MANNER AND FORM IN THE AUSTRALIAN STATES

BY JEFFREY D. GOLDSWORTHY*

[*This article attempts to clarify the constitutional foundations in the Australian States for what is commonly called 'manner and form' legislation: legislation prescribing mandatory procedures for future legislation which differ from the standard or ordinary procedures. It begins by analysing the reasoning of the High Court in* Trethowan's *case, and deriving from it three alternative grounds for such legislation. It then considers the extent to which the Australia Act affects those grounds. Next, some difficult questions likely to be faced in resorting to them are discussed, including the extent to which the legislative process can be encumbered. Two suggested additional grounds are then considered but rejected. The article concludes by summarizing the ways in which a State Bill of Rights could be entrenched.*]

1. *INTRODUCTION*

This article will examine the constitutional foundations for restrictive procedures: procedures for legislating which differ from the standard or ordinary procedure and which, if binding, *must* — not may — be followed for valid legislation to result.[1] This term is used rather than the more familiar 'manner and form' to emphasize that these foundations are not necessarily limited to s. 6 of the Australia Act[2] which speaks of manner and form requirements.

The article is concerned solely with the legislative powers of the Australian State Parliaments. As was held in *Attorney-General for the State of New South Wales and Others v. Trethowan and Others*,[3] the nature and extent of these powers depends upon the relevant constitutional instruments: the general theory of parliamentary sovereignty is pertinent only to the extent that it illuminates their meaning. This proposition can be defended on more than one ground. First, even those who most staunchly defend Dicey's thesis that the United Kingdom Parliament cannot bind its successors do not extend it to any Parliament whose powers derive from 'some "higher law," that is, some (logically and historically) prior law *not laid down by itself*.'[4] Secondly, even in the absence of such a 'higher law' the Parliaments of the Commonwealth would be distinguishable from that of the United Kingdom. As F. M. Brookfield persuasively argues, although both the sovereign legislative power and the procedure by which it is exercised may in the United Kingdom be matters of historically evolved political fact rather than law, in Commonwealth countries legislative powers and pro-

* LL.B. (Hons) (Adel.), LL.M. (Ill.), M.A. (Calif.). Lecturer in Law, Monash University.

1 Restrictive procedures must be distinguished from *alternative* procedures which may — not must — be followed. I have borrowed this terminology from Hanks, P. J., *Australian Constitutional Law* (3rd ed. 1985) 70 *et seq*.

2 Australia Act 1986 (Cth); Australia Act 1986 (U.K.). Because the provisions of these Acts are materially identical, and for convenience, I will refer simultaneously to both as 'the Australia Act'. Section 6, of course, replaced the proviso to s. 5 of the Colonial Laws Validity Act 1865 (U.K.).

3 (1931) 44 C.L.R. 394.

4 Hood Phillips, O., and Jackson, P., *Constitutional and Administrative Law* (6th ed. 1978) 61. Hood Phillips concedes the correctness of the decision in *Trethowan's* case on this ground (at p. 86), as does Wade, H. W. R., 'The Basis of Legal Sovereignty' (1955) 15 *Cambridge Law Journal* 172, 182.

cedures are created and regulated by law.[5] It is fortunate that the powers of the United Kingdom Parliament are of limited relevance here. Those powers are if anything *more* controversial and uncertain than those of our State Parliaments.[6] Moreover, the argument that the United Kingdom Parliament *can* bind itself originally derives,[7] and gains much of its plausibility, from cases such as *Trethowan* concerned with colonial or dominion parliaments; it would be ironic if that argument were now to be thought crucial to the powers of the latter.

Detmold has argued that the United Kingdom Parliament lacks power to enact binding restrictive procedures and therefore could not have granted power to do so to the Australian State Parliaments.[8] This argument depends upon a putative principle of political philosophy, which he calls 'the principle of inter-temporal equivalence: a legislative will may not bind a later legislative will of otherwise equal status.'[9] According to Detmold, the principle's validity derives from its 'inherent rational claim' rather than from its having been positively established as law.[10] Therefore the principle, if valid, applies to the Australian State Parliaments directly of its own force rather than through the medium of Imperial legislation: the powers of the United Kingdom Parliament are not essential to Detmold's argument. The argument, and the issue of political legitimacy it raises, are discussed further below.[11] But among the obstacles faced by the argument is one which should be mentioned now: it entails that *Trethowan's* case was wrongly decided, and that the manner and form proviso in s. 5 of the Colonial Laws Validity Act 1865 (U.K.) (hereinafter called the 'C.L.V. Act'), upon which the decision in that case was based, should have been either held to be *ultra vires* or given a radically narrower construction.[12] This makes it extremely unlikely that the argument could now be accepted by an Australian court. It will be assumed here that the decision in *Trethowan's* case is binding with respect to the interpretation of the manner and form proviso.[13]

The article begins by analysing the reasoning of the High Court in *Trethowan*, and deriving from it three alternative grounds for holding restrictive procedures binding (Section 2). It then considers the extent to which the Australia Act affects these grounds (Section 3). Next, some difficult questions likely to be faced in resorting to them are discussed (Sections 4-6). Two suggested *additional* alternatives are then considered but rejected (Sections 7 and 8). The article concludes by summarizing the ways in which a State Bill of Rights could be entrenched (Section 9).

5 Brookfield, F. M., 'Parliamentary Supremacy and Constitutional Entrenchment: A Jurisprudential Approach' (1984) 5 *Otago Law Review* 603, 607-16 and 632.

6 For a thorough discussion of those powers, and the literature relating thereto, see Winterton, G., 'The British Grundnorm: Parliamentary Supremacy Re-examined' (1976) 92 *Law Quarterly Review* 591.

7 *Ibid.* 604.

8 Detmold, M. J., *The Australian Commonwealth: A Fundamental Analysis of Its Constitution* (1985) 207-8 and 212-3.

9 *Ibid.* 213.

10 *Ibid.*

11 Section 6(a), *infra*.

12 Detmold acknowledges this, and is forced to argue that the proviso should have been construed in a way which would have required overruling the decision of the Privy Council in *McCawley v. R.* [1920] A.C. 691; Detmold, *op. cit.* 212-6.

13 See also the text to n. 51, *infra*.

2. TRETHOWAN'S *CASE*

In *Trethowan's* case, the first and still *the* major case to discuss restrictive procedures, the High Court of Australia considered whether or not the Parliament of New South Wales had to comply with s. 7A of the Constitution Act 1902 (N.S.W.). Section 7A required that before being presented for the Royal assent, Bills dealing with certain subject-matters (including the amendment or repeal of s. 7A itself) be approved by a majority of the electors of the State Parliament voting at a referendum. By a majority of 3 to 2, the Court decided that s. 7A was valid and (if there is a difference[14]) binding, and on appeal the Judicial Committee of the Privy Council upheld that decision.[15]

There were two obstacles to the decision, two reasons for thinking that the Parliament could perhaps ignore s. 7A (this is important because without either obstacle s. 7A may have been binding independently of the grounds relied on by the Court). The first was that s. 4 of the Act which established the original Constitution Act of New South Wales, the Imperial Act 18 and 19 Vict. c. 54, called the Constitution Statute, provided that it should be lawful for the New South Wales Legislature 'to make Laws altering or repealing all or any of the Provisions of the said reserved Bill [*viz.*, the Constitution Act which was set out in a schedule to the Statute], in the same Manner as any other Law for the good Government of the said Colony . . .'.

The second obstacle was that s. 5 of the C.L.V. Act declared that the New South Wales Legislature, as a representative Legislature, 'shall . . . have, and be deemed at all Times to have had, full Power to make Laws respecting [its own] Constitution, Powers, and Procedure'. I will call this power a 'continuing constituent power': it was a 'continuing' power because the legislature had *at all times* to be deemed to have had it — *i.e.*, even when ignoring or overriding a restrictive procedure — and because the legislature was unable to abdicate or restrict it by amending or repealing s. 5 (it being part of an Imperial Act applying to New South Wales by paramount force).[16]

There was uncertainty on the Bench as to whether, if s. 7A was not binding for either of these reasons, this would be because it was *invalid* or because it was valid but repealable at any time in the ordinary manner. It was argued by the appellants that s. 7A was invalid because it was repugnant either to s. 4 of the Constitution Statute or s. 5 of the C.L.V. Act or both.[17] Dixon J. seems to have equivocated. At one point he said that the issue was whether s. 7A could be 'real and effective and achieve [its] end,' or whether it could be amended or repealed at any time in the ordinary manner, or indeed simply ignored because (on the authority of the Privy Council in *McCawley v. The King and Others*[18]) an Act

14 See nn. 17-22, and accompanying text, *infra*.

15 *Trethowan* [1932] A.C. 526.

16 For these reasons Dixon J. described the power — subject to the manner and form proviso — as 'superior and indestructible,' and McTiernan J. said that s. 5 was 'an overriding charter which keeps the legislature continuously supplied with plenary power to make laws respecting its own constitution, powers and procedure': *Trethowan* (1931) 44 C.L.R. 394, 430 and 443 respectively.

17 *Ibid.* 399, 401 and 405.

18 [1920] A.C. 691.

passed contrary to it would be deemed to repeal or modify it by implication.[19] But later he suggested that if not for the manner and form proviso in s. 5 of the C.L.V. Act, s. 7A would have been 'void' because of repugnancy to the power granted by s. 5.[20] Gavan Duffy C.J. held that although s. 7A could be repealed at any time in the ordinary manner it was itself a valid enactment.[21] But the better view is that if s. 7A was not binding, this would have been due to its being invalid. As Detmold says, 'nothing can be law which does not bind the only body it purports to bind.'[22] If so, no question of express or implied repeal arises.

