Section 85 Victorian Constitution Act 1975: Constitutionally Entrenched Right . . . or Wrong?

CAROL A FOLEY*

I. INTRODUCTION

Historically, State parliaments have always been free to alter the jurisdictions of their Supreme Courts by standard legislative means.[1] Kirby P considered this legislative freedom, in the context of the New South Wales Supreme Court, in the case of *Building Construction Employees and Builders' Labourers Federation of New South Wales* v *Minister for Industrial Relations*.[2] In that case he referred to s 49 of the *Constitution Act* 1855 (NSW) as the source of that State's plenary legislative authority to amend judicial power within the State.[3] His comments may be applied equally to the Victorian Parliament as s 41 of the *Constitution Act* 1855 (Vic) was cast in identical terms. Section 41 provided:

> All the Courts of Civil and Criminal Jurisdiction within Victoria and all Charters, legal Commissions Powers and Authorities and all Officers judicial administrative or ministerial therein respectively except in so far as the same may be abolished altered or varied by or may be inconsistent with the provisions of this Act or shall be abolished altered or varied by any Act or Acts of the Legislature shall continue to subsist in the same form and with the same effect as if this Act had not been made.

However, despite this apparent legislative plenitude, it is well accepted, both legislatively and at common law, that State parliaments can impose legislative restrictions upon themselves in certain circumstances via entrenchment or restrictive procedures.[4]

In 1975 the Victorian Parliament enacted the *Constitution Act* 1975 (Vic) ('the *Constitution Act*') to consolidate the existing law in respect of the Parliament, the Executive and the Supreme Court.[5] The *Constitution Act*, however, did more than merely consolidate the law; it accorded constitutional status and protection to the Supreme Court of Victoria for the first time in its

* BA, LLB (Hons) (Monash), Assistant Lecturer in Law, Monash University. I am grateful to Professor Enid Campbell for her valuable comments on an earlier draft of this article.

[1] Standard legislative procedure: a simple majority of those present (in accordance with the quorum requirements — *Constitution Act* 1975 (Vic), ss 32 and 40) and voting.

[2] (1986) 7 NSWLR 372.

[3] Id 401.

[4] An entrenchment or restrictive procedure is a valid means by which a State Parliament can bind itself or its successors as to the manner and form in which subsequent legislation can be passed in respect of particular matters. Generally speaking, a restrictive procedure is used to protect matters of fundamental importance, eg, human rights. The effect of the procedure is to disable Parliament from enacting legislation via standard or normal means. Mechanisms such as special majorities, referendum procedures or particular language forms are the most commonly used.

[5] *Parliamentary Debates*, Legislative Assembly (Vic), 15 April 1975, 4963 and 1 May 1975, 5831.

history.[6] Essentially, this meant that the Victorian Parliament was no longer able to derogate from the powers or jurisdiction of the Supreme Court by standard legislative means, but was required to comply with an entrenchment procedure.[7] So, not only did the Victorian Parliament seek to protect Supreme Court jurisdiction by means of an entrenchment procedure, it took the further step of constitutionally entrenching that jurisdiction.

The justification for this additional step, according to the Legal and Constitutional Committee ('LCC'),[8] was and is based on human rights considerations and the desirability of protecting a 'fundamental constitutional principle'[9] — namely the Rule of Law.[10] However, it is submitted that the constitutional entrenchment of the Supreme Court cannot be supported on either of these grounds.

Furthermore, since its inception, the Victorian constitutional entrenchment has given rise to a number of significant procedural and legal problems, none of which appears to have been satisfactorily resolved despite legislative and judicial efforts to the contrary.

Also noteworthy is the fact that no other Australian State or Territory has found it necessary to entrench the power and jurisdiction of its Supreme Court constitutionally,[11] in spite of the fact that the prevailing trend in Australian jurisdictions has been to protect other aspects of their legal systems, such as the constitution, powers and procedures of their parliaments by constitutional means.[12] And, constitutional entrenchment aside, neither has any State (Victoria[13] included) or Territory sought to entrench its Supreme

[6] *Constitution Act* 1975 (Vic), Part III.

[7] In 1975 the relevant entrenchment procedure was contained in ss 18(2)(b) and (3) of the *Constitution Act* 1975 (Vic); see also p 122 infra.

[8] The LCC was established by s 4(1)(b) of the *Parliamentary Committees (Joint Investigatory Committees) Act* 1982 (Vic) which inserted a new Part I into the *Parliamentary Committees Act* 1968 (Vic). This new Part set up a number of joint investigatory committees, one of which was the LCC. The Act (as amended) commenced operation on 25 August 1982. Section 4B set out the LCC's functions.

[9] Legal and Constitutional Committee, *Thirty-Ninth Report to the Parliament: Report upon the Constitution Act 1975*, Report No 121 (March 1990) 4–6, para 1.6 (hereafter referred to as the 'LCC Report').

