

## Waiting For The Other Shoe To Fall: The Unresolved Issues in *Yougarla v Western Australia*

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The decision of the High Court in *Yougarla v Western Australia*<sup>1</sup> on 9 August 2001 terminated the long saga<sup>2</sup> of litigation brought by a number of Aboriginal elders from the Pilbara region in Western Australia concerning whether the State was under a continuing constitutional obligation to set aside an amount of 1% of annual public revenue for the benefit of the Aboriginal inhabitants of the State. That obligation had derived from s. 70 of the *Constitution Act 1889* (WA)<sup>3</sup>, an entrenched provision included in the *Constitution Act* at the insistence of the British Government when Western Australia was granted full responsible government in 1890.<sup>4</sup> The provision was unique to Western Australia and reflected an imperial concern for the welfare of the indigenous inhabitants of the colony in the face of the deprivations caused by white settlement<sup>5</sup>. The crucial issue was whether s.70 had been validly repealed

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<sup>1</sup> [2000] HCA 47 (9 August 2001).

<sup>2</sup> Initially in the name of *Judamia v Western Australia* (Owen J, striking out pleadings, WA Supreme Court, Library No 950137, 23 January 1995; appeal dismissed, Full Supreme Court, Library No 960114, 1 March 1996; reversed on appeal by High Court, setting aside order of Owen J, 9 October 1996. After the death of Snowy Judamia the action became *Crow Yougarla v Western Australia* (1998) 146 FLR 128 (Murray J, dismissing claim on basis that plaintiffs lacked standing and other grounds); appeal to Full Supreme Court dismissed (1998) 21 WAR 488.

<sup>3</sup> “There shall be payable to Her Majesty, in every year, out of the Consolidated Revenue Fund the sum of Five thousand pounds ... to be appropriated to the welfare of the Aboriginal Natives, and expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of Aboriginal children (including half-castes), and in assisting generally to promote the preservation and well being of the Aborigines. ... Provided always, that if and when the gross revenue of the Colony shall exceed Five hundred thousand pounds in any financial year, an amount equal to one per centum of such gross revenue shall ... be substituted for the said sum of Five thousand pounds...”

The sections also provided that the moneys should be under the sole control of the Governor and be expended by the Aborigines Protection Board: further, that if the amount due in any year was not wholly expended it should be retained for future expenditure.

<sup>4</sup> Western Australia was the last Australian colony to receive self-government.

<sup>5</sup> See P Johnston “The repeals of section seventy of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust” (1989) 19 WA Law Rev 318, 320-322.

either in 1897<sup>6</sup> or 1905<sup>7</sup>. The High Court unanimously decided that s.70 had been validly repealed in 1905, at least, if not earlier<sup>8</sup>, and therefore had no continuing constitutional operation

While the single opinion of Kirby J gives some context and colour to the background to the dispute, the joint judgment particularly may appear to the untutored reader an arid and mechanical examination of a complex web of several inter related, curious and anachronistic “manner and form” provisions scattered throughout a number of 19<sup>th</sup> century Imperial statutes.

These statutes were concerned with progressively providing constitutions for the various Australian colonies. More specifically, they included the *Australian Colonies Constitutions Act (No 1) 1842 (Imp)* (“the 1842 Act”), which was primarily concerned with providing a partially representative Legislative Council for New South Wales, followed by the *Australian Colonies Constitutions Act (No 2) 1850 (Imp)* (“the 1850 Act”) which authorised the establishment of a fully bicameral form of responsible government for NSW. The constitutional procedures provided for NSW by that Act were extended to the other Australian colonies, including Western Australia. Finally, the *Western Australian Constitution Act 1890 (Imp)* (“the *WA Constitution Act 1890*”) empowered Her Majesty, Queen Victoria, to assent to the *Constitution Bill 1889*, a measure passed by the Legislative Council of Western Australia, which bill was annexed as a schedule to the Imperial Act.

### **The appellants’ contentions and the High Court’s response.**

The appellants’ contentions entailed two steps. The first was common ground, namely that any bill for a law that interfered with s.70 had to be reserved, in accordance with s.73 of the *Constitution Act*,<sup>9</sup> for the Royal

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<sup>6</sup> There had been a third, earlier attempt by the West Australian legislature to repeal s.70 in 1894 but the bill lapsed for failure to receive the Royal Assent within two years as required by s.33 of the *Australian Colonies Act (No 1) 1842*.

<sup>7</sup> *Aborigines Act 1905 (WA)* (“the 1905 Act”).

<sup>8</sup> The Court did not find it necessary to decide whether an earlier attempt at repeal in 1897 was successful though only Kirby J found that it had been.

<sup>9</sup> Section 73 so far as relevant reads: “The Legislature of the Colony shall have full power ... from time to time ... to repeal or alter the provisions of this Act. Provided ... that every

Assent (thus requiring the approval of the British Government). The second step was that such a bill reserved under s.73 attracted two further “manner and form” requirements.<sup>10</sup> The first, found in s.33 of the 1842 Act, originally applied only to bills passed by the Legislative Council of NSW<sup>11</sup>. Later it was extended to the other Australian colonies.<sup>12</sup> It required that bills reserved by the Governor for the royal assent<sup>13</sup> had to be proclaimed in the colony after assent in a particular way (“the proclamation requirement”). The second requirement, found in s.32 of the 1850 Act, was that certain bills, concerning the constitution of the colonial legislature and reserved by the Governor for the royal assent, had to be laid before both Houses of the United Kingdom Parliament for 30 days before receiving the royal assent (“the tabling requirement”).

It was contended that the 1897 bill to repeal s.70 failed to comply with both requirements, while the 1905 Act, although properly proclaimed, failed for lack of tabling in the imperial Parliament. In the event, the High Court unanimously held that the tabling requirement did not operate in relation to bills to repeal s.70 hence the 1905 Act was not invalid for any failure to table<sup>14</sup>. Having been properly proclaimed it was effective to remove s. 70 from the *Constitution Act*. Although the majority of the Court, in the joint judgment, found that the proclamation requirement was applicable to repeal s. 70, and hence impliedly the 1897 repeal failed for want of compliance, that was irrelevant for the purposes of the claim, given the effect of 1905 repeal.

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Bill which shall interfere with the operation of ... section seventy ... shall be reserved by the Governor for the signification of Her Majesty's pleasure...”

<sup>10</sup> The appellants' argument centred on the proper construction of s.2 (a) of the *WA Constitution Act 1890* (Imp), which preserved the portions of the 1842 and 1850 Acts “relating to” reservation and made them applicable to bills to be reserved under the *Constitution Act*. For reasons of brevity this aspect of the argument will not be explained in this paper.

<sup>11</sup> As mentioned, note 6 above, s.33 also contained the requirement for assent within two years of reservation which the Imperial authorities ruled had not been complied with in the case of the abortive attempt to repeal s. 70 in 1894.

<sup>12</sup> See s.12 of 1850 Act.

<sup>13</sup> These included certain specified categories of bills, such as those affecting the membership of or elections for the Legislative Council, or others reserved in the Governor's discretion. Notably, s.33 of the 1842 Act also contained the time requirement for assent within two years of reservation, upon which the 1894 bill to repeal s.70 foundered (see note 6 above).

<sup>14</sup> This was contrary to what Murray J, note 2, had decided at first instance.

Kirby J differed from the majority in holding that neither the proclamation requirement nor the tabling requirement was applicable to either of the repealing bills.

**Other issues.**

The decision did, however, address two other issues that may be of interest to a wider audience.

**(a) Justiciability.**

The respondents contended that compliance with the relevant manner and form requirements was *non justiciable* on a number of grounds, including the fact that tabling was a step to be taken in the United Kingdom Parliament at the instigation of the executive government of the United Kingdom. That proposition was not accepted. In the joint judgment it was said:

“One submission was that the question of compliance with the tabling procedures was ‘non-justiciable’ because it involved an aspect of the procedures of the Parliament at Westminster. However, what is at stake here is the validity of the 1905 Act, a statute of Western Australia, not the United Kingdom. In *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, both Rich J and Dixon J treated manner and form requirements binding subordinate legislatures as requiring fulfilment of every requirement imposed upon the process of law-making, including the laying of colonial bills before the Houses of the Imperial Parliament.”<sup>15</sup>

Kirby J also rejected the claim of non-justiciability<sup>16</sup>.

**(b) Section 106 Commonwealth Constitution.**

The respondents further submitted that after the passing of s.106 of the *Commonwealth Constitution*, the only manner and form requirements that needed to be satisfied were those actually imposed by the *Constitution Act* (WA).

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<sup>15</sup> At paragraph [63]

Section 106 of the Commonwealth Constitution relevantly reads:

“The Constitution of each State of the Commonwealth shall, subject to this Constitution continue as at the establishment of the Commonwealth ... until altered in accordance with the Constitution of the State”.

The respondents submitted that the expression in s.106, “the Constitution of each State”, was to be read as confined solely to the legislation of the State, excluding any manner and form provisions that might be derived from Imperial legislation.

Neither the plurality Justices nor Kirby J accepted this contention. The joint judgement noted that such a confined reading of the expression would not be consistent with the number of prior High Court decisions including those referred to by Brennan CJ in *McGinty in Western Australia* (“*McGinty*”).<sup>17</sup>

Kirby J did accept that there was some ambiguity and a degree of uncertainty about what precisely the expression “the Constitution of the State” in s.106 means. He held that the better view was that the phrase was not confined to the respective Constitution Acts of the States freed of all requirements of Imperial legislation that governed them before Federation<sup>18</sup> nor did his Honour accept that the “Constitution of the State” embraces only matters pertaining to the legislature. The courts of each State would in his view ordinarily be regarded as part of the “Constitution of the State”. He observed that if the various Constitution Acts of the States set the outer limits of the constitutional elements of each State, Supreme Courts would not be included. Such a conclusion would be contrary to the High Court’s decision in *Re Tracey; Ex parte Ryan*<sup>19</sup> in which the High Court had held that State courts are part of the government of a State and are protected from Federal control by s.106.<sup>20</sup>

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<sup>16</sup> At paragraphs [79-81], referring to *Egan v Willis* (1998) 195 CLR 424 at 487 [124].

<sup>17</sup> (1996) 186 CLR 140 at 171-173.

<sup>18</sup> At paragraph [89].

<sup>19</sup> (1989) 166 CLR 518 at 547, 575.

### **Historic context.**

In reaching the above conclusions the judgments construed the terms of the relevant statutes largely without regard to the historic context in which s. 70 was included in the *Constitution Act*. Some mention of that background is made by Kirby J who had regard to the evolving constitutional relationship between the Australian colonies and the United Kingdom leading up to Federation<sup>21</sup>.

