved. By federal law, effect must be given to some manner and form provisions found in State legislation.

69 Neither the applicants nor the amici advanced any challenge to the validity of the *Australia Act*. No intervener made any such submission. The applicants, the amici and the interveners were all content to argue the applications on the basis that s 6 of the *Australia Act*, either alone or in conjunction with s 6 of the *Australia Act* 1986 (UK), was capable of valid application. The dispute between them was restricted to whether the provisions of s 6 were engaged in the particular circumstances of the case. At no time in the oral argument of the applications was the contrary suggested.

70 That this should be so is not surprising when it is recalled that in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* all seven

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34 *Sue v Hill* (1999) 199 CLR 462 at 490-491 [61]-[62].

35 (1989) 168 CLR 340 at 381.

Justices constituting the Court concluded[36] that "the continuance of the Constitution of a State pursuant to s 106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par (xxxviii)" of s 51. Section 6 of the *Australia Act*, therefore, is not to be seen as some attempt to alter s 106 or s 107 otherwise than in accordance with the procedures required by s 128. Section 6 was enacted in the valid exercise of power given to the federal Parliament by s 51(xxxviii).

Section 13 of the *Electoral Distribution Act* and s 6 of the *Australia Act*

71 Was either the Repeal Bill or the Amendment Bill, if it became law, within s 6 of the *Australia Act*? That is, was it "a law ... respecting the constitution, powers or procedure of the Parliament of the State"? If either Bill, on its becoming law, would meet that description, s 6 of the *Australia Act* would be engaged and the law would "be of no force or effect unless it [was] made in such manner and form as ... required by a law" made by the Western Australian Parliament.

72 The meaning to be given to the expression "constitution, powers or procedure of the Parliament" must be ascertained taking proper account of the history that lay behind the enactment of the *Australia Act*. In particular, it is necessary to give due weight to the learning that evolved about the operation of the *Colonial Laws Validity Act*, s 5 of which also spoke of "laws respecting the constitution, powers, and procedure" of the legislatures to which it applied.

73 In s 5 of the *Colonial Laws Validity Act* the expression "constitution, powers, and procedure" appeared in that part of the section which provided that a representative legislature "shall ... have, and be deemed at all times to have had, full power to make laws respecting" those subjects. The reference to manner and form requirements in the proviso to the section was treated[37] as a condition upon which the full power referred to in s 5 was exercisable. Section 6 of the *Australia Act* takes a different form. It provides directly for the requirement to observe manner and form. Nonetheless, the use of the expression "constitution, powers or procedure" in the *Australia Act* is evidently intended to build on the provisions of the *Colonial Laws Validity Act*. (The use of the conjunction "or" rather than "and" in the collocation is readily explained by the drafting change from grant of power to requirement to obey manner and form.)

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36 (1989) 168 CLR 340 at 381.

37 *Attorney-General (NSW) v Trethowan* (1932) 47 CLR 97; [1932] AC 526.

74 On its face, the expression "constitution, powers or procedure" of a legislature describes a field which is larger than that identified as "the constitution" of a legislature. It is not necessary or appropriate to attempt to describe the boundaries of the areas within the field that the three separate integers of the expression "constitution, powers or procedure" cover, let alone attempt to define the boundaries of the entire field. In particular, it is not necessary or appropriate to explore what is encompassed by the reference in s 6 of the *Australia Act* to "powers or procedure" of a legislature, whether in relation to the ability of a legislature to entrench legislation about any subject or otherwise[38]. It is enough to focus on the expression the "constitution" of the Parliament.

75 The "constitution" of a State Parliament includes (perhaps it is confined to) its own "nature and composition"[39]. The Attorneys-General for New South Wales and Queensland, intervening, both submitted that s 6 of the *Australia Act* should be read strictly and that, accordingly, the "constitution" of a State Parliament should be understood as referring only to the general character of the legislature rather than the rules pursuant to which members are returned to a chamber.

76 For some purposes, the nature and composition of the Western Australian Parliament might be described sufficiently as "bicameral and representative". But the reference in s 6 of the *Australia Act* to the "constitution" of a State Parliament should not be read as confined to those two descriptions if they are understood, as the submissions of the Attorneys-General for New South Wales and Queensland suggested, at a high level of abstraction. That is, s 6 is not to be read as confined to laws which abolish a House, or altogether take away the "representative" character of a State Parliament or one of its Houses. At least to some extent the "constitution" of the Parliament extends to features which go to give it, and its Houses, a representative character. Thus, s 6 may be engaged in cases in which the legislation deals with matters that are encompassed by the general description "representative" and go to give that word its application in the particular case. So, for example, an upper House whose members are elected in a single State-wide electorate by proportional representation is differently constituted from an upper House whose members are separately elected in single member provinces by first past the post voting. Each may properly be described

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38 cf *Smith v The Queen* (1994) 181 CLR 338 at 352-353.

39 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 429 per Dixon J.

as a "representative" chamber, but the parliament would be differently constituted if one form of election to the upper House were to be adopted in place of the other.

77 Not every matter which touches the election of members of a Parliament is a matter affecting the Parliament's constitution. In *Clydesdale v Hughes*[40], three members of the Court held that a law providing that the holding of a particular office did not disable or disqualify a person from sitting as a member of the Legislative Council of Western Australia was not a law which, for the purposes of s 73 of the 1889 Constitution, effected an alteration or change in the constitution of that House[41]. Again, however, it is neither necessary nor appropriate to attempt to trace the metes and bounds of the relevant field.

78 The Repeal Bill and the Amendment Bill were respectively to do away with, and then provide an alternative structure for, the constitution of the two Houses of the Western Australian Parliament. The Repeal Bill did away with the scheme under which there were two Houses elected from 57 districts and six regions respectively, where the 57 districts were to be ascertained in accordance with the rules prescribed by s 6 of the *Electoral Distribution Act*. Those rules depended upon the division between the metropolitan and other areas and the application of a tolerance of 15 per cent more or less. Upon the Repeal Bill coming into force the manner of effecting representation in the Parliament would have been at large. Considered separately, then, the Repeal Bill was for a law respecting the constitution of the Parliament of Western Australia.

79 The Amendment Bill, if it came into force, would have provided for 57 electoral districts and six electoral regions, but they would have been differently drawn from the way for which the *Electoral Distribution Act* provided. The criteria to be applied in drawing electoral boundaries under the Amendment Bill would have differed according to whether the electoral district had an area of less than 100,000 square kilometres. The tolerance in the smaller districts would have been reduced from 15 per cent to 10 per cent; in the larger districts the formula was more complicated, but again the tolerance was changed from 15 per cent. In addition, and no less significantly, under the Amendment Bill, the number of members of the Council would have been increased, from the 30 specified by s 5 of the *Constitution Acts Amendment Act* 1899, to 36. The

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40 (1934) 51 CLR 518 at 528.

41 See also *Western Australia v Wilsmore* (1982) 149 CLR 79 at 102.

Amendment Bill was for a law respecting the constitution of the Parliament of Western Australia.

80 The conclusions reached about the operation of s 6 of the *Australia Act* make it unnecessary to decide whether, separately from and in addition to the provisions of that section, there is some other source for a requirement to comply with s 13 of the *Electoral Distribution Act*[42]. It is enough to notice two matters. First, as indicated earlier in these reasons, the continuance of the constitution of a State pursuant to s 106 of the federal Constitution is subject to the *Australia Act*[43]. Section 13 of the *Electoral Distribution Act* is made binding by s 6 of the *Australia Act*. Secondly, the express provisions of s 6 can leave no room for the operation of some other principle, at the very least in the field in which s 6 operates, if such a principle can be derived from considerations of the kind which informed the Privy Council's decision in *Bribery Commissioner v Ranasinghe*[44] and can then be applied in a federation[45].

Prorogation

81 Consideration of the issues already discussed is sufficient to determine that the Full Court of Western Australia was correct in the conclusions it reached. Nonetheless, it is as well to say something briefly about the prorogation issue.

82 Reduced to its essentials, the submission of the amici on this issue was that once the two Houses of the Western Australian Parliament were prorogued (as they were by proclamation made on 9 August 2002), any Bills to which the Royal Assent had not then been given lapsed and, for that reason, could not lawfully be presented for or given the Royal Assent.

83 The argument depended upon giving a meaning and effect to proroguing a House of the Western Australian Parliament that, in turn, depended upon parliamentary practice in Britain. This practice was said to be sufficiently

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42 cf *Bribery Commissioner v Ranasinghe* [1965] AC 172 at 197.

43 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia* (1989) 168 CLR 340 at 381.

44 [1965] AC 172 at 197.

45 *McGinty v Western Australia* (1996) 186 CLR 140 at 297.

described in *Western Australia v The Commonwealth*[46]. There, Gibbs J[47] said, quoting Hatsell[48], that the rule of parliamentary practice in Britain was that "all Bills, or other proceedings, depending in either House of Parliament, in whatever state they are, are entirely put an end to, and must, in the next session be instituted again, as if they had never been". In the same case, Stephen J described[49] the effect of prorogation as "wiping clean the parliamentary slate".

84 In Britain, the practice has developed of prorogation being effected by an announcement to both Houses being made in the House of Lords of the Queen's command that Parliament should prorogue. The announcement is made by one of the commissioners of a royal commission[50]. That commission authorises the signification of the Royal Assent to any Bills then pending and that assent is pronounced before the prorogation[51]. Accordingly, the circumstances which arise in this case would not arise in Britain. The British practice ensures that, if legislation has passed both Houses, assent is given before the Houses are prorogued.

85 The power to prorogue given by s 3 of the 1889 Constitution is a power "to prorogue the Legislative Council and Legislative Assembly from time to time". The power may be exercised with respect to each House at different times or at the one time. When it is said that prorogation wipes the parliamentary slate clean, what is meant is that proceedings *then pending* in the House that has been prorogued must be begun again unless there is some contrary provision made by statute or Standing Order. (Here, the Standing Orders of each House provided for proceedings to be taken up after prorogation at the point they had reached when the House was prorogued[52].) But here, if the Bills had been passed by both

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46 (1975) 134 CLR 201.

47 (1975) 134 CLR 201 at 238.

48 *Precedents of Proceedings in the House of Commons*, (1818), vol 2 at 335-336.

49 (1975) 134 CLR 201 at 254.

50 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed (1997) at 233.

51 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed (1997) at 233-234.

52 Western Australia, Legislative Council, *Standing Orders*, Order 436; Western Australia, Legislative Assembly, *Standing Orders*, Order 220.

Houses, there was no proceeding then *pending* in either House. Each House would have completed its consideration of the Bills. There being no proceeding *pending* in the Houses, proroguing the Houses would have had no relevant effect on the Bills. They could lawfully have been presented for and could lawfully have received Royal Assent.

Conclusion and orders

86 For these reasons, which differ in some significant respects from those adopted by the majority in the Full Court, the questions asked in the proceedings should be answered, "No". Special leave to appeal should be granted in each matter; the appeal in each matter should be treated as instituted and heard instanter but dismissed. There should be no order for the costs of either application or either appeal, the respondent in each case simply submitting to the jurisdiction of the Court. The amici should bear their own costs.

87 KIRBY J. These applications for special leave to appeal[53] concern the constitutional law of Western Australia ("the State"). Specifically, they concern the latest attempt to correct the unequal distribution of electors in the State for the purpose of State elections[54].

Representative democracy and the value of the vote

88 *Changes in electoral democracy*: At the time of federation, both in federal and State elections in Australia[55], as in other countries, there were significant departures from the ideal of electoral democracy. In all but two of the Australian States, women had no vote[56]. Property qualifications existed[57]. So did plural voting[58]. The number of voters in electorates (and hence the value and influence of their votes) varied considerably. Substantial variations existed in the size of metropolitan and rural constituencies.

89 Over the ensuing century, tolerance of such disparities in the value of each elector's vote declined in Australia, as in other countries with democratic governments. In part, this change occurred because of improvements in the means of communication. These removed, or reduced, a justification commonly offered for disparities. In part, it followed parliamentary repeal of the worst

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53 From a judgment of the Full Court of the Supreme Court of Western Australia: *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201. The applications were referred into the Full Court by order of Gummow, Callinan and Heydon JJ on 11 April 2003.

54 *Burke v Western Australia* [1982] WAR 248 at 252-253.

55 The qualification of electors in federal elections were initially related to those in State elections. See the Constitution, ss 8 (Senate), 30 (House of Representatives).

56 Norberry and Williams, "Voters and the Franchise: the Federal Story", *The Vision in Hindsight: Parliament and the Constitution Paper No 16*, Australian Parliamentary Library Information and Research Services Research Paper No 17, 28 May 2002. See now Art 7 of the Convention on the Elimination of All Forms of Discrimination against Women done at New York on 18 December 1979, 1983 *Australia Treaty Series* 9, entered into force for Australia on 27 August 1983.

57 Hughes, "Institutionalising electoral integrity", in Sawer (ed), *Elections: Full, free & fair*, (2001) 142 at 145. There were similar property requirements for jury service: *Ng v The Queen* (2003) 77 ALJR 967 at 973 [36]; 197 ALR 10 at 18-19.

58 Hughes, "Institutionalising electoral integrity", in Sawer (ed), *Elections: Full, free & fair*, (2001) 142 at 145.

types of malapportionment with their tendency to entrench sectional interests[59]. And in part, in other countries, it reflected the insistence of the courts and, more recently, international bodies, that such disparities should be minimised to ensure compliance with fundamental rights and to require that the rhetoric about democracy and representative government be matched by legally enforceable, and approximately equal, voting entitlements[60].

90 Within Australia, the general principle of approximate equality in the value of each vote (with an allowable variation usually expressed in terms of percentages) is now reflected in the electoral law of the Commonwealth and most of the States. Western Australia remains an exception to the trend towards "equality of electorate size [as reflecting] a change in society's perception of the appropriate expression of the concept of representative democracy"[61]. In that State alone, the disparities in electorate numbers remain very large. They do so as a result of the law in question in these proceedings[62].

91 By reason of population movements, the disparities between the respective electoral values of metropolitan and non-metropolitan votes in the State have continued to increase[63]. Such variance is obviously of large political significance. In otherwise close elections, it favours the interests of those

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59 *McGinty v Western Australia* (1996) 186 CLR 140 at 185 referring to Brugger and Jaensch, *Australian Politics: Theory and practice*, (1985) at 208-214 and Lijphart, *Electoral Systems and Party Systems*, (1994) at 15.

60 In the United States, this occurred after decisions of the Supreme Court: *Wesberry v Sanders* 376 US 1 (1964); *Kirkpatrick v Preisler* 394 US 526 (1969); *White v Weiser* 412 US 783 (1973); *Karcher v Daggett* 462 US 725 (1983). In Canada see *Reference re Provincial Electoral Boundaries (Sask)* [1991] 2 SCR 158 at 170.

61 *McGinty v Western Australia* (1996) 186 CLR 140 at 202 per Toohey J.

62 Subsequent to the enactment of the 1987 legislation (by which the relevant sections of the *Electoral Distribution Act* 1947 (WA) were inserted), 74% of the electors in the State (being the proportion of voters in metropolitan electorates) would choose 50% of the members of the Legislative Council, leaving 26% of the electors (those in non-metropolitan electorates) to choose 50% of the members of the Council. In respect of the Legislative Assembly, 74% of the electors (in metropolitan electorates) would choose 60% of the members while 26% of the electors (in non-metropolitan electorates) would elect 40% of the members: see *McGinty v Western Australia* (1996) 186 CLR 140 at 213-214.

63 For example, in 1996 there was a variance of 414% in the District of Ashburton: see *McGinty v Western Australia* (1996) 186 CLR 140 at 214.

candidates and political parties that draw more support from non-metropolitan voters. In a general election, such a bias in the value of individual votes can accumulate to influence the composition of the State Parliament and hence the formation of the Government of the State.

92 *The McGinty case and its aftermath*: In 1996, The Hon J A McGinty and others, then part of the Parliamentary Opposition, sought relief in this Court against the inequality in the value of the votes of electors in the State. They appealed to a constitutional implication of representative democracy, said to derive either from the federal Constitution or from the State *Constitution Act* 1889 (WA) ("the Constitution Act"). In *McGinty v Western Australia*[64], all members of this Court rejected the supposed federal constitutional implication. A majority[65] rejected the implication based on the Constitution Act.

93 Now, in government, Mr McGinty returns to this Court as Attorney-General for Western Australia, in effect, to support a new attempt to overturn what he claims to be the electoral malapportionment of the State. He, and the State, seek to uphold the validity of legislation said to have been passed by the two Chambers of the Parliament of the State, designed to abolish the legal foundation for present electoral disparities and, in consequence, to bring the State substantially into line with the approach taken to the value of votes in all other parts of the nation.

94 Given that the Parliament of the State has constituent powers, and may (subject to law) repeal, amend and change all State laws, including those of a constitutional character, Mr McGinty's position on the face of things seems more promising than it was in his last proceeding. However, by majority decision of the Full Court of the Supreme Court of Western Australia[66], he lost his attempt in that court to uphold the alteration to the offending law. Now, seeking special leave to appeal, he has returned to this Court to challenge the correctness of the Full Court's disposition.

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64 (1996) 186 CLR 140.

65 Brennan CJ, Dawson, McHugh and Gummow JJ; Toohey and Gaudron JJ dissenting.

66 Malcolm CJ, Anderson, Steytler and Parker JJ; Wheeler J dissenting.

The facts and legislation

95 *The basic facts*: The background facts are set out in other reasons[67]. Mr Laurence Marquet is the Clerk of the Parliaments of Western Australia. By the Joint Standing Rules and Orders of the two Houses of the Parliament of the State, it is his responsibility to present every Bill to the Governor of the State for the signification of the Royal Assent once it has passed through the Legislative Council and the Legislative Assembly[68].

96 Mr Marquet brought proceedings in the Supreme Court for the determination of two questions, namely whether it was lawful for him to present to the Governor for the signification of Her Majesty's Assent the Electoral Distribution Repeal Bill 2001 (WA) ("the Repeal Bill") and the Electoral Amendment Bill 2001 (WA) ("the Amendment Bill"). Pending the outcome of the proceedings, neither Bill has been so presented.

97 The two questions stated in the Supreme Court were designed to tender the basic issue of whether it was sufficient for the two Bills, in the normal way, to complete their passage through both Chambers of Parliament by a *simple* majority of the members present and voting; or whether, in this particular case, it was essential, for the validity of the Bills, and each of them, that they should have passed by a vote of an *absolute* majority of the members of both Chambers.

98 Although each of the Bills was passed by an *absolute* majority of the members of the Legislative Assembly, the vote on the second and third readings of each Bill in the Legislative Council, whilst attracting a *simple* majority of those members present and voting, fell short of securing an *absolute* majority in that Chamber. Being uncertain as to his duty, Mr Marquet sought the rulings that now bring the matter to this Court.