[10] Id 12–16; see also pp 127–9 infra.

[11] The State Constitutions of South Australia, Queensland and Western Australia contain provisions dealing with judicial tenure, salaries and pensions: *Constitution Act* 1934–1978 (SA), ss 74–75; *Constitution Acts* 1867–1978 (Qld), ss 15–17, 38; *Constitution Act* 1889–1980 (WA), ss 54–55, 58.

The Constitutions of New South Wales and Tasmania and the Self-Government Acts of the Australian Capital Territory and the Northern Territory do not deal with the judicial system at all: *Constitution Act* 1902 (NSW); *Constitution Act* 1934 (Tas); *Australian Capital Territory (Self-Government) Act* 1988 (Cth); *Northern Territory (Self Government) Act* 1977 (Cth).

[12] *Constitution Act* 1902 (NSW), ss 7A, 7B; *Constitution Act* 1934 (SA), ss 8, 10a; *Constitution Act* 1867–1978 (Qld), s 22; *Constitution Act* 1889 (WA), s 73; *Constitution Act* 1934 (Tas), s 41A; *Australian Capital Territory (Self-Government) Act* 1988 (Cth), ss 24(2)(a)(b), 26; *Northern Territory (Self Government) Act* 1977 (Cth), s 12(a)(b).

[13] Although Victoria has never entrenched the power and jurisdiction of its Supreme Court, the salaries, allowances and pensions of Supreme Court judges were protected by restrictive procedures set out in the *Supreme Court Act* 1958 (Vic), s 12(1)(c), (2)(b), (3)(f); see also fn 85 infra.

Court jurisdiction by means of ordinary legislation, eg, in its *Supreme Court Act*.

The primary purpose of this article is to examine the problems created in 1975 by the constitutional entrenchment of Supreme Court jurisdiction. It will be argued that the constitutional protection of the Supreme Court is both unnecessary and unwieldy and that there is no justification on historical, juristic, pragmatic or human rights grounds for its continuation.

II. A BRIEF SURVEY OF THE HISTORICAL ORIGINS OF THE VICTORIAN JUDICIARY

In order to gain a fuller understanding of the current situation it is helpful to begin with a brief survey of the historical development of the Victorian judicial system to provide a comparative basis and to avoid an analysis of Supreme Court jurisdiction in a temporal vacuum.

In the Beginning

When the various Australian colonies were settled by the British, the laws of England, subject to 'very many and very great restrictions',[14] were received into the colonies on the basis that the colonies were 'settled'[15] as opposed to 'ceded or conquered' territories.[16]

The laws so received naturally encompassed both enacted and unenacted law;[17] however, over time, the position differed somewhat between the two. In order to become an operative part of the colonial body of law, received English legislation had to *both* be in force in England *and* be applicable to the

[14] Sir W Blackstone, *Commentaries on the Laws of England* (Thomas M Cooley (ed), 3rd ed (revised), 1884) Vol I, 105, 107.

[15] 'Settlement' meaning the time at which the particular territory became a place of settlement under the laws of the Empire. This involved more than merely discovering the land; it included symbolic and ceremonial acts such as setting up proper marks and inscriptions as first discoverers and possessors, planting the national flag, firing off a *feu de joie*, claiming the land in the name of the monarch and embarking on effective occupation of the territory concerned. It also included the physical ability to deny use of the land to other nation states; see also A C Castles, *An Australian Legal History* (1982) ch 2; and A C Castles, *An Introduction to Australian Legal History* (1971) 15-16.

[16] According to common law principles developed in English courts since the twelfth century, when British settlers occupied and 'settled' land which was not regarded as being owned or settled by anyone else (*res nullius* under international law), English law (as applicable at that time) applied to the colony. On the other hand, where the land was already owned and settled and had been conquered or ceded, the existing law in force in that land continued until altered by the Crown or by the British Parliament; see also Blackstone, op cit (fn 14) 105, 107; and Castles, *An Introduction to Australian Legal History*, op cit (fn 15) 10–11; Castles, *An Australian Legal History*, op cit (fn 15) 493.

[17] Note that unenacted law included, as well as substantive legal rules and principles, the common law and equitable rules dealing with the powers and jurisdictions of the courts.

colony at the time of settlement otherwise it never became part of the local law unless, of course, it was later adopted by the local legislatures.[18] Received unenacted law, on the other hand, was broader and more flexible in its application.