The High Court thought that neither obstacle was insuperable. As for the power conferred by s. 4 of the Constitution Statute, because it referred specifically to the original Constitution Act it may have been completely spent when that Act was repealed to make way for the Constitution Act 1902; but even if not, it was subject to the manner and form proviso in s. 5 of the C.L.V. Act, a later Act intended to be definitive.[23] As for the power conferred by s. 5 of the C.L.V. Act, it too was subject to this proviso which required that the laws of a colonial representative Legislature 'respecting the Constitution, Powers, and Procedure of such Legislature . . . [be] passed in such Manner and Form as may from Time to Time be required' by, *inter alia*, any 'Colonial Law for the Time being in force in the said colony.' The Bills to which s. 7A applied concerned the constitution, powers or procedure of the State legislature, and the restrictive procedure which it prescribed was held to constitute a requirement as to manner and form.[24]

Rich J. held that s. 7A bound the Parliament for another reason, logically independent of the first. It was argued by the respondents that

> [t]here are two ways, which are quite distinct from each other, in which one Parliament can tie the hands of a succeeding Parliament. One is as to the manner and form . . . . The other method . . . resides in the power which the New South Wales Parliament has to alter its own constitution. That is independent of manner and form. It can alter its own constitution and transfer the law-making power to a different group of bodies or to a group of bodies differently constituted.[25]

[19] (1931) 44 C.L.R. 394, 430. Fajgenbaum and Hanks disagree with the final clause in the case of restrictive procedures which do not govern their own amendment or repeal, arguing that

> an earlier Act is not repealed because the procedure adopted for the enactment of the later one is inconsistent with that prescribed by the provision or terms of the earlier Act. There is no inconsistency of provisions or terms between an Act . . . and an earlier Act which prescribes a manner and form for the later Act's enactment, a manner which has not been observed. The first Act contains a provision or term prescribing the procedure for enacting the second and the second contains no provision or term relating to the matter of procedure contained in the first.

Fajgenbaum, J. I., and Hanks, P. J., *Australian Constitutional Law* (1972) 280. (The argument is repeated in Hanks, P. J., *op. cit.* n. 1, 109.) But the later Act declares that 'such-and-such is the law' while the earlier Act in effect declares that 'such-and-such shall not be the law': there is a contradiction here sufficient to construe the latter as having been impliedly repealed.

[20] (1931) 44 C.L.R. 394, 431-2.

[21] *Ibid.* 412-3. McTiernan J. equivocated on this point: for his conclusions see *ibid.* 445-6. The views of Rich and Starke JJ. are unclear.

[22] Detmold, *op. cit.* n. 8, 212. Maughan K. C. argued in *Trethowan's* case that 'If an Act says that it shall not be repealed except in a particular way, such a provision is either good or bad; and when the time comes to repeal it, if it can be repealed in some other way, then to all intents and purposes it was bad from the beginning': (1931) 44 C.L.R. 394, 405-6. As Detmold's discussion suggests, Gavan Duffy C.J.'s curious view may stem from the 'notion in English constitutional law that although parliament cannot bind its successors if it were to [attempt to] do so its act would be law though its successors would not be bound' (Detmold, *loc. cit.*).

[23] (1931) 44 C.L.R. 394, 416-7 *per* Rich J., 427-9 *per* Dixon J., 423-4 *per* Starke J. The Privy Council agreed: [1932] A.C. 526, 539.

[24] See the text to nn. 64-8, *infra*.

[25] (1931) 44 C.L.R. 394, 407-8. See also 410-1.

Rich J. agreed that there were '[t]wo methods of controlling the operations of the Legislature' and said that even if he were wrong in holding that the manner and form proviso made s. 7A binding, it was binding because it had altered the composition of the legislature by introducing 'a new element [namely, the electors] . . . into the legislative authority': thenceforth, 'the legislative body consist[ed] of different elements for the purpose of legislation upon different subjects.'[26]

Rich J. thus expressly based his decision upon two independent grounds. Dixon J. decided the case on the basis of the manner and form proviso,[27] although two *obiter dicta* indicate his attraction towards other grounds as well. In the celebrated passage concerned with the enforceability of a hypothetical restrictive procedure in the United Kingdom, he concluded that

> the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside.[28]

The other *obiter dictum* is his remark that

> The power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct. Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its powers to repeal those very laws.[29]

Starke J. also based his decision squarely on the manner and form proviso,[30] although his statement that 'the proviso to sec. 5 . . . puts the matter, in my opinion, beyond doubt,' suggests that he may have reached the same decision without it.[31] The Privy Council relied solely on the proviso.[32] The case is therefore binding authority only in relation to the manner and form proviso, although support for alternative grounds can be found in the judgments of Rich and Dixon JJ.[33] This is important because while the manner and form proviso requires that laws respecting the constitution, powers or procedure of the legislature comply with manner and form requirements, it does not apply to other laws.

In relation to the alternative grounds, Rich J. referred only to the reconstitution of the legislature by the inclusion of a new element within it. Dixon J., in the long passage just quoted, referred to laws prescribing legislative procedures as well as laws changing the constituent elements of the legislature. To some extent

26 *Ibid.* 418-20.
27 *Ibid.* 430-3.
28 *Ibid.* 426.
29 *Ibid.* 429-30.
30 *Ibid.* 423-4.
31 Starke J. thought that the ample constituent powers conferred upon the Parliament enabled it 'to fetter its legislative power, to control and make more rigid its constitution': *Ibid.* 423. But he ignored the *continuing* nature of the power granted by s. 5 of the C.L.V. Act.
32 [1932] A.C. 526, 540-1.
33 This has often been recognized: *e.g.* Friedmann, W., 'Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change' (1950) 24 *Australian Law Journal* 103, 104; Fajgenbaum and Hanks, *op. cit.* n. 19, 280-3; Lumb, R. D., *The Constitutions of the Australian States* (4th ed. 1977) (later cited as Lumb 1) 109-12; and Lumb, R. D., 'Fundamental Law and the Processes of Constitutional Change in Australia' (1978) 9 *Federal Law Review* 148 (later cited as Lumb 2), 170-4 and 180. The possibility of alternative grounds has also been judicially recognized in Australia, although *The Bribery Commissioner v. Pedrick Ranasinghe* [1965] A.C. 172 (discussed in Section 7, *infra*) rather than *Trethowan's* case is usually cited as authority for it: see n. 11 *infra*.

both kinds of laws can be said to change the constitution of the legislature. 'Parliament' is constituted partly by laws prescribing the persons or bodies included within it, *and* partly by laws prescribing the procedures they must follow, because when acting otherwise than in accordance with those procedures those persons or bodies do not act *as Parliament*. Thus, it could be argued that a requirement that bills be passed by a special majority in either or both of the Houses was part of the constitution of Parliament.[34] To that extent, Rich and Dixon JJ. had in mind a single alternative to the manner and form proviso. I will use the term 'reconstitution' to refer to this alternative, and the terms 'structural reconstitution' and 'procedural reconstitution' to refer to the two different kinds thereof. As is clear from these considerations, and from the judgment of Rich J. (if he was right), *some* restrictive procedures can be treated *either* as laying down a requirement as to manner and form *or* as partially reconstituting the legislature.

However, *some* procedural requirements could not plausibly be characterized as pertaining to the constitution of the legislature (for example, requirements relating to timing). If Dixon J. thought that some of these may nevertheless be binding independently of the manner and form proviso, he must have had in mind a second alternative. I will use the term 'pure procedures' to refer to such procedural requirements — 'pure' because necessarily they affect neither the legislature's constitution (otherwise reconstitution would be the issue) nor its substantive powers (otherwise they would invalidly restrict Parliament's continuing constituent power[35]). It follows that pure procedures must not be excessively demanding and difficult to comply with. In addition to pure procedures, it could be argued that requirements concerned solely with the *form* of legislation may be binding independently of the manner and form proviso. For example, if an Act provides that it may only be expressly repealed or amended, it could be argued that, without impinging on the Parliament's constitution or its substantive powers, it prescribes a *form* which repealing or amending laws must assume to be valid. I will add this possibility to that of pure procedures, and treat them both as constituting a single alternative to the manner and form proviso and reconstitution. I will use the term 'pure procedure or form' to refer to this second alternative.[36]

It should be observed that both alternatives evade the second obstacle to the

[34] It is implicit in the judgment of the South African Supreme Court in *Harris and Others v. Minister of the Interior and Another* [1952] (2) S.A. 428 that procedural requirements can form part of the definition of 'Parliament'. Centlivres C.J., speaking for the Court, said that one could regard 'the word "Parliament" as meaning Parliament sitting either bicamerally or unicamerally in accordance with the requirements of the South Africa Act' (*ibid.* 463), and that 'legal sovereignty is or may be divided between Parliament as ordinarily constituted and Parliament as constituted under s. 63 and the proviso to s. 152 [requiring a two-thirds majority at a joint sitting of both Houses]' (*Ibid.* 464). This aspect of the case is discussed by Cowen, D. V., 'Legislature and Judiciary' (1952) 15 *Modern Law Review* 282, 287, 289-90. The question of procedural reconstitution is discussed further in the text to nn. 80-1, *infra*.

[35] This matter is discussed further in Section 6(a), *infra*.