99 *The key provision of s 13*: The key provision that is said to give rise to the necessity to obtain the affirmative vote of an *absolute* majority in each Chamber, is s 13 of the *Electoral Distribution Act* 1947 (WA) ("the 1947 Act"). Although that section appears in other reasons, as it is crucial, I will repeat it:

> "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

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67 The reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("the joint reasons") at [9]-[12]; the reasons of Callinan J at [223]-[229].

68 In accordance with the Constitution Act, s 2(3).

of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively."

100 This provision was itself enacted as part of the law of the State in the normal way. There was no purported requirement of an absolute majority for its passage. No referendum was held to "entrench" the section so as to give it a special status. It simply passed into law as an ordinary piece of State legislation. Nevertheless, the Full Court held that it gave rise to extraordinary legal consequences.

101 I will not detail the history of the constitutional laws of the State[69]. They are found principally in the Constitution Act. There are other relevant enactments[70]. These include the *Constitution Acts Amendment Act* 1899 (WA) ("the Constitution Amendment Act") and, so it is claimed, the 1947 Act itself. Apart from the last-mentioned Act, there is a general law on elections in Western Australia, namely the *Electoral Act* 1907 (WA) ("the Electoral Act"). This additional legislation is sufficiently described in other reasons[71].

102 The real contestants in these proceedings (as before the Full Court) were the Attorney-General and the State (as applicants), and a number of persons and bodies representing "political, rural and country community interests"[72]. By leave, the latter appeared together as *amici curiae* ("the *amici*"). They supplied a contradictor for the proceedings both in the Full Court and in this Court.

The issues

103 The following issues arise:

(1) *The justiciability issue*: Whether, having regard to the deference observed by courts in relation to proceedings in Parliament, the questions presented in the proceedings are justiciable, so that they may give rise to a judicial determination concerning the validity of things done in Parliament.

(2) *The prorogation issue*: Whether the Repeal Bill and the Amendment Bill lapsed after their alleged passage through Parliament by reason of the

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69 The joint reasons at [15]-[22].

70 *Yougarla v Western Australia* (2001) 207 CLR 344 at 377-378 [89], 385-389 [117]-[127].

71 The joint reasons at [23]-[36].

72 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 226 [100]. Their identities are set out in the joint reasons at [8].

prorogation of the Legislative Council and Legislative Assembly on 9 August 2002, so that, whatever otherwise might have been their legal effect, each Bill had expired and thus has no continuing legal force.

(3) *The implied repeal issue*: Whether s 13 of the 1947 Act was impliedly repealed by s 2(3) of the Constitution Act following the insertion of that sub-section by the *Acts Amendment (Constitution) Act* 1978 (WA) ("the 1978 Act"). If the consequence of the 1978 Act was the implied repeal of s 13 of the 1947 Act, the supposed impediment to the amendment of the provisions of the 1947 Act by simple majority was removed before the passage of the Repeal Bill and the Amendment Bill in 2001. As a result, each of those Bills, upon receiving the Royal Assent, would take effect according to its terms.

(4) *The amend/repeal issue*: Whether, assuming s 13 of the 1947 Act remained in force after the 1978 Act, and was effective to determine the validity of any Bill to "amend" the 1947 Act, the Repeal Bill, by its provision *repealing* that Act in its entirety, would, if it received the Royal Assent, remove the impediment to *amendment* of the 1947 Act. If so, would the Amendment Bill, freed from the asserted requirement of s 13 of the 1947 Act (whether viewed in isolation or in combination with the Repeal Bill), validly substitute a new electoral system for the unequal electoral divisions for which the 1947 Act provided?

(5) *The effectiveness of entrenchment issue*: If it should be necessary to consider the operation of s 13 of the 1947 Act, whether, upon any of the grounds propounded, that section was effective to "entrench" the procedural requirements which it contained, thereby obliging a later Parliament to obey its terms. Alternatively, was s 13 of the 1947 Act effective in 2001, so as to render invalid the Repeal Bill and the Amendment Bill, if those measures, separately or together, were to be characterised as amendments of the 1947 Act?

(6) *The costs issue*: Whether the costs of the *amici*, as the effective contradictor in this Court, should be borne by the applicants.

104 No party to the proceedings contested the justiciability issue. However, it was raised in a detailed submission by an applicant for leave to be heard as an *amicus curiae* whose request to participate was rejected by the Court[73]. The prorogation issue was argued by the *amici*. It was contested by the applicants. On the costs issue, the applicants opposed any order for costs in favour of the *amici*. One potential issue in the proceedings was disclaimed. No attempt was

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73 Mr Jeremy Ludlow. See the reasons of Callinan J at [254].

made to reopen the holding on the constitutional implications decided in *McGinty*.

105 As will appear, the effectiveness of the entrenchment issue, at least in one of its guises, raises for me questions which were not the subject of submissions for the applicants or the *amici*. However, litigants cannot, by concession or agreement, foreclose the duty of a court to decide questions necessary for decision by reference to the correct understanding of the applicable law, particularly the law of the Constitution[74]. My concerns were clearly and repeatedly raised during argument in this Court. It will be necessary to return to them.

The proceedings are justiciable and remedies are available

106 *Deference to parliamentary deliberations*: The detailed consideration by the Full Court of the justiciability of the proceedings, the presentation to this Court by the rejected *amicus curiae* of a substantive written submission on the point and the fact that the issue concerns the jurisdiction of, or exercise of jurisdiction by, the Court, make it desirable to address the justiciability issue. It can be done briefly.

107 In *Egan v Willis*[75], this Court, explicitly or impliedly, rejected a submission on behalf of a State to the effect that the Bill of Rights of 1688[76], as received into Australian law, prohibited courts in Australia from inquiring into, and deciding, the privileges of a State Parliament, in a case otherwise presenting a justiciable controversy. In that case, I pointed out that[77]:

> "[T]he nature of a federal polity … constantly renders the organs of government, federal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical provenance, are not colonial legislatures. … Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament

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74 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[144]; 194 ALR 161 at 199. See also *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1586 [106]; 200 ALR 403 at 430. By reason of its conduct of the proceedings, a party may disentitle itself from invoking the law: *Dovuro Pty Ltd v Wilkins* (2003) 77 ALJR 1706 at 1722 [89]; 201 ALR 139 at 161.

75 (1998) 195 CLR 424.

76 1 Will & Mary Sess 2, c 2, Art 9.

77 (1998) 195 CLR 424 at 493 [133.4].

> must, in the Australian context, be adapted to the entitlement to constitutional review. Federation cultivates the habit of mind which accompanies constitutional superintendence by the courts."

Nevertheless, as between the branches of government in Australia – notably the legislatures of the nation and the courts – there remain constitutional principles of mutual respect and deference. I am careful to observe these[78].

108 *The proceedings are justiciable*: Issues may arise as to justiciability in respect of judicial examination of the deliberative stages of proceedings of a parliament. Such issues may also arise in relation to the remedies available to give effect to judicial decisions[79]. However, neither of these difficulties exists in the present applications. The deliberative proceedings of the State Parliament upon each of the Bills in question, and in each Chamber, have concluded. The terms of s 13 of the 1947 Act expressly address conduct (namely presentation of the Bill to the Governor for Her Majesty's Assent) after the conclusion of that deliberative phase. As well, the language used in s 13 ("shall not be lawful") indicates that the State Parliament envisaged (in the event of a dispute) that resort might be had to a court in order to determine conclusively the extent of any lawfulness or otherwise of the conduct proposed[80]. No injunctive or other remedies were sought against Parliament or any of its officers or employees. Instead, Mr Marquet, as Clerk of the State Parliaments, requested the courts to determine two questions of law.

109 In Australia, things have come a long way since *Stockdale v Hansard*[81]. In that case it was suggested that the determination by the courts of questions such as those presented by Mr Marquet amounted to an attempted usurpation of power by the courts at the expense of Parliament. Now, to the contrary, representatives of opposing political viewpoints in and out of Parliament, and the State itself as a constitutional entity of the Commonwealth, come to this Court asking that a point be authoritatively decided. The only party with a possible

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78 *Sue v Hill* (1999) 199 CLR 462 at 557 [247]-[248]; *Re Reid; Ex parte Bienstein* (2001) 182 ALR 473 at 478-479 [23]-[27]; cf Bamforth, "Parliamentary Sovereignty and the Human Rights Act 1998", (1998) *Public Law* 572 at 579-580.

79 cf *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203 at 204-205; *Clayton v Heffron* (1960) 105 CLR 214 at 265 per Fullagar J; *McDonald v Cain* [1953] VLR 411 at 418, 433; *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 193.

80 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 209 [17], 210 [21], 223-224 [84], 242-243 [160].

81 (1839) 9 Ad & E 1 [112 ER 1112].

interest to argue non-justiciability, the Attorney-General, quite properly declined to do so[82].

110 It follows that, like the Full Court, I entertain no doubt as to the justiciability of the proceedings. Similarly, I have no doubt that it was proper for the Full Court, as it is for this Court, to exercise its power to decide the issues tendered, and to provide declaratory relief[83]. Upon the matters of principle presented by the issue of justiciability and relief, my views remain as expressed in *Eastgate v Rozzoli*[84].

Prorogation did not extinguish the Bills

111 *Prorogation and English practice*: The prorogation point arose as a proposition of the *amici*. It was in the nature of a contention, supporting the orders of the Full Court upon a ground not relied upon by that court.

112 I leave aside the procedural peculiarity of a non-party raising such a point and go straight to its substance. Although the argument was not advanced in the Full Court (the prorogation occurred after completion of the hearing before the Full Court), as this Court heard full submissions about it and as, if made good, it is a complete answer to the applications, it should be decided. No suggestion was made that the examination of the issue of prorogation presented new or different questions of justiciability beyond those that I have mentioned. Nor was it claimed that the issue raised any problems of procedural fairness that would require its rejection.

113 The evidentiary footing for the submission was the uncontested fact that, following the asserted passage of the Repeal Bill and the Amendment Bill through both Chambers of Parliament, the Governor of Western Australia, on 9 August 2002, prorogued the Legislative Council and Legislative Assembly. He did this pursuant to powers granted to him by the Constitution Act[85]. The *amici* submitted that the result of such prorogation, for the validity of Bills awaiting the Royal Assent, depended upon the proper construction of the provision empowering the Governor "to prorogue" the Houses of Parliament. They argued

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82 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 230 [120]. Contrast the position that arose in the case of the Governor of St Kitts/Nevis: Phillips, *Commonwealth Caribbean Constitutional Law*, (2002) at 331.

83 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 210 [23], 223-224 [84], 244 [165]-[169], 270 [296].

84 (1990) 20 NSWLR 188 at 193.

85 s 3.

that such power was to be understood in the light of the common law of parliaments concerning the meaning of the Royal act of "prorogation".

114 In support of their contention that prorogation had – however unwittingly – caused the Repeal Bill and the Amendment Bill to lapse, the *amici* invoked observations about the effect of prorogation made by Gibbs J[86] and Stephen J[87] in *Western Australia v The Commonwealth*[88]. The latter, by reference to English texts and commentaries, concluded that prorogation was, in effect, the termination of a parliament. It amounted to "wiping clean the parliamentary slate". Because the Queen is a constituent part of the State Parliament, the *amici* submitted that the English practice, and the applicable common law of parliaments, was thereby incorporated into the statutory act of "prorogation" envisaged by the Constitution Act. In consequence, save in relation to any Bills that were lawfully reserved for the Queen's pleasure (in respect of which the *amici* were prepared to allow an exception), and subject to any amendment of the practice by statute, standing rules or orders, prorogation, as such, terminated the life of any Bill emanating from the previous session of Parliament when that Bill had not earlier received the Royal Assent.

115 *Prorogation in colonies and dominions*: It must be acknowledged that the references to English practice, cited by the *amici*, lend a measure of support to their submission[89]. However, Australian practice[90] and, it seems, practice in other countries of the Commonwealth of Nations that have generally followed English parliamentary traditions[91], have not observed the same strictness with respect to the rule that prorogation has the effect of extinguishing Bills that have not been signed into law.

116 The reasons for the departure from English practice in the legislatures of former British colonies and in the dominions and independent nations of the Commonwealth are not hard to find. Given the huge distances of the Empire,

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86 (1975) 134 CLR 201 at 238.

87 (1975) 134 CLR 201 at 254.

88 (1975) 134 CLR 201.

89 Limon and McKay (eds), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed (1997) at 233-234.

90 Selway, *The Constitution of South Australia*, (1997) at 90 [7.2.2].

91 *Purushothaman v State of Kerala* [1962] AIR (SC) 694 at 698-700 [4]-[9]. See also Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada*, 3rd ed (1903) at 193-197.

later the Commonwealth of Nations, the personal attendance of the Monarch (as was once traditional in England) or of the Monarch's representative under commission[92], at the conclusion of each parliamentary session, to give assent to outstanding Bills and so wipe "clean the parliamentary slate", was not so feasible. Moreover, the necessity, in specified cases, to reserve certain Bills for the assent of the Monarch personally, contradicted the very notion of legal extinguishment upon prorogation. The time taken to send such a Bill to Whitehall and to return it with the indication of the Monarch's pleasure, would typically require the survival of the Bill over one or more prorogations, even possibly a dissolution of the legislature, if the procedure for reservation were to have utility. In consequence of this point of difference (and perhaps the development of different parliamentary traditions) a large number of Bills in Australia, specifically in Western Australia, have been given the Royal Assent after prorogation, although the passage through the Chambers of Parliament was completed before it[93].

117 There are other features of Australian parliamentary practice that make it unsuitable to incorporate the United Kingdom practice as a rule of the Australian common law of parliaments. These include the provisions for a referendum to be held upon certain proposed laws, both under federal[94] and State[95] constitutional provisions. It would be destructive of the operation of such provisions (involving distinctive institutional procedures not so far incorporated in the constitutional law of the United Kingdom) if a Bill for such a proposed law were to be treated as extinguished by an intervening prorogation. That has not been the Australian practice. As well, in the Federal Parliament, the normal continuation of the Senate committees, notwithstanding prorogation of the Parliament in anticipation

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92 Pursuant to the *Royal Assent Act* 1967 (UK): see Bennion, *Statutory Interpretation – A Code*, 4th ed (2002) at 175-176.

93 Many Western Australian Acts were assented to after prorogation, including, for example, *Trading-stamps Abolition Act* 1902 (WA); *Marine Insurance Act* 1907 (WA); *Redistribution of Seats Act* 1929 (WA); *Loan Act* 1938 (WA); *Superannuation and Family Benefits Act* 1938 (WA); *Marketing of Eggs Act* 1938 (WA); *Companies Act* 1943 (WA); *Criminal Injuries Compensation Act* 1985 (WA); *Disability Services Act* 1992 (WA).

94 Constitution, s 128. All amendments to the federal Constitution, other than the *Constitution Alteration (Aboriginals)* 1967 (Cth), were assented to after the prorogation of the session of the Federal Parliament in which the Bill was passed and, in some cases, after the dissolution of that Parliament. See Australia, House of Representatives, Standing and Sessional Orders, O 264.

95 eg the Constitution Act, ss 73(2)(g), 73(3)-(6); cf *Constitution Act* 1902 (NSW), s 7A ("Referendum for Bills with respect to Legislative Council and certain other matters").

of dissolution of the House of Representatives, is another reason why the Australian practice has developed along lines different from that observed at Westminster[96].

118 *Conclusion – Bills not extinguished*: It follows from this distinct history of prorogation and its effects, born initially of the different necessities and traditions of the colonies and dominions of the Crown, that it should not be accepted that prorogation of the Chambers of Parliament in Western Australia "entirely put an end to" all Bills "as if they had never been"[97]. By replacing the Royal prerogative of prorogation with local statutory provisions providing for that form of interruption to parliamentary proceedings, it must be accepted that the local, and not the English, practice is referred to where reference is made in Australian legislation to this parliamentary notion. It would be productive of great mischief, uncertainty and inconvenience if it were otherwise. Much Australian legislation assented to after prorogation (not least in Western Australia) could be revealed as invalid. This is as undesirable as it is unnecessary. Because in other respects, I agree with what is said on the prorogation issue in other reasons[98], the contentions of the *amici* on that issue should be rejected.

The implied repeal argument was rightly rejected

119 *The argument of implied repeal of s 13*: The implied repeal issue arises out of amendments effected to the Constitution Act by the 1978 Act by which s 2(3) was inserted. That sub-section relevantly provides:

> "Every Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73, be presented to the Governor for assent by or in the name of the Queen".

120 The applicants submitted that this sub-section could not coexist with s 13 of the 1947 Act because it was impossible to comply with both provisions. They laid emphasis upon the imperative language of s 2(3) ("*shall* … be presented"); its reference to "*[e]very* Bill"; and its explicit identification of one exceptional case (namely s 73 of the Constitution Act), not presently material. They also referred to the failure of s 2(3) of the Constitution Act explicitly to save s 13 of

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96 Evans (ed), *Odgers' Australian Senate Practice*, 10th ed (2001) at 517-519; Harris (ed), *House of Representatives Practice*, 4th ed (2001) at 226-227.

97 *Western Australia v The Commonwealth* (1975) 134 CLR 201 at 238 per Gibbs J citing Hatsell, *Precedents of Proceedings in the House of Commons*, (1818), vol 2 at 335-336.

98 The joint reasons at [81]-[85]; the reasons of Callinan J at [295]-[302].

the 1947 Act. And they relied on the generality of the language of the sub-section and the fact that it was incorporated in the principal constitutional statute of the State, ostensibly as a provision of universal operation. In such circumstances, the applicants argued that effect should be given to the statute of higher generality, enacted later in time, to the extent of the ensuing inconsistency[99]. This resulted, so the applicants submitted, in the implied repeal of the particular provision of s 13, enacted earlier.

121 In support of this construction, the applicants invoked the treatment of direct repugnancy contained in the joint reasons of this Court in *Yougarla v Western Australia*[100]. Although in 1982, in *Western Australia v Wilsmore*[101], reference was made to s 13 of the 1947 Act, without any hint of doubt as to its validity, the applicants pointed out that no issue had arisen in that case concerning the validity of that section or the question of whether it had been impliedly repealed by the 1978 amendment to the Constitution Act.

122 *Conclusion – no such repeal*: The applicants' arguments on this issue are unconvincing. As was pointed out in the Full Court[102], the failure in the 1978 amendment of the Constitution Act to make explicit reference to s 13 of the 1947 Act was readily explained by the fact that s 13 was not part of the Constitution Act. It was contained in a separate law dealing with a specific and particular subject (electoral districts). Although obviously relevant to the operation of the Constitution Act, the 1947 Act was addressed to a distinct subject with its own fully self-contained statutory *locus*. The provisions of s 2(3), inserted in the Constitution Act in 1978, did no more than to give legislative force to a general and long-standing constitutional practice governing the presentation of Bills to the Governor for the Royal Assent once they had passed both Houses of Parliament[103]. Neither in its terms nor in the speeches explaining its purpose was there any suggestion that the 1978 amendment had, as an object, the repeal of s 13 of the 1947 Act.