Unlike statute law, unenacted law could become an operative part of colonial law even if it was not applicable in a colony as at the time of settlement. The judicial trend has been to hold that the 'cut-off' date that applied at settlement to enacted law did not apply in quite the same way in respect of unenacted law. It is accepted that in many instances unenacted law was received at settlement but lay dormant until a colony developed sufficiently for the law to the applicable.[19] As Gibbs J said in *State Government Insurance Commission* v *Trigwell*,[20] there is a presumption that the 'entire fabric of the common law, not shreds and patches of it, was carried with them by the colonists to the newly occupied territory.'[21]

Another factor to be considered in respect of unenacted law is that it is not 'self executing'.[22] It can only become operative once courts or other appropriate bodies have been established with the recognised authority to apply or execute that law. The early courts were established by Imperial legislation and/or by the Royal Prerogative[23] in the form of executive instruments such as the Charters of Justice. Not unnaturally, these first courts were modelled on their British counterparts but with certain significant differences.

[18] This position was legislatively confirmed by 9 Geo IV c 83 (1828), s 24 (the *Australian Courts Act*) (UK) which provided that all such laws in force in England and applicable to the colonial situation on 25 July 1828 (agreed settlement date) were to apply to New South Wales (which included Victoria and Queensland) and to Van Diemen's Land (later Tasmania); see Castles, *An Australian Legal History*, op cit (fn 15) 425–31 re judicial confirmation of this position. The situation in both Western Australia and South Australia was similarly confirmed by later legislation (both UK and local), the settlement dates being 1 June 1829 and 28 December 1836 respectively; see Castles, *An Australian Legal History*, op cit (fn 15) 427 for further discussion in respect of Western Australia and South Australia.

[19] *Fitzgerald* v *Luck* (1839) 1 Legge 118; *Cooper* v *Stuart* (1889) 14 App Cas 286; *Delohery* v *Permanent Trustee Co of New South Wales* (1904) 1 CLR 283; cf *R* v *Farrell, Dingle and Woodward* (1831) 1 Legge 5; *Campbell* v *Kerr* (1886) 12 VLR 384; see also J M Bennett and A C Castles, *A Source Book of Australian Legal History* (1979) 283–91; Castles, *An Australian Legal History*, op cit (fn 15) ch 17.

[20] (1979) 26 ALR 67.

[21] Id 73.

[22] Castles, *An Australian Legal History*, op cit (fn 15) 495.

[23] Where used in combination, the legislation authorised the court to be constituted in the first place and then the executive instrument actually brought it into being under the monarch's prerogative power: J M Bennett, *A History of the Supreme Court of New South Wales* (1974) 30.

The legality of the creation of courts under the prerogative has been disputed by some writers but will not be pursued in this article: see E Campbell (1964) 4 *Syd LR* 343; E Campbell (1964) 50 JRAHS 161; R Else-Mitchell (1963) 49 JRAHS 1; The Hon H V Evatt (1938) 11 ALJ 409; Sir Victor Windeyer (1962) 1 *U Tas LR* 635; S H Z Woinarski, 'The History of Legal Institutions in Victoria: Sine Historia Jurisprudentia' (unpublished Doctor of Laws thesis, Law Library, University of Melbourne, 1942).

The First Colonial Courts

Because Victoria was initially a part of the colony of New South Wales its judicial origins are traceable back to the first settlement at Port Jackson in New South Wales. This settlement was, indisputably, of a penal nature[24] and the early colonial courts reflected its punitive regime.

In 1787, *An Act to enable His Majesty to establish a Court of Criminal Judicature, on the Eastern Coast of New South Wales and the parts adjacent*[25] empowered the Crown to authorise the Governor or Lieutenant Governor of New South Wales to convene a Court of Criminal Jurisdiction. The Court was actually established in that same year by the *First Charter of Justice for New South Wales*[26] and had authority pursuant to the Act to proceed 'in a more summary way'[27] than the courts in Great Britain. In fact, the procedures followed were more akin to a court martial than a common law court[28] and the Court itself was presided over by a judge-advocate and by six officers of His Majesty's forces.[29] The first criminal court assembled on 11 February 1788 and cases dealing with assault and petty theft were heard on that day.[30]

A Court of Civil Jurisdiction was also constituted at this time under the *First Charter of Justice*, although, unlike the Court of Criminal Jurisdiction, it had no statutory foundation. It too operated according to a very summary procedure[31] but was presided over by a judge-advocate and two 'fit and proper persons' who were appointed by the Governor.[32] The first civil case in Australia was decided on 5 July 1788.[33]

Neither court provided for a jury trial.[34]

[24] *An Act for the effectual transportation of felons, and other offenders; and to authorise the removal of prisoners in certain cases, and for other purposes therein mentioned (The Transportation Act)*, 24 Geo III c 56 (1784) enabled the King in Council to decide where the penal colonies were to be located and two Orders in Council dated 6 December 1786 nominated the eastern coast of Australia and the adjacent islands: Bennett and Castles, op cit (fn 19) 1.

[25] 27 Geo III c 2 (1787).

[26] *Warrant for the Charter of Justice* (The First Charter of Justice for New South Wales), 2 April 1787, HRA, Ser IV, Vol I, 6–12.