[36] In *The South-Eastern Drainage Board (South Australia) v. The Savings Bank of South Australia* (1939) 62 C.L.R. 603 this alternative might have been decisive if it had been raised, but it was ignored in argument and by the High Court. Even if the Court decided *sub silentio* that there is no such alternative, that decision would not be binding (Cross, R., *Precedent in English Law* (3rd ed. 1977) 149), and its persuasive authority must be small given the flaws in the majority's reasoning in relation to the manner and form proviso (see Lumb 1, *op. cit.* n. 33, 99).

bindingness of restrictive procedures: the continuing constituent power conferred by s. 5 of the C.L.V. Act. As for reconstitution, that power is not diminished by a law which merely reconstitutes the body which possesses it (the legislature): thenceforth the power can still be exercised, but only by the legislature *in its reconstituted form*.[37] As for pure procedure or form, the legislature is not even partially deprived of that power by having to comply with a procedure or form in exercising it, provided that compliance is not excessively difficult, costly or time-consuming.[38] These alternatives seem logically to exhaust the ways in which restrictive procedures can be established without impinging on that power; no third alternative to the manner and form proviso suggests itself.

But it is not clear how either alternative evades the first obstacle, posed by s. 4 of the Constitution Statute, if the power granted by that section has not been spent (a possibility left open by *Trethowan*).[39] The original constitutional instruments of three other States contain clauses similar to s. 4,[40] and what follows applies equally to them. It was established in *Trethowan* that even if s. 4 had some continuing effect after the repeal of the original Constitution Act in 1902, it was qualified by the manner and form proviso in s. 5 of the C.L.V. Act (now s. 6 of the Australia Act).[41] Although it has been argued that s. 5, including the proviso, was not intended to and did not qualify s. 4 in any way and that *Trethowan's* case was therefore wrongly decided,[42] the weight of authority to the contrary is surely insurmountable. But if after 1902 s. 4 had some continuing effect, qualified *only* by the manner and form proviso, then it might be objected to both the reconstitution and pure procedure or form alternatives that, apart from the proviso, Parliament retains power to pass laws dealing with constitutional matters 'in the same Manner as any other Laws for the good Government of [the state].'

Since *Trethowan's* case two other possible grounds for the bindingness of some kinds of restrictive procedure have been suggested. First, some have suggested[43] that such a ground can be derived from the statement of the Privy Council in *The Bribery Commissioner v. Pedrick Ranasinghe*,[44] that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law.'[45] Secondly, the

37 See Lumb 1, *op. cit.* n. 33, text to 110 n. 143. But see the text to nn. 80-1, *infra*.

38 For further explanation of this proviso, see the text to nn. 78-9, *infra*.

39 It is argued in Section 3, *infra*, that the Australia Act now removes this obstacle.

40 Vic.: 18 & 19 Vict. c. 55, s. 4; Qld: (1857-61) cl. 22, Order in Council (1859), *British Parliamentary Papers*; W.A.: (1890) 53 & 54 Vict., c. 26, s. 5.

41 (1931) 44 C.L.R. 394, 416-8 *per* Rich J., 428-9 *per* Dixon J.; [1932] A.C. 526, 539 (Privy Council). Rich J. also thought that apart from the proviso the power granted by s. 5 of the C.L.V. Act authorized reconstitution of the legislature for particular purposes regardless of s. 4 of the Constitution Statute.

42 O'Brien, B. M., 'The Indivisibility of State Legislative Power' (1981) 7 *Monash University Law Review* 225, 238-42. In essence O'Brien advocates the position adopted by Long Innes J., the lone dissenter on this issue, in *Trethowan and Anor. v. Peden and Ors.* (1931) 31 S.R. (N.S.W.) 183, 222-32.

43 See n. 11, *infra*.

44 [1965] A.C. 172.

45 *Ibid.* 197.

Supreme Court of Western Australia in *Western Australia and Others v. Wilsmore*[46] suggested that a restrictive procedure set out in the Constitution of an Australian State may be binding by virtue of s. 106 of the Commonwealth Constitution.

One purpose of this article is to determine which of these five suggested grounds are currently available. It concludes that the first three grounds discussed are still available, but that neither the Privy Council's judgment in *Ranasinghe* nor s. 106 of the Commonwealth Constitution adds any further, independent alternative.

3. *THE EFFECT OF THE AUSTRALIA ACT*

The High Court in *Trethowan's* case overcame two obstacles in order to hold that s. 7A was binding. Do these obstacles still threaten to render restrictive procedures ineffectual?

As for the first, the Australia Act authorizes the State Parliaments to repeal or amend provisions such as s. 4 of the Constitution Statute. But it is likely that those provisions would be held to have expired anyway; once the original Constitution Act was repealed, it is difficult to see what continued effect s. 4 could have had. It could be argued that:[47] s. 4 denied power to the New South Wales Parliament to enact restrictive procedures; in 1865 the manner and form proviso in s. 5 of the C.L.V. Act only partly qualified this denial; and when the Constitution Act of 1902 was enacted to replace the original Constitution Act, the Parliament logically could not give to itself a power which it still partly lacked. But at least two objections can be made to this argument. First, it implausibly construes s. 4 as a restraint or limitation, whereas it was in intention and effect permissive or facultative, as Lord Russell explained in his despatch quoted by Dixon J. in *Trethowan*.[48] Secondly, it ignores the possibility that the Parliament's constituent power enabled it to expand its legislative powers and thereby overcome any limitation which s. 4 might previously have imposed. As Dixon J. said in *Trethowan*, by using a constituent power 'a legislature, whose authority was limited in respect of subject matter or restrained by constitutional checks or safeguards, might enlarge the limits or diminish or remove the restraints.'[49]

The Australia Act now settles the question. Sub-section 3(1) of this Act declares that the C.L.V. Act 'shall not apply to any law made after the commencement of this Act by the Parliament of a State', and sub-s. 3(2) provides that no such law shall be invalidated on the ground of repugnancy to the provisions of any Act of the United Kingdom Parliament, and that 'the powers of the Parliament of a State shall include the power to repeal or amend any such Act . . . in so far as it is part of the law of the State.' Sub-section 3(2) is subject to s. 5 of the Act, which withholds from the State Parliaments power to repeal or amend the

[46] (1981) 33 A.L.R. 13.

[47] An argument in some respects similar to this was made by Long Innes J. in *Trethowan and Anor. v. Peden and Ors* (1931) 31 S.R. (N.S.W.) 183, 225-30.

[48] (1931) 44 C.L.R. 394, 428.

[49] *Ibid.* 430.

Commonwealth of Australia Constitution Act, the Commonwealth Constitution, the Statute of Westminster and the Australia Act itself. Section 5 of the Act does not save the Constitution Statute from the scope of the power granted by s. 3 to repeal or amend Imperial legislation. Even if, after 1902, s. 4 of the Constitution Statute was still an obstacle to the bindingness of restrictive procedures outside the manner and form proviso, s. 3 of the Australia Act has removed the obstacle. The enactment of a restrictive procedure, if valid and binding independently of the proviso, would repeal or modify s. 4 by implication.

What of the second obstacle to the decision in *Trethowan*? It presumably follows from sub-s. 3(1) of the Australia Act that a law which ignores or overrides a restrictive procedure cannot rely on the continuing constituent power granted by s. 5 of the C.L.V. Act. But sub-s. 2(2) of the Australia Act can be relied on in its place. Sub-section 2(2) declares and enacts that 'the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State.' Because the Australia Act cannot be repealed or amended by a State Parliament (see ss 5 and 15) this section, like s. 5 of the C.L.V. Act, confers a continuing constituent power which, subject to s. 6, the State Parliaments themselves cannot abdicate or restrict.[50]

Section 6 of the Australia Act re-enacts the manner and form proviso of s. 5 C.L.V. Act and so preserves the ground relied on by the High Court and the Privy Council in *Trethowan* to overcome the two obstacles. Moreover, any objections[51] to the broad interpretation of the term 'manner and form' adopted in *Trethowan* are now weakened by the presumption that a re-enactment of words confirms their prior judicial interpretation. But of course, this is a relatively weak presumption.

Does the maxim *expressio unius est exclusio alterius* support an argument that the express re-enactment of s. 6 excludes the reconstitution or the pure procedure or form alternatives? The Australia Act cannot possibly have the intention or the effect of removing the power of the State Parliaments to alter their own constitutions; indeed, sub-s. 2(2) of the Act is now a further source of that power. The reconstitution alternative is therefore unaffected. But it could be argued that the pure procedure or form alternative has been impliedly excluded, although it would be almost equally plausible (or implausible) to argue that it was excluded in 1865 by the enactment of the manner and form proviso in s. 5 of the C.L.V. Act.

[50] This may seem to generate a harmless paradox: if the United Kingdom Parliament can effectively abdicate part of its own power, as it has purported to have done in enacting s. 1 of the Australia Act, but the State Parliaments cannot because — until it is itself repealed or amended — sub-s. 2(2) will continue to supply them with full power despite their attempts to rid themselves of it, then sub-s. 2(2) cannot do what it claims to do, which is to confer on the latter *all* the powers formerly possessed by the former with regard to each State respectively. But this is not paradoxical, just the natural result of sub-s. 2(2) being qualified by ss 5 and 15 of the Act which prevent the state Parliaments from using the power conferred in sub-s. 2(2) against itself. As to the power of the United Kingdom to do this, see Winterton, *op. cit.* n. 6, 600-4.

[51] See, *e.g.*, the text to nn. 12 and 42, *supra*.

To conclude, the Australia Act removes the first obstacle, but preserves the second and the three alternative methods of overcoming it discussed in section 2 (with the possible exception of pure procedure or form).

4. *THE RECONSTITUTION ALTERNATIVE*

Although it is possible to argue that a restrictive procedure is binding because it has reconstituted Parliament for special purposes, such an argument is likely to meet difficulties.

One difficulty is that in some States alterations to the constitution of the Parliament must themselves comply with a restrictive procedure. For example, s. 18 of the Constitution Act 1975 (Vic.) requires that any Bill 'by which an alteration in the constitution of the Parliament, the Council or the Assembly may be made' (or for the amendment of s. 18 itself) be passed by absolute majorities in both Houses before presentation for the Royal assent. In Victoria, therefore, a restrictive procedure would not be binding on the ground that it had reconstituted the Parliament unless it had been enacted in that manner. The same is true in any other state whose Constitution contains a requirement of this sort.