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99 *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 624-628; *Shergold v Tanner* (2002) 209 CLR 126 at 136-137 [34]-[35].

100 (2001) 207 CLR 344 at 354-355 [17].

101 (1982) 149 CLR 79 at 100.

102 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 272 [301].

103 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 272 [302].

123 Moreover, as is demonstrated in other reasons[104], where s 2(3) of the Constitution Act refers to "passage through" the Houses of Parliament, it obviously means "passage" complying with any applicable requirements of law. If, therefore, the particular requirements of s 13 of the 1947 Act applied to the passage of the Repeal Bill and the Amendment Bill (and if such requirements were valid and binding, and insusceptible to change by the means adopted in those Bills) there was no inconsistency between s 13 of the 1947 Act and s 2(3) of the amended Constitution Act. Each remained effective to do its own separate work. Hence, there was no implied repeal of s 13 of the 1947 Act. The implied repeal issue was rightly determined by the Full Court against the applicants.

"Repeal" of s 13 of the 1947 Act was not an "amendment"

124 *The repeal/amendment issue*: I now reach one of the two points determinative of these applications. It will be remembered that s 13 of the 1947 Act forbade the presentation to the Governor of a Bill of a described character. In terms of s 13, the prohibition applied only where the Bill was one "to amend this Act", that is, the 1947 Act. The Repeal Bill was not described in its short or long titles as one to "amend" the 1947 Act. This was so although the annual statutes of the State, as of all parts of the Commonwealth, are full of legislation described by reference to their amending purpose and effect. Thus, the Amendment Bill is so described. It is, in form and substance, a Bill to amend the Electoral Act. To the contrary, the Repeal Bill, in its operative clause addressed to the 1947 Act, is true to its short title. Clause 3 of that Bill simply provides: "The *Electoral Distribution Act 1947* is repealed."

125 The applicants argued that, both in form and in substance, the Repeal Bill was rightly so described. In respect of the 1947 Act, it performed a distinct, specific, well-known and differentiated legal function of "repealing" earlier legislation *in toto* – not "amending" it. On this footing, the argument proceeded, the Repeal Bill was not governed by s 13 of the 1947 Act. The Full Court divided on this issue. The majority rejected the suggested distinction[105]. The dissenting judge accepted it[106].

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104 The joint reasons at [61]. See also *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 217 [52], 218 [60]-[62], 225 [93], 254 [226]-[227], 255 [230]-[232]; cf *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 [51], 618 [63], 646 [152]; *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 470 [75]-[77]; 195 ALR 24 at 45-46.

105 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 216 [47], 225 [91], 247 [183], 249 [198], 249-251 [202]-[206].

106 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 288 [370] per Wheeler J.

126 Although repeal and amendment do not, in ordinary parlance, or in normal parliamentary practice, mean exactly the same thing, there is an overlap between the two notions. Differentiation between them involves "a matter of substance and not one of form only"[107]. As Jordan CJ put it in *Beaumont v Yeomans*[108]:

> "One Act may purport to amend another by repealing *part* of it. On the other hand, an amendment may be effected either by the addition to a section of a particular phrase, or by the repeal of the *section* and the substitution of the same words with the phrase added. … And where a *provision* of an Act is repealed and re-enacted in a form which enlarges its scope, this has been construed as amounting in substance to an amendment, because the new provision has been regarded as intended to be retrospective so far as it is mere repetition, and prospective so far as it is new: *Ex parte Todd*[109]."

127 These remarks, concerning the overlap of the notions of "repeal" and "amendment", are stated in the context of a "repeal" of "part" of an Act, or of a "phrase", "section" or "provision" – not "repeal" of the entire Act. The same differentiation may be observed in judicial *dicta* in *Mathieson v Burton*[110] and in *Kartinyeri v Commonwealth*[111]. I remain of the view that I expressed in the last-mentioned case[112]:

> "Whether a repeal or amendment is made is … not dependent upon the use of a particular legislative formula any more than the constitutionality of a statute is decided by the 'badge' of the verbal description which the statute wears. However, care must be taken in the use of observations made by the Court as to the character of a law as a 'repeal' or 'amendment' having regard to the different contexts in which the question may be raised. Absolute statements should be avoided for they are likely to produce error."

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107 *Beaumont v Yeomans* (1934) 34 SR (NSW) 562 at 569.

108 (1934) 34 SR (NSW) 562 at 569-570 (emphasis added).

109 *Ex parte Todd; In re Ashcroft* (1887) 19 QBD 186.

110 (1971) 124 CLR 1 at 9-10.

111 (1998) 195 CLR 337 at 353-354 [9], 375 [67].

112 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 421 [174] (footnotes omitted).

128 Approaching the present issue in that way, the task is to find the legal character of the Repeal Bill, whether read with, or separately from, the Amendment Bill. The *amici* argued that the character of the Repeal Bill, in the context, was a Bill to "amend" the 1947 Act, thereby attracting whatever legal limitation s 13 of that Act imposed upon the Bill's passage through the Legislative Council.

129 *Viewing the repeal as an amendment*: The majority in this Court have concluded that the Repeal Bill and the Amendment Bill were attempts to "amend" the 1947 Act[113]. Upon an expansive view of s 13 of the 1947 Act, this is an available construction. By the time problems of statutory (still more constitutional) interpretation reach this Court, it is rare that only one outcome is available.

130 The considerations that have persuaded the majority to their opinion are stated in their reasons. As it seems to me, there are five main arguments supporting the conclusion that the Repeal Bill and the Amendment Bill, separately or together, involve an attempt to "amend" the 1947 Act. These are first, that otherwise the "entrenchment" of the procedure in s 13 is too readily circumvented; secondly, that a long line of cases holds that the notions of "amend" and "repeal" can overlap; thirdly, that the course adopted allows to be done indirectly what could not have been done directly if s 13 were effective as an entrenchment; fourthly, that demanding an absolute majority of both Houses was entirely reasonable for important legislation and effective entrenchment conduced to that end; and, fifthly, that "manner and form" requirements in State Constitutions serve valuable constitutional purposes protective of institutions and minorities, important in a contemporary system of democratic or representative government, and for those reasons should not be read down or defeated but upheld and applied[114].

131 By way of contrast, I do not find persuasive[115] the suggestion that "repeal" of the 1947 Act alone was not feasible because it would leave the State without electoral districts essential to the conduct of an election if the Amendment Bill had been defeated. First, the Amendment Bill was not defeated but purportedly passed by the normal requirement. Secondly, the proposition suggests a limitation on the powers of repeal that has no source in the constitutional law of

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113 The joint reasons at [56]-[57]; the reasons of Callinan J at [274].

114 Lee, "'Manner and Form': An Imbroglio in Victoria", (1992) 15 *University of New South Wales Law Journal* 516; Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?", (1980) 11 *Federal Law Review* 167.

115 The joint reasons at [43]-[45].

the State. Thirdly, legislative majorities quite often force the hand of Opposition parties or of members of different chambers. This, above all, is a subject where the law must be decided in the context of political realities. Nothing concentrates attention to realities so much as the desire of those holding office to be re-elected to Parliament. The notion that the State might have been left without electoral districts is fanciful. In the present context, it can be ignored.

132 *"Amend" does not include repeal*: Notwithstanding the arguments that now prevail in this Court, I have concluded that the requirements attaching to a Bill to "amend" the 1947 Act do not apply, in accordance with s 13, to a Bill such as the Repeal Bill. My reasons are as follows.

133 First, it remains the fundamental task of statutory construction to give meaning to a parliamentary purpose in accordance with the words used in the law in question[116]. Interpretation is a text-based activity[117]. Although the context of a law, or of the subject matter dealt with, may suggest that the interpreter's immediate, or intuitive, response to the words should be reconsidered, the admonition of Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*[118] remains true: "[I]t is not unduly pedantic to begin with the assumption that words mean what they say".

134 The subjective purposes of the legislators who sought to "entrench" the 1947 Act against alteration by way of s 13 are irrelevant. So are extraneous considerations where these conflict with the language by which the law is expressed. Thus, although the word "and" can sometimes be construed, in a particular context, to mean "or", this is not what the word usually means[119]. Normally, it means exactly what it says – a conjunctive concept. Courts have a duty to give effect to that meaning[120]. So here. In a matter of such importance, if Parliament had meant to attach procedural requirements to the total "repeal" of the 1947 Act, it could have said so; but it did not.

135 Secondly, although, in particular contexts, "amend" may include the repeal or replacement of a given provision in legislation, most of the judicial

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116 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518.

117 *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1816 [59]; 201 ALR 271 at 285.

118 (1981) 147 CLR 297 at 304.

119 *Re The Licensing Ordinance* (1968) 13 FLR 143 at 147 per Blackburn J.

120 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1799 [13]; 201 ALR 260 at 263.

discussion explaining such overlap is addressed to partial repeals – as of a phrase, section, provision or division of an Act. The words "amend" and "repeal" are technical words of legal connotation. On the face of things, they import a technical meaning. The total "repeal" of an Act would not normally be described as an "amendment" of that Act.

136 In the English language, and in legal usage, amendment typically connotes alteration by a due and formal procedure; changing something, particularly for the better; removing or correcting faults in, or rectifying, something[121]. Inherent in all of these ideas (as in the usual parliamentary reference to "amend") is the continued existence and operation of that which is "amended". By definition, where that which pre-existed is "repealed" in totality, there is nothing substantive left to be "amended". A close examination of judicial *dicta* on the subject suggests that, at least usually, references to "repeal", where that word is said to overlap with an "amendment", are to a "repeal" of part only of the pre-existing law. Repeal of an entire Act (which is in issue here) does not normally fit comfortably with the concept of "amendment".

137 Thirdly, we do not come to the provisions of s 13 of the 1947 Act as to a blank page. The section must be understood and interpreted against the background of earlier provisions of the law of Western Australia, dealing with the "entrenchment" of constitutional requirements by "manner and form" provisions designed to oblige observance of particular procedures and, specifically, "entrenchment" of laws governing electoral districts. Far from assisting the *amici's* argument (as the majority believe), I regard the constitutional and legislative history as strongly supporting the applicants.

138 When s 13 of the 1947 Act is read in its historical context, the legislative selection of the word "amend" takes on an added significance. Thus, in the *Western Australia Constitution Act* 1890 (Imp) ("the Imperial Act") power was conferred on the Parliament of Western Australia to make laws "*altering* or *repealing*" particular provisions. From at least that time, this suggests that a distinction was drawn between mere "alteration" and "repeal". The same differentiation was recognised in the *Interpretation Act* 1898 (WA)[122]. It provided that any Act might be "*altered*, *amended*, or *repealed*" in the same session of Parliament. A provision with that wording was carried over to the *Interpretation Act* 1918 (WA)[123], indicating a distinct parliamentary consciousness of the difference between amendment and repeal.

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121 *The Macquarie Dictionary*, Federation Edition (2001), vol 1 at 57 ("amend").

122 s 4(3).

123 s 44.

139 It was the 1918 version of the *Interpretation Act* of the State that was current at the time the 1947 Act was enacted containing s 13. The 1947 Act did not contain a specific definition of "repeal" or "amend". By the *Interpretation Act* 1984 (WA)[124], the word "amend" was defined for the first time to mean "replace, substitute, in whole or in part, add to or vary, and the doing of any 2 or more such things simultaneously or by the same written law". By the same provision, "repeal" was defined to include "rescind, revoke, cancel, or delete". I would not limit the operation of the 1984 *Interpretation Act* to laws enacted after its enactment, although those who adopted s 13 of the 1947 Act, if they had stopped to consider this point, would have done so in the context of the earlier interpretative provisions. This matters not. In the end, such statutory provisions simply aid the construction of the particular provision read in its own special context.

140 Here, the attempt to "entrench" a parliamentary procedure was made against the background of earlier attempts. Specifically, the Constitution Act[125] referred to the power to "repeal or alter" legislation. In this respect, it mirrored the provision of the Imperial Act and, substantially, the then applicable *Interpretation Act*. In the context, therefore, a clear distinction was drawn between alteration (or amendment) and repeal. The differentiation was not easy to overlook. It would have been open to those who made the earlier laws to use some generic verb (such as "change") to cover all forms of legislative modification (to suggest another neutral word). Instead, successive drafters persisted, in a constitutional context, with differentiation between "alteration" and "repeal". It is absurd to suggest that the drafter of s 13 of the 1947 Act would have been ignorant of these important precedents or that legislators more generally, when considering a provision such as s 13, would not have appreciated (if it had been drawn to notice) the ambit of the more limited term ("amend") in which s 13 was expressed[126].

141 The difference of language adopted in s 13 of the 1947 Act may have been deliberate (as Wheeler J speculated in the Full Court[127]). However that may be, it is not the subjective intentions or expectations of the law-makers that matter. It is the effect of the law that they enact by the language that they adopt. That language confined the imposition of procedural requirements to an attempt to

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124 s 5.

125 s 73(1).

126 The same distinction has been drawn more recently in the *Australia Act* 1986 (Cth), s 15(2) and the *Australia Act* 1986 (UK), s 15(2) ("repeal or amend the Act").

127 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 282 [348].

"amend", not "repeal", the 1947 Act. Against the history of such provisions, on the face of things, the distinction is a real one. It should not be waved aside.

142 In the event of an ambiguous statutory provision, it is necessary, as a general rule, to construe the disputed provision by reference to the whole of the Act as well as to cognate statutes on related subjects. Amongst other things, this assists in identifying the relevant purposes. If statutes form a legislative scheme, consideration of the scheme helps to clarify the meaning of ambiguous terms because the statute can then be viewed as it was intended to operate in the relevant field of regulation. However, such a technique is unsuitable in considering the Bills in this case. The legal context which the Bills would enter when enacted, and the question of whether their *combined* effect involves an amendment or repeal of the principal Act, do not yield answers in these applications. Nor is the form/substance dichotomy of value here. The applications turn on the construction of s 13. The focus must be, as the joint reasons state[128], "whether the *legislation*, on its true construction, distinguishes between those two concepts [of repeal and amend]". Focussing on the combined operation of the Bills, as the Full Court did[129], distracts attention from the interpretative task. The operation of the Bills is not the subject of inquiry; the word "amend" is, used in a constitutional setting. To attribute meaning to that word and to the provision in which it appears, reliance should be placed upon relevant interpretative principles. In this constitutional context, the word "amend" postulates a particular parliamentary procedure. The laws, as adopted, must be measured against the touchstone of that procedure. Approached in this way, the Repeal Bill does not, in its terms or effect, properly answer to a description of a Bill to "amend" the 1947 Act.

143 *Applicable interpretative principles*: The normal approach of this Court to the interpretation of legislation is to endeavour to give effect to the purpose of the written law[130]. This is the approach that I generally favour[131] and not only in the interpretation of legislation[132]. In recent times the former inclination to adopt

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128 The joint reasons at [50] (emphasis added).

129 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 216 [49], 249-250 [202]-[203], 285 [362].

130 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

131 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 77 ALJR 623 at 686 [383]; 195 ALR 609 at 695.

132 *B & B Constructions (Aust) Pty Ltd v Brian A Cheeseman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 234-235; Kirby, "Towards a Grand Theory of

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different rules for particular categories of statutory interpretation has been doubted[133].

144 I am prepared to accept that a purpose behind the drafting of s 13 of the 1947 Act was to "entrench" the procedural requirements there stated, including in the case of "repeal" of the 1947 Act with subsequent amendment of, and re-enactment of provisions in, other laws. In short, I accept that the object of the use of the word "amend" in s 13 probably included prevention of the legislative changes now attempted by the Repeal Bill and the Amendment Bill. In such circumstances, does not the principle of purposive construction (reinforced, in this regard, by legislative requirements to the same effect[134]) oblige this Court to give the meaning to "amend" in s 13 urged by the *amici*? I think not.

145 Statutory construction is not a mechanical task. Where a court's jurisdiction is invoked, it requires judicial analysis and assessment of many factors. In *Rodriguez v United States*[135], the Supreme Court of the United States observed:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."

146 It follows that the identification of the apparent purpose of legislation usually represents a second step in the process of judicial interpretation. The first step is analysis of, and fidelity to, the language in which that purpose is expressed. Depending upon the interaction between language and purpose, it may sometimes be possible, and judicially proper, to adopt an expansive construction so as to overcome an apparent textual difficulty and to help achieve the identified purpose, even to palliate what may appear to be a mistake or defect

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Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95.

133 eg *Steele v Deputy Commissioner of Taxation* (1999) 197 CLR 459 at 477 [52]; *Austin v Commonwealth* (2003) 77 ALJR 491 at 514 [102], 542 [251]; 195 ALR 321 at 352, 390-391; *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1028-1029 [63]-[66]; 197 ALR 297 at 309-310; cf *Deputy Commissioner of Taxation v Chant* (1991) 24 NSWLR 352 at 356-357.

134 *Interpretation Act* 1984 (WA), ss 18 and 19.

135 480 US 522 at 525-526 (1987).

in the legislative expression[136]. However, as I said in *Trust Company of Australia Ltd v Commissioner of State Revenue*[137]:

> "Courts may sometimes perceive, and feel able to overcome, injustices, mistakes and omissions in the written law. But if the text is relevantly clear, and applicable to the case in hand, no court may substitute its own view of what the law *should* be (or perhaps *would* have been if only Parliament had considered the case and foreseen the instance that arose to present a difficulty)."

147 The foundation for this rule, stated in that case, is the consideration that[138]:

> "Obedience to the text of legislative provisions is founded on a critical postulate of democratic governance that is inherent in the Australian Constitution. … [I]t is the first duty of the courts to give effect to a valid legislative purpose where it is expressed in law. The primacy of that obligation derives from the special legitimacy of the written law that may, in turn, be traced to the imputed endorsement of such a law by legislators elected by the people. This means that courts must give effect to the purpose of the lawmaker, ascertained by reference to the language in which that purpose is expressed."

148 In some cases (for example, remedial or protective legislation) courts may still be more inclined to repair apparent defects in the expression of the written law. In other cases, courts will not struggle to expand the operation of the written text beyond its express provisions. Instead, they will adopt a construction that confines the law more precisely to the language used[139]. This course is not adopted by judges to frustrate the purposes of legislation. It is justified by reference to postulated assumptions, attributed to Parliament, defensive of its prerogatives and of the liberties of the people[140].

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136 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [69]; 197 ALR 297 at 311 referring to *Tokyo Mart Pty Ltd v Campbell* (1988) 15 NSWLR 275 at 283.

137 (2003) 77 ALJR 1019 at 1029 [69]; 197 ALR 297 at 311 (footnote omitted).

138 *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

139 *Victims Compensation Fund Corporation v Brown* (2003) 77 ALJR 1797 at 1799 [13], 1804 [33]; 201 ALR 260 at 263, 269.