[27] 27 Geo III c 2 (1787), Preamble.

[28] J Crawford, *Australian Courts of Law* (1982), 23; Castles, *An Australian Legal History*, op cit (fn 15) 378–9.

[29] D Neal, *The Rule of Law in a Penal Colony* (1991) 54, 89–91.

[30] Bennett and Castles, op cit (fn 19) 23.

[31] Crawford, op cit (fn 28) 23; Bennett and Castles, op cit (fn 19) 19–22.

[32] *First Charter of Justice*, HRA, Ser IV, Vol I, 6; Neal, op cit (fn 29) 90.

[33] This was a complaint brought by two convicts, Henry and Susannah Kable, against Captain Sinclair, captain of the convict ship, the *Alexander*, for failing to deliver to them a marriage parcel worth around fifteen pounds sterling. The Kables were successful: Neal, op cit (fn 29) 4–5, 26; Windeyer, op cit (fn 23) 660–2.

[34] Castles, *An Introduction to Australian Legal History*, op cit (fn 15) 36–7; G Bird, *The Process of Law in Australia — Intercultural Perspectives* (1988) 6–8.

Establishment of the Supreme Courts

In 1814 the *Second Charter of Justice for New South Wales*[35] abolished the old Court of Civil Jurisdiction,[36] implemented a new lower civil court hierarchy[37] and established a Supreme Court as a court of record.[38] Again, there was no statutory basis for the constitution of the Supreme Court and it too dealt only with civil matters. The Court was authorised to

> hear and determine all pleas concerning lands, tenements, hereditaments, and all manner of interests therein, and all pleas of debt, account or other contract, trespasses, and all manner of other personal pleas whatsoever, except where the cause of action shall not exceed £50 sterling . . .[39]

The Court was presided over by a judge and two lay magistrates.[40] Persons aggrieved by Supreme Court decisions had an automatic right of appeal to the Governor[41] and then ultimately to the Privy Council if the amount involved exceeded £3000.[42]

The inadequacies and inconveniences[43] of this early judicial system were addressed in 1823. The Act of 1787 was repealed by *An Act to provide, until the first day of July, one thousand eight hundred and twenty-seven, and until the end of the next Session of Parliament, for the better Administration of Justice in New South Wales and Van Diemen's Land* (the *New South Wales Act*)[44] which abolished all the old colonial courts and established the first Supreme Courts with a general jurisdiction in New South Wales and Tasmania (then called Van Diemen's Land). The Act also set up an inferior court hierarchy.[45]

Section 1 of the Act provided, inter alia, that

> it shall be lawful for His Majesty, His Heirs and Successors, by Charters or Letters Patent under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*, to erect and establish Courts of Judicature in *New South Wales* and *Van Diemen's Land* respectively, which shall be styled "The Supreme Court of *New South Wales*", and "The Supreme Court of *Van Diemen's Land*"...

and the general jurisdictions of the Courts were set out in s 2:

> The said Courts respectively shall be Courts of Record, and shall have Cognizance of all Pleas, Civil, Criminal, or Mixed, and *Jurisdiction in all Cases Whatsoever* [emphasis added], as full and amply to all Intents and

[35] *Letters Patent to Establish Courts of Civil Judicature in New South Wales* (The Second Charter of New South Wales), 4 February 1814, HRA, Ser IV, Vol I, 77–94.
[36] Id 83.
[37] The Governor's Court and the Lieutenant-Governor's Court: ibid.
[38] Id 83–4.
[39] Id 84.
[40] Ibid.
[41] Id 87.
[42] Id 88.
[43] This aspect will not be dealt with in this article: see Bennett and Castles, op cit (fn 19) 38–42.
[44] 4 Geo IV c 96 (19 July 1823).
[45] Courts of Quarter Sessions and a Court of Requests: Castles, *An Australian Legal History*, op cit (fn 15) 152.

> Purposes in *New South Wales* and *Van Diemen's Land* respectively, and
> and every the Islands and Territories which now are or hereafter may
> subject to or dependant upon the respective Governments thereof,
> His Majesty's Courts of King's Bench, Common Pleas, and Exchequer
> *Westminster*, or either of them, lawfully have or hath in *England* ...