Few constitutional scholars who read *Yougarla* will be aware of the fact that when the Western Australian Legislative Council, having achieved the first stage of representative government in 1870, sought in the latter part of the 1880's to move to the further stage of full responsible government,<sup>22</sup> a serious issue emerged as to whether a future colonial government could be entrusted with the responsibility of adequately protecting the Aboriginal inhabitants of Western Australia. Strong, largely evangelical opinions were expressed in the British Parliament on the topic.<sup>23</sup>

The matter of Aboriginal welfare was also one in which the Governor, Sir Frederick Napier Broome, was interested, not least because of allegations of slavery in the North coastal region of Western Australia. These activities were exposed in a defamation suit brought by the Rev. John Gribble against the "West Australian" newspaper in 1886.<sup>24</sup> Accordingly, the provision that was to become s.70 played a prominent role in the negotiations conducted through the agency of Governor Broome between the United Kingdom authorities, principally Sir Henry Holland, later Lord Knutsford, the Secretary of State for Colonies, and the colonial representatives in the Legislative Council. Section

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<sup>20</sup> Some of the wider implications of the role and scope of s.106 with respect to Australia's Federal constitutional system will be addressed below.

<sup>21</sup> Note 1 at [103]-[106].

<sup>22</sup> In accordance with s.12 of the 1850 Act.

<sup>23</sup> Particularly effective were a group of politicians who met at Exeter Hall whose efforts had earlier resulted in Great Britain withdrawing from the slave trade. See Johnston, note [5], at 321.

<sup>24</sup> J.Gribble *Dark Deeds in a Sunny Land*, republished 1987 with postscript by Sue-Jane Hunt, at 68-69. These allegations were repeated in the English press. See H Reynolds *This Whispering in our Hearts*, 1998, 154-155.

70 was developed in drafts exchanged between Broome and Holland between 1888 and 1890.<sup>25</sup>

The provision is without precedent in British constitutional arrangements<sup>26</sup>. In any event, against protracted and vociferous objection by colonial politicians s.70 was included in the *Constitution Bill* virtually as the price upon which self-government was granted. That it was seen distastefully as one part of a forced bargain was evident from protests made by leading colonists when the new legislature established by the 1889 *Constitution Act* came into being. As early as 1892 moves were made for its abolition.<sup>27</sup> These eventually came to fruition when the Premier of the colony, Sir John Forrest, after an earlier failure to repeal the offensive provision in 1894<sup>28</sup> achieved agreement with a much more compliant and sympathetic Secretary of State for the colonies, Joseph Chamberlain, leading to the its attempted repeal in 1897.

In 1905, however, due to the agitation by a socially conscious Perth lawyer, Mr Lyon Wiess, the legal effectiveness of the 1897 repeal was called into doubt.<sup>29</sup> Mr Lyon Wiess contended that any bill to repeal s.70 had to comply with the proclamation requirement in the 1842 Act. The 1897 repeal, not having done so, was bad in law. The Imperial authorities consulted the law officers who gave their opinion that the 1897 repeal was open to constitutional doubt and a new Act should be passed,<sup>30</sup> the bill for which should be reserved in accordance with s.73 of the *Constitution Act* and after the royal assent had

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<sup>25</sup> See Johnston, note [5], 321-323.

<sup>26</sup> There is some suggestion that its originator was Governor Broome himself, drawing on his experience while Governor of Natal in South Africa, where a fund for the welfare of the indigenous peoples had been drawn from the use of native lands. See N Greene "From Princes to Paupers: The Struggle for Control of Aborigines in Western Australia 1887-1898" in *Early Days; Journal of the Royal Western Australian Historical Society*, Volume 11, Part 4, 1998, at 447-462.

<sup>27</sup> Johnston note [5] at 323-328.

<sup>28</sup> The 1894 repealing bill lapsed when the two year period between reservation and assent expired, prescribed by s.33 of the 1842 Act, expired due to protracted negotiations between Perth and London. See note 6 above.

<sup>29</sup> Johnston note 5 at 334-339.

<sup>30</sup> The opinion of Sir R Finlay KC, Attorney General, and Sir E Carson KC, Solicitor General, is reproduced in Johnston, *ibid*, at 336-338. In their opinion the 1897 repeal was not legally valid, as the assent of Her Majesty had not been signified in accordance with s.33 of the 1842 Act.

been given, should be properly proclaimed. This led to the 1905 repeal which purported to apply retrospectively to 1897.

It would also not be evident to the uninformed reader of *Yougarla* that the 1905 repeal did not simply disappear into the mists of history. It was the cause of simmering discontent among the Aboriginal populace in various parts of Western Australia throughout the remaining decades of the 20<sup>th</sup> century.<sup>31</sup> Aborigines in the Pilbara in the late 1940s brought it to the attention of a white miner, Mr Don McLeod, who was interested in Aboriginal welfare, particularly employment conditions on pastoral stations. Until his death in April 1999, Don McLeod continued to press the issue of whether s.70 had been effectively repealed and if it had, whether such repeal entailed a breach of trust between the Aboriginal inhabitants of Western Australia and the relevant governments concerned in its repeal.<sup>32</sup>

In so far as the joint judgment omits any reference to the context in which s.70 was included in the Western Australian constitution and the circumstances of its repeal in 1905, it represents in no way what some legal scholars would call a exercise in *therapeutic jurisprudence*. A therapeutic judgment is one where, even if a challenge is unsuccessful, some awareness and recognition is shown for the wider social and cultural aspects that give meaning to the challenge.

In terms of the actual reasoning behind the decision, *Yougarla v Western Australia* has little, apart from what was said about s.106 of the *Commonwealth Constitution*, for constitutional scholars. This is not to say that either the joint judgment or that of Kirby J concerning the manner and form issues is beyond analytic criticism. A close examination of the reasoning in each case demonstrates that there are logical difficulties and inconsistency

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<sup>31</sup> The matter was agitated before the Aboriginal Land Inquiry, conducted by Paul Seaman QC in 1984 (see Johnston, note 5, 318).

<sup>32</sup> An opinion was sought from John Toohey QC prior to his elevation to the High Court. As Justice Toohey, his Honour declined to sit on the appeal in *Judamia v Western Australia*. See also J Toohey, "The One Percent Solution", Public Law and Public Administration Discussion Group, ANU, Canberra, 2 December 1987.

in both judgments.<sup>33</sup> This is not merely a quibble that can be made by the appellants alone. What is remarkable about the joint judgment is that while it does not accept some of the arguments put by the appellants, it adopts reasoning which is inconsistent with both the case put by the respondents<sup>34</sup> and the several justices in the Full Court of the Western Australian Supreme Court.<sup>35</sup> Only Kirby J in his reasoning reflects some acceptance of the respondents' contentions.<sup>36</sup> However, the parties aside, the analysis of the various Imperial and colonial Acts is hardly engaging or edifying to a wider audience.

If *Yougarla* is read as dealing solely with the above issues the case might at best form a footnote in some text or learned thesis. The real interest of the case lies, however, in issues which were left undetermined. This occurred because at a directions hearing on 5 February 2001 to consider how the case should be argued before the Full High Court, Gummow J, taking into account the wide suite of issues that the appeal from the Full Supreme Court covered, directed that in the first instance only the specific issues relating to the relevant manner and form provisions<sup>37</sup> should be heard.<sup>38</sup> If the appellants had succeeded on the manner and form questions the remaining issues were to be addressed at a second stage. Having regard to the negative outcome of stage one, however, further consideration of the other matters proved unnecessary.

### **The Issues that *Yougarla* did not address.**

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<sup>33</sup> These will be elaborated in subsequent articles by the writer and by Dr S Churches.

<sup>34</sup> The respondents relied substantially on legislative history and historical materials of colonial office practice. Their principal argument was that the 1842 proclamation and the 1850 tabling requirements were tied to bills for specific purposes connected to legislative arrangements existing only for a certain time, so that the manner and form restrictions lapsed when those purposes were spent, or did not apply to a repeal of s.70, because it did not fit the specific purposes referred to in the 1842 and 1850 Acts.

<sup>35</sup> The spent purposes argument was accepted by Ipp J 21 WAR at 505 and Anderson J at 519, while White J, as to the requirement for tabling, held at 532 that tabling in accordance with the 1850 Act applied to the classes of bills required to be reserved under that Act exclusive of the class of bills reserved under s.73 of the *Constitution Act*.

<sup>36</sup> His Honour did accept a version of the spent purposes argument; note 1 at [125] - [128].

<sup>37</sup> Including aspects of s.106 Commonwealth Constitution arising from the manner and form submissions.

<sup>38</sup> <http://www.austlii.edu.au/au/other/hca/transcripts/2000/P60/1.html> (5 February 2001).

The further issues that were not reached in *Yougarla* fall into four groups. They arise in the main out of a number of special defences put forward by the respondents, and in some instances, from the appellants' contentions in reply.

In broad terms, the four groups are:

- (a) issues concerning *the relationship between the States' and the Commonwealth constitutions*, and in particular, the significance and relevance of s. 106 of the Commonwealth Constitution;
- (b) *procedural issues concerning jurisdiction and limitations* on bringing the action, in particular defences based on the *Crown Suits Act 1947 (WA)*, the *Limitation Act 1935 (WA)*, and the effect on both those Acts, if the suit was one in *federal jurisdiction*, of the *Judiciary Act 1903 (Cth)*;
- (c) assuming the 1897 and 1905 repeals to be invalid, *the effect of validating legislation*, namely:
  - (i) the *Australian States Constitution Act 1907 (UK)*; and
  - (ii) Section 76A of the *Interpretation Act 1984 (WA)*<sup>39</sup>, the latter in turn raising issues concerning whether:
    - a. the *Australia Acts 1986 (UK and Cth)* could be notionally given a back dated application to operate upon the 1897 and 1905 repeals, involving the interpretation of various provisions in those Acts;
    - b. s. 76A of the *Interpretation Act* could retrospectively change a legislative fact that a bill had not come into existence as an Act;
    - c. s.76A itself was invalid by reasons of repugnancy with the UK version of the *Australia Act*, or inconsistency with the Australian version; and

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<sup>39</sup> A provision inserted into the principal Act after the *Judamia/Yougarla* litigation had commenced in the Supreme Court, though see discussion at WA Parliamentary Debates (Hansard) Legislative Council, 1994, 8778, 11260.

d. the *Australia Acts* themselves validly applied in relation to Western Australia; and

- (d) several discreet threshold issues including:-
- (i) the *standing* of the appellants; and
  - (ii) the relationship, as respondents, between the Attorney General and the State of Western Australia.