140 *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 415-416 [30]-[31], 430 [71]-[72]. See also *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 77 ALJR 40 at 59-60

(Footnote continues on next page)

149 In the present case, three interpretative principles are relevant. They reinforce my conclusion that s 13 of the 1947 Act is confined in its operation to the word used, attaching procedural consequences to a Bill "to amend" the 1947 Act and not, as such, one to "repeal" it *in toto*. I will explain each of these principles in turn.

150 *Interpretation and legislative power*: The capacity of colonial and State legislatures in Australia to "entrench" provisions requiring special procedures to be followed for valid law-making became the established doctrine of this Court, at least so far as the "manner and form" requirement of the *Colonial Laws Validity Act* 1865 (Imp) ("the CLVA") was concerned[141]. It is important to note that the provision that included the proviso in s 5 of the CLVA as to "manner and form" was expressed as, and primarily intended to be, a large grant of legislative power. Indeed, it was described as a declaration of colonial independence by the Imperial Parliament[142]. The CLVA enhanced the law-making capacity of the legislatures of the Australian States[143]:

> "[E]very representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature".

151 The proviso as to "manner and form" which then followed did not withdraw this large legislative mandate, extending in the case of the colonial (now State) legislatures in Australia to a constituent power – one to change its own constitution. It was, and was intended to be, a comprehensive grant of power so as to render each legislature "the master of its own household, except in so far as its powers have in special cases been restricted"[144].

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[105]; 192 ALR 561 at 588; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 77 ALJR 1629 at 1642 [78]-[79], 1643 [82]; 201 ALR 1 at 18-19, 20; *Yuill v Corporate Affairs Commission (NSW)* (1990) 20 NSWLR 386 at 403-404.

141 As in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

142 The first use of this expression is attributed to Sir Frederic Rogers in a letter appearing in Marindin (ed), *Letters of Frederic Lord Blachford*, (1896) at 157 noted Swinfen, "The Genesis of the Colonial Laws Validity Act", (1967) *The Juridical Review* 29 at 33.

143 CLVA, s 5.

144 *McCawley v The King* [1920] AC 691 at 714.

152 In this respect, the grant, or confirmation, of legislative power inherited by the State Parliaments of Australia is larger than that enjoyed by the Federal Parliament itself. Without conforming to the amendment requirements of s 128, that legislature does not have power, as such, to alter its own constitution. It is in the context of legislatures enjoying such constituent powers, that the proviso in s 5 of the CLVA must be understood and given effect. It is this consideration that has led to judicial and other observations (with which I agree) insisting that the price extracted for the imposition of a purported "entrenched" provision upon such a parliamentary institution is that, to be effective, it must be done by clear and unambiguous language.

153 In *West Lakes Ltd v South Australia*[145], King CJ referred to this issue as one of "great constitutional importance". In the same case, Zelling J said[146]:

> "Whilst I accept, without deciding, that it is possible to have a section entrenched by a manner and form provision which does not fall within s 5 of [the CLVA], nevertheless, given the general rule that the Acts of one Parliament do not bind its successors, it would require very clear words before a court would find that that was what had happened. It is one thing to find manner and form provisions in a statute affecting the constitution, it is quite another to find Lord Birkenhead's proverbial Dog Act or a provision thereof elevated to constitutional status."

154 Although these words were addressed to the suggested operation, apart from s 5 of the CLVA, of a constituent instrument defining the procedures of a legislature[147], the same words, in my view, apply to the operation of the "manner and form" proviso in the CLVA itself. The point is really self-evident. The powers of a State legislature in Australia are otherwise great. Save for the federal Constitution, they are relevantly uncontrolled. To burden those powers with restrictions, and then to entrench such restrictions, requires "very clear words".

155 Whatever the supposed source of the "entrenchment", the requirement for great care in its formulation, and strict observance of the terms in which it is expressed, is nothing more than the discharge by the courts of their responsibility to uphold, and defend, the "full power to make laws" granted to our colonial forebears in the nineteenth century in representative legislatures throughout the British Empire. The intervening years, federation, and the advance of democratic

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145 (1980) 25 SASR 389 at 396.

146 *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 413.

147 As in *Bribery Commissioner v Ranasinghe* [1965] AC 172 at 198.

governance in the Australian Commonwealth, have made defence of such legislative powers a stronger, not a weaker, imperative.

156 Important principles of constitutional law and public policy sustain the approach that King CJ and Zelling J explained in *West Lakes*. Thus, Professor Carney has demonstrated[148]:

> "One could argue that the expression of the people's will through the deliberations of Parliament as a democratically elected body should not be restricted by earlier Parliaments representing the people of another age or time. This argument asserts that the sovereignty of the people should remain intact and unfettered. The counter argument to this, is that if one accepts the possibility that at some time in the future either the will of the people might become distorted in relation to certain issues or that the parliamentary system itself might be manipulated to disregard the rights of minority groups or the majority of the people even, then the adoption of safeguards to protect a state from such occasional lapses in good government are fully justified … There is no guarantee that this capacity to bind future Parliaments will only be exercised in the general public interest."

157 To similar effect, Professor Hanks observed[149]:

> "[H]ow far should one Parliament be permitted to impose on a future Parliament restrictive procedures, procedures with which the first Parliament was not obliged to comply? Should the courts accept that an elected Parliament, facing a series of contemporary problems, may not deal with those problems in the way which seems appropriate to it, because an earlier Parliament (not faced with those problems but claiming clairvoyance) had decreed that a special and restrictive legislative procedure must be followed by any future Parliament? Are the courts to endorse what is, essentially, a denial by yesterday's legislators that today's legislators lack prudence and sound judgment?"

158 It is unnecessary in these applications to resolve all of the possible disagreements over such questions. However, the cited extracts indicate that the attempted "entrenchment" of laws adopted by an earlier Parliament, purportedly imposing the observance of extraordinary legislative procedures for their alteration, will frequently be controversial. It is not unreasonable, in such

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148 Carney, "An Overview of Manner and Form in Australia", (1989) 5 *Queensland University of Technology Law Journal* 69 at 73.

149 Hanks, *Australian Constitutional Law: Materials and Commentary*, 5th ed (1994) at 146.

circumstances, to demand that those who attempt the "entrenchment" (and hence endeavour to limit the legislative powers of Parliaments in the future) must do so in clear and unambiguous language or fail.

159 I regard this as the approach most consistent with that adopted by this Court in the past to like questions[150]. It is the approach that I would adopt when asked to resolve the ambiguity presented by the limited mention in s 13 of the 1947 Act of the statutory notion of "amendment", without any reference to "repeal" or any of the other more generic terms in which such attempted "entrenchments" have been expressed.

160 *Interpretation favouring civil rights*: A second interpretative principle reinforces the first. It affords an additional reason why the operation of s 13 of the 1947 Act should be confined to "amendments", as stated, and not extended to "repeal" which is not stated.

161 The contrary view, by adopting an expansive interpretation of the word "amend", impedes the passage into law of a proposed law designed to terminate statutory provisions that have the tendency to diminish the effective operation of the system of "representative democracy" or "representative government" as it has developed everywhere else in Australia[151]. Whatever may have been the principle reflected elsewhere and in earlier legislation, the provisions enacted by the 1947 Act no longer express the standard adopted in other parts of the nation.

162 So far as federal elections are concerned, electoral divisions must not be less than 96.5%, nor more than 103.5%, of the average divisional enrolment for the State or Territory at the time[152]. In the States, the principle of equality is also generally expressed in legislation, subject to an allowance not exceeding 10% more or less of the equalised quotient[153]. Exceptionally, a slightly different

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150 eg *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603 at 625; *Western Australia v Wilsmore* (1982) 149 CLR 79.

151 Although the term "representative government" was used in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the term "representative democracy" has been used in many decisions to explain the significance of the Federal Constitution for the effective protection of free speech. In *Roberts v Bass* (2002) 77 ALJR 292 at 296 [12]; 194 ALR 161 at 165, Gleeson CJ referred to "the Constitution's concept of representative democracy".

152 *Commonwealth Electoral Act* 1918 (Cth), s 66(3)(a).

153 *Constitution Act* 1902 (NSW), s 28; *Constitution Act* 1934 (SA), s 77(1) and (2) (definition of "permissible tolerance"); *Electoral Boundaries Commission Act* 1982 (Vic), s 9(2); *Electoral Act* 1992 (Q), s 45(1)(a); *Electoral Act* 1992 (ACT), s 36.

tolerance is occasionally allowed for limited and identified electorates[154]. However, none of these variations approaches the disproportion in the value of the vote which s 13 of the 1947 Act supposedly "entrenches" in the law of Western Australia. In this sense, the 1947 Act diminishes the equality of the vote of each elector in State elections in that State to an extent, and by a means, not now found anywhere else in Australia. And s 13 of the 1947 Act is said to "entrench" this disparity.

163 In *McGinty*, for reasons of text and history, the federal Constitution was held not to provide relief from such diminution of the rights of electors[155]. However, that does not mean that the common law is silent on the approach that is to be taken to statutory interpretation in a case that otherwise diminishes such fundamental rights. On the contrary, this Court has repeatedly[156] and recently[157] held that, without clear legislative provision, fundamental rights will not be abrogated or impaired by general statutory language.

164 Not infrequently, this Court is called upon to resolve ambiguities concerning the meaning of the written law. Construed one way, the law respects and upholds fundamental rights. Construed another, it impinges upon them and diminishes them. In cases of such a kind, this Court, and courts throughout the common law world, usually prefer the construction of the written law that upholds fundamental rights. The reason for this preference has been explained in several ways – by assumptions about parliamentary "intention", and by insistence that those who make laws that diminish the basic or fundamental rights of

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154 *Electoral Act* 1992 (Q), s 45(1)(b); *Legislative Council Electoral Boundaries Act* 1995 (Tas), s 10(2)(a).

155 (1996) 186 CLR 140 at 177-178, 189, 201-202, 216-217, 236-237, 284-285. See also *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1.

156 *Potter v Minahan* (1908) 7 CLR 277 at 304; *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28; *Coco v The Queen* (1994) 179 CLR 427 at 435-438; *Wik Peoples v Queensland* (1996) 187 CLR 1 at 123-124, 155, 185-186, 247-248; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 381 [89].

157 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 328 [121]; *Oates v Attorney-General (Cth)* (2003) 77 ALJR 980 at 987-988 [45]; 197 ALR 105 at 115-116; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 77 ALJR 1629 at 1642-1643 [78]-[83]; 201 ALR 1 at 18-20.

citizens ensure that their purpose is absolutely clear so that they wear any opprobrium (and carry the political accountability) for such diminution[158].

165 A recent illustration of this approach on the part of this Court may be found in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[159]. There, the question was whether a federal statute empowering an agency to investigate corporate affairs had abrogated legal professional privilege. The Court unanimously held that the absence of clear words or of a necessary implication in the legislation sustained an interpretation that avoided the abrogation of an important common law right, privilege or immunity[160]. That principle helped this Court to come to the outcome that it did.

166 It might be said that the entitlement of an elector to vote is not, as such, a fundamental common law right but a privilege dependent upon legislation which is constantly being changed. This is only partly true. A State Electoral Act that purported, on arbitrary or immaterial grounds, to deprive electors of an entitlement to vote would offend a core postulate, or implication, of the federal and State Constitutions. The concept of representative government or representative democracy has been held repeatedly to be a crucial feature of the system of government which the federal Constitution establishes. The States (and in my view the self-governing Territories) are integral parts of the Commonwealth. A tyranny or autocracy could not exist as a constituent polity of the integrated federal nation to which the Constitution gave birth.

167 This being the case, it would be untenable for this Court to agonise about the suggested statutory deprivation of rights to immigrants[161] or to persons accused of crimes[162], or even to corporations facing proceedings for unpaid

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158 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131 per Lord Hoffmann; *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 615 [44]; *Daniels Corporation International Pty Ltd v ACCC* (2002) 77 ALJR 40 at 60 [106]; 192 ALR 561 at 588-589.

159 (2002) 77 ALJR 40; 192 ALR 561. See also *Oates v Attorney-General (Cth)* (2003) 77 ALJR 980 at 987-988 [45]; 197 ALR 105 at 115-116.

160 *Daniels Corporation International Pty Ltd v ACCC* (2002) 77 ALJR 40 at 43 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 49 [43] per McHugh J, 65-66 [132] per Callinan J and 57-58 [93]-[94] of my own reasons; 192 ALR 561 at 565, 573, 596 and 585.

161 *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36 at 93; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 28.

162 *Coco v The Queen* (1994) 179 CLR 427 at 435-438; *Oates v Attorney-General (Cth)* (2003) 77 ALJR 980 at 987-988 [45]; 197 ALR 105 at 115-116.

customs duty[163] or allegedly deprived of confidential legal advice when investigated for statutory offences[164], but to show no concern about legislation purporting to deprive electors of approximately equal value for their votes, cast in State elections. To say the least, a law that diminishes the value of the votes of the majority of citizens in a State because they live in populous metropolitan districts of the State, is as important as one that denigrates rights, privileges and immunities of the kind that have persuaded this Court to adopt an interpretative principle favourable to fundamental civil rights and unfavourable to their diminution.

168 To put it bluntly, it is more important for this Court to adopt an interpretation of the written law that upholds the approximately equal value of civic participation in a representative democracy or representative government (which influences the content of so many other laws) than to ensure that the privileges of a trading corporation are defended when it faces customs prosecutions or trade practices investigations. As a court, we should not be more tender to the civil rights of wealthy inanimate legal persons (important though they may be) than we are to the rights of citizens in a State to enjoy approximate equality in the influence that their votes have in affecting the composition of Parliament, and thus of the Government, in that State. At the very least, where there is ambiguity or doubt in the applicable legislation, this Court, as in the past, should adopt the construction that advances fundamental rights in preference to one that attempts to "entrench" against normal legislative repeal a provision giving effect to the last malapportionment of State electorates in the Commonwealth.

169 By "malapportionment", I refer to the inequalities in the size of electoral districts provided for in s 6 of the 1947 Act[165]. It is inaccurate to suggest that the 1947 Act merely permits a variance of 15% more or less (that is, a total potential variance of 30%) in the number of enrolled electors comprised in any district[166]. In the case of the State, that variance, already much larger than anywhere else in

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163 *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 298-299 [26]-[31], 328 [121]; *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 77 ALJR 1629 at 1642-1643 [78]-[83], 1653 [135]; 201 ALR 1 at 18-20, 34.

164 *Daniels Corporation International Pty Ltd v ACCC* (2002) 77 ALJR 40; 192 ALR 561.

165 See Jaensch, *Election! How and why Australia votes*, (1995) at 69-70; Moon and Sharman, "Western Australia", in Moon and Sharman (eds), *Australian Politics and Government: The Commonwealth, the States and the Territories*, (2003) 183 at 198-203.

166 The joint reasons at [79].

Australia, is multiplied by the added variance derived by dividing the State (as s 6 of the 1947 Act requires) into two areas – a Metropolitan Area of 34 districts and the remaining area (comprising the balance of the State) of 23 districts. This division, which the Electoral Distribution Commissioners appointed by the 1947 Act are obliged by law to observe, exaggerates the specified percentage variance by reference to the allocation of the population to electoral districts. The 1947 Act does not, like other Australian electoral statutes, adopt a general principle of approximately equal electorates with permitted variance at the margins. It enshrines a double formula that ensures inequality – and substantial inequality at that.

170 During argument, it was suggested that, whether the 1947 Act was a "malapportionment" and whether it impinged on the electoral rights and privileges of citizens in the State, were "political", not legal, questions[167]. It is true that they are political in character. But when, by a simple enactment, without referendum of the electors or other formalities, an attempt is made to "entrench" electoral malapportionment against change by a subsequent Parliament, the *political* objectives of such a measure necessarily enlist *legal* means. It is impossible to disentangle completely issues of constitutional law and politics[168]. As Dixon J remarked in *Melbourne Corporation v The Commonwealth*[169]:

> "[I]t has often been said that political rather than legal considerations provide the ground of which the restraint [on federal legislative power] is the consequence. The Constitution is a political instrument. It deals with government and governmental powers. The statement is, therefore, easy to make though it has a specious plausibility. But it is really meaningless. It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling."

So it is also with the laws concerned with the Constitution and elections of a State.

171 In such circumstances, a court should adhere to basic principle. One such principle is the judicial preference, demonstrated over many years and in many contexts, for the interpretation of legislation, federal and State, that advances, and does not diminish, fundamental rights. In the present case, that approach assists

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167 See eg *Attorney-General (WA) v Marquet* [2003] HCATrans 259-260 at 158.

168 cf *Plaintiff S157/2002 v Commonwealth* (2003) 77 ALJR 454 at 475 [108] per Callinan J; 195 ALR 24 at 52-53 quoting R G Menzies.

169 (1947) 74 CLR 31 at 82.

this Court to construe s 13 of the 1947 Act strictly, in accordance with the words used in the section, no more and no less. So approached, the word "amend" does not extend to total "repeal". This Court should not provide a more ample meaning for the word than is required, because to do so has consequences inimical to the equal value of the voting rights of citizens entitled to vote in the State.

172 *Interpretation favouring human rights*: The difference between basic civil rights and fundamental human rights was mentioned in *Daniels Corp*[170]. The issue had to be considered in that case because the appellant there was an artificial person, not a human being entitled, as such, to rights inhering in natural persons. The privilege to participate, by voting, in a system of representative democracy or representative government belongs to human beings. As it is reinforced by the principles of universal human rights, this consideration adds a third interpretative principle that favours a strict approach to the meaning of s 13 of the 1947 Act[171].

173 Australia is a party to the International Covenant on Civil and Political Rights[172] ("ICCPR"). It is also a signatory to the First Optional Protocol to that instrument. By that Protocol, complaints of alleged non-compliance with the principles accepted by the ICCPR may be communicated to the relevant treaty body, the United Nations Human Rights Committee ("HRC").

174 Article 25 of the ICCPR states relevantly (with emphasis added):

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, … through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and *equal* suffrage and shall be held by a secret ballot, guaranteeing the free expression of the will of the electors".

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170 (2002) 77 ALJR 40 at 56 [85]-[86], 59 [102]-[103]; 192 ALR 561 at 583-584, 587-588.

171 *Daniels Corporation International Pty Ltd v ACCC* (2002) 77 ALJR 40 at 59 [103]; 192 ALR 561 at 587-588. See also *Austin v Commonwealth* (2003) 77 ALJR 491 at 542-543 [252]-[254]; 195 ALR 321 at 391.

172 Done at New York on 19 December 1966, 1980 *Australia Treaty Series* 23, entered into force for Australia on 13 November 1980 in accordance with Art 49.

175 The rights expressed in this Article are confined, exceptionally, to "citizens" of a State Party. The purpose of the Article is to provide a broad formulation of the guarantee of democratic accountability to their citizens on the part of the governments of the States Parties[173]. The reference, in the opening words, to the impermissibility of specified distinctions, is a reference to irrelevant considerations causing discrimination as listed in Art 2. This refers to discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The obvious objective of the prohibition is to ensure that such immaterial considerations enjoy no weight in diminishing the universality and equality of the right of citizens to take part in the conduct of public affairs and to vote in elections.