Other difficulties will possibly be encountered if it is argued that a restrictive procedure has *structurally* reconstituted the Parliament. In *Trethowan's* case itself, McTiernan J. argued that *even if* s. 7A could be said to have 'constituted *ad hoc*' another legislature, s. 5 of the C.L.V. Act granted continuing constituent power to the legislature *as ordinarily constituted* which, therefore, 'ha[d] sec. 7A completely under its control.'[52] In other words, he did not agree with Rich J. that the continuing constituent power granted by s. 5 could be divided up and apportioned among different legislative bodies even if they could be validly created and endowed with *ordinary* legislative power. Today, sub-s. 2(2) of the Australia Act grants continuing constituent power to the State Parliaments. Does the term 'Parliament of a State' refer, in each case, to a single institution or to any number of them according to the allocation of ordinary legislative power within the State? The term is not defined in the Australia Act, but most of the State Constitution Acts contain definitions of their respective Parliaments. Section 15 of the Constitution Act 1975 (Vic.), for example, provides that

> The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria.

It seems plausible to suggest that when the Australia Act refers, as in sub-s. 2(2), to 'the Parliament of each State', it is referring to whatever institutions are, from time to time, defined as such in the State Constitutions. If so it is *these* bodies which have been granted continuing constituent power by sub-s. 2(2). Sub-section 16(1) of the Australia Act confirms this. It provides that

> [a] reference in this Act to the Parliament of a State includes, in relation to the State of New South Wales, a reference to the legislature of that State as constituted from time to time in accordance with the Constitution Act, 1902, or any other Act of that State, whether or not, in relation to any particular legislative act, the consent of the Legislative Council of that State is necessary.

This acknowledges the effect of ss 5A and 5B of the Constitution Act 1902

[52] (1931) 44 C.L.R. 394, 447.

(N.S.W.) which authorize the Governor in certain circumstances to assent to legislation which has not been passed by the Legislative Council. Sub-section 16(1) thereby recognizes that the Parliament of a State may, in Rich J.'s words, 'consist of different elements for the purpose of legislation upon different subjects.'[53] But the sub-section very conspicuously does *not* include the legislative body which, according to Rich J. in *Trethowan's* case, s. 7A constituted. Indeed, its reference to 'the legislature of that State as constituted from time to time in accordance with the Constitution Act, 1902' is *at present* a reference to s. 3 of that Act which defines 'the Legislature', for the purposes of the Act, as 'His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly,' although (as it expressly acknowledges) both ss 5A and 5B provide that in some circumstances a Bill assented to without having been passed by the Council shall 'become an Act of the Legislature' (a phrase used in ss 5A and 5B but not s. 7A).

The suggestion, which sub-s. 16(1) confirms, is that the reference to State Parliaments in sub-s. 2(2) of the Australia Act is a reference to the Parliaments (or 'Legislatures') as defined from time to time in each State Constitution. This must be qualified in one respect. If the definition of Parliament in a State Constitution can conceivably be altered in ways not compatible with the meaning of 'Parliament' in the Australia Act, the latter must have *some* substantive content and cannot *simply* refer to the former. For example, it is argued below that democratic accountability may be part of the meaning of 'Parliament' for the purposes of the Australia Act: if a State Constitution purported to redefine Parliament by including in it unrepresentative bodies this would not affect the denotation of 'Parliament' in that Act. Although sub-s. 16(1) shows that 'Parliament' in sub-s. 2(2) *can* refer to an institution consisting of different elements for different purposes, whether it does so may depend on the nature of the elements in question. These questions are discussed further in Section 6(c).

In any event, the suggestion entails that to argue that a restrictive procedure has structurally reconstituted Parliament one must argue that Parliament *as defined in the State Constitution* has been reconstituted. In Victoria, for example, one must argue that s. 15 of the Victorian Constitution has been repealed or modified by implication, if not expressly.[54] (Bear in mind that this is *not* the case if Parliament is argued to have been procedurally reconstituted, for example by a requirement that certain Bills be passed by a special majority. This would be quite consistent with, and so would not have to be regarded as modifying, a provision such as s. 15 which is not concerned with procedures. None of what

[53] *Ibid.* 419-20.

[54] As was pointed out above (text to n. 18), the Privy Council held in *McCawley's* case that State Constitutions can be repealed or modified by implication. It is usual to speak of implied repeal but not implied amendment, but in many situations including that under discussion this seems unnatural. In *Goodwin v. Phillips* (1908) 7 C.L.R. 1, 7, Griffith C.J. said that if the provisions of two Acts 'are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.' Surely it is more natural to describe this as amendment or, at least, 'modification' (the term used by the Privy Council in *McCawley*) rather than repeal?

follows applies to procedural reconstitution.) While there is no conclusive objection to such an argument, it will be implausible where implied repeal or modification is alleged.

Even in *Trethowan's* case, Rich J.'s construction of s. 7A — that it altered the constitution of the State legislature — seems quite strained. Section 3 of the New South Wales Constitution was then as it is today, defining 'the Legislature', for its purposes, as 'His Majesty the King with the advice and consent of the Legislative Council and Legislative Assembly.' Within s. 7A itself there are references to 'the Legislature' which are consistent only with that definition, and so s. 7A cannot have modified s. 3 by implication. Rich J.'s construction can be defended (although still not persuasively) only as maintaining that s. 7A reconstituted the legislature for the purposes of the C.L.V. Act but not the State Constitution, which entails that the term 'the legislature' did not have the same meaning in each statute. But it is even less plausible to suppose that by 'Parliament of a State' the Australia Act could mean something other than 'Parliament' as defined in the State Constitution in question (subject to the qualification previously noted).

If the restrictive procedure does *not* itself use the term 'Parliament' (as s. 7A used 'the Legislature') in a way which is inconsistent with the argument that it has by implication modified the definition of the term in the State Constitution, then that argument will be available but still implausible. Implied repeals are usually held to have occurred where this is necessary to resolve inconsistencies between earlier and later Acts: Pearce states that 'there is a heavy onus on a person asserting an implied repeal — he must show that the legislature did intend to contradict itself.'[55] In the situation under discussion, there is no such inconsistency. It is true that, unless the restrictive procedure is held to have impliedly modified the constitutional definition of 'Parliament', it will be ineffectual if there is no other ground for holding it binding (which may be so if s. 6 of the Australia Act is not relevant). But the *causa causans* or real cause (as opposed to the *causa sine qua non*) of this result is not that constitutional definition, but sub-s. 2(2) of the Australia Act: that the procedure will be ineffectual does not establish that it is inconsistent with the definition. Whereas actual inconsistency between two provisions entails that to some extent both have dealt with the same matter, it does not follow from the mere fact that a restrictive procedure would have been binding *if* it had reconstituted Parliament, that it *did* reconstitute Parliament. It is not permissible to rewrite a statute in order to save it.

5. *CHARACTERIZATION UNDER SECTION 6 OF THE AUSTRALIA ACT.*

Section 6 of the Australia Act provides, as did s. 5 of the C.L.V. Act before it, that the validity of a law made by a State Parliament 'respecting the constitution, powers or procedure of the Parliament' depends upon its having been made in accordance with existing requirements as to manner and form. But what kinds of laws are (or are not) laws 'respecting the constitution, powers or procedure of Parliament'?

55 Pearce, D. C., *Statutory Interpretation in Australia* (2nd ed. 1981) 124.

In *Commonwealth Aluminium Corporation Limited v. Attorney-General*,[56] Hoare J. seems to have adopted an argument first suggested by Fajgenbaum and Hanks.[57] A 1957 Act provided that an agreement between Comalco and the Queensland Government should have the force of law as if enacted in the Act (s. 3), and that it should not be varied except pursuant to a further agreement between the same parties (s. 4). Hoare J. held that a 1974 Act dealing with mining royalties had been made in contravention of s. 4 of the 1957 Act, which he construed as prescribing a restrictive procedure for the enactment of future legislation. Section 4 was, he thought, a law respecting the constitution, powers and procedure of the legislature of Queensland, and this would seem necessarily to be true of any law prescribing a restrictive procedure, by the very definition of that term (although it could be argued that he erred in construing s. 4 as a restrictive procedure purporting to bind the Parliament[58]). He then concluded that the 1974 Act was also a law respecting the constitution, powers or procedure of the legislature because it enacted provisions which conflicted with the 1957 Act.[59] This conclusion must be based on the assumption that the 1974 Act purported to repeal or amend s. 4 by implication because its enactment was inconsistent with s. 4. A law repealing or modifying another law is surely, at least in part, a law respecting the same matter dealt with by the latter; and if the latter prescribes a restrictive procedure it necessarily follows that both are laws respecting the constitution, powers or procedure of the legislature.

If this argument is sound, s. 6 of the Australia Act makes *all* manner and form requirements binding, because it entails that *any* law passed contrary to an existing restrictive procedure is, for that reason, a law 'respecting the constitution, powers or procedure of the Parliament.' If so, that phrase has no effect whatsoever on the scope of the words 'a law' which it was clearly intended to qualify. This in itself casts doubt on the argument.

If a law expressly purports to repeal or amend a provision in an earlier law imposing a restrictive procedure, the conclusion that the former is a law 'respecting the constitution, powers or procedure of the Parliament' seems irresistible. But what if, as in the *Comalco* case, the law expressly purports to repeal or amend *other* provisions of the earlier law, provisions which are protected by the restrictive procedure, but not the procedure itself? Or what if it ignores the earlier law completely, but is inconsistent with some of its substantive provisions? Then the conclusion follows only if in doing these things it must be construed as attempting to repeal or modify the restrictive procedure. But the subsequent Act need not be so construed; rather, it simply *ignores* the restrictive procedure. It *must* be construed as attempting to repeal or modify the restrictive procedure

[56] [1976] Qd.R. 231.