**(a) The Relationship of States' Constitutions to Commonwealth and the function of s.106 of the Commonwealth Constitution.**

As discussed above, the High Court in *Yougarla* did address one aspect of s.106 in relation to the kind of manner and form requirements the State Parliament was required to comply with when amending its Constitution. It held that the procedural restrictions to be observed in altering the Constitution of Western Australia were not confined solely to restrictions, such as s.73, in the *Constitution Act 1889 (WA)* itself, excluding those derived from imperial statutes. In that regard a wider question arises: what other "constitutional" legislation qualifies as falling within the description "Constitution of the State"?

In the case of Western Australia, for example, a manner and form requirement outside the *Constitution Act* is found in s.14 of the *Electoral Distribution Act 1947 (WA)*.<sup>40</sup> That section provides that it is unlawful for a bill amending that Act (which regulates the composition of the Legislative Council) to be presented to the Governor for the Royal Assent unless it has been passed in each House of Parliament by an absolute majority.

The High Court held in *Western Australia v Wilsmore*<sup>41</sup> that the requirement in s 73(1) of the *Constitution Act*, that bills altering the "constitution" of either House of Parliament be passed by absolute majorities.<sup>42</sup> applied only to provisions relating to the Houses that were found in the *Constitution Act* itself

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<sup>40</sup> This provision is currently the subject of litigation before the Supreme Court in the action of *Marquet v Attorney General (WA) and the State of Western Australia* SCWA CIV 2949 of 2001, discussed below.

<sup>41</sup> (1982) 149 CLR 79.

and not elsewhere. Since the distribution of Legislative Council electorates in Western Australia is now a matter dealt with in another Act, the *Electoral Distribution Act*, the operation of s.73 is not engaged. Nevertheless, although appearing in another Act, it is arguably open to a court<sup>43</sup> to treat s.14 of the *Electoral Distribution Act 1947* as part of the “Constitution of Western Australia” for the purposes of s.106 of the Commonwealth Constitution.

Whatever the extent of the statutory instruments comprising the constitution of a State, the connection(s) between state and the Commonwealth constitutions under s.106 has other, wider ramifications. If it be accepted that a breach of a manner and form provision in a State constitution entails, by virtue of s.106, a breach of the latter provision the most immediate consequence is that any challenge to a State law based on failure to observe manner and form conditions is a matter of Federal jurisdiction.

This was in fact the view taken by the Full Court of the Supreme Court of Western Australia in *Western Australia v Wilsmore*.<sup>44</sup> Gummow J endorsed this view in *McGinty*<sup>45</sup> where he said;

“Further, it is submitted that the concluding words of s.106 of the Constitution, ‘until altered in accordance with the Constitution of the State’, empower a State Parliament to insert into its Constitution a manner and form requirement, provided it is not inimical to the principles of representative democracies. This produces the result that the double entrenchment effected by s.73 is effective also by force of the statement in s.106 of the Constitution that the ‘Constitution of each State of the Commonwealth shall, subject to this Constitution, continue’.

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<sup>42</sup> An absolute majority is half the membership of the House plus one, irrespective of the number of members who *actually vote*.

<sup>43</sup> Other considerations aside, such as whether the provision was properly entrenched in the first place and whether a later Parliament is bound by it. Another view would characterise the Act as containing essentially machinery, rather than constitutive (in the constitutional sense), provisions.

<sup>44</sup> [1981] WAR 197 per Burt CJ at 184.

<sup>45</sup> (1996) 186 CLR 140 at 296.

It may be accepted that the question whether a law of the State was enacted in a manner and form which did not satisfy s.73 would arise under the Australian Constitution and in particular under s.106 thereof, for the reasons given by Burt CJ in *Western Australia v Wilsmore*. This would be because the phrase in s.106 'altered in accordance with the Constitution of the State' recognises or accepts requirements, such as s.73, which otherwise apply to State constitutional changes. Accordingly, the sense of the phrase 'altered in accordance with' would be 'so altered as not to contravene any otherwise binding requirement'. There would be a distinct question whether s.106 goes further so as to create any additional and binding category of restraint upon State constitutional alteration."<sup>46</sup>

Where a breach of a State manner and form provision entails a consequential breach of s.106 the suit is one arising under the *Commonwealth Constitution*. It therefore attracts Federal jurisdiction<sup>47</sup> with the result that the matter falls within the reach of the *Judiciary Act 1903* (Cth).<sup>48</sup>

To accept that there is, in effect, a textual association between the State and Commonwealth Constitutions, at least so far as manner and form provisions are concerned, invites consideration of the more general relationship between the two constitutional systems. At bottom, this involves one of the most fundamental constitutional questions of all: What is the basis, the "Grundnorm", of a State's constitutional system?<sup>49</sup>

Various judicial views have been expressed on this point. Barwick CJ in *New South Wales v Commonwealth*<sup>50</sup> saw the effect of the *Commonwealth of*

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<sup>46</sup> His Honour conceded that views differed as to the latter matter, referring to G Goldsworthy, "Manner and Form in the Australian States" (1987) 16 Melbourne University Law Review 403 at 426-428.

<sup>47</sup> Under s.76 (i) *Commonwealth Constitution*.

<sup>48</sup> *Wilsmore v Western Australia* [1981] WAR 179 per Burt CJ at 184; *Western Australia v Wilsmore* (1982) 149 CLR 79 per Murphy J at 85-86. The implications of this are further explored below in relation to the procedural defences raised by the respondents in *Yougarla* and in particular, the effect of the *Judiciary Act 1903* (Cth) on the *Crown Suits Act 1947* (WA).

<sup>49</sup> Some aspects of this issue are explored by N Douglas "The Western Australian Constitution: its source of authority and relationship with Section 106 of the Australian Constitution" (1990) 20 UWALR 340.

<sup>50</sup> (1975) 135 CLR 337, at 372.

*Australia Constitution Act 1900 (Imp)* as converting the pre-existing Australian colonies into States. He said<sup>51</sup>

“As States, they owe their existence to the Constitution which, by ss106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies enjoyed, including the power of alteration of those constitutions.”

A more conservative view was expressed by Burt CJ in *Western Australia v Wilsmore*;<sup>52</sup> namely that the sole source of the authority for the States’ constitutions is the imperial Acts which created them.

The differences between these formulations can be rationalised as depending on semantic distinctions between a State “owing its existence as a State” to, and its “constitution deriving its authority” from, a particular source. Nevertheless, the role of the 1900 imperial legislative settlement achieved in the *Commonwealth of Australia Constitution Act 1900 (Imp)*, giving authority and legitimacy to the Constitution endorsed by the “people of the Australian colonies”, arguably has not been satisfactorily explained. The repatriation of the Australian *Grundnorm* brought about by the passing of the *Australia Acts 1986 (UK and Cth)* suggests that s.106 of the Commonwealth Constitution now operates in a purely autochthonous Australian context.<sup>53</sup>

Certainly some members of the High Court have expressed the view from time to time that in fact s.106 may have a two-way operation insofar as it not only subjugates some aspects of state constitutions to overriding Commonwealth norms (“subject to”), but also entails some restraint upon the

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<sup>51</sup> Ibid. His Honour expressed a similar view in *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172 at 182. A more audacious contention of the respondents was one relying on propositions drawn from Murphy J in *Bisticic v Rokov* (1976) 135 CLR 552 and *China Ocean Shipping Co. v South Australia* (1979) 145 CLR 172 at 236 that upon the Australian colonies becoming States of the Commonwealth in 1901 the United Kingdom Parliament ceased to have any power over their constitutions. That contention was not addressed in the Full Supreme Court and is inconsistent with later dicta such as that of Gaudron J in *Sue v Hill* (1999) 199 CLR 462, [171] – [173]; 163 ALR 648 at 694.

<sup>52</sup> [1981] WAR 179 at 183.

Commonwealth itself. In *Australian Railways Union v Victorian Railways Commissioners* Dixon J stated:<sup>54</sup>

“It may be that sec.106 provides the restraint upon the legislative powers of States which differentiates it from the power over the subject and that no law of the Commonwealth can impair or affect the Constitution of a State. No doubt, sec.106 is conditioned by the words ‘subject to this Constitution’ but so too is sec.51.”

Similar views were expressed by members of the Court in *Re Tracey*<sup>55</sup> concerning the ability of the Commonwealth to impose restrictions upon the jurisdictions of State courts.

The possible set of relationships between State and Commonwealth constitutions was raised in *McGinty*<sup>56</sup> in relation to the question whether, if there be some standard in the *Commonwealth Constitution*, derived by implication from its terms, of electoral equality as between the value of a vote in different electorates, could such an implied limitation, through one means or another, apply to the electoral systems under state constitutions.

In that context it was submitted in *McGinty* that there are four possible relationships between State constitutions and that of the Commonwealth.

The first is an “organic” model which envisages that the *Commonwealth Constitution* coexists with the state constitutions in a merged single polity so that fundamental constructs such as a principle of electoral equality, like that of representative government, permeate the whole constitutional structure.

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<sup>53</sup> See *Sue v Hill* (1999) note 48 where it is pointed out that s.106 is itself “subject to [the] Constitution” and hence to laws made under s.51 (xxxviii) thereof, the power under which the *Australia Act* (Cth) was passed.

<sup>54</sup> (1930) 44 CLR 319 at 391-392.

<sup>55</sup> Note 18.

<sup>56</sup> Above, note 16.

A second proposed model is that s.106 becomes a conduit pipe or umbilical cord through which certain key principles found in the *Commonwealth Constitution* are transmitted or transfused to the individual state constitutions.

A third model conceives of the state constitutions as satellites in a less immediate relationship with the Commonwealth but in which there is a shared space in which various interactions and entanglements may occur. In that regard provisions such as s.15 of the *Commonwealth Constitution*, conferring the function upon State Parliaments of appointing Senators to fill casual vacancies, represent instances of particular associations between the two. Furthermore, the kind of situation discussed in some of the representative government cases such as *Theophanous v Herald & Weekly Times Ltd*<sup>57</sup> and *Levy v Victoria*<sup>58</sup> contemplates some matters, such as political affairs, as matters in which Commonwealth and state elements intertwine and are indistinguishable.

The final theoretical postulate is that the Commonwealth and State constitutions exist as separate entities on different planes, with certain matters and functions, such as customs and excise duties, extracted from the state constitutions by virtue of the Commonwealth.