176 In accordance with its procedures, the HRC has issued General Comment 25 on Art 25[174]. That document emphasises that "Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant"[175]. According to General Comment 25, voting processes must be "established by laws that are in accordance with paragraph (b)"[176]. Accountability of the government to citizens is essential. This is no mere formality. In dealing with individual communications, complaining of derogations from the requirements of Art 25 on the part of States Parties, the HRC has been critical of those that have created "enclaves of power" for particular groups sometimes favoured by former governmental regimes, sometimes reinforced by constitutional powers accorded to one legislative chamber to block initiatives adopted by the popularly elected chamber, aimed at removing the entrenched privileges[177].

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173 Nowak, *UN Covenant on Civil and Political Rights*: *CCPR Commentary*, (1993) at 441.

174 CCPR General Comment 25 adopted by the HRC at its 1510th meeting (57th session) on 12 July 1996. See Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (2000) at 496-505.

175 CCPR General Comment 25, par 1.

176 CCPR General Comment 25, par 7.

177 Concluding Comments on Chile, 30 March 1999, CCPR/C/79/Add.104, par 8. See also Franck, "The Emerging Right to Democratic Governance", (1992) 86 *American Journal of International Law* 46 at 63-64; Joseph, "Rights of Political Participation", in Harris and Joseph (eds), *The International Covenant on Civil and Political Rights and United Kingdom Law*, (1995) 535 at 543.

177 In a number of decisions in response to such communications, the HRC has criticised restrictions imposed by States Parties on the free and equal exercise of the right to vote[178]. Whilst accepting that the ICCPR does not oblige any particular electoral system, General Comment 25 insists that "[t]he principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another"[179]. It goes on:

> "The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."

178 An analysis of Art 25 of the ICCPR states, with particular reference to the electoral boundaries within Western Australia upheld by this Court in *McGinty*, that[180]:

> "General Comment 25 indicates such measures are impermissible. Though positive discrimination is permitted in some respects under article 25, the text of General Comment 25 does not seem to permit it in the context of the value of one's vote."

This conclusion appears consistent with the recent approach of the HRC in relation to other States Parties with unequal voting systems, notably Zimbabwe[181].

179 General Comment 25 insists on the integral part played, in making the citizen's right of political participation effective, by the enjoyment by the citizen of "free communication of information and ideas about public and political

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178 eg *Landinelli Silva v Uruguay* (34/78); *Pietraroia v Uruguay* (44/79); Concluding Comments on Hong Kong, 9 November 1995, CCPR/C/79/Add.57, par 19; Concluding Comments on Paraguay, 3 October 1995, CCPR/C/79/Add.48, par 23. See Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (2000) at 502.

179 CCPR General Comment 25, par 21.

180 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (2000) at 504 (footnote omitted).

181 Concluding Comments on Zimbabwe, 6 April 1998, CCPR/C/79/Add.89, par 23.

issues" and also "freedom of association"[182]. By reference to the requirements of the federal Constitution, this Court's decisions in the "free speech" cases have upheld the former principle[183]. Earlier, its decision in *Australian Communist Party v The Commonwealth*[184] upheld the latter against federal legislation incompatible with that right.

180 Although it has been held that no federal constitutional principle applies to the present circumstances[185], it remains the law that this Court will construe ambiguities in Australian legislation so as to avoid serious derogations from the international law of fundamental human rights. That law includes requirements expressed in a treaty freely adopted by Australia in terms of Art 25 of the ICCPR. As Gleeson CJ stated in *Plaintiff S157/2002 v Commonwealth*[186]:

> "[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment[187]. As Lord Hoffmann recently pointed out in the United Kingdom[188], for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or

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182 CCPR General Comment 25, pars 25 and 26. See Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, (2000) at 509-510.

183 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

184 (1951) 83 CLR 1.

185 *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1; *McGinty v Western Australia* (1996) 186 CLR 140.

186 (2003) 77 ALJR 454 at 462 [30]; 195 ALR 24 at 34.

187 *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ.

188 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115 at 131.

> necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'."

The apportionment of electoral districts in Western Australia, given effect by the 1947 Act, appears inconsistent with the jurisprudence of the HRC on the fundamental rights of the citizen to *equal* political participation in a democratic state provided for in the ICCPR to which Australia is a party. Those who think otherwise should familiarise themselves with the findings of the HRC concerning the electoral laws of regimes with which Australia would not normally wish to be compared.

181 Conforming to the approach adopted by this Court in *Mabo v Queensland [No 2]*[189], this Court should therefore prefer a construction of the 1947 Act that avoids an effective derogation from Art 25 of the ICCPR to a construction that would not only give effect to that derogation but would purportedly "entrench" it by imposing requirements for "repeal" of the incompatible laws that do not apply to other legislation. Supposed exceptional requirements that make repeal of the offending law more difficult should be given a strict interpretation. This is so because they would otherwise burden the individual human rights stated in Art 25 of the ICCPR. In the exposition and development of Australian law, *Mabo [No 2]* holds that such rights may assist in the elucidation of the law in cases of ambiguity. Here, that ambiguity derives from the use in s 13 of the 1947 Act of the word "amend". It can either be read broadly or narrowly. The three interpretative principles that I have identified combine to suggest that, in this context, "amend" should be construed narrowly. This, therefore, is the approach that this Court should take.

182 *The supposed flaw answered*: The joint reasons suggest[190] that this third interpretative principle involves a logical difficulty and is self-contradictory. With respect, that opinion betrays a basic misunderstanding about the operation of interpretative principles for construing legislation generally and the use of international human rights norms in particular.

183 The flaw in the majority's reasoning is that it confuses the *subjective* purpose of the legislators who proposed and enacted s 13 of the 1947 Act with the *objective* interpretation of that Act. Let it be accepted that the *subjective* purpose was indeed to frustrate the basic norms of human rights which, even by

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189 (1992) 175 CLR 1 at 42 per Brennan J (with the concurrence of Mason CJ and McHugh J). See also *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 657-658; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 417-418 [166]; cf *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487.

190 The joint reasons at [55].

that time, were emerging in international human rights law[191]. This is irrelevant to a court's task of statutory construction. That task is an *objective* one. It takes into account the norms of basic civil rights recognised by the common law and also fundamental human rights recognised by international law.

184 In many, perhaps most, of the cases in which this Court has insisted upon the interpretation of legislation to conform with basic rights recognised by the common law, it was probably the subjective purpose of the law-maker, so far as the matter was considered, to deprive the person affected of basic rights. Yet this Court has insisted that doing so must be made completely clear. Amongst other things, only in that way will political accountability be assigned where it belongs. The application of international human rights principles is no different. The basic civil rights recognised and upheld by the common law overlap and coincide with the principles of international human rights law. If the law is found wanting by that standard and is not clear and unambiguous, a court will presume a parliamentary purpose to comply with the standard. It is in this way that, from its earliest days, this Court has upheld fundamental values in the law.

185 The present is not a time to weaken in our resolve. On the contrary, the advent of the developed principles of international human rights law, where applicable, should strengthen the Court in its insistence upon compliance by legislation apparently departing from fundamental rights so that such rights are not swept away by oversight or sleight of hand. In our legal system it will usually be possible for the legislature, if it so wishes, to enact clear legislation having the effect proposed. No Bill of Rights will prevent this happening. But at least the deprivation of rights will then be made more clear. Political accountability for the deprivation will have to be accepted.

186 Contrary to the suggestion in the joint reasons[192], the interpretative principles do not confuse the evaluating of desirability and meaning. They neither do so in the consideration of basic common law rights (which is well established), nor of international human rights (which is new and dates in this Court from *Mabo [No 2]*[193]). To suggest otherwise is to turn our back on nearly

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191 Section 13 was enacted in 1947. Article 21(3) of the Universal Declaration of Human Rights was adopted in 1948. It provided, in terms since reflected in Art 25 of the ICCPR: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and *equal* suffrage and shall be held by secret vote or by equivalent free voting procedures." (emphasis added)

192 The joint reasons at [53].

193 (1992) 175 CLR 1 at 42.

a century of the use of this technique of interpretation so far as common law rights are concerned[194]. The discovery of meaning is never a mechanical task. It involves more than the ascertainment of the relevant words and the use of a dictionary. This is especially so where, as here, the question in issue concerns the meaning of words expressing constitutional ideas operating in a context moulded by centuries of history and law and, more recently, by the emergence of notions of fundamental human rights which the law generally protects.

187 *Conclusion – the repeal succeeds*: It follows that the Repeal Bill, once given the Royal Assent, will validly repeal, in its entirety, the 1947 Act. It will be a valid law, because it is a law within the constitutional competence of the Parliament of the State. In so far as the Repeal Bill would affect the constituent powers of that Parliament, it would be within its legislative competence to do so. In so far as s 13 of the 1947 Act purports to provide, and "entrench", a special procedure for a Bill to "amend" the 1947 Act, that procedure did not apply to the Repeal Bill. The better construction of that Bill is that it would not, when presented for the Royal Assent, "amend" the 1947 Act. According to its terms, it would "repeal" that Act, leaving nothing relevant of its operative provisions following assent, specifically nothing in s 13, remaining.

188 This means that the failure of the Repeal Bill, and thereafter of the Amendment Bill, to gain an absolute majority vote of members during passage through the Legislative Council was legally immaterial. Each Bill was duly passed through both Chambers of State Parliament in accordance with law. There is no legal obstacle to the presentation of each Bill, in turn, to the Governor. Specifically, there is no impediment arising from any constitutional requirement for the enactment of the Bills, or either of them, in any "manner and form" required by the Constitution of the State. The applicants are therefore entitled to succeed.

Section 13 was not "entrenched"

189 *Three means of entrenchment*: In light of the foregoing conclusion, it is not essential for me to deal with the challenge to "entrenchment" of s 13 of the 1947 Act. However, as the issue was argued and is legally important, I will deal with it. It affords a second basis to support the validity of the Bills in issue.

190 Most Acts of a legislature, such as the State Parliament, may be amended or repealed in the ordinary way, either expressly or impliedly. No special majority is required. Although the *amici* argued that the binding force of s 13 of the 1947 Act, and its control over the procedures of State Parliament, derived, in part, from s 106 of the federal Constitution, this view has not gained the support

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194 Since at least *Potter v Minahan* (1908) 7 CLR 277 at 304.

of the majority of this Court[195]. It does not appear to be supported by the text of the federal Constitution. There the sole provision expressly entrenching a procedure for the amendment of laws is that relating to the amendment of the federal Constitution itself[196]. Without more, the provisions of s 106 of that Constitution do not supply a power of entrenchment. They simply refer back to the requirements of the State Constitution and thus beg the question to be answered.

191 This leaves the three bases that were argued to support the propounded "entrenchment" of s 13 of the 1947 Act, namely (1) s 5 of the CLVA; (2) s 6 of the *Australia Acts*[197]; and (3) a common law principle that a legislature must conform to any regulation of its own law-making powers.

192 Unless one, or other, of the foregoing bases for "entrenchment" of s 13 of the 1947 Act has the effect desired by the *amici*, none of the earlier discussion really matters. In that event, s 13 is simply a provision of legislation which, like any other, may be repealed, amended, altered or changed by a later Parliament, as it sees fit, ridding itself by ordinary alteration of the incompetent attempt of a predecessor Parliament to impose special procedures or requirements upon it.

193 *Section 5 of the CLVA*: At the time of the enactment of s 13 of the 1947 Act, and thereafter, there is no doubt that s 5 of the CLVA was accepted as applicable to the laws made by the Parliament of Western Australia. Indeed, the CLVA was one of the Imperial statutes, along with others[198], that together formed the Constitution of the State upon the coming into force of the federal Constitution.

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195 *McGinty v Western Australia* (1996) 186 CLR 140 at 172-173 per Brennan CJ, 296-297 per Gummow J; cf *Western Australia v Wilsmore* [1981] WAR 179 at 184.

196 Constitution, s 128.

197 The *Australia Act* 1986 (Cth) and the *Australia Act* 1986 (UK).

198 *Australian Constitutions Act* 1842 (Imp); *Western Australia Constitution Act* 1890 (Imp); and the Acts referred to in *Yougarla v Western Australia* (2001) 207 CLR 344 at 353-354 [14]-[17], 376-377 [87]-[88].

194 The history of the CLVA, growing out of peculiar events in South Australia[199] (and preceded by earlier Imperial legislation[200]), suggests that it was not the purpose of that facultative measure to become an instrument of limiting, even crippling, their powers[201]. It is now too late to correct the judicial decisions that construed the proviso to s 5 as an authority to fetter the constituent and legislative powers of Australia's State Parliaments[202]. However, the absurdity of the postulate that would permit one Parliament, by a vote of a simple majority, to require that no change to its constituent powers might occur without a two-thirds, 80% or 90% or 99% majority to be effective, shows the limits to which the undemocratic potential of s 5 of the CLVA, so construed, could be pushed, at least in legal theory. Obviously, it cannot be so. To suggest the contrary would be inconsistent with the assumptions of the federal Constitution.

195 The capacity of the CLVA to act as a means of imposing on Australia's State Parliaments (and their electors) the dead hand of past political notions and factional interests affords a good reason for restricting the operation of s 5 of the CLVA strictly in accordance with its terms. The proviso to s 5 was expressed to relate solely to "such laws", being "laws respecting the constitution, powers, and procedure of" the "representative legislature" with which the CLVA was concerned. Hence, when s 13 of the 1947 Act became law, the question of its effectiveness as a means of "entrenching" a requirement for a particular majority, depended upon whether the amending Bill was properly classified as one "respecting the constitution, powers, and procedure of such legislature". Repeatedly, the courts made it clear that s 5 of the CLVA had to be read as a whole, the proviso stating a condition which must be fulfilled before the legislature can validly exercise its power to make the kind of laws which are referred to in s 5[203].

196 In 1986, by s 3(1) of the *Australia Acts*, enacted both by the Federal Parliament and the Parliament of the United Kingdom, it was declared that the CLVA was inapplicable "to any law made after the commencement of this Act

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199 Swinfen, "The Genesis of the Colonial Laws Validity Act", (1967) *The Juridical Review* 29; O'Connell and Riordan, *Opinions on Imperial Constitutional Law*, (1971) at 68-73.

200 See the *Colonial Acts Confirmation Act* 1863 (Imp).

201 cf Brennan, "The Privy Council and the Constitution", in Lee and Winterton (eds), *Australian Constitutional Landmarks*, (2003) 312 at 329-330.

202 Keith, *Imperial Unity and the Dominions*, (1916) at 389-390.

203 cf *McCawley v The King* [1920] AC 691 at 704 per Lord Birkenhead LC (a reference to entrenching the *Dog Act*).

by the Parliament of a State". By s 2(2) of the *Australia Acts*, it was enacted that each State Parliament had all the legislative powers that the United Kingdom Parliament "might have exercised before the commencement of this Act for the peace, order and good government of that State". Neither *Australia Act* purported to repeal the CLVA in its application to laws of the State enacted *before* 1986, including therefore the 1947 Act, with the special provision of s 13. In so far as the 1947 Act is within the terms of the proviso in s 5 of the CLVA, I will assume that the CLVA continues to have effect according to its terms.

197 This leaves the question whether, properly characterised, s 13 of the 1947 Act is a law respecting "the constitution, powers, and procedure" of the State Parliament. In this context, the word "constitution", in my view, is concerned with fundamental provisions affecting the design and institutional composition of the legislature in question. What is involved is the framework and basic structure of the legislature, as such. It addresses questions such as whether one of the Houses of Parliament might be abolished – a change of "constitution" that occurred in Queensland and has since been attempted in other States[204]. The word is not concerned with matters of detail such as individual membership of a parliamentary chamber or elections.

198 The true character of the 1947 Act is that of a law about electoral boundaries in the State. Such boundaries are fixed by administrative decisions undertaken by the Electoral Distribution Commissioners. Laws on such a matter are not properly characterised as respecting the "constitution, powers, and procedure" of Parliament[205]. To assign such a character to the 1947 Act would be to permit the provisions of s 13 to distort the proper description and classification of that Act. For the purpose of the application of a provision such as s 5 of the CLVA, that would be to invite error.

199 For like reasons, the fact that s 13 of the 1947 Act itself relates to a procedure of the legislature of the State, does not justify characterisation of the 1947 Act as one for that purpose. Were it otherwise, every time an attempt was made to impose a particular procedure upon a State legislature, by the incorporation of a "manner and form" provision in a purported entrenchment, this would have achieved a self-fulfilling outcome. That cannot have been the meaning and effect of the proviso to s 5 of the CLVA. That section, properly understood, called forth a characterisation of the entirety of the law in question. If, otherwise, that law was not one "respecting the constitution, powers, and procedure of such legislature" the inclusion in it of a provision such as s 13 could

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204 As in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and *Clayton v Heffron* (1960) 105 CLR 214.

205 cf *Sabally and N'Jie v HM Attorney-General* [1965] 1 QB 273 at 297.

not stamp such a character on the law. The contrary view would allow any State law to be entrenched by the simple addition of a provision like s 13, even the proverbial *Dog Act*, mentioned in *McCawley v The King*[206].

200 There are good reasons of principle for reading provisions such as s 5 of the CLVA in this way. The entrenchment, by s 13 of the 1947 Act, of a requirement for an absolute majority, may seem innocent enough. However, the principle at stake is very large. If given a wide application, it would be inimical to the basic postulates of representative democracy and representative government. The supposed power of entrenchment must be tested by other possibilities of extreme and undesirable impositions upon a representative legislature of a State of Australia. Whilst not denying the possibility of entrenchment, as such, the wisdom of restricting the effective imposition of such outcomes to laws of a very limited class is borne out both by the text of the CLVA and by the general postulate of democratic accountability that underpins all Australia's constitutional arrangements[207].

201 It follows that, so far as the CLVA still has constitutional application to a law of the Parliament of Western Australia enacted before 1986 – and specifically to the 1947 Act – the powers of "entrenchment" afforded by the proviso to s 5 of the CLVA did not extend to the entrenchment of s 13. Subject to what is next said, that section was therefore susceptible, as any other "unentrenched" law, to change by a later Act of State Parliament enacted in the ordinary way. It was not rendered immune from such alteration by the provisions of the CLVA operating with s 13 of the 1947 Act. On that footing, it would matter not whether the Repeal Bill was a Bill to "amend" the 1947 Act. It could be presented to the Governor in due time whatever its character in that respect because, so far as s 5 of the CLVA was concerned, s 13 of the 1947 Act was not "entrenched". It could be amended or repealed by a simple vote.

202 *Section 6 of the Australia Acts*: In the Full Court, the view was adopted that the only possible source for the binding effect of s 13 of the 1947 Act was s 6 of the *Australia Acts*[208]. Generally speaking, the applicants and the governmental interveners (other than the *amici* who drew on additional sources) supported this proposition. Although I fully understand the nationalist purposes

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206 [1920] AC 691 at 704.