The Act also placed the Supreme Courts in a position of great potenti political power derived from the fact that they were given the same powers the courts at Westminster[46] and could therefore 'refer to a higher law'.[47] E implication this meant that the colonial Supreme Courts could exercise supervisory jurisdiction over both governmental officers and the lower cou via the prerogative writs of *mandamus*, *certiorari*, prohibition and *habe corpus*; they could also award damages where appropriate.[48]

As well as this, the Supreme Courts had the power to pronounce upon th validity of legislation in the colonies. They could invalidate local legislatio simply by declaring that it was repugnant to the laws of England[49] and the could hold that English legislation was inapplicable to the circumstances the colony.[50]

Sir Francis Forbes, the first Chief Justice of New South Wales, therefo believed that the Supreme Courts were 'a check' on the arbitrary exercise legislative, executive and political power in 'classic rule of law terms'.[51] Th was not a totally independent restraint, however, as the Supreme Cou Judges themselves were appointed by the British Government and held offic at the British Government's 'pleasure' — they did not have life tenure.[52]

The Supreme Courts were instituted by *Letters Patent* in 1823[53] and thei continuance and jurisdiction were preserved in 1828 by *An Act to provide fo the administration of justice in New South Wales and Van Diemen's Land* (th *Australian Courts Act*).[54] Subsequently, as each colony was founded, it

[46] 4 Geo IV c 96 (19 July 1823), s 2.

[47] Neal, op cit (fn 29) 92.

[48] Id 108; Castles, *Introduction to Australian Legal History*, op cit (fn 15) 69–70.

[49] 4 Geo IV c 96 (19 July 1823), s 29 which required the Governor to obtain the certificat of the Chief Justice stating that any proposed law was not repugnant to the laws c England.

[50] Neal, op cit (fn 29) 92.

[51] Id 113.

[52] The position of colonial judges differed from that of their United Kingdom counte parts. In the United Kingdom the *Act of Settlement* 1700 (UK), s 3 provided that judge were to hold office during their good behaviour and could only be removed by *bot* Houses of Parliament. The *Act of Settlement* was generally held *not* to apply to colonia judges and this was confirmed in *Terrell* v *Secretary of State for Colonies* [1953] 2 All E 490. However, each of the Colonies later introduced tenure provisions, which wer modelled on the British position, into their Constitutions or other legislation. Th position has now been modified and a compulsory retirement age legislatively im plemented: see Castles, *An Australian Legal History*, op cit (fn 15) 150–1, 340–4; Neal op cit (fn 29) 92; HRA, Ser IV, Vol I, 94.

[53] New South Wales: *Charter Establishing Courts of Judicature in New South Wales* (Th Third Charter of Justice for New South Wales), 13 October 1823, HRA, Ser IV, Vol I 509; Bennett and Castles, op cit (fn 19) 53–8; Van Diemen's Land (Tasmania): *Warran for Charter for Supreme Court in Van Diemen's Land* (First Charter of Justice for Va Diemen's Land), 18 August 1823, HRA, Ser III, Vol IV, 478; Bennett and Castles, op ci (fn 19) 112–15.

[54] 9 Geo IV c 83 (25 July 1828).

Supreme Court was likewise established[55] and later State Constitutions have merely provided for the continuance of their respective Supreme Courts as already established at that time.[56]

The Victorian Supreme Court

In 1851 the Colony of Victoria was formally separated from New South Wales[57] and the Victorian Supreme Court was subsequently established in 1852. Section 28 of *An Act for the better Government of Her Majesty's Australian Colonies* (the *Australian Constitutions Act*)[58] initially provided for the establishment of the Supreme Court of Victoria:

> It shall be lawful for Her Majesty, by letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland, to erect and appoint a Court of Judicature in the said Colony of Victoria which shall be styled "The Supreme Court of the Colony of Victoria".

However, no such letters patent being received in Victoria,[59] the Supreme Court was ultimately established in 1852 by a statute intituled *An Act to make provision for the better Administration of Justice in the Colony of Victoria* (the *Supreme Court (Administration) Act*).[60] The nature and jurisdiction of the Court were contained in ss 10, 11 and 14–16 and encompassed the common law, criminal law, equitable, ecclesiastical and administration of deceased estates jurisdictions respectively. Section 33 provided for an appeal to the Privy Council from Supreme Court decisions.[61]

Concurrent administration of the common law and equity, as established under the United Kingdom's *Judicature Acts* of 1873 and 1875, was adopted in Victoria in 1883[62] and has, over time, been incorporated into the various consolidations of the Victorian *Supreme Court Act*.[63] In 1915 the name of the court was changed from 'The Supreme Court of the Colony of Victoria' to 'The Supreme Court of the State of Victoria'.[64] However, although the name was updated to reflect changing times, the language and style of the legislation itself remained antiquated, verbose and difficult to understand.[65] Indeed, the 1958 consolidation of the *Supreme Court Act*, which remained in force until