Of the first, organic, possibility Brennan CJ in *McGinty* stated:

“The plaintiffs advanced an alternative form of this submission, namely, that the principle of representative democracy implied in the text and structure of the Commonwealth Constitution informs the Federal ‘organic unity of the Commonwealth and the States’. I am not confident that I understand that submission. However it be understood, it must involve some notion of representative democracy controlling the distribution of State Parliaments of electoral power in relation to State elections. The proposition must be rejected.”<sup>59</sup>

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<sup>57</sup> (1994) 187 CLR 104.

<sup>58</sup> (1997) 189 CLR 579.

The second possibility, the conduit pipe model, also found no acceptance in the circumstances of *McGinty's* case. It was explicitly rejected by Toohey and Gaudron JJ.<sup>60</sup>

The third proposed model of individual entanglements, to the extent it has been debated, has also not achieved any consensus among members of the High Court. Brennan CJ in fact doubted a necessary inter-relationship between Commonwealth and state constitutional matters in *Levy's* case.<sup>61</sup>

While it is accepted that one application of the qualification “subject to this Constitution” in s106 has the consequence of withdrawing particular matters from State constitutions, or in the case of s.109, giving supremacy to Commonwealth laws, that does not necessarily entail the proposition that State and Commonwealth constitutions exist in separate spheres.

The most extensive general discussion of the relevance of s.106 to state constitutions is that of Brennan CJ in *McGinty*. He states:<sup>62</sup>

“[Section106] has a dual operation. Its first operation is to prescribe what the new elements of the Federal polity – the States – shall be. When the people of the Australian Colonies were united in the Commonwealth of Australia... and those Colonies became Original States of the Commonwealth by operation of Covering Cl.6, the Colonies – the old constitutional entities, acquired a new constitutional status. They became States... deriving their existence as States from the Commonwealth Constitution. Secondly, s.106 conferred on respective States substantially the Constitutions at the antecedent Colonies. The same Constitutions as had been conferred on the Colonies prior to 1 January 1901 were continued as the Constitutions of the respective States thereafter, subject to such modifications as were effected by the *Commonwealth of Australia Constitution Act 1900* (Imp) and the *Commonwealth Constitution*.”

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<sup>59</sup> Note 16, 186 CLR at 176.

<sup>60</sup> Note 16; Austlii reference;<http://www.austlii.edu.au/cgibin/disp.pl/au/cases/cth/high%5fct/unrep245.html>, Toohey J, judgment paragraphs [41]-[56]; Gaudron J, paragraphs [78]-[79].

<sup>61</sup> Note 55.

He continued: “The Constitutions of the several States are, by force of s.106, subject to the Commonwealth Constitution, the provisions of which may be either expressed in its text or implied in its text and structure.”<sup>63</sup>

He then went on to hold, so far as any requirement of electoral equality was concerned, that even if it were found in the *Commonwealth Constitution* there was nothing textually or structurally that permitted any implication of equality to affect State electoral matters. They were solely a matter for state parliaments. To that extent they were discrete and separate matters, unregulated by the *Commonwealth Constitution*. Arguably, this resembles the satellite model.

In summary, having regard to the state of existing authority, it seems that as yet there is no comprehensive or coherent view as to the general relationship between the two sets of constitutions.

### **(b) Procedural Defences**

At the outset of the *Judamia/Yougarla* litigation, the respondents sought to have the proceedings struck out on the basis of failure to bring the action within the time limits imposed by s.6 of the *Crown Suits Act* 1947 (WA) and s.47A of the *Limitation Act* 1935 (WA). The first provision requires three months’ notice to be given to the Crown Solicitor of any action against “the State of Western Australia”.<sup>64</sup> The second provision imposes a similar limitation in regard to actions against persons sued on behalf of the State or performing functions under State laws. The appellants asserted that the Attorney General for the State was a person that attracted the operation of the latter provision.

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<sup>62</sup> At 171-2

<sup>63</sup> At 173.

<sup>64</sup> The ambiguity inherent in the concept of the “States” as constitutional entities and the States as manifestations of “the Crown” is mentioned below.

The consequence according to the respondents was that in each case the plaintiffs<sup>65</sup> in *Judamia/Yougarla*, by virtue of these limitation provisions passed in 1947 and 1935, should have commenced their action within three months of the constitutional breach “occurring” in 1905 at the latest.

The interpretive issues that were raised included whether:

- (a) a claim for a mere declaration that an Act was not validly passed<sup>66</sup> constitutes an “action” for the purposes of s.6 of the *Crown Suits Act*;
- (b) the cause of action arose, and was only referable to legislative events, in 1905 when the tabling did not take place, or whether plaintiffs’ claim invoked a continuing act of neglect;<sup>67</sup>
- (c) “the Crown in right of the State of Western Australia” in the *Crown Suits Act* referred only to the Crown in its *executive* manifestation where the suit was based on failures in the course of the *legislative* process, and whether the Attorney General is a “person” of the kind referred to in s. 47A of the *Limitation Act*.<sup>68</sup>

The State’s submissions found favour with Owen J in the first instance upon a strike out application,<sup>69</sup> the first Full Supreme Court on appeal,<sup>70</sup> and subsequently Murray J<sup>71</sup> on remitter from the High Court after the first appeal

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<sup>65</sup> The expression ‘plaintiffs’ is used here in relation to those initiating the suit.

<sup>66</sup> Adopting the form of proceeding used in *Dyson v Attorney General* [1911] 1 KB 410.

<sup>67</sup> In so far as there was alleged to be a contemporary obligation to set 1% of state revenue aside for persons of the same class as the plaintiffs, further to a standing and accumulating appropriation under an unrepealed s.70.

<sup>68</sup> While the meaning of “person” in s.47A must be construed in its particular statutory context the difficulties of interpreting the term with reference to constitutional persons is explored in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334.

<sup>69</sup> See note 2.

<sup>70</sup> Note 2.

<sup>71</sup> (1996) 146 FLR 128.

to that Court (*Judamia v Western Australia*<sup>72</sup>), and finally by the second Full Supreme Court.<sup>73</sup> Despite the weight of this authority the interpretive issues concerning these limitation provisions cannot be accepted as concluded beyond doubt, given that the High Court in *Judamia* stated that the contentions of the respective parties were arguable but did not have to be decided.

The issues of construction of the limitation provisions themselves are too particular to warrant further exploration in this paper. On the other hand two arguments advanced by the appellants in reply on these procedural aspects should be noted as having continuing significance. Both have constitutional ramifications.

The first contention was that the State legislature was incompetent to impose a statutory limitation on actions based on non-compliance with manner and form restrictions, as it would have the effect of practically repealing entrenched provisions such as s.70. It would be open to the State to pass invalid legislation and then place procedural bars on vindicating the breach<sup>74</sup>. While reasonable limitations on suing might be in order to preclude suing for a monetary claim based on an unconstitutional statute,<sup>75</sup> this should not apply in the case of a declaration seeking recognition of a continuing unconstitutional state of affairs. This contention found no support among the various members of the Supreme Court.<sup>76</sup>

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<sup>72</sup> The Full Supreme Court in *Judamia* held that the plaintiffs could not, for the purposes of seeking a *Dyson* type declaration, add the Attorney General as a party if the action had been wrongly brought against the State in the first instance, a proposition that drew from Kirby J comment about the procedural issues resembling those in "Bleak House" (High Court Transcript <http://www.austlii.edu.au/au/other/hca/transcripts/1996/P40/2.html>). The High Court upheld the appeal *ex tempore* without giving reasons.

<sup>73</sup> 21 WAR per Ipp J at 507; Anderson J at 523-528; White J not deciding.

<sup>74</sup> Citing *Antill Ranger & Co. Pty Ltd v Commissioner for Motor Transport* (1955) 93 CLR 83 and *Commissioner for Motor Transport v Antill Ranger & Co. Pty Ltd* (1956) 94 CLR 177 at 180 (PC).

<sup>75</sup> *Barton v Commissioner for Motor Transport* (1957) 97 CLR 633. See also *Mutual Pools & Staff Pty Ltd v Commissioner of Taxation* (1994) 179 CLR 155.

<sup>76</sup> The issue was shortly dismissed by Murray J at first instance and not addressed by any members of the Full Supreme Court on appeal.

Of greater importance, in terms of its likelihood to arise in future constitutional litigation which involves a State as defendant, is the appellants' argument that suits like *Yougarla* are actions engaging federal jurisdiction by reason of s.106 of the *Commonwealth Constitution*.<sup>77</sup> Hence they attract the operation of ss. 64 and 79 of the *Judiciary Act* (Cth). Section 64<sup>78</sup> arguably deprives the States of any "Crown" immunity from suit that they may otherwise enjoy by requiring courts exercising federal jurisdiction to treat them as if they were ordinary subjects. In that respect if the effect of s.64 is to assimilate a State to the status of a non-governmental litigant it goes beyond the modified relaxation of immunity from suit effected by the various States' *Crown Suits Acts*.<sup>79</sup> Since the *Judiciary Act* itself does not apply any limitations to suits in federal jurisdiction regarding declarations of validity of legislation, s.79 of that Act then comes into play. It provides in effect that in the absence of any relevant Commonwealth law the laws of the relevant State<sup>80</sup> relating to procedure will apply so far as possible. It therefore "picks up" the various limitation provisions, if any, provided under relevant state laws. In the case of a constitutional action based on non-compliance with the law-making process there is no such limitation applicable in Western Australia.<sup>81</sup> The *Judiciary Act* in other words, as a matter of construction, leaves no room for the *Crown Suits Act* to operate.

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<sup>77</sup> Section 106 could give rise to a matter 'arising under the Constitution' (s.76 (i)) first on the basis of the narrow view that to alter the 'Constitution of the State' an amendment must be 'in accordance with' that Constitution (the proviso at the end of s.106), or because, on a broader view, s.106 engrafts the State constitutions onto the Commonwealth (the first part of s.106), thus establishing the Commonwealth' Constitution as the *Grundnorm*. Burt CJ in *Western Australia v Wilsmore* [1982] WAR 179 at 183-184 accepted the first view but not the latter: see note 52 above. Whichever be the case, s.106 provides one but not necessarily the only platform for federal jurisdiction in manner and form suits. Federal jurisdiction could arise regarding a challenge to State legislation by a resident of another State under s.75 (iv) of the Constitution.

<sup>78</sup> Section 64 so far as relevant reads: "In any suit to which the Commonwealth or a State is a party, the rights of the parties shall be as nearly as possible the same...as in a suit between subject and subject".