[57] Fajgenbaum and Hanks, *op. cit.* n. 19, 286-7. The argument is referred to in Lumb 1, *op. cit.* n. 33, 99 n. 84, and is endorsed by Warnick, L., 'State Agreements — the Legal Effect of Statutory Endorsement' (1982) 4 *Australian Mining and Petroleum Law Journal* 1, 13. It is hard to see how the argument can be made consistent with another argument made by Fajgenbaum and Hanks which is discussed in n. 19, *supra*.

[58] Dunn J. thought that s. 4 purported to bind the Queensland Government but not the Parliament: [1976] Qd.R. 231, 260.

[59] *Ibid.* 248.

only if its efficacy depends upon its doing so. But this is the case only if the legislature is bound by the restrictive procedure — which is the very question in issue (whether s. 6 makes the restrictive procedure binding). In other words, the approach which Hoare J. took to this question *begged* the question. Section 6 makes a restrictive procedure binding *only if* the subsequent law is one respecting the constitution, powers and procedure of the Parliament. But his argument inverts this logical relationship, making a decision as to the latter depend upon an assumption as to the former. To dispute Hoare J.'s conclusion, on the other hand, does *not* require that the very question to be answered (whether s. 6 applies) be begged: logically, it *cannot* be necessary to assume that a restrictive procedure is *not* binding in order to decide that a law which ignores it is not a law respecting the constitution, powers or procedure of Parliament.

Hoare J.'s argument could possibly be defended if, whether or not a restrictive procedure is binding in the *strong* sense that legislation passed contrary to it is invalid (which is the effect of s. 6, for example), all are binding in the much *weaker* sense that they are valid until repealed, although they can be repealed either expressly or impliedly by the enactment of a law contrary to them. This turns partly on the question of whether a restrictive procedure which is ineffectual is invalid, or valid but subject to repeal or amendment at any time in the ordinary manner, a question discussed earlier in this article.[60]

But *even if* an utterly ineffectual restrictive procedure can be described as 'valid', is it plausible to say that it is repealed or modified by a law passed contrary to it, and that until that time it is binding? If so, this would vindicate Hoare J.'s argument, which becomes: the subsequent law is valid despite the restrictive procedure *only because* it has partially repealed or modified the restrictive procedure. But this is quite implausible. If the repeal of the restrictive procedure is a *result* of the enactment of the new Act, the requirement being binding up until that moment, how can the enactment have been valid? This would require a blatant bootstraps argument, the new Act relying for its *validity* upon one of its own *effects* — claiming to validate itself.

But some odd consequences follow if Hoare J.'s view is rejected. Imagine an Act which includes twenty substantive sections on some topic remote from the constitution, powers and procedure of the Parliament, and then a twenty-first section entrenching a restrictive procedure for the future repeal or amendment of the Act. If the Parliament subsequently wishes to repeal the Act without complying with the restrictive procedure it should pass an Act repealing not the whole of the old Act, but just its first twenty sections. The first strategy would be defeated by a non-question begging version of Hoare J.'s argument: to repeal the whole of the old Act would be to repeal s. 21, and this *would* be to deal with the constitution, powers and procedure of the legislature (since s. 21 is a law on that topic). To adopt the second strategy would be to ignore s. 21 which, as explained, would not similarly come adrift.

By contrast, imagine a Bill of Rights purporting to invalidate past or future legislation inconsistent with stipulated social and political rights, and to permit

[60] See the text to nn. 17-22, *supra*.

those rights to be amended or repealed only through a restrictive procedure. In this case the substantive provisions of the Bill — those setting out the protected rights — which are entrenched by the restrictive procedure, are *themselves* laws respecting the powers of the Parliament, because they specifically purport to restrict future legislation (this was lacking in the case considered in the previous paragraph). Therefore, a later Act passed in the ordinary manner, expressly purporting to amend or repeal one of those substantive provisions, *would* be a law respecting the powers of the Parliament, even if it ignored the restrictive procedure: if valid it would expand or contract the Parliament's power to make other laws in the ordinary way thereafter. Furthermore, even an Act which was merely *inconsistent* with one of those substantive provisions would arguably be a law respecting the Parliament's powers; by impliedly repealing that provision it would *not* be a law just *ignoring* the matter. If this is right, s. 6 would invalidate both Acts for non-compliance with the restrictive procedure. But arguments to the contrary could still reasonably be made: just because this conclusion avoids the flaw in Hoare J.'s reasoning does not show that it is free of other flaws. A court might refuse to characterize an Act which ignored the Bill of Rights as a law respecting the powers of Parliament, even though it partly repealed a provision of that Bill by implication, because this aspect of its character was relatively insubstantial.[61] The problem is one of dual characterization, which the High Court has grappled with in applying the Commonwealth Constitution.

6. *CHARACTERIZING THE RESTRICTIVE PROCEDURE*

(a) *Manner and form or substantive restriction?*

A distinction must be drawn between manner and form requirements, which are binding in the cases to which s. 6 of the Australia Act applies, and attempts to abdicate or restrict the Parliament's continuing constituent power, which are invalid. A restrictive procedure must be characterized as one or the other to determine whether or not it is binding under s. 6.[62] If such a distinction cannot be drawn — if provisions substantively restricting that constituent power can be binding under s. 6 — then the power could be completely extinguished, which would defeat sub-s. 2(2).[63]

In *Trethowan's* case Dixon J. said that the manner and form proviso allowed the exercise of the power to be qualified or controlled by law, but only to a limited extent: a law 'cannot do more than prescribe the mode in which laws respecting these matters must be made.'[64] This suggested that the manner and form proviso applied only to requirements reconstituting the legislature or prescribing pure procedures. But two pages later he described the scope of the manner and form proviso in sweeping terms, to include 'all the conditions which

[61] Lumb 1, *op. cit.* n. 33, 100 (text to n. 87) seems to assume this.

[62] *West Lakes Ltd v. South Australia* (1980) 25 S.A.S.R. 389, 396 *per* King C.J.

[63] The problem of restrictions of substantive power masquerading as manner and form requirements is discussed in Friedmann, *op. cit.* n. 33, 105f; Fajgenbaum and Hanks, *op. cit.* n. 19, 288; Lumb 1, *op. cit.* n. 33, 112; Lumb 2, *op. cit.* n. 33, 179; and Winterton, *op. cit.* n. 6, 605.

[64] (1931) 44 C.L.R. 394, 431.

the Imperial Parliament or that of the self-governing State or colony may see fit to prescribe as essential to the enactment of a valid law.'[65] Rich J. adopted an equally expansive formulation,[66] which the Privy Council later endorsed,[67] and this made it possible to hold that in requiring the assent of a majority of the electors, s. 7A laid down a manner and form requirement rather than — as Gavan Duffy C.J. and McTiernan J. thought[68] — stripping the legislature of power to act without the assent of an outside body. (Dixon and Rich JJ. interpreted the statutory words 'manner and form' so broadly because they believed that this was intended by those who enacted the C.L.V. Act. Dixon J. acknowledged that 'the language of the proviso may be susceptible of an interpretation which confines its application to the procedure by and the form in which a Bill is to be dealt with [within the legislature]', but he rejected this because when the proviso was enacted laws requiring things to be done outside the legislature were prominently in view and clearly intended to be included.[69] This historical fact outweighed what might otherwise have seemed logically to follow from the need to distinguish manner and form from substantive restraints of power.)

If the concept of manner and form stretches this far it is indeed doubtful whether the necessary distinction can be drawn after all. If giving a power of veto to an outside body is not restricting the legislature's powers in a substantive sense then what is? This objection must have been among the reasons which prompted Rich J. to propose the second, alternative ground for his decision. If the electors were not an outside body, but had been made part of the legislature, then the objection could be defused. But this arguably disingenuous tactic merely gives rise to another, equally worrying, objection. Can just *any* body be made a new element of the legislature?

In *West Lakes Ltd v. South Australia*[70] King C.J. proposed that in relation to the manner and form proviso a distinction could be drawn between the electorate and other outside bodies. His Honour said that

> a requirement that an important constitutional alteration be approved by the electors at a referendum . . . although extra-parliamentary in character, is easily seen to be a manner and form provision because it is confined to obtaining the direct approval of the people whom the 'representative legislature' represents. If, however, parliament purports to make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation, a 'serious question' must arise as to whether the provision is truly a law prescribing the manner and form of legislation, or whether it is not rather a law as to substance, being a renunciation of the power to legislate on that topic unless the condition exists.[71]

In fact his Honour went on to answer this 'serious question' by adopting the latter characterization of the provision in question.[72]

65 *Ibid.* 432-33.
66 *Ibid.* 419.
67 [1932] A.C. 526, 541.
68 (1931) 44 C.L.R. 394, 413-4 and 442-3 respectively.
69 *Ibid.* 432, and 419 *per* Rich J.
70 (1980) 25 S.A.S.R. 389.
71 *Ibid.* 397.
72 Hoare J. in effect came to the opposite conclusion on the facts in *Commonwealth Aluminium Corporation Limited v. Attorney-General (Qld)* [1976] Qd.R. 231, 250, because Parliament had retained its power of vetoing any change to the law made by agreement among the outside bodies in question (Comalco and the Crown). With respect, the retention by Parliament only of a power of veto is not consistent with the requirement that the legislature retain *full* constituent power.