[55] The exception being Western Australia which was settled in 1829 although its Supreme Court was not established until 1861: Crawford, op cit (fn 28) 107, 120 fn 2.
[56] Id 43 fn 11.
[57] See p 118 infra.
[58] 13 & 14 Vict c 59 (5 August 1850).
[59] 15 Vict No 10 (6 January 1852), Preamble.
[60] 15 Vict No 10 (6 January 1852), s 2.
[61] There is no longer such an appeal right to the Privy Council: *Australia Act* 1986 (Cth)/*Australia Act* 1986 (UK), s 11.
[62] *The Judicature Act* 1883 (Vic).
[63] Crawford, op cit (fn 28) 112–13.
[64] *Supreme Court Act* 1915 (Vic), s 6.
[65] It was not until 1986 that the Victorian Parliament effected a significant review and consolidation of the law in 'plain English' — *Supreme Court Act* 1986 (Vic) — although a fundamental overhaul of the legislation and procedures governing Supreme Court practice had been initiated by the Hon Haddon Storey (then Attorney-General) in 1975: *Parliamentary Debates*, Legislative Assembly (Vic), 23 October 1986, 1503 and 4 December 1986, 2883; Legislative Council (Vic), 5 December 1986, 1658.

repealed in 1986,[66] has been described as a 'collection of provisions derive from nineteenth century English legislation'.[67]

The 1958 Act (as periodically amended) was the operative legislation i force at the time of the 1975 consolidation of the Constitution and was th repository of those provisions dealing with the constitution, jurisdictio powers and duties of the Supreme Court and its judges. Section 15 of the Ac which delineated the general powers and jurisdiction of the Court, was unpr tected by any manner and form requirements whatsover and neither did suc protection appear to be necessary. Historically, at least since the time of th *Australian Courts Act*, the role and position of the Supreme Courts in th Australian hierarchy of power had been uncontroversial and unchallenge But, in spite of this, the Hamer Liberal government proposed that th abovementioned provisions[68] be repealed and re-enacted in the new *Const tution Act* 1975 as part of its consolidation package.

III. THE VICTORIAN CONSTITUTION ACT 1975

Brief History of the Constitution

The Port Phillip District was proclaimed open for settlement in 1836 but i was not until 1851 that the Colony of Victoria was actually established Section 5 of the *Australian Constitutions Act*[69] (colloquially known as th *Separation Act* in Victoria)[70] provided that the Colony of Victoria wa deemed to be established upon the issuing of the writs for the first members o the Legislative Council of Victoria. In May 1851, *An Act to provide for th division of the Colony of Victoria into Electoral Districts and the Election o Members to serve in the Legislative Council* (the *Victoria Electoral Act*)[71] wa enacted in Sydney and on 1 July 1851 Governor FitzRoy[72] issued the writs fo the election of the Council and Victoria became an independent colony as o that date.[73]

Since first settlement, the Imperial Parliament had sought to keep a tigh control over the running of the Australian colonies. However, as time passed the British policy mellowed and the Colonial Legislatures were authorised t prepare constitutional instruments and submit them to the Imperial govern ment for approval. In response to this the Legislative Council of Victori passed a Bill on 25 March 1854 intituled *An Act to establish a Constitution i and for the colony of Victoria.* This Bill was presented to Lieutenant-Governo La Trobe who reserved the Bill for Her Majesty's pleasure. The Imperial

[66] *Supreme Court Act* 1986 (Vic), s 140(1).
[67] *Parliamentary Debates*, Legislative Assembly (Vic), 23 October 1986, 1503.
[68] *Supreme Court Act* 1958 (Vic), ss 6–19 inclusive.
[69] 13 & 14 Vict c 59 (5 August 1850).
[70] R Rienits (ed), *Australia's Heritage* (1970) Vol III, 821.
[71] 14 Vict No 47 (2 May 1851).
[72] Sir Charles Augustus FitzRoy was the Governor of New South Wales from 1846–1855.
[73] This day was known as 'Separation Day' and was thereafter celebrated as a public holiday in Victoria for fifty years: see Rienits, op cit (fn 70) 871.

Parliament, after making certain amendments,[74] authorised Queen Victoria to give that assent on 21 July 1855 and the *Constitution Act* 1855[75] was proclaimed by the newly appointed Governor of Victoria, Sir Charles Hotham, on 23 November 1855. The *Constitution Act* 1855 itself was contained in the schedule of a United Kingdom enactment[76] and was regarded as having the force of law by virtue of that Imperial Act.

It is notable that, apart from s 41,[77] which, inter alia, preserved all existing courts of civil and criminal jurisdiction within Victoria, and various other provisions which dealt with the commissions,[78] salaries[79] and pensions[80] of judges, the *Constitution Act* 1855 was silent in respect of the substantive aspects of judicial power, ie, its nature and scope or ambit. In fact, apart from the initial provision in the Imperial Act of 1850 providing for the establishment of the Supreme Court in the Colony of Victoria,[81] the substantive aspects of judicial power had, until the enactment of the *Constitution Act* 1975, always been contained in legislation concerned with the administration of justice.[82]