<sup>79</sup> Except where as in the case of s.6 of the *Crown Suits Act* (WA) it subjects any suit against the state to a limitation condition. The effect of s.64 of the *Judiciary Act* upon the status of the states as litigants in federal jurisdiction is discussed in the ALRC Discussion Paper 64, The Judicial Power of the Commonwealth - A review of the Judiciary Act 1903 and related legislation. (2000), Paras 5.90 to 5.107. For general issues relating to s.64 see paras 5.248 to 5.260.

<sup>80</sup> That is, the State in which the suit is heard.

<sup>81</sup> This, of course, presumes the *Crown Suits Act* is not applicable since it relates to the Crown in a capacity other than that of a "subject". The expression "as nearly as possible"

The appellants sought to raise the effect of the *Judiciary Act* by way of an amendment to their pleadings at the commencement of the appeal in *Yougarla* before the Full Supreme Court. While counsel maintained the issue was solely one of construction, the Solicitor General for Western Australia submitted that it potentially raised matters under the *Commonwealth Constitution*, including s.109 inconsistency between ss.64 and 79 of the *Judiciary Act* (Cth) and s.6 of the *Crown Suits Act* (WA), and the power of the Commonwealth Parliament to pass a provision like s.64,<sup>82</sup> thereby regulating the Crown in right of a State in relation to its immunities.<sup>83</sup> Accordingly, it was submitted, the appeal could not proceed unless notices were served on the various Attorneys General under s.78B of the *Judiciary Act*. Faced with the delay that would have entailed the appellants did not pursue the point at that stage.

At the application before the High Court for special leave to appeal<sup>84</sup> the Solicitor General sought to have the ground relating to the *Judiciary Act* excluded from the appeal but the Court declined, Gummow J stating: '[I]f federal jurisdiction was being exercised, it cannot be brushed over, it seems

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comes into consideration in that regard. See ALRC Discussion Paper 64 note 76, 5.120 to 5.122.

<sup>82</sup> Presumably the respondents were referring to the power under s.78 of the Commonwealth Constitution in conjunction with s.51 (xxxix). Whether s.78 extends beyond procedural rights to substantive matters is not relevant to this discussion since the right to sue is a procedural right any way. The obverse proposition is that once a matter falls within federal jurisdiction a State has no power to prescribe limits on the parties. To do so would be inconsistent with Chapter III of the *Constitution*. The Commonwealth can in a sense 'waive' the immunity from State interference with federal jurisdiction by passing a measure like s.79 of the *Judiciary Act*. In such cases the Commonwealth's legislation 'picks up' State provisions capable of applying in the circumstances. There cannot be a s.109 inconsistency problem in that instance, however, because the State provision operates as federal law. At the most an inconsistency between the terms of a State law and a Commonwealth law in those circumstances must be resolved as one of repugnancy between two Commonwealth laws.

<sup>83</sup> Possibly raising the *Melbourne Corporation* doctrine relating to some implied limits on Commonwealth powers to severely interfere with central State institutions (see *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31. See also *re Australian Education Union* (1995) 69 ALJR 43. Similar objections have been raised but not settled in cases such as *Maguire v Simpson* (1977) 139 CLR 362. For a recent discussion of s.64 see *The Commonwealth v Western Australia* [1999] HCA 5 (11 February 1999) per Gleeson CJ and Gaudron J at [45]-[49]; Gummow J at [131]-[137] and Hayne J at [246]-[248].

<sup>84</sup> *Yougala v Western Australia* special leave application 4 August 2000 <http://www.austlii.edu.au/au/other/hca/transcripts/1999/P64/1.html>.

to me, and it is a pure question of law.”<sup>85</sup> Since the appeal did not reach the issue, however, the question whether the *Judiciary Act* can supplant the State Crown Suits legislation remains moot.

To debate the effect of s.64 of the *Judiciary Act* upon State immunity perhaps by-passes a prior and more fundamental issue: Does the *Commonwealth Constitution*, in making the States amenable to suit in some instances, deprive them of any immunity they might otherwise enjoy? The point here is that s.75 (iii) of the *Constitution* provides for federal jurisdiction in suits against the Commonwealth, arguably removing Commonwealth immunity from suit. There is no such general provision regarding the States other than s.75 (iv) dealing with special cases.<sup>86</sup> Is a State’s immunity only modified in those instances?

The textual questions so raised should be distinguished from the issues addressed above as to the function of s.106 in creating the States as constitutional entities. On one view s.106, in imposing a requirement that a State follow its own Constitution when altering it, must presuppose the matter is one capable of judicial review and vindication. If so a *Crown Suits Act* that frustrates the object of s.106 would be incompatible with the *Constitution*

### **(c) Retroactive Validation.**

If the 1897 and 1905 attempts to repeal s.70 were held ineffective, the respondents relied on two post-1905 provisions as retrospectively validating the failed bills.

The first was s. 2(1) of the *Australian States Constitution Act 1907* (UK). It operated to validate colonial legislation, which failed, where a Governor had assented to a bill when it should have been reserved for the Monarch’s assent. Successively, Murray J<sup>87</sup> and the Full Supreme Court<sup>88</sup> rejected the respondents’ contention on the ground that the imperial provision only applied

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<sup>85</sup> Ibid.

<sup>86</sup> Suits between States, or a State and a resident of another State.

<sup>87</sup> 146 FLR 128.

where *reservation had not occurred*. In the case of the 1897 and 1905 bills they *had been reserved* and assented to by the Monarch.

Section 76A of the *Interpretation Act* (WA), the second validating measure, presented a more substantial obstacle. Murray J at first instance in fact accepted s.76A as having cured any defect in the 1897 and 1905 repeal process.<sup>89</sup>

Section 76A(1) was introduced into the *Interpretation Act* in 1994. It provides:

“Each provision of any Act ... enacted or made, or purporting to have been enacted or made, before the commencement of the *Australia Acts*: -

- (a) has the same effect as it would have had;
- (b) is as valid as it would have been,

if the *Australia Acts* had been in operation at the time of its enactment or making, or purported enactment or making”.

Similar provisions were passed by the other states around that time. The respondents submitted that the effect of s.76A was that any issue as to the validity of Western Australian legislation passed in 1897 or 1905 should be decided as if the relevant provisions of the *Australia Acts* were then in force. In other words, the provision created a legislative “*Tardus*”<sup>90</sup> capable of transporting the *Australia Acts* back in time to apply to previous constitutional situations then subsisting.

The appellants’ primary contention was that s.76A could not give the provisions of the *Australia Acts* 1986 (UK and Cth) an operation in relation to statutes passed in accordance with procedures operative prior to 3 March 1986, the date fixed by proclamation for the latter Acts to come into force. To treat the *Australia Acts* as if operative at 1897 and 1905 would require an

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<sup>88</sup> See Anderson J, 21 WAR at 520-521, White J at 536-537.

<sup>89</sup> His Honour having found that the earlier repeals had failed for lack of tabling at Westminster.

<sup>90</sup> The term will be appreciated by fans of the long running 1970’s BBC television series “Dr Who”. It refers to a miraculous police box that could transport its occupants to different

implied amendment of those Acts in so far as they expressed an intention to take effect 'after the commencement of [this] Act'. The parliament of Western Australia would have no power, in the first place, to amend the *Australia Acts* in that regard since the only mode available to do so is s.15 of those Acts. Section 15 limits the power of amendment to the Commonwealth Parliament at the request of the States.

If s.76A did purport to amend the *Australia Act* (Cth) so as to give it an operation inconsistent with its terms it would be invalid for inconsistency by reason of s.109 of the *Commonwealth Constitution*.<sup>91</sup>

Assuming nevertheless that the *Australia Acts* could be given a retrospective application, the respondents contended that ss.6 and 9 of the Acts operated to validate the earlier repeals.

Section 6 of the *Australia Acts* provides:

"A law made after the commencement of this Act by the Parliament of the State respecting the constitution, powers of procedure of the Parliament of the State shall be of no force or effect unless it is made in such a 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."

The most problematic aspect of the respondents' reliance on the *Interpretation Act* defence was that even if s.6 of the *Australia Acts* could be given, by sub-s.76A (1), some retrospective operation, the 1897 and 1905 WA Acts repealing s.70 were not laws '*respecting the constitution, powers or procedure of*' the *Western Australian Parliament* within the terms of s.6. Section 6 could therefore have no relevant application to the 1897 and 1905

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time zones. Dr Steven Churches authored the metaphor in this instance, co-counsel for the appellants in *Yougarla*.

<sup>91</sup> Arguably there would not be a problem of repugnancy with the UK version where a State Act purports to give the *Australia Acts* a pre-dated commencement in so far as s.3 of the *Australia Acts* removes repugnancy with UK statutes as a ground of invalidity. The problem arising from s.15 as the exclusive basis for amendment still remains.

Acts.<sup>92</sup> Although Murray J held that s.6 of the *Australia Acts* was capable of applying to the earlier West Australian Acts,<sup>93</sup> his view on that point was overturned on appeal.<sup>94</sup>

Despite the fact that the limited operation of s.6 of the *Australia Acts* foreclosed this retroactive operation in relation to the 1897 and 1905 repeals, an alternative argument advanced by the respondents was that s.76A gave retrospective effect to sub-section 9(2) of the *Australia Acts*. That provision reads:

“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.”

It was said that the situation created by sub-section 9(2) could be taken to exist notionally at the time of enactment of 1897 and 1905 measures. In that event no reservation requirements existed as at those dates so that the failure to comply with the machinery of reservation was irrelevant. The short answer to this, according to the appellants, was that reservation *had* occurred, so sub.s.9 (2) had no application.<sup>95</sup>

An alternative response put by the appellants was that if the purported repeals in 1897 and 1905 were in fact a legislative nullity that situation could not be fictionally altered in 1994 when s.76A was passed. Relying on *University of Wollongong v Metwally*<sup>96</sup> the appellants contended that the State Parliament possessed no power to override the operation of the State Constitution by

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<sup>92</sup> Arguably, whether s.6 could apply to the 1905 repealing Act or not is irrelevant since, putting s.9 of the *Australia Acts* aside for the moment, it still would oblige the State Parliament to follow manner and form requirements such as those found in s.73 of the *Constitution Act*.

<sup>93</sup> 146 FLR 128.

<sup>94</sup> 21 WAR per Ipp J at 505; Anderson J at 521 and White J at 540.

<sup>95</sup> This is similar to the issue concerning s. 2(1) of the *Australian States Constitution Act* 1907 (UK) discussed above. Ipp J does not appear to have addressed this point; Anderson J declined to rule on it stating at 522 that the concepts involving retrospectivity were elusive and difficult. White J found it unnecessary to address the issue as he had held the 1905 repeal valid in any case.