This may prove to be a very useful suggestion. In order to apply s. 6 of the Australia Act, a distinction *must* be drawn between manner and form requirements and attempts to restrict Parliament's substantive powers. If that distinction is to be viable a provision subjecting legislation to the veto of an outside body (other than the electorate) *cannot* be characterized as a manner and form requirement for the purposes of s. 6. King C.J.'s suggestion, even if it is not logically impeccable, allows this conclusion to be drawn, while preserving the authority of *Trethowan* in relation to constitutionally required referenda.

What of a requirement that certain laws must be enacted in a particular *form*, for example, that Acts repealing or amending other stipulated legislation must do so expressly?[73] In *South-Eastern Drainage Board (South Australia) v. Savings Bank of South Australia*,[74] Evatt J. said that

> In my opinion the legislature of South Australia has plenary power to couch its enactments in such literary form as it may choose. It cannot be effectively commanded by a prior legislature to express its intention in a particular way . . . [Section 6 of the Real Property Act 1886 (S.A.)] purports to lay down a rigid rule binding upon all future parliaments. It declares that, however clearly the intention of such parliaments may be expressed . . ., that intention shall not be given effect to unless it contains the magic formula. I think that the command in sec. 6 was quite ineffective and inoperative.[75]

But, with respect, there is every reason to think Evatt J. erred in saying this. If such a law is not a binding requirement as to the form of legislation then what is? In relation to the distinction between laws restricting Parliament's substantive powers and those prescribing a manner and form for the exercise of those powers, such a requirement is unquestionably a law of the latter sort. The only power denied to Parliament is power to repeal or amend by implication, and this is not a *substantive* power. The substantive power is the power to repeal or amend, which Parliament retains and can exercise at will. Nor is there any good reason of principle to hold that such requirements cannot bind. Why should a Parliament *not* be required to show in some unequivocal form that it has considered and intends to deal with a matter deemed important by an earlier Parliament? *Obiter dicta* in British cases[76] are irrelevant, since the powers of the United Kingdom Parliament are not controlled by any provision such as s. 6 of the Australia Act. With respect to Sir Harry Gibbs, the question is not whether such a requirement

[73] The efficacy of this sort of requirement is discussed in Campbell, E., 'Comment on State Government Agreements' (1977) 1 *Australian Mining and Petroleum Law Journal* 53, 54-6. Whether or not the Commonwealth Parliament can subject itself to this sort of requirement is discussed by Detmold, *op. cit.* n. 8, 217-8 and Winterton, G., 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 *Federal Law Review* 167, 183-7 and 190-1. Winterton also discusses *R. v. Drybones* [1970] S.C.R. 282, in which the Canadian Supreme Court upheld the efficacy of s. 2 of the Canadian Bill of Rights 1960, which required that legislation inconsistent with the Bill of Rights expressly declare that it should operate notwithstanding the Bill: *ibid.* 182-5.

[74] (1939) 62 C.L.R. 603.

[75] *Ibid.* 633-4. Section 6 provided that 'no law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply notwithstanding the provisions of The Real Property Act 1886.' Evatt J.'s statement was not endorsed by the other Justices, who merely held that the manner and form proviso did not apply because s. 6 was not a law respecting the constitution, powers or procedure of the legislature: *ibid.* 618 *per* Latham C.J., 623 *per* Starke J., 625 *per* Dixon J., and 636 *per* McTiernan J.

[76] Campbell cites two such *obiter dicta*: *op. cit.* n. 73, at 54.

is 'difficult to reconcile with formal legal theory',[77] but whether it is reconcilable with the constitutional provisions (including s. 6) which regulate the powers of the State Parliaments.

Special majority requirements pose much greater difficulties. They can be characterized in two different ways. First, they can be characterized as prescribing a special *procedure* with which the legislature must comply.[78] On this view, the constitution of the legislature is structural, not procedural: it is *neutral* with respect to the majorities needed for particular purposes. If this view is adopted, the validity of the requirement depends on whether it is so onerous that it restricts the substantive power of the legislature rather than merely prescribing a procedure for its exercise.[79]

The alternative is to characterize special majority requirements as altering the *constitution* of Parliament for particular purposes.[80] This may appear logically to raise different questions — it is less obvious that a special majority requirement restricts Parliament's powers, if its effect is that Parliament *consists of* bodies acting for some purposes by special majority: inaction, it could be argued, shows that Parliament, so constituted, *chose* not to act, rather than that it was *unable* to act. On the other hand, an impaired ability to act may be due to internal as well as external constraints: just like a person, an institution may be handicapped by its own character or anatomy. Furthermore, the choice between these two alternative characterizations of special majority requirements seems to be arbitrary: no good reason is apparent for choosing one rather than the other. If so, a decision as to the validity of such a requirement would exemplify the worst vices of abstract conceptualism if it turned on that choice. The same principles should apply whatever alternative is chosen: it should not be possible to curb the freedom of Parliament by making what would otherwise be an external fetter part of its internal constitution.[81]

But *what* principles should apply? In the terminology of legal philosophy this is a 'hard case': the empirically identifiable legal rules and principles do not provide a determinate solution. If it is not to act arbitrarily a court called on to resolve the issue will have to consider fundamental principles of political morality.[82] It will not be able to escape this predicament by deferring to the legislature, for the very problem posed is '*which* legislature?'

In *West Lakes* King C.J. said:

77 Sir Harry Gibbs, 'The Constitutional Protection of Human Rights' (1982) 9 *Monash University Law Review* 1, 11.

78 *E.g.* Marshall, G., *Constitutional Theory* (1971) 56-7.

79 Friedmann, *op. cit.* n. 33, 105-6; Lumb 1, *op. cit.* n. 33, 112; Lumb 2, *op. cit.* n. 33, 179.

80 *E.g.* Cowen, *loc. cit.* n. 34, discussing the reasoning of the South African Supreme Court in *Harris v. Minister of the Interior* [1952] (2) S.A. 428.

81 Hood Phillips complained of the argument that Parliament could be *redefined* by a special majority requirement that 'it is a fiction or formula designed to avoid classifying the matter as "procedural"': *op. cit.* n. 4, 85.

82 For our purposes it does not matter whether these principles are part of the law, as Dworkin would have it, or whether they are extra-legal, as a positivist such as Raz would insist: the point is simply that they ought to be considered. See Dworkin, R., *Taking Rights Seriously* (1977) and *Law's Empire* (1986), and Raz, J., *The Authority of Law* (1979).

> There must be a point at which a special majority provision would appear as an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner and form of their exercise. This point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental constitutional provision.[83]

On this view, the question is one of degree: at some point the special majority is so onerous that Parliament's ability to act is unduly impaired (whether by an external fetter or its own constitution).

But some would object that this does not go far enough: they would argue that to require *anything* more than a simple or absolute majority would invalidly restrict a State Parliament's powers. Detmold holds democracy to require that 'the people of one time are to be as free in their parliament as the people of another: their will in parliament is of constitutionally equivalent status to that of their successors.'[84] (This is one example of a more general 'principle of inter-temporal equivalence: a legislative will may not bind a later legislative will of otherwise equal status.'[85]) Hanks poses as the basic issue whether 'the courts [should] endorse what is, essentially, a denial by yesterday's legislators that today's legislators lack prudence and sound judgment.'[86] A court could hold that sub-s. 2(2) of the Australia Act gives expression to this democratic principle, so that the people of each State, acting through their Parliament, must not only possess the plenary legislative power which the sub-section grants — they must possess it as fully and freely as their predecessors. On this view, *any* procedural requirement tending to curb that power would be invalid.

To test the soundness of this view it is useful to briefly explore Detmold's principle of inter-temporal equivalence, which he takes to have far-reaching implications. For example, it leads him to doubt whether the 1977 amendment to s. 128 of the Commonwealth Constitution, which included the people of the territories in constitutional referenda, could invalidate a future constitutional amendment passed by a national majority of State electors but not a national majority of State and Territory electors, because otherwise 'the people of the States in 1977 would have bound their successors.'[87] The same reasoning would deny efficacy to any other attempt to democratize the exercise of power: a body (X) reconstituting itself more democratically, or transferring its powers to a new, more democratically accountable, body (Y) would be held not to have bound X, as originally constituted, in the future. But this reasoning is erroneous, unacceptably elevating the principle of inter-temporal equivalence above that of democracy itself. In the case of X transferring its powers to Y, a later attempt by X to resume its powers should be resisted because the principle of democracy overrides the principle of equivalence between the wills of the earlier and the later X. To hold that X cannot resume its powers is not to *reject* the equivalence principle, but to subordinate it to another, more important principle which also 'obtains not by positive establishment but by its inherent rational claim'.[88] Such a holding

[83] (1980) 25 S.A.S.R. 389, 397. See also the discussion referred to in n. 63, *supra*.
[84] Detmold, *op. cit.* n. 8, 208.
[85] *Ibid.* 213.
[86] Hanks, *op. cit.* n. 1, 120.
[87] Detmold, *op. cit.* n. 8, 210.
[88] *Ibid.* 213.

would be primarily justified not by the will of the earlier X (which *would* entail rejecting the equivalence principle), but — in Detmold's own terms — by reason.[89]

Detmold also challenges the correctness of the decision in *Trethowan's* case because it violated the equivalence principle.[90] But it can be argued, to the contrary, that the decision was fully consistent with the principle because in this context it requires only that '*the people* of one time are to be as free in their parliament as the people of another',[91] and a referendum requirement merely requires the direct rather than indirect expression of the people's choice. Alternatively, the decision can be defended on the ground that the equivalence principle was properly overridden by the principle of democracy — by the inherent reasonableness of requiring that fundamental constitutional changes be endorsed by the electors.