207 cf Campbell, "Incorporation through Interpretation", in Campbell, Ewing and Tomkins (eds), *Sceptical Essays on Human Rights*, (2001) 79.

208 *Marquet v Attorney-General (WA)* (2002) 26 WAR 201 at 219 [65], 257-258 [245], 260 [251]-[252].

of the several *Australia Acts*, I am unconvinced of their constitutional validity in the respect in question here[209].

203 As to the version of the *Australia Act* enacted by the Parliament of the United Kingdom of Great Britain and Northern Ireland[210], I deny the right of that Parliament in 1986 (even at the request and by the consent of the constituent Parliaments of Australia[211]) to enact any law affecting in the slightest way the constitutional arrangements of this independent nation[212]. The notion that, in 1986, Australia was dependent in the slightest upon, or subject to, the legislative power of the United Kingdom Parliament for its constitutional destiny is one that I regard as fundamentally erroneous both as a matter of constitutional law and of political fact. Indeed, I regard it as absurd. Despite repeated challenges by me in these proceedings[213], no arguments were advanced to defend this last purported Imperial gesture. Mention of the United Kingdom Act in the joint reasons[214] appears to be descriptive not normative. That Act was something done, doubtless with bemusement by the British authorities, at the request of their Australian counterparts. Unfortunately, the latter remembered their legal studies decades earlier but failed to notice the intervening shift in the accepted foundation of sovereignty over Australia's constitutional law. Sovereignty in this country belongs to the Australian people as electors. It belongs to no-one else, certainly not to the Government and Parliament of the United Kingdom elected

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209 Different considerations affect the validity of the *Australia Act* 1986 (UK) in so far as it provides for the termination of appeals from State courts in Australia to the Privy Council – the provision of that facility being arguably a proper matter of United Kingdom law.

210 That Act is described in its long title as one "to give effect to a request by the Parliament *and Government* of the Commonwealth of Australia". In the preamble to the Act it is stated that such request and consent was made "with the concurrence of the States of Australia". No reference is made to the assent or concurrence of the Australian people (as electors). The Act is purely intergovernmental and interparliamentary.

211 Purportedly pursuant to the *Statute of Westminster* 1931 (UK): see *Australia (Request and Consent) Act* 1985 (Cth).

212 cf *Sue v Hill* (1999) 199 CLR 462 at 487 [48]-[49], 524-525 [161]-[163]; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 523-524 [113]; *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 400-401 [7], 441-443 [151]-[153].

213 *Attorney-General (WA) v Marquet* [2003] HCATrans 259-260 at 4, 52-53, 84-85. See also at 127-128, 144, 147.

214 The joint reasons at [68]-[69].

in the House of Commons from the people of those islands and not elected at all in the House of Lords.

204 It was then submitted[215] that the true source of the constitutional validity of the *Australia Acts*, at least of the federal Act, was the legislative power given by the Constitution to the Federal Parliament to enact federal statutes as an "exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia"[216]. (I pause to observe that, if this constitutional head of power was available, it was curious indeed that it was considered necessary to bother with an enactment by the United Kingdom Parliament.) In favour of giving s 51(xxxviii) a wide meaning is the consideration mentioned by Dawson J in *Polyukhovich v The Commonwealth*[217] that "[a]n interpretation of the Constitution which denies the completeness of Australian legislative power is unacceptable in terms of constitutional theory and practice".

205 The difficulty with this source of legislative power is immediately apparent. Section 51 of the Constitution (and thus all the legislative powers therein provided) is expressed to be "subject to this Constitution". That important phrase subjects all federal legislation to the fundamental postulates of the Constitution. These include the provisions of Ch III, dealing with the Judicature. But they also include the provisions of Ch V with respect to the States and the requirements of s 128 concerning any alteration of the Constitution. Whatever difficulties might exist for amendment of the "covering clauses" or preamble to the Constitution, no such difficulty arises for the amendment of ss 106 and 107 which are part of the body of the constitutional text and subject, as such, to s 128[218].

206 The last-mentioned provision reserves to the Australian people, as electors of the Commonwealth, the power to make formal changes affecting the basic law of the nation. Any change to the basic constitutional powers of the Parliaments

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215 *Attorney-General (WA) v Marquet* [2003] HCATrans 259-260 at 4, 52-53, 85-86.

216 Constitution, s 51(xxxviii). This power has been described as holding "the dubious distinction of being one of the most obscure and inscrutable provisions of the Constitution Act": Craven, *Secession: The Ultimate States Right*, (1986) at 176.

217 (1991) 172 CLR 501 at 638. See also *McGinty v Western Australia* (1996) 186 CLR 140 at 230 per McHugh J.

218 Gageler and Leeming, "An Australian Republic: Is a Referendum Enough?", (1996) 7 *Public Law Review* 143 at 148-149.

of the States of Australia, and to the Constitution of each State, limiting or controlling the constituent powers of those legislatures (as the *Australia Act* 1986 (Cth) purports to introduce) amounts to an attempt at a formal alteration to ss 106 and 107 of the Constitution. As such, it can only be effected if it is passed in accordance with s 128 of the federal Constitution. Otherwise, any such purported imposition of new limitations by federal law (or by the laws of other States) is invalid and ineffective. In accordance with s 106 of the federal Constitution, the Constitution of each State would remain as it was in 1901 until altered "in accordance with the Constitution of the State", not as purportedly altered by a federal Act, such as the *Australia Act* 1986 (Cth).

207 However desirable particular provisions of the *Australia Act* 1986 (Cth) may seem to be, it is a statute of one constituent part of the Commonwealth purporting to alter the Constitutions of other constituent parts of the Commonwealth made without the one essential and undoubted "entrenched" requirement for such alterations, namely the participation of the electors of the Commonwealth in an amendment approved by them in accordance with s 128.

208 Convenience may ultimately overwhelm these legal and logical difficulties. The "march of history" may pass by my concerns[219]. The passage of time may accord constitutional legitimacy and respectability to what has happened. Constitutional law is often dragged by the chariot of political realities, at the end of a long chain. The legislative and governmental unanimity, and the generally advantageous nature of the purported changes in the *Australia Acts*, may reward those measures with perceived effectiveness that becomes unquestioned law with the passing years. However, in case a similar attempt is made in the future to circumvent s 128 of the Constitution in such a way, by intergovernmental agreement and legislation without the participation of the people of Australia as electors, I lift my voice in protest[220].

209 In the view that I take, nothing in s 6 of the *Australia Acts* or either of them (nor the *Australia Acts (Request) Act* 1985 of each State) validly authorised the imposition on a Parliament of a State by federal or foreign law of a restriction not otherwise existing at the time of the federal Constitution concerning the power of the Parliament of that State to enact laws respecting the "constitution, powers or procedure of the Parliament of the State". On this basis, the supposed foundation in s 6 of the *Australia Act*, whether of the United Kingdom or of the Federal Parliament, for the effectiveness of s 13 of the 1947 Act, is unavailing. Subject to what follows, deprived of the support of s 6 of the *Australia Acts*, the

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219 *Bonser v La Macchia* (1969) 122 CLR 177 at 223 per Windeyer J.

220 Lindell and Rose, "A Response to Gageler and Leeming: 'An Australian Republic: Is a Referendum Enough?'", (1996) 7 *Public Law Review* 155 at 156-157.

supposed new source for the binding force of s 13 of the 1947 Act, as an entrenchment of the procedure there provided, is knocked away. It has no legal effect as such. It presents no obstacle to the presentation of the Repeal Bill and the Amendment Bill, in that order, to the Governor for the Royal Assent that will bring those measures into law.

210 The joint reasons complain[221] that the parties, interveners and *amici* did not challenge the validity of the *Australia Acts*. But that has been the problem – that governmental and political parties have not contested the validity of that legislation. They represent the very class who devised and enacted it. The constitutional arrangements of this country do not belong to them but to the people as electors for whom this Court stands guardian. It is not for parties, interveners or *amici*, by their agreements or silence, to oblige this Court to misapply the law – least of all constitutional law, concerned as it is with the fundamentals of government[222]. The question of validity was repeatedly raised by me during argument in these applications, as it has been in other cases. Justices of this Court owe a higher duty to the Constitution and the law. They are not hostages to the arguments of the parties. Nor are they mere arbitrators of the disputes that parties choose to define and propound.

211 *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*[223], to which the joint reasons refer[224], gives no support for the scheme evident in the *Australia Acts*. That was a case concerning the *Coastal Waters (State Powers) Act* 1980 (Cth) and related legislation. The "Offshore Constitutional Settlement" did not involve United Kingdom legislation. Nor was the *Port MacDonnell* decision concerned, as such, with the constituent power of a State Parliament. Neither did the legislation in question purport to have the effect of amending the federal Constitution (ss 106 and 107) or to impose limits or controls on the powers of those Parliaments as the *Australia Acts* do. The case does not, therefore, touch the concerns that I have raised. Still less does it answer those concerns. They stand unanswered.

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221 The joint reasons at [69].

222 *Roberts v Bass* (2002) 77 ALJR 292 at 320-321 [143]-[144]; 194 ALR 161 at 199; *British American Tobacco Australia Ltd v Western Australia* (2003) 77 ALJR 1566 at 1586 [106]; 200 ALR 403 at 430; *Australian Communication Exchange Ltd v Deputy Commissioner of Taxation* (2003) 77 ALJR 1806 at 1815 [51]; 201 ALR 271 at 283.

223 (1989) 168 CLR 340.

224 The joint reasons at [70].

212 Even if (contrary to my view) s 6 of the *Australia Acts* were valid, it is, in relevant respects, no more than a mirror image of s 5 of the CLVA. The only source of the purported power of "entrenchment" under it is with respect to a law "made after the commencement of this Act [1986] by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State". For reasons already given, the Bills of 2001 fell outside that description.

213 If (also contrary to my view) the Repeal Bill and the Amendment Bill do seek to "amend" the 1947 Act and specifically s 13, those Bills are not laws within s 6 "respecting the constitution, powers or procedure of the Parliament of the State". Properly characterised, they are no more than laws that repeal an earlier law on the subject of electoral divisions and electoral law. Thus, giving the *Australia Acts*, and all of them, full force and effect according to their terms, they do not authorise or sustain the "entrenchment" purportedly contained in s 13 of the 1947 Act. Approached in either way, the attempted entrenchment is ineffective to prevent the passage of the two Bills into law. There is no legal impediment to the presentation of those Bills to the Governor in proper sequence for Her Majesty's Assent.

214 *Conforming to constituent requirements*: The third and final basis upon which the *amici* argued that s 13 of the 1947 Act was "entrenched" was that suggested by remarks of the Privy Council in *Bribery Commissioner v Ranasinghe*[225]. There, Lord Pearce observed that "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law"[226]. In support of this supposed additional source of restraint on legislative power, the *amici* referred to judicial *dicta* in other decisions[227] and to academic writing[228].

215 No common law principle of such a kind could stand against the clear grant of law-making power to a representative legislature of Australia, as

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225 [1965] AC 172.

226 *Bribery Commissioner v Ranasinghe* [1965] AC 172 at 197.

227 *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 at 163-164.

228 Latham, "What is an Act of Parliament?", (1939) *King's Counsel* 152 at 152-153 cited by Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed (2001) at 513-514; Campbell, "Comment on State Government Agreements", (1977) 1 *Australian Mining and Petroleum Law Journal* 53 at 54-55; Lumb, *The Constitutions of the Australian States*, 5th ed (1991) at 128; Winterton, "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?", (1980) 11 *Federal Law Review* 167 at 189-190; Lee, "'Manner and Form': An Imbroglio in Victoria", (1992) 15 *University of New South Wales Law Journal* 516 at 530.

provided in, and under, the Imperial legislation establishing that legislature and as confirmed in the colonial and State Acts that make up the State Constitutions as well as by the federal Constitution itself[229]. Unless the principle in *Ranasinghe* involves no more than an over-broad paraphrase of the provisions of s 5 of the CLVA, it cannot, on its own, afford a higher source of law to impose a restraint upon the law-making power of the legislatures concerned. Where there is no higher source that underpins an inhibition on the law-making power of State Parliaments, the simple answer to the Privy Council's proposition in *Ranasinghe* is that the legislature enjoys full power to repeal the purported conditions or limitations on its law-making. Once it does so, it is not bound by those conditions or limitations. It is free to ignore them. They do not then control its "power to make laws".

216 *Conclusion – no effective entrenchment*: It follows that there is no additional or separate source of the restraint to sustain the validity of s 13 of the 1947 Act as a restriction on the law-making powers of later Parliaments. Nor should this Court be swift to invent one. If there are to be such restrictions, clothed with constitutional legitimacy, they must find their source in the approval of the electors of Australia. They must do so either under the provisions for amendment of the federal Constitution[230] or by the participation of State electors, in an entrenchment process pursuant to the power to alter the State Constitution recognised by s 106 of the federal Constitution. Other attempts amount to an endeavour by ordinary legislation to stamp the will of the past upon the State Parliaments and electors of the future. Such attempts should not easily succeed. They do not succeed here.

The *amici's* costs should be paid

217 *A contested claim for costs*: The applicants are therefore entitled to succeed in this Court. The *amici* applied, whatever the outcome, for an order for costs in their favour. In my view that application succeeds.

218 Subject to valid legislation providing otherwise, the costs of proceedings in this Court are in the discretion of the Court, as an incident to the Court's discharge of its constitutional function[231]. No particular legislation governs the provision of costs in the present case. The applicants opposed an order for costs in favour of the *amici*. They pointed out that, ordinarily, interveners and those in

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229 Constitution, ss 106, 107.

230 Constitution, s 128.

231 *Judiciary Act* 1903 (Cth), s 26: *De L v Director-General, NSW Department of Community Services [No 2]* (1997) 190 CLR 207 at 222-223.

a like position do not secure orders in favour of their costs. They normally participate in proceedings at their own risk and expense. The applicants argued that the *amici* were substantial organisations or individuals, with large interests in the outcome that they were entitled to pursue, but without demonstrated financial needs such as individual citizens caught up in constitutional litigation sometimes have. The Attorney-General complained that when, as an individual non-governmental litigant, he had failed in the proceedings in *McGinty*, far from his costs being paid, he had been ordered to pay the costs of the successful governmental party. The well-known law of tit for tat is common in Australian politics. Courts act on juster principles.

219 *Contradictors' costs should be paid*: The applicants' arguments are without merit. The *amici* were necessary participants in these proceedings. By their submissions, they helped crystallise the competing contentions. At stake were constitutional issues transcending the interests of private litigants. Although, in the result, in my view, the *amici* fail, it is difficult to see how the proceedings could have been conducted without them. The Court might have been forced to require the appointment of a contradictor. In such circumstances, the costs of that person would have had to be borne by the State, the constitutional law of which was in question.

220 The *amici* who were given leave to appear are therefore entitled to their costs in this Court.

Orders

221 Special leave to appeal should be granted in each matter. Each appeal should be treated as instituted and heard instanter and allowed. The answers given by the Full Court of the Supreme Court of Western Australia should be set aside. In place of those answers, each of the questions asked in the proceedings should be answered in the terms proposed by Wheeler J in the Full Court. The State should pay the costs of the *amici* in this Court.

222 CALLINAN J. Section 13 of the *Electoral Distribution Act* 1947 (WA) ("the EDA") is an entrenching provision. The principal question which this case raises is whether the passage through both Houses of the Parliament of Western Australia of a Bill to "repeal" that Act by a simple majority rather than an absolute majority of the members of each House as required by the section did in law effect the repeal.

The facts

223 On 19 December 2001 the Electoral Distribution Repeal Bill 2001 (WA) ("the Repeal Bill") completed its passage through both Houses of the Western Australian Parliament. The following day, the Electoral Amendment Bill 2001 (WA) ("the Amendment Bill") also passed through both Houses of the Western Australian Parliament. Both Bills were passed by a majority of the members of each House present and voting. In the Legislative Council, however, the Bills were passed by a simple majority of the members actually present only.

224 Clause 3 of the Repeal Bill is in the following form:

> "**3 *Electoral Distribution Act 1947* repealed**
>
> The *Electoral Distribution Act 1947* is repealed."

225 By contrast, cl 4 referred to both amendment and repeal:

> "**4 *Constitution Acts Amendment Act 1899* amended**
>
> (1) The amendments in this section are to the *Constitution Acts Amendment Act 1899*.
>
> (2) Section 5 is amended by deleting 'as defined under section 6'.
>
> (3) Section 6 is repealed.
>
> (4) Sections 18 and 19 are repealed and the following section is inserted instead –
>
> '**18. Constitution of Legislative Assembly**
>
> The Legislative Assembly shall consist of 57 elected members who shall be returned and sit for electoral districts.'"

226 Clause 5 was a transitional provision and need not be set out. Clause 6 however uses the language of amendment in respect of the *Electoral Act* 1907 (WA) ("the Electoral Act") and is as follows:

"**6 *Electoral Act 1907* amended**

(1) The amendments in this section are to the *Electoral Act 1907*.

(2) Section 24(3) is amended by deleting 'under section 3(2)(f) of the *Electoral Distribution Act 1947*'.

(3) Section 51(2) is amended by deleting 'under the *Electoral Distribution Act 1947*'."

Its purpose was to insert a new Pt IIIA into the Electoral Act to deal with the distribution of electoral boundaries for the Legislative Council and Legislative Assembly. In consequence, the Electoral Act, although with some significant changes, would replace and serve the purposes previously served by the EDA. Clause 16I of the Bill, for example, provided for the State to be divided into electoral divisions in a manner that would change the current ratio of electors to members. The Amendment Bill also included provisions to amend the *Constitution Acts Amendment Act* 1899 (WA) to increase the number of members of the Legislative Council from 34 to 36.

227 On 21 December 2001, the Clerk of the Parliament of Western Australia sought declarations from the Supreme Court of Western Australia whether it was lawful for him to present the Bills to the Governor for assent in the light of s 13 of the EDA which provides that:

> "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."

Proceedings at first instance

228 The matter came on for hearing before the Full Court of the Supreme Court of Western Australia, specially constituted for the occasion by five judges (Malcolm CJ, Anderson, Steytler, Parker and Wheeler JJ), in April 2002. The first defendant was the Attorney-General for Western Australia, and the second defendant was the State of Western Australia. By leave of the Court, a number of incorporated bodies and two persons representing various political, rural and community interests appeared together as amici curiae. In substance, the dispute in the proceedings was joined between the defendants and the amici.

229 As a preliminary issue, the Court considered whether it had jurisdiction to intervene in the parliamentary process after the deliberative stage had been completed but before the Royal Assent. Their Honours also considered whether,

if the Court did have jurisdiction before the completion of the process of enactment, it should exercise that jurisdiction, or do so only if and after the Royal Assent were granted. All members of the Court were of the opinion that the issues raised by the proceedings were justiciable and that the Court's jurisdiction in relation to them should be exercised[232].