<sup>96</sup> (1984) 158 CLR 447, per Deane J at 479. His Honour constituted the majority with Gibbs CJ, Murphy and Brennan JJ.

creating a retrospective legal fiction. *Akar v Attorney General of Sierra-Leone*<sup>97</sup> also gives some force to this argument, the Privy Council holding that an unconstitutional change to a fundamental law of a polity could not be altered by a later law unless that law itself complied with necessary constitutional standards. More recent support can be found in the statement of Dawson, Toohey and Gaudron JJ in *Mutual Pools & Staff Pty Ltd v Commissioner of Taxation* that:

“[P]arliament cannot bring legislation within power by deeming facts to be as they are not or by deeming things to have a character which they do not bear. No more...can a restriction imposed by the Constitution – as by s 55 – be avoided by deeming facts to be as they are not.”<sup>98</sup>

The argument was not accepted by Murray J, however.<sup>99</sup> Given their view that s.76A was not applicable to repeals of s.70, it was unnecessary for members of the Full Supreme Court to deal with the issue.

The third line of attack by the appellants on s.76A was directed to the constitutional validity of that provision itself. In the first place, it was contended that if, notionally, the *Australia Acts* could be transported back to 1905, they could only operate in a legislative context that included s.106 of the *Commonwealth Constitution*. Since s.15 of the *Australia Acts* withholds power from the States to use it to amend the *Commonwealth Constitution* s.106 would be unaffected by the *Australia Acts* as at that date. Section 6 of the *Australia Acts* could not impliedly repeal s.106. It would continue to require observance of manner and form provisions in the State Constitution as they then were. For s.76A to have the effect of removing the need to comply with the manner and form requirements prevailing at the time of repeal would therefore be inconsistent with s.106.

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<sup>97</sup> [1970] AC 853.

<sup>98</sup> (1992) 173 CLR 450, at 469. Their Honours speak initially of a state of physical fact but the second sentence appears to widen the context to include matters of constitutional status.

<sup>99</sup> 146 FLR 128.

The appellants also challenged s.76A on the basis that it had not been passed in compliance with paragraphs 73 (2)(e) and (g) of the *Constitution Act 1889 (WA)*. These latter provisions were inserted into the *Constitution Act* by amendment in 1978. They require any bill that affects ss. 2, 3, 50, 51 and s. 73 itself of that Act to be passed by absolute majorities in each House of Parliament and to be submitted for approval by the electors at a referendum. Sections 2 and 3 concern the make up of the Western Australian legislature, providing for the passage of laws by the two Houses of Parliament and the giving of assent by the Queen, represented by the Governor. Sections 50 and 51 constitute the Governor as the royal representative. Section 73(2) effects an entrenchment of s.73 in so far as a bill that affects the operation of that provision must comply with its own manner and form requirements.

It was submitted that to alter the *Constitution Act* retrospectively, by purporting through the 1994 amendment to the *Interpretation Act* to apply s.9 (2) of the *Australia Acts* so as to remove the reservation requirements applicable to a law repealing s.70, involved a reconstruction of the State legislature as constituted under ss.2 and 3 of the latter Act. This was because the relationship between the Queen and the Governor under those provisions, as constituent elements of the law making process, would be modified in that certain bills that previously were required to be assented to by the Queen herself could thereafter be assented to by her representative. It would also entail an alteration to the functions attaching to the office of the Governor as the Queen's representative under s.50 of the *Constitution Act*. As such the legislative process stipulated by s.73 (2)(g), including a referendum, should have been observed. This proposition was summarily dismissed by Murray J<sup>100</sup> and was not addressed by the Full Supreme Court.

The most fundamental attack on the respondents' resort to s.76A was to challenge the validity of the *Australia Acts* themselves in their application to Western Australia. This was based on non-compliance, again, with paragraphs 73(2)(e) and (g) of the *Constitution Act 1889*, and focused on the

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<sup>100</sup> Ibid.

process by which the *Australia Acts* were enacted. The legislative course of events with regard to both the United Kingdom and the Commonwealth's version of the *Australia Acts* commenced with a *Request Act* passed by the Parliament of each Australian State. The necessary West Australian Act<sup>101</sup> requesting the Commonwealth Parliament to enact that measure was a necessary precondition to the validity of the Commonwealth's Act in so far as the latter purported to be passed in accordance with s.51 (xxxviii) of the *Commonwealth Constitution*.<sup>102</sup> If the requesting Act was invalid in the first place the subsequent Commonwealth Act would be a nullity.

A similar argument was advanced with respect to the United Kingdom version. It was submitted that in the light of s.4 of the *Statute of Westminster* 1930 (UK) in conjunction with the *Statute of Westminster Adoption Act 1942* (Cth) the United Kingdom Parliament could not validly amend the relevant provisions of the West Australian Constitution unless it had received the necessary requests from both the State and Commonwealth authorities.

The appellants contended that the *Request Act* passed by the State Parliament was invalid by reason of its failure to satisfy the requirements of paragraphs 73(2)(e) and (g) of the *Constitution Act* (requiring absolute majorities and a referendum). It was submitted that the *Request Act* comprised the first legislative step of initiating an amendment to the *Constitution Act* in two respects. The first was setting in train an alteration to ss. 2 and 3 by reconstructing the relationship of the two Houses to the Queen, thereby affecting the constitution of the State legislature. The second consisted of causing an amendment to s.73 of the *Constitution Act* because it would bring about the repeal of the requirement in s.73 (1) for reservation by the Governor of bills to amend s.70.<sup>103</sup>

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<sup>101</sup> *Australia Act (Request) Act 1985* (WA) ("the *Request Act*").

<sup>102</sup> This allows the Commonwealth Parliament to exercise the same powers that could have been used by the UK Parliament in 1900 but only if requested by the Parliaments of all the States.

<sup>103</sup> Assuming it still existed in 1994, the year s.76A of the *Interpretation Act* was passed.

Again this submission received no detailed consideration by the Full Supreme Court. While it remains a matter in conjecture for Western Australia, the interesting question is whether the issue has relevance to other States. This depends on whether they had, prior to the *Australia Acts*, manner and form provisions equivalent or analogous to s.73 (2) of the *Constitution Act (WA)*.<sup>104</sup>

#### **(d) Other Unresolved Issues**

##### **(i) Standing**

While the High Court in *Yougarla* disposed of the action on the basis that the tabling requirement found in the 1850 Act was not applicable to the 1897 and 1905 repeals of s.70,<sup>105</sup> the primary and essential basis on which the appellants lost at first instance and before the Full Supreme Court was that of *standing* to sue. Although the Justices of the Supreme Court applied the “special interest” test laid down in the *Australian Conservation Foundation Inc v The Commonwealth*<sup>106</sup> they adopted a narrow and traditional approach to identifying the nature of the plaintiffs’ interest. They did not regard the plaintiffs as having a sufficiently material interest in the proceedings. The plaintiffs had to demonstrate that there was some likelihood of financial benefit accruing to them individually.<sup>107</sup> The most extreme view in that regard assumed an onus on the plaintiffs to establish that the expenditure by the State over the previous 100 years on Aboriginal affairs could not have satisfied the annual one percent requirement.<sup>108</sup> The contention that they could establish a *statutory* basis<sup>109</sup> for standing as members of a specially

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<sup>104</sup> See, for example, s.10A of the *Constitution Act* 1934 (SA). Under paragraph 10A(2)(e) of that Act the dual requirements of reservation and referendum applied to a change to that provision. It was thereby entrenched. Arguably the legislative request by South Australia to remove reservation required a referendum. See also the *Constitution Act* 1867 (Qld) sub-ss. 2A(2) and 53(1) relating to the Governor’s functions regarding assenting to legislation.

<sup>105</sup> And no other basis. In *Marshall v MacTiernan* [2001] WASC 294 (24 October 2001) at paragraph 26 the High Court’s decision in *Yougarla* is cited as an authority regarding s.47A of the *Limitation Act (WA)*, a matter that was excluded from the appeal as heard.

<sup>106</sup> (1980) 146 CLR 493.

<sup>107</sup> See Murray J (1996) 146 FLR 128; Ipp J 21 WAR at 496-498; Anderson J at 509-511; and White J at 529.

<sup>108</sup> See Ipp J, *ibid*, at 497-498.

<sup>109</sup> That the protective purposes of a statute are relevant to considering whether members of the protected class have sufficient standing was recognised in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, another case upon which the plaintiffs relied but not cited by the Court.

delimited class entitled to *constitutional* protection by reason of the *Constitution Act* itself received no recognition. The fact that on appeal the appellants abandoned any claim specifically for monetary compensation, while they persisted in seeking a declaration as to the continuing operation of s.70, was seen to aggravate their position regarding standing.<sup>110</sup>

What is remarkable about the Full Court judgments that addressed standing was that no consideration was given to the case of *Bateman's Bay Local Aboriginal Council v Aboriginal Community Benefit Fund Pty Ltd* ("*Bateman's Bay*")<sup>111</sup> even though that authority was cited to the Court at length. The failure to consider *Bateman's Bay* did not pass without comment at the hearing of the special leave application. Gummow J indicated that were standing to be considered by the High Court, regard should be taken of that case.<sup>112</sup>

Had the High Court addressed the issue of standing in *Yougarla* it might well have reversed the position adopted in the lower courts. Certainly the Western Australian approach to standing does not seem consonant with the High Court's general approach to redressing public and constitutional wrongs, not only in regard to standing but generally in adapting equitable remedies to vindicate public law grievances, particularly where the equitable remedy of declaration is concerned.<sup>113</sup>

### **Correct Parties in Constitutional Suits.**

One other issue from *Yougarla* of wider interest concerns the relationship between the Attorney General of a State and the State itself as defendants in

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<sup>110</sup> See Ipp J at 496.

<sup>111</sup> (1998) 194 CLR 247. *Croome v Tasmania* (1997) 191 CLR 119 and *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte World Development Movement Ltd* [1995] 1 All E R 611 were also cited to the Court as instances of a more flexible judicial approach where standing falls to be considered in a context that has regard to the nature of the matter and the relief sought. Neither was mentioned in the judgments.

<sup>112</sup> Austlii <http://www.austlii.edu.au/au/other/hca/transcripts/1999/P64/1.html> at p9. Kirby J also commented that there might be an important question whether a member of the Aboriginal community in Western Australia had standing to agitate the issues of the validity and force of the protective provisions of the Constitution of the State.

constitutional suits. In the Full Supreme Court, Anderson J, while accepting that the Attorney General may be an appropriate and perhaps the correct defendant in relation to an action for a declaration of right, took a different view with respect to the State of Western Australia.<sup>114</sup>

While this was not a significant issue in the *Yougarla* litigation, it remains a matter requiring clarification. Its most immediate significance in *Yougarla* concerned the interrelationship between the 'Crown' and 'the State' in regarding the application of the *Crown Suits Act* and the *Limitations Act*.