Returning to special majority requirements, can they too be defended by appealing to a principle which overrides the equivalence principle? Brookfield argues that 'the legal possibility of a constitutional straightjacket is an evil less to be feared than that of perpetual and helpless submission to an omnipotent parliament'.[92] It could be argued that a transient majority should not be able to alter, at whim, fundamental constitutional arrangements around which the allegiance of the bulk of the community has coalesced.[93] A special majority requirement ensures that, in normal circumstances, change will enjoy some measure of bipartisan support (although, it will be objected, the entrenchment of the *status quo* need not have done). Again, a society is not necessarily undemocratic because its constitution protects unpopular minorities from the legislative attack of a prejudiced majority.[94] A requirement that legislation be supported by a special majority could in some circumstances provide such protection, although we may hope that in Australia the need for such protection is unlikely to arise.

In the author's opinion, referendum requirements provide ample protection against the improvident actions of transient parliamentary majorities, without violating democratic principles, and therefore special majority requirements should not be permitted.

(b) *Pure procedure or form, or substantive restriction?*

It has been suggested here that even if a restrictive procedure is not binding under s. 6 of the Australia Act, it might be binding if it relates purely to procedure or form, because it would not impinge upon Parliament's continuing constitutent power. Could the requirement of a referendum be binding on this ground? After all, Dixon J. implicitly held that s. 7A of the New South Wales Constitution did no more 'than prescribe the mode in which laws respecting these

89 *Ibid.* 199-200, 230-6, and 239-41.
90 *Ibid.* 208, 212-6.
91 *Ibid.* 208; my empahsis.
92 Brookfield, *op. cit.* n. 5, 628.
93 Harris, B. V., 'The Law-making Powers of the New Zealand General Assembly: Time to Think About Change' (1984) 5 *Otago Law Review* 565, 580.
94 See, *e.g.*, Ely, J. H., *Democracy and Distrust: A Theory of Judicial Review* (1980).

matters must be made.'[95] But I would submit that it could not. Dixon and Rich JJ. gave a broad construction to the words 'manner and form' in s. 5 of the C.L.V. Act because they believed that it was true to the intentions of those who enacted them. In the case of the pure procedure or form alternative no such reason exists. To require that an outside body, even the electors, must assent to a bill before it can be enacted is to deprive the Parliament of power.

The comments made in the preceding section in discussing special majorities and requirements as to form apply equally here, in relation to cases not covered by s. 6 of the Australia Act.

(c) *The limits of reconstitution*

In *West Lakes* King C.J. helpfully suggested that for the purposes of the manner and form proviso, a distinction could be drawn between the electorate and other outside bodies. But in relation to the reconstitution alternative, the suggestion is less useful. If the electorate can be made part of Parliament for certain purposes, why not other outside bodies? If a restrictive procedure is argued to have this effect by implication, the argument may fail for the reasons given in Section 4, above. But what if legislation *expressly* redefines Parliament by including, for a special purpose, some outside body other than the electorate? (What if it included *part* of the electorate — for example women only, in relation to laws affecting women's rights?) The problem is that the State Constitutions arguably do not include any entrenched requirement guaranteeing democracy.[96]

It used to be possible to argue that, because of the words 'representative legislature' in s. 5 of the C.L.V. Act, State Parliaments had to remain representative,[97] but s. 3 of the Australia Act now declares that the C.L.V. Act does not apply to State laws made after its coming into operation. Today, if a court is to draw a distinction for *this* purpose between the electorate and other outside bodies it must either (a) interpret the word 'Parliament' in sub-s. 2(2) of the Australia Act so as to exclude partly or wholly unrepresentative bodies; (b) reject, at least partly, the doctrine of parliamentary sovereignty: that is, maintain that there are fundamental constitutional principles, capable of overriding legislation, which do not owe their own existence to (superior) legislation; or (c) hold democratic requirements to be implied in some other constitutional provision or provisions, such as the 'peace, order and good government' formula which is used in most State Constitutions and now in sub-s. 2(2) of the Australia Act to describe the legislative power enjoyed by State Parliaments.

[95] See n. 64, *supra*.

[96] A similar problem could be posed by a procedural reconstitution, such as by a special majority requirement insulating minority views from the ordinary democratic process. This problem is dealt with in the text to nn. 78-94, *supra*.

[97] This was the view of three Justices in *Taylor and Others v. Attorney-General of Queensland and Others* (1917) 23 C.L.R. 457: Barton J., 468, Isaacs J., 474, and Powers J., 481. Gavan Duffy and Rich JJ. declined to express any firm opinion (*ibid.* 477). But the extent of representation argued to be thus guaranteed was necessarily limited by s. 1 of the C.L.V. Act which defined 'representative legislature' as 'any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by Inhabitants of the Colony.'

It is beyond the scope of this article to fully canvass these alternatives. As for the first, it may quite plausibly be thought that in Australia in 1986 the word 'Parliament' meant a fully representative institution, and this interpretation would further the purpose of the Australia Act which was to complete the transfer of *responsible* government in its fullest sense to the Australian States. But for other purposes this alternative is less helpful. Where special majority requirements are concerned it might be argued that 'Parliament' in sub-s. 2(2) means an institution making decisions by ordinary majority. An attempt to justify a referendum requirement might be challenged on the ground that, for the purposes of the Australia Act, a Parliament necessarily consists only of *representatives*, rather than the electors themselves. These arguments would be artificial and unconvincing, blatantly concealing policy choices behind arbitrary definitional stipulations. If a court decides to invalidate a special majority or referendum requirement for reasons of principle, it should do so openly.

The second alternative is currently enjoying growing support among academic lawyers,[98] but whatever its merits, the likelihood of judicial endorsement is another matter. Although Cooke J. of the New Zealand Court of Appeal has suggested in a number of *obiter dicta* that Parliament may not be able to override fundamental common law rights,[99] both the South Australian Full Supreme Court[1] and the New South Wales Court of Appeal[2] have recently repudiated that notion. The third might be accepted by those who find the first inadequate and the second too radical or dangerous: but the third is tantamount to the second in a legalistic disguise. In the case just mentioned, two members of the New South Wales Court of Appeal endorsed the unorthodox view that the phrase 'peace, welfare, and good government' in s. 5 of the Constitution Act 1902 (N.S.W.) *does* confine the legislative power possessed by the State Parliament. Street C.J. said:

> For my own part, I prefer to look to the constitutional constraints of 'peace, welfare, and good government' as the source of power in the Courts to exercise an ultimate authority to protect our parliamentary democracy, not only against tyrannous excesses on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of Parliament. I repeat what I have said earlier — laws inimical to, or which do not serve, the peace, welfare, and good government of our parliamentary democracy, perceived in the sense I have previously indicated, will be struck down by the courts as unconstitutional. There is here a field of constitutional jurisprudence which has not yet been explored and developed.[3]

Priestley J.A. thought that the courts in New South Wales could, on this basis, invalidate a law requiring the murder of blue-eyed babies.[4] Mahoney J.A. disagreed with both, while Kirby P. and Glass J.A. expressly declined to decide the

98 *E.g.* Dike, C., 'The Case Against Parliamentary Sovereignty' (1976) *Public Law* 283, Walker, G. de Q., 'Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion' (1985) 59 *Australian Law Journal* 276, Allan, T. R. S., 'The Limits of Parliamentary Sovereignty' (1985) *Public Law* 614, Detmold, M. J., *The Unity of Law and Morality, A Refutation of Legal Positivism* (1984) ch. X; Detmold, *op. cit.* n. 8, 252-7.

99 These *dicta* are collected and commented upon by Caldwell, J. L., 'Judicial Sovereignty — A New View' (1984) *New Zealand Law Journal* 357.

1 *Grace Bible Church v. Reedman* (1984) 36 S.A.S.R. 376.

2 *Building Construction Employees and Builders' Labourers Federation v. Minister for Industrial Relations (N.S.W.)* (1986) 7 N.S.W.L.R. 372.

3 *Ibid.* 387.

4 *Ibid.* 421-2.

question.[5] In *Sillery v. R.*,[6] Murphy J. said that a law authorizing the infliction of cruel and unusual punishment would transgress the limits of power expressed in the words 'peace, order and good government.' It is worth adding that, before the enactment of the Australia Act, the State Parliaments could arguably have expanded their powers by simply deleting phrases such as 'peace, order and good government' from their Constitutions.[7] But this is no longer possible given sub-s. 2(2) of that Act.

7. *THE* RANASINGHE *PRINCIPLE*

In *The Bribery Commissioner v. Pedrick Ranasinghe*[8] the Judicial Committee of the Privy Council held that the Ceylon Parliament was constrained by sub-s. 29(4) of the Ceylon (Constitution) Order-in-Council 1946, which required that certain bills should not be presented for the Royal assent unless accompanied by a certificate of the speaker certifying their passage by two-thirds of the members of the House of Representatives. The Board denied that the Ceylon Parliament was therefore not fully sovereign, saying that this 'does not limit the sovereign powers of parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.'[9] Whether ultimately persuasive or not, this proposition could be defended on the ground of either the reconstitution or the pure procedures alternative (it was shown in Section 6(a) that special majority requirements can be characterized in either way). As for the former, sub-s. 29(4) could be said to have reconstituted Parliament for special purposes without in any way diminishing its sovereign powers. As for the latter, the sub-section could be said to have prescribed a procedure for legislating which the Parliament was perfectly free to follow.[10]

It has sometimes been said that *Ranasinghe* may stand for a broader proposition, derived from the Privy Council's statement that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law.'[11] Does this mean that a State Parliament is necessarily bound by any restrictive procedure set out in the State's Constitution Act? But of course these are not the only instruments regulating the legislative

5 *Ibid.* 413, 406 and 407 of their respective judgments.

6 (1981) 35 A.L.R. 227, 234.

7 This argument was put by Trindade, F. A., 'The Australian States and the Doctrine of Extra-Territorial Legislative Incompetence' (1971) 45 *Australian Law Journal* 233, and in *Pearce v. Florenca* (1976) 135 C.L.R. 507, 515. Gibbs J. in effect said it was 'difficult to see why' it was not sound.