230 Three issues of substance remained: first, whether on the proper construction of s 13 of the EDA, the Repeal Bill or the Amendment Bill is a Bill "to amend" the EDA and, secondly, whether s 13 had been impliedly repealed by the *Acts Amendment (Constitution) Act* 1978 (WA) ("the Constitution Amendment Act"). The third issue raised a question as to the source and continuing force and validity of the EDA, that is, whether on their proper construction, s 6 of the *Australia Act* 1986 (Cth) and possibly the *Australia Act* 1986 (UK) ("the Australia Acts"), were an effective source of power for, or validation of s 13 of the EDA, and operated to enable the EDA to continue to bind the Western Australian Parliament.

First issue in the Full Court

231 The majority (Malcolm CJ, Anderson, Steytler and Parker JJ) concluded in relation to the first issue that the two Bills were in substance an attempt to *amend* the EDA which needed to, but did not in fact, comply with s 13. After reviewing the relevant authorities, Steytler and Parker JJ (with whom Malcolm CJ and Anderson J agreed), held that[233]:

> "the question whether an enactment involves the repeal or amendment of earlier legislation is a matter of substance, ie, 'the substantial effect produced', rather than one, simply, of form. Further, the precise context in which the issue arises may be material to the answer."

232 Their Honours were of the view that s 13 had the purpose of entrenching the provisions of the EDA. It was an Act that dealt with an essential aspect of the Constitution of the Western Australian Parliament and s 13 was enacted in the expectation that there must, and always would be legislation on the topic with which it deals[234]. This understanding of s 13, their Honours said, indicated that a

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232 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 209-210 [17]-[23] per Malcolm CJ, 223-224 [84]-[85] per Anderson J, 230-244 [119]-[169] per Steytler and Parker JJ, 270 [296] per Wheeler J.

233 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 246 [181].

234 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 247 [187].

narrow interpretation of the word "amend" in the section was inappropriate. Absent a reasonably broad interpretation, s 13 would be without legal effect[235].

233 Their Honours were of the further opinion that the Repeal Bill and the Amendment Bill constituted a legislative scheme. They held that Parliament did not intend the permanent revocation of the EDA, that is to say, to create what would in effect be a legal vacuum so far as the means and basis of election of members of the Parliament were concerned. Instead, Parliament intended to transfer the stipulation of the relevant bases for election of members, from the EDA to the Electoral Act. It would be artificial therefore, to consider the Repeal Bill in isolation from the Amendment Bill. The substance of Parliament's intention was the amendment of the EDA for the purposes of s 13[236].

234 There was, Steytler and Parker JJ said[237] (Malcolm CJ agreeing[238]) a further basis upon which s 13 applied to and governed the Repeal Bill in any event. It was that, because the Bill included a transitional provision to continue the operation of s 11 of the EDA until the next general election, the Act was not wholly repealed, and would in part at least, continue to operate, albeit only until the date of the next general election. The Repeal Bill was therefore an amendment Bill in any event[239].

235 Wheeler J (dis) was of the view that the natural meaning of the word "amend" as used in s 13 of the EDA should be adopted, that "the Parliament must be taken to mean precisely what it said"[240].

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235 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 247 [188].

236 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 249-250 [202].

237 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 250-251 [204]-[206].

238 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 216-217 [51].

239 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 251 [206].

240 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 274 [312].

236 As to the operation of the two Bills taken together, if and when enacted, as a legislative scheme, her Honour said this[241]:

> "[they could not be] considered as a repeal and re-enactment or repeal and substitution of the [EDA]. It is true that the [EDA] is repealed, but what is 'substituted' is the insertion of a series of provisions, many of them identical with the former [EDA] provisions and others quite different, into the [Electoral Act]. If the scheme were to come into operation, the concept of an [EDA] would cease to exist at all. By analogy, if one were to repeal the *Police Act 1892* (WA), and insert all former sections from it into the *Criminal Code* (WA), and the *Local Government Act 1995* (WA), and the *Health Act* (depending upon which was the most appropriate place for the particular sections) it would be difficult to see how the *Police Act* could be regarded as having been 'amended' rather than repealed."

237 Her Honour accepted however that amendment and repeal were overlapping concepts[242]:

> "Plainly, there is some overlap between the concepts of amendment and of repeal in relation to a statute, since the repeal of a section, whether it is re-enacted or not, is an amendment – that is, an alteration – of the statute as a whole. ...
>
> However, because of the difference between the concepts of an 'enactment' an 'Act' and a 'section', it is one thing to say that an Act has been amended because one or more sections has been repealed, in which case the Act continues to exist in an altered form; it is another to say that the repeal of an Act in its entirety may be regarded as an amendment of the Act. In the latter case, the Act ceases to exist. To say that an Act which has entirely ceased to exist has been 'amended' is in my view inconsistent with any understanding of the word 'amend'."

238 Wheeler J rejected that the presence of a transitional provision in the Repeal Bill meant that the EDA was in any event only "amended" and thereby in terms literally attracted the operation of s 13[243].

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241 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 280 [337].

242 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 280-281 [340]-[341].

243 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 287-288 [369].

Second issue in the Full Court

239 The second issue was whether s 13 of the EDA had been impliedly repealed by the Constitution Amendment Act, which, among other things, inserted s 2(3) into the *Constitution Act* 1889 (WA) ("the Constitution Act"). Section 2(3) provides:

> "(3) Every Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73 of this Act, 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."

240 It was argued that the only qualification to the requirement that Bills be presented to the Governor for assent after passage through the Houses of Parliament was the phrase "subject to section 73". Because, it was said, there was no express qualification in s 73 of the Constitution Act with respect to the matters referred to in s 13 of the EDA, the latter must have been impliedly repealed.

241 Steytler and Parker JJ (with whom Malcolm CJ and Anderson J agreed) held that the argument that s 13 had been impliedly repealed failed[244]. Their Honours pointed out that s 73 of the Constitution Act made it unlawful to present certain Bills to the Governor for assent unless those Bills had been passed by an absolute majority of each House of Parliament. The desirability, their Honours thought, of there being an express exception to s 2(3) of the Constitution Act in order to preserve the operation of s 73, was "patently obvious"[245]. Legislative provisions beyond the Constitution Act were not however affected[246]:

> "It would be strange, indeed, if the intention of the [Constitution Amendment Act] had included the repeal of the operation of s 13 of the [EDA], but this was left to pass by way of implication from a provision such as s 2(3). In our view, it is not apparent that by the amendments made by the [Constitution Amendment Act], it was intended to affect, or repeal, a legislative provision such as s 13 which was outside the

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244 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 218 [62] per Malcolm CJ, 225 [93] per Anderson J, 257 [240] per Steytler and Parker JJ.

245 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 254 [223].

246 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 254 [226].

> [Constitution Act] itself. The significant legislative purpose, apparent from the [Constitution Amendment Act] itself, neither required nor suggested any such wider purpose."

242 Steytler and Parker JJ accepted that the argument that s 13 had been impliedly repealed depended upon the true meaning of the word "passage" in s 2(3) of the Constitution Act: whether the support of a simple majority of the members of each House of Parliament present and voting meant that there had been a "passage" of the Bill or Bills[247]. Their Honours were of the opinion that in order for a Bill to complete its "passage" through Parliament, it must have been passed by each House in a manner (and form) which are valid and binding as a legal expression of each House's consent to the Bill becoming a law[248]. On the assumption that s 13 of the EDA is valid[249]:

> "a Bill within the scope of s 13, which failed to secure the support of an absolute majority of the members of either House on the second or third reading in that House of the Bill, would not have completed its passage through that House within the meaning of s 2(3)."

Accordingly, their Honours held, there was no foundation for a conclusion that s 13 of the EDA had been impliedly repealed[250].

243 Wheeler J agreed with the majority on this point. Her Honour concluded that s 2(3) of the Constitution Act and s 13 of the EDA were reconcilable, and that therefore there was no implied repeal of s 13[251]. That is[252]:

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247 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 254-255 [228].

248 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 255 [231].

249 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 256 [236].

250 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 256 [237].

251 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 272, 274 [301], [309].

252 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 272 [301].

> "Section 13 is narrow and particular in its scope; it is expressed to apply only to amendments to the [EDA]. It appears to me that it is open to read s 13 as a proviso to, or exception from, the new provisions of the [Constitution Act], which exception deals with the particular case of amendment to the [EDA]."

The third issue in the Full Court

244 The third matter considered by the Court was the operation of s 6 of the Australia Acts in relation to s 13 of the EDA.

245 It was submitted that the Parliament of Western Australia could not bind itself or a future Parliament in the manner that s 13 purported to do because it had been vested with plenary legislative powers[253]. Section 13 could therefore only have binding effect, if at all, on the Parliament by force of s 6 of the Australia Acts which provides:

> "**6 Manner and form of making certain State Laws**
>
> 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 a law made by that Parliament, whether made before or after the commencement of this Act."

246 It was submitted by the applicants that the Australia Acts had no application to the Bills because they were not Bills "respecting the constitution, powers or procedure of the Parliament".

247 Steytler and Parker JJ, with whom Malcolm CJ and Anderson J agreed, held that s 13 was binding on the Western Australian Parliament by virtue of s 6 of the Australia Acts. Wheeler J did not decide the issue. The majority accepted that the Western Australian Parliament had plenary powers. This had been confirmed by s 2 of the Australia Acts[254]. Their Honours also observed, however, that the plenary powers of State parliaments had been limited since 1865 by the proviso to s 5 of the *Colonial Laws Validity Act* 1865 (Imp) which provided:

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253 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 257 [244].

254 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 258 [247].

> "5. Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony."

248 Although the *Colonial Laws Validity Act* was repealed by the Australia Acts, the proviso contained in s 5 of that Act was replaced by s 6 of the Australia Acts. Their Honours concluded that[255]:

> "In the [Australia Acts] the declaration and enactment of legislative powers in s 2 includes full power to make laws respecting the constitution, powers and procedure of the Parliament of the State. Relevantly, this had also been the effect of the grant of legislative powers affected by the primary enactment in s 5 of the [*Colonial Laws Validity Act*]. ... For relevant purposes there is no material difference between the operation and effect of s 6 of the [Australia Acts], read with s 2, and the proviso to s 5 of the [*Colonial Laws Validity Act*] read in the context of s 5, even though s 6 is expressed as a mandatory requirement to observe manner and form requirements rather than as a proviso to the grant of powers as in s 5 [of the *Colonial Laws Validity Act*]."

249 In the result, in their Honours' view, s 6 of the Australia Acts was effective to make binding upon a State Parliament any conditions as to manner and form which the Parliament has required to be observed when making a law respecting the constitution, powers or procedures of Parliament[256].

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255 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 259 [249].

256 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 260 [251].

250 Steytler and Parker JJ were prepared to accept that the "constitution of the Parliament comprehends, at least, the composition, nature and makeup of each House"[257]. Their Honours went on to say[258]:

> "In the context of a bicameral representative legislature such as the Western Australian Parliament, the view commends itself to us that those provisions which govern, in respect of each House, the number of members, and whether the electors of the State vote as a whole to elect them or be divided into geographic or other divisions for the purpose of voting, and if voting is in divisions the basis upon which that division is made, and which provide for the number of members to be returned by each division, are each matters of such central relevance and significance to the composition and makeup of each of the Houses of the Parliament, and to the representative character or nature of the two Houses so constituted, as to be within the scope of the 'constitution' of the Parliament within the meaning of s 6 of the [Australia Acts]."

251 Section 13 of the EDA therefore continued to have application to the Parliament of Western Australia in attempting to enact "constitutional legislation", and should have been complied with for the lawful passage of the Repeal Bill and Amendment Bill.

The appeals to this Court

252 The Attorney-General for Western Australia and the State of Western Australia sought special leave to appeal to this Court. On 11 April 2003, a Full Bench of three Justices referred the application to an enlarged bench.

253 Those who were amici curiae in the Supreme Court of Western Australia sought and were granted leave to appear in this Court. The Attorneys-General of the Commonwealth, the State of Queensland and the State of New South Wales appeared as interveners.

254 An additional application to appear as amicus curiae in this Court made by Mr Jeremy Richard Ludlow was dismissed.

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257 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 263 [266].

258 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 264 [267].

Justiciability

255 Steytler and Parker JJ made a comprehensive survey of the cases relevant to any question of justiciability and whether the Full Court should in its discretion exercise its jurisdiction[259]. No one seeks to argue that this Court should take any different view. Accordingly, I can turn immediately to the issues which were argued in this Court which, with one addition, were the same as those with which the Full Court was concerned. The additional issue here was whether the intervening prorogation of the Parliament caused the Bills to lapse so as to prevent their transmission to the Governor for the Royal Assent in any event. It is an issue which will only need to be resolved if the applicants succeed on other issues in the case.

"Amend" or "Repeal"

The applicants' argument

256 The applicants submitted that in order to determine whether a Bill effects an amendment or a repeal, regard need be had to the real and substantial consequences of it if enacted. A Bill which has the effect of obliterating or extinguishing an Act in its entirety is not a Bill to amend that Act, but is a Bill to repeal it. There is, it was submitted, a real distinction of substance between "repeal" and "amend". The word "amend" in s 13 of the EDA was carefully chosen. It is wrong to suggest that the repeal of the EDA was in any way subject to, or conditional upon the enactment of legislation in replacement of it. The repeal of the EDA could and did stand alone. Accordingly, the Repeal Bill was not a Bill to amend the EDA. It was a Bill to repeal it and was therefore not affected by or subject to s 13 of the EDA.

257 The applicants argued that central to the approach of the majority of the Supreme Court was the view that it was necessary to look at the effect of the two Bills taken together, that is, to look at and to regard the Bills as a scheme. The applicants submitted that it is not appropriate to regard Bills not expressed to be interdependent in such a way as to give them an aggregated or combined operation. The appropriate course, it was submitted, is to focus on the substance of the Repeal Bill only, as it alone purported to change the EDA. The intent and substance of the Repeal Bill were to repeal the EDA and not to effect amendments to it.

258 Nor is it appropriate, according to the applicants, to find that the purpose of s 13 was to entrench the provisions of the EDA, and to immunise them from

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259 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 230-244 [119]-[169].

change otherwise than in accordance with s 13. The applicants submitted that to do so would be to give an unwarranted purposive construction to the section inconsistent with its plain words which are that it was a Bill to *amend* the EDA.

259 Finally, the applicants argued that the conclusion of Malcolm CJ, Steytler and Parker JJ that the Repeal Bill, even when considered in isolation, actually amended rather than repealed the EDA, was incorrect: the transitional provisions set out in the Repeal Bill repeal the EDA in toto, and merely establish a new regime which is to exist during the transitional period. As the EDA would no longer exist after the commencement of the Repeal Bill, the Repeal Bill cannot be said also to amend it.

The competing arguments

260 The amici, in response to these submissions, argued that a dichotomy between "amend" and "repeal" cannot be drawn in the context of s 13 of the EDA. If ever a provision called for a purposive construction it was this one, s 13. If it were otherwise and "amend" did not include "repeal", the whole intention of the entrenchment of the EDA effected by the section would be futile.

261 The amici also submitted, in the alternative, that the Repeal Bill, taken alone or read with the Amendment Bill, amended the EDA. They argued however that the reasoning of the majority did not necessarily turn on a reading of the Bills together as a scheme, nor on the transitional provisions. Nonetheless, the amici submitted, that to the extent that the majority in the Full Court may have separately relied on those matters, no error in their reasons was demonstrable.

The decision

262 In order to answer the questions raised by the applicants it is necessary to understand the nature and purpose of constitutions in this country and the history and conditions that have shaped their forms and provisions.

263 Western Australia is a vast State in a vast country. The population of both is unevenly distributed between metropolises and the country. In consequence, electorates vary in size, as do the demands of travel, communication, and servicing generally, upon those who represent their constituents. Equally it is obvious that there are many ways in which members of Parliaments may be elected, that is to say, democratically elected. Indeed, throughout the democratic world many different ways of electing representatives to Parliaments have been chosen. Similarly, Parliaments are not constituted according to any universal model. Even in Australia there is considerable variation. Queensland has a unicameral legislature. The terms of members of State upper houses vary

considerably[260]. Parliamentary representatives could be elected, as is the case with the Senate, on the basis of a single total State electorate, or, as with the House of Representatives, on the basis of one member for one electoral division, the boundaries of which are not immutable. The point is that Parliaments cannot be elected and operate without provision, indeed fairly elaborate provision, to enable them to do so. And it is against the background of these elementary propositions that the Constitution of Western Australia must be identified, and the legislation and the Bills to which reference has been made, must be examined.

264 The first of these to which I turn is the EDA. What work has it to do? The answer is, essential work, work of a kind that if not done, would not enable a legislature to be elected and to function. Section 3 reflects the choice (made by ss 6 and 7 of the Constitution Amendment Act) of separate electoral divisions or districts for the election of members of the Parliament. Section 6 states the number of districts and distributes them (unevenly) between metropolitan areas as defined, effectively the capital Perth and its environs, and the rest of the State. Other provisions, ss 2, 2A, 3, 7, 8 and 9 prescribe the times, persons, procedures, bases and other matters for the determination of the boundaries of, and numerical tolerances in, electoral divisions.

265 Sections 51, 59, 60, 61 and 62 of the Electoral Act deal with the administration of the Western Australian electoral roll and have as their premise concepts of electoral districts and regions which are given life by the EDA. They could not be given effect if the EDA were not in place. Without the EDA or some like Act or replacement of it, elections for the Parliament of Western Australia could not be conducted. The inclusion of the transitional provision in cl 5 of the Repeal Bill continuing the current districts and distributions for a certain period is itself an effective acknowledgment of the essentiality of much of the EDA.

266 I turn to the Amendment Bill. Its purpose is to amend the *Constitution Acts Amendment Act* 1899 (WA) to increase the number of Legislative Councillors from 34 to 36 to be elected from six electoral regions each electing an equal number of councillors. Further, the Amendment Bill would insert in the Electoral Act provisions for the division from time to time of the State into 57 electoral districts and six electoral regions, by electoral distribution commissioners. The Amendment Bill contained a new provision, cl 16I, for

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260 For example, 8 years in New South Wales (ss 22B and 24, *Constitution Act* 1902 (NSW)), 8 years in Victoria (ss 28 and 38, *Constitution Act* 1975 (Vic)), 6 years in South Australia (s 14, *Constitution Act* 1934 (SA)), 6 years in Tasmania (s 19, *Constitution Act* 1934 (Tas)) and 4 years in Western Australia (s 8, *Constitution Acts Amendment Act* 1899 (WA)).

insertion in the Electoral Act, providing a new basis for the division of the State into electoral districts. The six electoral regions would be determined by groupings of the electoral districts, so that the changed basis for division of the State into electoral districts would also effect a change to the basis of the determination of the six electoral regions. Otherwise, apart from some related machinery provisions, the provisions to be inserted into the Electoral Act by the Amendment Bill are, largely, in the same terms as the present provisions of the EDA with the exception of s 13 which would have no further operation.