The 1975 Victorian Constitution Act

The *Constitution Bill* 1975 (Vic) was introduced into the Legislative Assembly by Mr Wilcox (then Attorney-General) on 9 April 1975. In his second reading speech Mr Wilcox stated that the Bill was 'essentially a consolidation of the existing law in force in Victoria relating to the Parliament, the Executive and the Supreme Court.'[83] Thus, as well as bringing together the constitutional provisions contained in the *Constitution Act* 1855 and the *Constitution Act Amendment Act* 1958 (Vic),[84] the Bill also incorporated certain provisions of the *Supreme Court Act* 1958 (Vic)[85] into the new Victorian Constitution.[86] According to Mr Hunt (then Minister for Local Government)

[74] For a brief discussion of the amendments see Z Cowen, 'A Historical Survey of the Victorian Constitution, 1856 to 1956' (1957) 1 MULR 9, 12–13. The nature of the amendments is not relevant for the purposes of this article.

[75] *An Act to enable her Majesty to assent to a Bill, as amended, of the Legislature of Victoria, to establish a Constitution in and for the Colony of Victoria*, 18 & 19 Vict c 55 (1855), Sch (I).

[76] *The Public General Statutes passed in the Third Session of the Sixteenth Parliament of the United Kingdom of Great Britain and Ireland*, 18 & 19 Vict (UK) 1855; see also *Parliamentary Debates*, Legislative Assembly (Vic), 15 April 1975, 4963; Cowen, op cit (fn 74) 13.

[77] See p 110 supra.

[78] *Constitution Act* 1855 (UK), s 38.

[79] *Constitution Act* 1855 (UK), s 39.

[80] *Constitution Act* 1855 (UK), s 49.

[81] 13 & 14 Vict c 59 (5 August 1850), s 28; and see p 117 supra.

[82] See pp 117–18 supra.

[83] See fn 5 supra.

[84] *Parliamentary Debates*, Legislative Assembly (Vic), 15 April 1975, 4966; see also P Hanks, 'Victoria' (1992) 3 *Pub LR* 33.

[85] See fn 68 supra.

[86] In order to lawfully repeal, alter or vary the relevant provisions of these three enactments, both the second and third readings of the *Constitution Bill* 1975 were required to be passed by an absolute majority of the whole number of the members of the Legislative Council and of the Legislative Assembly respectively: *Constitution Act* 1855 (UK), s 60; *Constitution Act Amendment Act* 1958 (Vic), s 57; *Supreme Court Act* 1958 (Vic),

this would 'give the creation and position of the Supreme Court and the ten ure of its judges constitutional status as part of the essential legal framewor of the State.'[87]

The actual changes brought about by the *Constitution Bill* were describe by Mr Wilcox as 'minor to little more than minor, but in no way ... sub stantive.'[88] However, the Victorian government considered it important tha the Bill be passed urgently[89] to ensure that 'Victoria [would] no longer b dependent upon United Kingdom legislation for its basic legal existence'[9 and to avoid any inadvertent repeal of the *Constitution Act* 1855 by th United Kingdom Parliament.[91] It would also bring all Victoria's consti tutional provisions into one Act that was in a 'readily accessible and com paratively short form.'[92]

The Opposition wanted to delay the passage of the Bill to enable th Parliament to consider whether or not the existing law was relevant an appropriate to Victoria in 1975[93] and to enable the Statute Law Revisio Committee ('SLRC')[94] to consider any necessary reforms.[95] In particular, the proposed the creation and constitutional entrenchment of a Bill of Rights.[96] I response, Mr Wilcox gave an undertaking to refer the Bill to the SLRC fo examination and report after it had been enacted[97] and this undertaking wa later affirmed by the then Premier of Victoria, Mr Hamer.[98]

The matter was referred to the SLRC by Mr Wilcox[99] and an eight pa inquiry was undertaken.[100] However, this inquiry was never completed; onl

s 12(1)(c), (2)(b), (3)(f). The second and third readings were so passed, in the Assembl on 1 May 1975 and in the Council on 8 May 1975.

87 *Parliamentary Debates*, Legislative Council (Vic), 6 May 1975, 5865.

88 *Parliamentary Debates*, Legislative Assembly (Vic), 1 May 1975, 5831.

89 A motion was moved by Mr Thompson (then Minister of Education) on 1 May 1975 t declare the Bill to be an urgent Bill. The motion was agreed to as specified by Standin Order No 78F: *Parliamentary Debates*, Legislative Assembly (Vic), 1 May 1975, 5819

90 *Parliamentary Debates*, Legislative Assembly (Vic), 15 April 1975, 4963.

91 Ibid.

92 Id 4964.

93 Id 4965.

94 The SLRC was a joint committee established pursuant to s 37 *Parliamentary Com mittees Act* 1968 (operative 4 December 1968). Its functions were set out in s 38 The SLRC became defunct in August 1982 pursuant to s 6 *Parliamentary Committee (Joint Investigatory Committees) Act* 1982 (Vic). It was replaced by the LCC: se fn 8 supra.