8 [1965] A.C. 172.

9 *Ibid.* 200.

10 The second characterization may seem less plausible than the first, but as explained in Section 6(a), nothing should turn on the choice between them.

11 [1965] A.C. 172, 197. For suggestions that *Ranasinghe* may have established some such broad principle see, *e.g.*, Gibbs J. in *The State of Victoria and The Attorney-General for the State of Victoria v. The Commonwealth of Australia and Connor* (1975) 134 C.L.R. 81, 163; Hoare J. in *Commonwealth Aluminium Corporation Ltd v. Attorney-General* [1976] Qd R. 231, 247; Matheson J. in *West Lakes Limited v. The State of South Australia* (1980) 25 S.A.S.R. 389, 420-1; Wilson J. (with whom three other Justices agreed) in *The State of Western Australia and Others v. Wilsmore* (1982) 40 A.L.R. 213, 225; Warnick, *op. cit.* n. 57, 12 and 17; and Thomson, J. A., 'State Constitutional Law: Gathering the Fragments' (1985) *University of Western Australia Law Review* 90, 93.

powers of State Parliaments. Today the Australia Act and the Commonwealth Constitution, as well as State Constitution Acts, come within that description, and whether a restrictive procedure is binding depends upon the interrelationship of all three. If the Privy Council's statement is adjusted accordingly, by pluralizing the word 'instrument', it does not add any third ground for the bindingness of restrictive procedures. Apart from s. 106 of the Commonwealth Constitution (which is discussed in the next section), restrictive procedures may be binding on any of the grounds already discussed, but not otherwise, because of the continuing constituent power in sub-s. 2(2) of the Australia Act; in other words, no other restrictive procedure can qualify as a 'condition of law-making . . . imposed by the instrument[s] which [themselves] regulate [the Parliament's] power to make law.' On any other interpretation the Privy Council's statement would not be good law in Australia because it would conflict with sub-s. 2(2) of the Australia Act.

8. *SECTION 106 OF THE COMMONWEALTH CONSTITUTION*

Section 106 of the Commonwealth Constitution provides that:

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

In *The State of Western Australia and Others v. Wilsmore*[12] Burt C.J. of the Western Australian Supreme Court, with whom Lavan and Jones JJ. agreed, decided that:

> Section 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.[13]

It followed that whether such a provision had been observed was a matter 'arising under the [Commonwealth] Constitution' within the meaning of s. 30(2)(a) of the Judiciary Act 1903 (Cth), and so the State of Western Australia could not appeal to the Judicial Committee of the Privy Council against the decision of the Full Court in *Wilsmore v. The State of Western Australia and Others*.[14] That case was then appealed to the High Court, which found it unnecessary to express any view as to the suggested effect of s. 106.[15]

Burt C.J. has been taken[16] to have meant that s. 106 constitutes a ground for holding restrictive procedures to be binding which is *independent* of those already discussed, potentially making an *additional class* of restrictive procedures binding. But it is not clear that he did mean this. He may have meant merely that when a restrictive procedure is already binding for other reasons, s. 106 'by its own force and for its own purposes' *also* makes it binding.

On the first interpretation of Burt C.J.'s decision, its implications are even more startling than may first appear. It is not clear what is meant by 'the

12 (1981) 33 A.L.R. 13.
13 *Ibid.* 18.
14 [1981] W.A.R. 159.
15 *The State of Western Australia and Others v. Wilsmore* (1982) 40 A.L.R. 213.
16 Hanks, *op. cit.* n. 1, p. 403, 118; Thomson, *loc. cit.*n. 11, p. 425.

Constitution of the State' in s. 106. Several interpretations are possible. The narrowest includes only the individual statutes called 'Constitution Acts'; the broadest includes all statutory provisions, common law rules and principles, and possibly conventions as well, which regulate the governmental institutions of each State. Judicial support for both interpretations can be found, and the merits of each (and a third) have been carefully evaluated in an article by C. D. Gilbert who recommends the broadest one.[17] To the reasons he adduces it need only be added that the purpose of s. 106 — to fully preserve the structures and powers of State governmental institutions except insofar as the new Commonwealth Constitution impinged upon them — would be better served if a broad rather than a narrow interpretation were adopted. There is no reason to think that s. 106 was intended to preserve only those documents called, in each State, the 'Constitution Act'. If so, the question whether or not a law has been passed otherwise than in accordance with a State's Constitution may not depend solely on provisions in the state's Constitution Act. On the first interpretation of Burt C.J.'s decision, s.106 will then have a much greater effect than Hanks, for example, acknowledges when he describes the Western Australian Supreme Court as having held that s. 106 makes effective restrictive procedures 'at least as expressed in the Constitution Acts of the Australian States.'[18] Indeed, on this interpretation s. 106 would arguably make binding *every* restrictive procedure purporting to bind a State Parliament, whatever its statutory location, because by its very nature a restrictive procedure (in the words of Isaacs and Rich JJ. in *McCawley v. The King and Others*[19]); is a rule 'by which [the legislature's] action as a recognized entity is regulated' and therefore falls within the broader meaning of 'Constitution'.

However, the second interpretation of Burt C.J.'s decision is preferable because on the first it would, with respect, be mistaken. When section 106 speaks of a constitutional alteration 'in accordance with' the Constitution of the State, the natural construction of those words is something like: 'not in violation of'. An alteration may not be 'in accordance with' the State Constitution in the utterly innocuous sense that its enactment was inconsistent with a restrictive procedure set out in a relevant instrument, but *if that procedure is not binding* it would still be 'in accordance with' the Constitution in the sense that its enactment would not have violated the Constitution. If the latter sense is the one intended, then to apply s. 106 it must logically be possible to determine *independently of it* whether or not a restrictive procedure is binding, because it must be possible to determine independently of it whether an alteration is 'in accordance with' the State Constitution (this follows from the words of the section). On this view, s. 106 does not impose any *additional* requirement with the effect that an alteration may be deemed not to be in accordance with a State Constitution although it would not otherwise have been so regarded. In other words, it does not make binding any restrictive procedure which is not already binding independently of

[17] Gilbert, C. D., 'Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council From State Supreme Courts' (1978) 9 *Federal Law Review* 348, 350-7.
[18] Hanks, *op. cit.* n. 1, p. 403, 117. But Hanks adverts to this at 118.
[19] (1919) 26 C.L.R. 9, 51.

it. The independent grounds for the bindingness of restrictive procedures are those already discussed.

9. *ENTRENCHING A BILL OF RIGHTS*

Rather than finishing with a bare summary of the conclusions reached herein, it may be useful to consider the ways in which a State Bill of Rights could be entrenched.

Sub-section 2(2) of the Australia Act grants to each State Parliament continuing constituent power, thereby assuming the rôle formerly played by s. 5 of the C.L.V. Act. There seem to be only three possible grounds for restrictive procedures which are compatible with sub-s. 2(2). The first is s. 6 of the Australia Act, to which sub-s. 2(2) is expressly subject: it makes binding requirements as to the manner or form in which laws respecting Parliament's constitution, powers or procedure must be passed. The second is that pure procedures or forms for legislation of any sort do not, by definition, impermissibly restrict Parliament's constituent power. The third is that a partial reconstitution of Parliament for special purposes also preserves the power granted by sub-s. 2(2), at least provided Parliament's ability to act is not destroyed or unreasonably impaired (Section 6(a)). These alternative grounds overlap in the sense that the same restrictive procedure might be supported by more than one of them.

The first ground is available only in relation to the enactment of laws respecting the constitution, powers and procedure of Parliament. The argument that *any* law made contrary to a manner and form requirement is a law of this sort should be rejected for begging the question. Nevertheless, legislation inconsistent with the guarantees of a Bill of Rights *might* be held to deal with Parliament's powers because of that inconsistency (Section 5): if not, those guarantees would not be effective on this ground. A second difficulty is that while genuine manner and form requirements are binding, attempts to restrict Parliament's substantive powers are not. Provisions requiring referenda, or requiring the *express* repeal or amendment of protected rights, are of the former sort; provisions requiring a very large majority or, arguably, anything more than a simple or absolute majority in Parliament, and those requiring the approval of outside bodies other than the whole electorate, are of the latter sort (Section 6(a)).

The second ground is available in relation to laws of any kind, but here the distinction between requirements of procedure or form, and restrictions of substance, should be drawn more strictly. Because the reasons which led the majority in *Trethowan's* case to construe the statutory term 'manner and form' broadly do not apply here, if neither s. 6 of the Australia Act nor reconstitution apply, a referendum requirement — even in a Bill of Rights — should logically be held to be a restriction of substance (Section 6(b)).

The third ground, reconstitution, is also available in relation to legislation of any kind. Sub-section 16(1) of the Australia Act acknowledges that Parliament can be constituted by different elements for different purposes, but because 'Parliament' in sub-s. 2(2) refers to Parliament as defined in the State Constitution in question, arguably any structural reconstitution for special purposes must

expressly amend that definition (Section 4). In Victoria, for instance, a referendum requirement should not be held to have partially reconstituted Parliament unless the definition of 'Parliament' in s. 15 of the Constitution Act 1975 (Vic.) has been expressly amended. Furthermore, there are limits to a State Parliament's power to reconstitute itself. Parliament cannot be validly reconstituted by the inclusion within it of either an unrepresentative element (Section 6(c)), or what would otherwise be an external fetter such as a special majority requirement of a very onerous kind or, arguably, of any kind (Section 6(a)).

Neither the Privy Council's judgment in *Ranasinghe* nor s. 106 of the Commonwealth Constitution adds any further, independent ground for entrenchment (Sections 7 and 8).