267 The introduction of the Amendment Bill in the form in which I have just summarized is itself a further indication of the essentiality of the sorts of provisions of the kind contained in the EDA, and in substantial part reproduced in the Amendment Bill.

268 The problem in this area is obvious. What continuing vitality should a fetter imposed by a former Parliament have in relation to a later one? How heavily, definitely and finally, if at all, should the legislators of the past dictate the future? The answer must take into account that the whole intention of a constitution is to provide for the community that it is to govern a degree of genuine and effective, but not entirely inflexible, stability and certainty. The preference by and large of common law countries (apart from the United Kingdom) has been for Constitutions which are alterable in compliance only with a more strict, and, it may be accepted, less accessible process than the mere enactment of other, non-constitutional legislation. Section 128 of the Constitution of this country is itself an example of a provision requiring compliance with a strict process for its operation. By contrast, in some other countries there seems to have been a degree of instability which the presence of provisions such as s 13 of the EDA and adherence to them help to avoid.

269 The rise and fall of some Constitutions and the uncertainty arising in respect of them are discussed in K C Wheare's *Modern Constitutions*. His account aptly captures the degree of instability, indeed chaos, which has sometimes accompanied constitutional change[261]:

> "It is worth while perhaps to emphasize the way in which Constitutions have come and gone in the first half of the twentieth century. Two World Wars provided the occasion for many of these changes. By the end of the First World War the Constitutions of Imperial Germany, of Imperial Russia, of the Austro-Hungarian Empire, and of the Turkish Empire, had been overwhelmed. In the next few years there arose new Constitutions, often for new states set up in the ruins of old Empires. There were new Constitutions for Germany (the so-called 'Weimar'

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261 2nd ed (1967) at 89-91.

Constitution of 1919), the USSR (1924 and 1936), Poland (1921), Czechoslovakia (1920), Jugoslavia (1921), Austria (1921), Hungary (1920), Estonia (1920), Lithuania (1928), Latvia (1922), Greece (1927), Roumania (1923), Albania (1925), Finland (1919), Portugal (1933), and Spain (1931). By the end of the Second World War most of these Constitutions had ceased to operate and had been joined in destruction by the older, pre-1914 Constitutions of France and Italy; in Finland, Portugal, and the USSR alone, perhaps, could it be claimed that the Constitution still preserved some semblance of its former self. In the years after 1945 new Constitutions began once more to appear, but in smaller numbers and with less liberal and democratic exuberance than in the years after 1918. There were new Constitutions for France (1946 and 1958), Italy (1948), the Federal Republic of Western Germany (1948), the Federal Peoples Republic of Jugoslavia (1946), Burma (1947), Ceylon (1948), India (1950), while in Austria and in Czechoslovakia an attempt was made to revive the old Constitutions of 1920 with some modifications, an attempt which was to fail in Czechoslovakia with the Communist *coup* of 1948 and the subsequent adoption of a new Constitution for a 'people's democratic republic'.

It is apparent from this account of the rise and fall of Constitutions that in Europe there are few countries which provide a sufficiently long and stable period of experience under a Constitution to enable one to consider, with any profit, the way in which the process of formal constitutional amendment has worked and how effective it has been. The Constitutions of most European countries have in fact not had a fair trial; they have not been given a chance to show whether they could work or not.

The same situation is found, broadly speaking, in Central and South America. In few of the republics has there occurred even twenty years' continuous government in accordance with the terms of a Constitution, and in some cases one Constitution has followed another in quick succession and in equal ineffectiveness. Between 1933 and 1948 fourteen new Constitutions were adopted in Latin America, and of these Brazil supplied three, one each in 1934, 1937, and 1946. It is true that in many cases these new Constitutions reproduce a good deal that was found in their predecessors, but in practice the frequency with which Constitutions come and go in most Latin-American States make any study of their ordered development impossible." (emphasis added)

270 Opinion as to the essentials however of and for a constitution are not unanimous. In *McCulloch v Maryland* Marshall CJ delivering the opinion of the Court said this[262]:

> "A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves."

271 On the other hand, many Constitutions contain quite elaborate detail with respect to matters which others eschew. Parts II and III of the Australian Constitution, for example, descend to the detail of the specification of the separate (State) electorates of Senators (s 7), the duration of their terms (ss 13 and 14), numbers of members of the House of Representatives (s 24), duration of the members' terms (s 28), and Part IV to the extent of the Parliament's powers with respect to the conduct of the business of Parliament.

272 It follows, in my opinion, that even though all draftspeople of Constitutions might not include the sort of detail as to the matters to which I have just referred, and those of a like kind in the EDA and in the Amendment Bill itself, it cannot be said, that these are not at least fit matters for inclusion in, and forming part of a constitution, and, having been designated as such by a manner and form entrenchment provision, in this case s 13 of the EDA, should not be so regarded.

273 The matters to which I have referred, and the conclusion that I draw from them, that the EDA forms part of the Constitution of the State, do not of themselves determine the meaning of and operation to be given to s 13 of the EDA, but they heavily influence them. It immediately strikes the reader how anomalous it would be if "amend" when used in a constitution were to be read so narrowly as to exclude, or have no application to a repeal, so as to enable a legislature, without complying with the requirements of s 13, to obliterate or extinguish entirely part of the Constitution, but not to amend it even by the addition or deletion of a mere word or phrase: that although the Parliament might not tinker with, it was entitled to annihilate a constitution or a substantial provision of it.

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262 17 US 315 at 406 (1819).

274 In my opinion therefore, "amend" in s 13 of the EDA should be read to include and apply to a purported "repeal". The fact that other legislation, for example, s 44 of the *Interpretation Act* 1918 (WA) uses each of the words "altered, amended, or repealed" does not dictate any different conclusion. The context there is quite different. In any event, on occasions, the words may be used interchangeably, and on others either conjunctively or disjunctively, for further or greater assurance and completeness. The context here, of a constitution, requires an expansive reading. It is unnecessary for me to repeat the history of the EDA and its precursors. This is fully described in the joint judgment of Steytler and Parker JJ in the Full Court[263] and the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in this Court. It is sufficient to say that the history is consistent with, and points to the conclusion which I have reached, that the purpose, and therefore the meaning to be given to s 13 of the EDA, was to immunise, consistently with the notion that constitutional change should be a matter of careful and detailed deliberation, the EDA against change, whether partially or completely, except by stringent compliance with a manner and form provision.

275 A second and separate reason for the same conclusion was given by the Full Court, that the Repeal Bill and the Amendment Bill should be read together and treated as part of a scheme.[264] It is unnecessary for me to express any concluded opinion on this although it does appear that the process undertaken by the Houses of Parliament was, and needed to be, a two-stage process. Without the latter there was no, or insufficient provision for the conduct of a general election. The attempted enactment of the Amendment Bill provides an indication of this.

276 There was a third reason given by the Full Court why the applicants' argument on this aspect of the case should fail. It was that, in any event, the EDA was not repealed, it was amended, because some of it was continued in operation, if only transitionally, by cl 5(2) of the Repeal Bill.[265] This raises a question of construction that could readily arise in other situations. I need express no opinion on it, as in my view the applicants fail on their first argument.

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263 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 247-249 [190]-[197].

264 See *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735 at 753-754 per Latham CJ, 768-770 per Starke J, 783-787 per Evatt J.

265 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 250-251 [204]-[207].

Repeal otherwise of s 13 of the EDA?

The applicants' argument

277 It was next submitted by the applicants that s 13 is directly inconsistent with s 2(3) of the Constitution Act (which was inserted in 1978 by the Constitution Amendment Act) as it is not possible to comply with both provisions at the same time. Section 13 purports to prohibit what s 2(3) requires. That is, s 2(3) requires that every Bill be presented to the Governor for the Royal Assent after its passage through the Houses of Parliament, while s 13 provides that it is not lawful to present certain Bills to the Governor unless they have been passed by an absolute majority.

278 The applicants submitted that in rejecting this argument, the Full Court erred by focussing on its perceived intention underlying s 2(3) rather than its clear operation. It was also submitted that the existence of an express exception to s 2(3) (s 73 of the Constitution Act) denies the existence of another, unstated exception.

279 Steytler and Parker JJ were of the opinion that the word "passage" in s 2(3) meant passage according to law. The applicants in this Court submitted that this interpretation ignores the effect of ss 14 and 24 of the *Constitution Acts Amendment Act* 1899 (WA) which provide that questions arising in the Legislative Council and Legislative Assembly be decided by a majority of votes of the members present (except for the presiding officer of each House who may exercise a casting vote). It was submitted that these provisions determine what is necessary for the passage of a Bill through the Parliament. Section 13, on the other hand, merely provides for the extent of the majority required before it is lawful to present the Bill for the Royal Assent. This does not, on the applicants' argument, deny that the Bill may still have passed the Houses if fewer than the required majority were obtained.

The arguments of the amici curiae

280 In response, the amici argued that for a statute to effect such a repeal it must be impossible to reconcile that later statute with the earlier one. This is not the case in relation to s 13 of the EDA and s 2(3) of the Constitution Act because the Full Court was correct in reading s 2(3) as requiring passage in compliance with any relevant manner and form provision. Sections 14 and 24 of the *Constitution Acts Amendment Act* are not relevant as they should be read as setting out no more than the occasions for passage by a simple majority vote, absent some other manner and form provision. If this were not so, the amici submitted, ss 14 and 24 of the *Constitution Acts Amendment Act* would themselves have been impliedly repealed by s 13 of the EDA.

281 In my view there has been no implied repeal of s 13. In *Goodwin v Phillips*, Griffiths CJ said[266]:

> "where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication. Another branch of the same proposition is this, that if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

282 In *South-Eastern Drainage Board (SA) v Savings Bank of South Australia*[267], Dixon J formulated a test for implied repeal by reference to whether it was "impossible" to reconcile the later and earlier provisions[268]:

> "But, unless it is found impossible to reconcile the later statute ... there is no room for the conclusion that the later Act must be regarded as meaning to operate upon land under the earlier Act and to do so inconsistently therewith."

283 Gaudron J pointed out in *Saraswati v The Queen*[269], that there must be strong grounds before an implication of repeal may be inferred[270]:

> "for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other."

The correct answer

284 Any inconsistency between the provisions can readily be resolved, however, by giving due effect to the word "passage" in s 2(3) of the Constitution Act. I agree with the majority in the Full Court that "passage" means "passage in a manner that is legally effective" rather than simply "passage in accordance with usual parliamentary practices". This interpretation recognizes that the Parliament

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266 (1908) 7 CLR 1 at 7.

267 (1939) 62 CLR 603

268 (1939) 62 CLR 603 at 625.

269 (1991) 172 CLR 1.

270 (1991) 172 CLR 1 at 17.

may adopt different means to protect particular provisions from subsequent, hasty, or ill-considered alteration.

285 As Steytler and Parker JJ said[271]:

> "... the adoption of the meaning of passage which we have suggested would provide a ready, and rather obvious, reconciliation of the operation of the latter and the earlier Acts."

286 There being a ready and obvious solution to any apparent inconsistency, it would not be right in my opinion, to say that it is impossible to reconcile the provisions. There is nothing to rebut the presumption that the provisions were intended to operate together. The Full Court was therefore correct to hold that s 13 had not been impliedly repealed.

Section 13 of the EDA does not bind the Parliament

The applicants' argument

287 What I have already said with respect to the components of the Constitution of Western Australia is really sufficient to dispose of the next argument raised by the applicants. It is that, in order for s 13 to be of binding force in respect of the Bills, they must be, but have not been shown to be laws "respecting the constitution, powers or procedure of the Parliament" for the purposes of s 6 of the Australia Acts. They submitted that it is clear from cases such as *Clydesdale v Hughes*[272] and *Western Australia v Wilsmore*[273] that not every law affecting the manner of choice of the membership of Houses of Parliament is a law respecting the constitution of the Parliament. In particular, it was submitted that laws providing for an "administrative process" by which electoral boundaries are to be determined are not laws respecting the constitution of the Parliament. In repealing the EDA, the Repeal Bill merely makes provision for the administrative machinery for the determination of electoral boundaries. The Amendment Bill, the applicants do however concede, does increase the number of members of the Legislative Council, but in doing so does not amend the EDA: s 13 is not therefore relevant.

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271 *Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA)* (2002) 26 WAR 201 at 256-257 [239].

272 (1934) 51 CLR 518.

273 (1982) 149 CLR 79.

The arguments of the amici curiae

288 The amici argue that the applicants cannot demonstrate any error in the Full Court's reasoning that a law for determining electoral boundaries is a law respecting the constitution of the Parliament. A law deals with the constitution of the Parliament of a State within the meaning of s 6 of the Australia Acts if it deals with its nature, composition or make-up. A law establishing the basis upon which electoral districts are determined, the amici submitted, deals with the nature, composition or make-up of a Parliament.

289 The amici also submitted that, in addition to s 6 of the Australia Acts, s 13 of the EDA has binding effect by way of, either or both s 106 of the Constitution, and s 2(1) of the Constitution Act which confers upon the Parliament of Western Australia the power to make laws for the peace, order and good government of Western Australia.

290 In *Attorney-General (NSW) v Trethowan*[274] Dixon J said this of the power contained in s 5 of the *Colonial Laws Validity Act*[275]:

> "The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct."

291 Laws, as these are, for the distribution of electorates and the composition of Parliament are clearly laws, as I have already held, respecting the constitution of a Parliament. The Bills in question lie at the core of the "nature and composition" of the legislature. They provide the bases for determining the geographic description of the electoral divisions that in turn are the basis for the allocation of seats in the legislature.

292 It follows that the Full Court was correct in holding that s 13 of the EDA is binding upon the Parliament of Western Australia by virtue of s 6 of the Australia Acts which effectively relevantly replaced the *Colonial Laws Validity Act* and successors to it. Section 3 of the Australia Acts provide as follows:

> "**3 Termination of restrictions on legislative powers of Parliaments of States**
>
> (1) The Act of the Parliament of the United Kingdom known as the Colonial Laws Validity Act 1865 shall not apply to any

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274 (1931) 44 CLR 394.

275 (1931) 44 CLR 394 at 429-430.

law made after the commencement of this Act by the Parliament of a State.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a State shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a State shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of the State."

293 The provisions of the EDA, including s 13, are part of the Constitution of Western Australia, and therefore may only be changed in accordance with the latter.

294 The Australia Acts may have been in part at least passed pursuant to s 51(xxxviii) of the Constitution, but there is more that can be said of them than that. All of the relevant Acts (federal and State[276]) as well as the *Australia Act* 1986 (UK) represent a final and indubitable recognition, a settlement between the United Kingdom, Australia and its States, and an ultimate legitimization of the respective constitutions, the sovereignty and the plenitude of the powers of the respective Australian polities[277]. They also represent a remarkable and rare consensus of polities which requires that their terms be given full effect. Nothing that was said in *Port MacDonnell Professional Fishermen's Assn Inc v South Australia*[278], in which the interaction of laws passed pursuant to s 6 of the *Australia Act* 1986 (Cth) and ss 51(xxxviii) and 106 of the Constitution was discussed, detracts from that.

Additional issue: prorogation

295 The original amici raised an additional issue in their submission which was not dealt with by the Supreme Court. They argued that there is a live issue whether, in any event, the Bills may now be presented for the Royal Assent

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276 See the *Australia Act* 1986 (Cth), *Australia (Request and Consent) Act* 1985 (Cth), *Australia Acts (Request) Act* 1985 (Q), *Australia Acts (Request) Act* 1985 (NSW), *Australia Acts (Request) Act* 1985 (Vic), *Australia Acts (Request) Act* 1985 (Tas), *Australia Acts (Request) Act* 1985 (SA), *Australia Acts (Request) Act* 1985 (WA).

277 Compare and contrast the patriation of the Canadian Constitution by the *Canada Act* 1982 (UK).

278 (1989) 168 CLR 340.

because the Legislative Council and Legislative Assembly have been prorogued. The giving, they submitted, of the Royal Assent is a legislative act which can only be performed during a session of Parliament. Prorogation of the Legislative Council and Legislative Assembly brings a session of Parliament to an end. Any unfinished business of that parliamentary session is brought to an end at the same time.

296 To this the applicants say that the Governor may lawfully assent to a Bill passed by the Parliament after prorogation. They also add that this is an issue that could be dealt with by way of a challenge to the validity of the legislation after it has received the Royal Assent, so that this Court can still proceed to consider the issue raised by the proposed appeals.

297 The position in the United Kingdom is that prorogation quashes all proceedings pending at the time of prorogation[279]. The Royal Assent is, in general, given to any Bills that have passed both Houses before prorogation[280].

298 The practice in the Commonwealth Parliament has been, that, upon prorogation, all proceedings come to an end and all business before the Parliament lapses[281]. Generally, Bills agreed to by both Houses are assented to before prorogation[282]. There have been occasions, however, when Bills were assented to after the Parliament had been prorogued[283].

299 In Western Australia, the applicants point out, there have been a number of Bills assented to after prorogation. Having regard, the applicants submit, to the time that communication with the Sovereign would have taken when the provisions allowing the reservation of Bills were introduced, it could not have been remotely contemplated that Bills would lapse if there was an intervening prorogation of Parliament.

300 Reference was also made to s 9 of the Australia Acts which, the applicants argued, put an end to any possibility of the reservation of State laws for the assent of the Sovereign. It provides as follows:

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279 Erskine May, *Parliamentary Practice*, 22nd ed (1997) at 233.

280 Erskine May, *Parliamentary Practice*, 22nd ed (1997) at 233-234.

281 Harris, *House of Representatives Practice*, 4th ed (2001) at 226.

282 Harris, *House of Representatives Practice*, 4th ed (2001) at 227.

283 Harris, *House of Representatives Practice*, 4th ed (2001) at 227.

"**9 State laws not subject to withholding of assent or reservation**

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

(2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon."

301 In *Simpson v Attorney-General*[284] the majority of the New Zealand Court of Appeal held that the Governor-General could assent to a Bill after the House of Representatives had ended its term[285]. In *Western Australia v The Commonwealth*[286], Gibbs J held that[287]:

> "At the time when the Constitution was enacted the effect of a prorogation was well recognized. ... it was said that a prorogation concludes a session and (subject to some immaterial exceptions) has the effect that 'all Bills, or other proceedings, depending in either House of Parliament, in whatever state they are, are entirely put an end to, and must, in the next session be instituted again, as if they had never been'."

302 I am inclined to think the applicants' argument correct but it is unnecessary for me to resolve this question. The other conclusions which I have reached obviate the need for that.

303 I would grant special leave to appeal but dismiss the appeals. The applicants and the amici curiae should each pay their own costs.

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284 [1955] NZLR 271.

285 [1955] NZLR 271 at 283 per Stanton and Hutchison JJ.

286 (1975) 134 CLR 201.

287 (1975) 134 CLR 201 at 238.