At the higher level of the *Commonwealth Constitution*, the question arises whether in matters arising under Chapter III, only the 'State' can be the proper defendant, though perhaps represented by the Attorney General. At the ultimate level, theoretical and jurisprudential issues emerge such as what precisely is the constitutional notion of a 'State'. This has already been mentioned in relation to possible constructions on s.106 of the *Commonwealth Constitution*. Arguably it has wider ramifications.<sup>115</sup>

Some clarification as to the relationship under the Commonwealth and State constitutions between the Attorney General as representative of the Crown and the State itself may be provided when the High Court delivers its decision in *Australian Catholic Bishops Conference v The Commonwealth*.<sup>116</sup> That decision, if all the issues presented to the Court are addressed, may illuminate other conundrums including the elements of constitutional standing and justiciability of constitutional issues where there is some lack of adversity

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<sup>113</sup> See *Truth About Motorways Pty Limited v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 [2000] HCA 11 (9 March 2000) and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

<sup>114</sup> 21 WAR 525-527. His Honour held at 527 that even if an action is barred against the Crown by virtue of the *Crown Suits Act* (WA) it could be maintainable against the Attorney General as representative of the Crown in its "legislative capacity".

<sup>115</sup> The matter goes beyond s.106 since Chapter III of the Constitution speaks to the position of the States in a number of instances (see note 83 above and accompanying text). Another factor is the function of Covering Clauses 4- 6 of the *Commonwealth of Australia Constitution Act* 1901 (UK) and the constitutional status they give to the 'States'. In the context of an implied principle of legal equality Deane and Toohey JJ in *Leeth v The Commonwealth* (1992) 174 CLR 455 (paragraph 7 of joint judgment) considered the States as "artificial entities" the people of whom constituted those entities.

between the contending parties.<sup>117</sup> It may also illuminate the conditions on which a court exercising federal jurisdiction should exercise its discretion both as to when it should entertain a matter, and if so, whether declaratory relief should be granted.

### **Has the second shoe already fallen?**

As mentioned above, some of the issues agitated though not resolved in *Yougarla* may have immediate implications for the case of *Marquet v Attorney General of Western Australia and the State of Western Australia* (“*Marquet*”).<sup>118</sup> *Marquet* is an action brought by the Clerk of the Western Australian Parliament. It seeks a declaration as to whether it is unlawful for him to convey the Electoral Distribution Repeal Bill 2001 to the Governor for the latter’s assent in the Queen’s name. The Bill repeals the *Electoral Distribution Act* 1947. A separate measure, the Electoral Amendment Bill 2001 re-enacts the provisions of the repealed Act relating to the distribution of the parliamentary electorates in substantially the same form as provisions of the *Electoral Act* 1907 (WA). The Legislative Council passed the bills by only a simple majority. The possible unlawfulness is said to arise because, in accordance with s.14 of the *Electoral Distribution Act*, it is unlawful to present to the Governor for assent a bill *amending* that Act unless it has been passed in each House by an absolute majority. The Government claims that s.14 does not apply to bills to *repeal* the whole Act. The key issue is whether the provision that repeals the *Electoral Distribution Act* in its entirety (including s.13) is one that “amends” that Act<sup>119</sup> and hence is required to be passed by an absolute majority.

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<sup>116</sup> *Re Sundberg; Ex parte Australian Catholic Bishops Conference*, C22/2000 (5 September 2001) <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/hca/transcripts/2000/C22/7.html>

<sup>117</sup> Giving rise to an element of hypothesis.

<sup>118</sup> Note 39.

<sup>119</sup> The Legislative Council Standing Committee on Legislation in its Eighth Report of 2001 on the bills discusses, in chapter 8, the meaning of “amend” as against “repeal”. Whether the ordinary meaning of those terms is appropriate will be a matter for judicial determination. Arguably, having regard to the distinction between “repeal” and “alter” drawn in s.73 (1) of the *Constitution Act* (WA) and s.5 of the *WA Constitution Act* 1890 (Imp) the constitutional sense of those terms imports wider and perhaps more fundamental considerations.

The action uses a process under the rules of the Supreme Court,<sup>120</sup> which authorises the Court to give a declaration as to the construction of a statute or document.

Three preliminary questions can be raised. These are whether:

- (a) the Supreme Court has *jurisdiction* in respect of the suit, both as regards its substance and timing;
- (b) in any event, the Court should, for a number of reasons, decline to hear the matter based on considerations of *justiciability*; and
- (c) both *defendants* are *competent parties* to the action.

The starting point here is that, as in *Yougarla*, if the action is one concerning compliance with provisions of an Act that arguably form part of the Western Australian “Constitution”<sup>121</sup>, it must be, by virtue of s.106, a suit within Chapter III of the *Commonwealth Constitution* engaging federal jurisdiction. As such it must satisfy the elements necessary for it to be a “matter” within the meaning of Chapter III. A matter must comprise a controversy, which implies the presentation of adversative views by a person affected by the law. The High Court in *Re Judiciary and Navigation Acts*<sup>122</sup> ruled that, unlike the Supreme Court of Canada, the High Court and necessarily any other court exercising federal jurisdiction cannot address a hypothetical issue and provide what is in effect an advisory opinion.

The question that arises in the circumstances is whether a suit for a declaration concerning the construction of s.14 of the *Electoral Distribution Act* and the relevant provisions of the bills passed by the Legislative Council impermissibly seeks what is in effect an advisory opinion in relation to the construction of that legislation. Arguably, the proceedings in *Marquet* come

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<sup>120</sup> Order 58 rule 11.

<sup>121</sup> As briefly indicated in note 43 this preliminary issue is open to debate.

<sup>122</sup> (1921) 29 CLR 257.

close to that situation. The Clerk of the Parliament is not in a position to advance views about the validity of the relevant bill one way or the other.<sup>123</sup>

The High Court further held in *Re Judiciary and Navigation Acts*<sup>124</sup> that a declaration should not be given in theoretical circumstances where the interests or duties of a party are not affected. In the instant case it cannot be objected that no one's interest is affected. Clearly the interests of the Members of Parliament and the voters they represent have an electoral interest. So far as the plaintiff's interest is concerned, however, he seeks clarification of whether it is lawful for him to present the repealing bill to the Governor for assent.<sup>125</sup> The plaintiff's claim to standing to raise the issue is contentious. It appears that his concern is based on the prospect that the presentation of the bill to the Governor for assent may be "unlawful". That however is not something that places the plaintiff in any risk of personal consequences.<sup>126</sup> The attribution of "unlawfulness" to a non-complying bill concerns the *legislative consequences* of the measure<sup>127</sup> and is not intended to be attended by any personal legal liability, not least by the Clerk who is merely performing a mechanical administrative act.<sup>128</sup> Any recriminations for

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<sup>123</sup> A proposal that the plaintiff could advance both sides of the argument is also problematic. It would be difficult to do so in a way that ensures the Court the full vigour of a contested argument. On the other hand a full-blooded presentation of argument on either side is apt to draw criticisms of partisanship. Although directed at the situation of tribunals engaged in adjudicative decision making, the principle in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 also suggests that persons whose responsibility is to act neutrally should not participate in proceedings but simply abide the decision of a court.

<sup>124</sup> *Ibid.* Whether the construction of the legislation in the mooted case entails an attempt to invoke jurisdiction to grant a declaration divorced from the administration of the law (one of the hallmarks of an advisory opinion) is debateable.

<sup>125</sup> The problem of uncertainty relied on by the Clerk can be distinguished from the dilemma faced by the plaintiff in *Croome's* case, note 108, in that the unlawfulness of presentation is not likely to affect the Clerk, whereas Mr Croome was entitled to know if he risked criminal prosecution if he disobeyed a Tasmanian criminal law whose constitutionality was in doubt.

<sup>126</sup> The Clerk appears to pitch the issue in terms of a personal liability. He adverts in exhibits LBM1 and LBM2 of his affidavit to the fact that any immunity that he has under s.51 of the *Constitution Acts Amendment Act 1899* (WA) does not cover the situation of presentation of bills. The issue is not what is the extent of any immunity he may have. It is whether there is any credible basis for personal liability that might render him open to penal sanction or civil liability. Arguably any attempt to prosecute or sue him in his parliamentary character would amount to contempt of Parliament.

<sup>127</sup> *Attorney General (NSW) v Trethowen* (High Court) (1931) 44 CLR 394.

<sup>128</sup> There is some ambiguity, it is submitted, about just what is entailed in the action of presenting a bill for the Royal assent. In *Trethowan v Peden* (1930) 31 SR (NSW) 183 the act of presentation was taken to be that of the *President* of the Legislative Council.

presenting a bill that does not satisfy constitutional procedures are political and fall upon the Governor's advisors, the Executive Council, who are responsible for the Governor's assenting<sup>129</sup>.

The problem here is not the dilemma of the Clerk, such as it is, but rather whether there is a properly justiciable issue.<sup>130</sup> This turns on whether there is in fact a proper contestant to present arguments contrary to those of the respondents. The Clerk himself is in no position to depart from a stance of impartiality so as to provide a proper disputant to the "controversy."<sup>131</sup> It may be noted that in other prior constitutional challenges it is normally an opposition member of the upper house who takes responsibility for the challenge.<sup>132</sup>

Though the lack of a proper contestant may not be fatal to jurisdiction it might be a factor affecting the discretion of the Supreme Court as to whether and how, the action should proceed.<sup>133</sup>

Even if the Supreme Court rules that it has jurisdiction in so far as there is a 'matter',<sup>134</sup> notwithstanding the artificial nature of the suit, it may decline to

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Further it is uncertain whether presentation is purely a legislative act in which the Executive Council has no part to play. Alternatively, even if it is a legislative act, convention and practice suggest the Governor should act on the advice of his or her Ministers. The ambiguity is implied in the comment of Kirby J in *Durham Holdings Pty Ltd v The State of New South Wales* [2001] HCA 7 (15 February 2001), endnote 153.

<sup>129</sup> See previous note.

<sup>130</sup> In *Mellifont v Attorney General (Queensland)* (1991) 173 CLR 289 the High Court stressed that the issues must be of a kind that is apposite for determination.

<sup>131</sup> The Clerk cannot be taken to represent any members of the House. Nor is it appropriate to characterise him as the agent of the individual members who take different views about the need to comply with the need for absolute majorities, as that would imply that he acts as surrogate for some but not all the members collectively. It would be even more invidious (and hypothetical) if the Clerk were to attempt to present arguments for both sides of the debate.

<sup>132</sup> *Trethowen v Peden* (1930) 31 SR (NSW) 183, *Clayton v Heffron* (1960) 105 CLR, *McDonald v Cain* [1953] VR 411.

<sup>133</sup> It should be noted that since this paper was delivered McKechnie J has directed the matter be heard on 17 April 2002 on which occasion counsel representing what has been termed 'the Country Coalition' the Liberal, National and One Nation parties and groups such as the Farmers Federation will appear to present submissions about the putative 'invalidity' of the bills. This may overcome the lack of a proper contradictor if not other objections.

<sup>134</sup> In *Truth About Motorways* note 105 the High Court took a more relaxed view of the need to establish a *personal* interest in cases where the equitable remedies of declaration or injunction are sought to vindicate public wrongs. There may be a breach of the State's

hear the matter as presently constituted because it lacks elements of justiciability.<sup>135</sup> In this regard, it is not only the plaintiff's inability to present arguments against the validity of the measures in contest. Nor is the problem that the Supreme Court is not being called upon directly to intervene in the intramural<sup>136</sup> activities of the Legislative Council. The measure in question, having been passed by that House, has completed that stage of the legislative process. Nevertheless the peculiar way in which the measure is now presented to the Court does indirectly raise issues of the proceedings in the House that led to the Clerk seeking the opinion of the Supreme Court. It is evident from the documents filed in the suit that the plaintiff relies on the debate in the Council to inform the Court of the existence of a dispute involving opposing views of the members. The Court cannot canvass the individual views expressed in the House because of Article 9 of the *Bill of Rights 1688* (UK) which forms part of the privileges of the House.<sup>137</sup> It is also dubious whether the Court should have any regard at all to the views of individual members.<sup>138</sup>

There is a further problem here. The failure of the President of the Legislative Council to make a definitive ruling on whether the bills should have been passed by an absolute majority is compounded by the apparent concurrence of the Council in the Clerk's action in seeking a declaration from the Supreme Court.<sup>139</sup> It places the Court in the invidious position of having to rule on the

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Constitution in the instant proceedings but the issue still is whether the Court in its discretion can decline to hear the action for want of a contradictor whose interest is sufficiently contradictory.

<sup>135</sup> In *Abebe v The Commonwealth* (1999) 197 CLR 510 Gleeson CJ and McHugh J at paragraphs [31]-[32] doubted whether an issue that did not concern a duty that was legally enforceable could ground a justiciable controversy. Arguably the plaintiff's interest in the nature of his action in conveying the bills to the Governor falls within the category of matters not intended to give rise to legally (as against politically) enforceable rights or obligations.

<sup>136</sup> The expression was used by Barwick CJ in *Cormack v Cope*, *ibid*, at 454.

<sup>137</sup> By reason of s.36 of the *Constitution Act 1889* (WA) and s.1 of the *Parliamentary Privileges Act 1891* (WA)

<sup>138</sup> *Victoria v The Commonwealth (PMA case)* (1975) 134 CLR 81 per Barwick CJ [51].

<sup>139</sup> These are matters which are referred to in the affidavit of the plaintiff sworn 19 December 2001, filed in the action. It raises problems of whether the Court can have regard to the proceedings of the Houses in light of s.1 of the *Parliamentary Privileges Act 1891*(WA) and Article 9 of the *Bill of Rights 1688*. Whether a court can have regard to statements made inside the House and for what purposes is also debatable (see *Victoria v The Commonwealth* (1975) 134 CLR 81, per Barwick CJ at [51]).

matter in a way where the Court might be seen to be settling what is essentially a political dispute at the behest of the House.<sup>140</sup>

A further problem is that the timing at which judicial intervention is sought may be critical. Normally the High Court has taken the view that a court should, in its discretion, decline to hear a constitutional challenge to a bill prior to assent unless there are pressing reasons to the contrary.<sup>141</sup> The peculiar situation that a manner and form restriction is cast in terms of: “It shall not be lawful to present to the Governor...” may be a countervailing factor in a special case<sup>142</sup> but generally Australian courts have been reluctant to intervene before a challenged bill receives the Royal assent.<sup>143</sup> In *Cormack v Cope*<sup>144</sup> there was a marked division within the High Court over the question whether the Court had jurisdiction to entertain a challenge to the validity of a measure before the law making process had come to an end.<sup>145</sup> Both as a matter of the Supreme Court’s jurisdiction and its exercise of discretion it would be prudent for the parties in *Marquet* to establish a basis for why intervention prior to assent is necessary. Had the bills been presented for assent when passed in

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<sup>140</sup> This facet raises the possible contravention of the principle in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 that a State Supreme Court cannot be required to perform a function incompatible with its independence from the legislature and executive. The way the Court’s jurisdiction is invoked could be crucial here. If a Member of Parliament had instigated the challenge against a member of the executive government the Court would be perceived as exercising its proper role of judicial review in settling a controversy. The way the matter was raised in the *Marquet* action could be perceived, on the other hand, as the Court being invited to involve itself in the legislative process.

<sup>141</sup> *Hughes and Vale Pty Ltd v Gare* (1954) 90 CLR 203, per Dixon J at 205; *Cormack v Cope* (1974) 131 CLR 432.

<sup>142</sup> *Trethowan v Peden* (1930) 31 SR (NSW) 183.

<sup>143</sup> *Eastgate v Rizzoli* (1990) 20 NSWLR 188, per Kirby P at 199. The presence of s.73 (6) of the *Constitution Act 1889* (WA) which permits an elector to challenge a measure that might be passed in contravention of s73 is not duplicated in the case of s.13 of the *Electoral Distribution Act* (WA).

<sup>144</sup> (1974) 131 CLR 432.

<sup>145</sup> The issue in *Cormack V Cope*, *ibid*, was whether the Court should intervene to grant an injunction to prevent a joint sitting of the Federal Parliament being convened pursuant to s.57 of the *Commonwealth Constitution* on the basis that a bill which had failed to pass the Senate did not satisfy the conditions specified in that provision. Barwick CJ at 454 held the Court had both jurisdiction and a duty to intervene at that stage; McTiernan at 461 thought the matter was non-justiciable; Menzies J at 465 considered it was no part of the Court’s authority to intervene to restrain the law making process at that point of proceedings; Gibbs J at 466 held the Court could intervene at any stage but in the instant case should not do so until after assent; Stephen J at 472 denied that the Court had jurisdiction other than in an exceptional circumstance a procedural irregularity could not

December 2001 arguably no irremediable consequences would have followed and a competent objector to its validity, such as a Member of Parliament, could have expeditiously instituted an action at that juncture.

The final problem in *Marquet* concerns the choice of defendants. If the view of Anderson J in *Yougarla*<sup>146</sup> regarding the different nature of the Attorney General and the State were to be followed, the action might only be competent as against the Attorney General and not the State. This raises, first, whether the State of Western Australia is an appropriate defendant. If the bill had already been passed the State would be a proper respondent to the issue of whether the resulting 'Act' is a 'law of the State' within the meaning of the *Commonwealth Constitution*. In the absence of the Governor's assent the appropriate respondent might be the members of the Executive Government.<sup>147</sup>

This raises the further question as to whether the Attorney General and the State are in an identical relationship. The Attorney's views on a matter may not necessarily be the same as the 'State' if in the latter case it comprises the interests of members of the Legislative Council as part of the legislature of the State<sup>148</sup>. Furthermore, the Attorney-General may have different responsibilities, first to the Government, as Minister and Member of Cabinet, and secondly as the first law officer of the Crown, in which office she or he is required to protect the Supreme Court from abuse of its jurisdiction<sup>149</sup>. A clearer course of action would have been if the suit had been brought against

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be cured after assent, while Mason J at 473 did not find it necessary to decide if the Court had jurisdiction as he considered intervention would have been premature.

<sup>146</sup> See note 111.

<sup>147</sup> Whether it is appropriate to use the expression 'the Crown in right of [a State]' when considering constitutional issues has been questioned in *The Commonwealth v Western Australia* note 80 by Gummow J at [105]-[108].

<sup>148</sup> Whether the State or Crown can have a legislative personality separate from its executive manifestation (the Government) is discussed in P Johnston "The Legal Personality of the Western Australian Parliament" (1990) 20 UWALR 323. The issue of what person or juristic agency can represent Parliament has been explored inconclusively in employment cases such as *An Electorate Officer v. A Research Officer* (1992) EOC 92-436 and *De Domenico v Marshall and the Australian Capital Territory* [1997] ACTSC 20 (17 April 1997).

<sup>149</sup> See the discussion of the various roles of the Attorney General in constitutional litigation in *Bateman's Bay* note 108 and *Truth About Motorways* note 110 per Gaudron J at [43]-[50]; Gummow J at [98]-[105]

the Premier as the principal advisor to the Governor, and perhaps the other members of the Executive Council who are appointed to advise the Governor with respect to assent.

For these various reasons, the action was arguably misconceived at its inception. If left in its present form it may well attract some of the issues left unresolved in *Yougarla*<sup>150</sup>. These difficulties may surface in the future if there if the case reaches the High Court on appeal<sup>151</sup>. It would be undesirable if the litigation reached that stage and was dismissed on jurisdictional grounds or by reason of discretionary considerations. It would be preferable if the procedure that has commonly been adopted in past constitutional litigation were adopted in regard to the validity of the legislation in question: namely that a member of the Legislative Council with an adverse interest in the matter were to seek a declaration after the bill is assented to by the Governor. That would be the most secure basis for the exercise of jurisdiction in the matter.

### **Conclusion.**

Although s.70 may now be taken to have been erased from the Western Australian Constitution, its ghost may continue to haunt later constitutional controversies. Manner and form issues of the kind agitated in *Yougarla* will probably, notwithstanding the *Marquet* action, arise very infrequently. But as *Yougarla* has demonstrated the permeation of Chapter III of the Commonwealth Constitution into State constitutional litigation raises a number of conceptual problems, some important, some of lesser substance, that await future resolution by the High Court.

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<sup>150</sup> One such issue could be the application of the *Judiciary Act* (Cth) to the proceedings. For example, if objection were taken in any future substituted action to the absence of notice under the *Crown Suits* or *Limitation Acts* regarding the relevant default (whatever it be), the response would be that, the action being in federal jurisdiction, there is no limitation requirement imposed under or by virtue of the Commonwealth Act.

<sup>151</sup> The Court has refused to hear appeals not properly constituted or formulated. See for example *Bass v Permanent Trustee Co Ltd* note 68.