95 *Parliamentary Debates*, Legislative Assembly (Vic), 1 May 1975, 5819–20.

96 The proposed Bill of Rights was to include freedom of expression, freedom of con science, freedom of religion and the rights of assembly and association: *Parliamentary Debates*, Legislative Assembly (Vic), 1 May 1975, 5820.

97 Id 5831.

98 *Parliamentary Debates*, Legislative Assembly (Vic), 8 May 1975, 6293.

99 Written request sent to the Committee on 27 November 1975 and accepted by the Committee on 8 December 1975.

100 The Committee was to consider: (a) the incorporation of a Bill of Rights into the Con stitution Act *or* as an Act in its own right; (b) the role of the Upper House; (c) the disqualification of Members of Parliament; (d) qualification of electors; (e) powers of the Governor; (f) procedural matters relating to Parliament; (g) the growth of the Execu tive; and (h) the relationship of public officers to political affairs: Statute Law Revision Committee, *Progress Report on the Constitution Act 1975 — A Bill of Rights* (Parlia mentary Paper D No 9/1979) 1–2, para 5.

the first two parts were addressed in separate *Progress Reports*[101] and no final reports were ever submitted to the Parliament.[102] In any event, the desirability or otherwise of constitutionally entrenching the jurisdiction and powers of the Supreme Court within the *Constitution Act* was not specifically raised in the terms of reference to the SLRC; nor was it directly addressed by the SLRC itself as part of its inquiry. And, most interestingly, neither had the issue been debated in either House of the Parliament during the passage of the *Constitution Bill.* Apparently, it was simply assumed that the constitutional entrenchment was a desirable and necessary adjunct to the rest of the legislative package.

Incorporation of Provisions Relating to the Supreme Court into the Constitution Act 1975

The existence of the Supreme Court itself was preserved by s 2(3) of the *Constitution Act* while Part III (ss 75–87 inclusive) dealt with various other aspects appertaining to the Court and the judiciary.

Section 96 of the *Constitution Act* repealed, inter alia, ss 6–19 inclusive of the *Supreme Court Act* 1958. Sections 6–14 effectively dealt with the constitution of the Supreme Court, the appointment, tenure and remuneration of judges and the establishment of the Supreme Court as a court of record. These sections were essentially re-enacted in ss 75–84 of the *Constitution Act.* The remaining provisions — s 15 (stating the Court's general powers and jurisdiction), s 16 (equitable jurisdiction), s 17 (probate jurisdiction), s 18 (administration of estates jurisdiction) and s 19 (matrimonial causes jurisdiction) — were amalgamated and simplified as set out in s 85 of the *Constitution Act* below:

> (1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto *in all cases whatsoever* [emphasis added] and shall be the superior Court of Victoria with unlimited jurisdiction.
> (2) The Court and the Judges of the Court shall have and may exercise such jurisdictions powers and authorities as were had and exercised by any of the superior Courts in England or the judges thereof or by the Lord High Chancellor of England including the jurisdiction powers and authorities in relation to probate and matrimonial cases and administration of assets at or before the commencement of Act No 502.[103]
> (3) The Court and the Judges of the Court shall in addition have and may exercise such jurisdiction (whether original or appellate) and such pow-

[101] *Progress Report on the Constitution Act 1975 — A Bill of Rights* (Parliamentary Paper D No 9/1979) and *The Role of Upper Houses of Parliament (Interim Report)* (Parliamentary Paper D No 1/1982).

[102] Mr David Ali, Clerk of the Papers and Assistant Clerk of Committees, Legislative Council of Victoria, in a letter to the author dated 5 August 1993.

[103] Act No 502 was the *Judicature Act* 1874 (Vic). It conferred jurisdiction of a kind possessed by the superior English courts at that time upon the Supreme Court. This included the supervisory jurisdiction of the English common law courts and the equitable jurisdiction of the Court of Chancery. Also note that sub-s (2) was repealed by s 132(d) *Supreme Court Act* 1986 (Vic) as part of the 1986 reform of the law relating to the Supreme Court of Victoria; see also fn 65 supra.

ers and authorities as are now prescribed by any Act as belonging to c exercisable by the Supreme Court of Victoria or the Judges thereof.[1
(4) This Act does not limit or affect the power of the Parliament to conf additional jurisdiction or powers on the Court.

The effect of the amendments was to render the *Supreme Court Act* 195 into an enactment that dealt primarily with administrative and procedur matters and powers. The substantive nature of judicial power, that is, th ambit and jurisdictional scope of the Court, was transferred into Part III c the *Constitution Act*. Likewise in respect of those provisions dealing with th independence of the judiciary — that is, the appointment, tenure, salarie pensions and retirement of judges.[105]

Entrenchment

Having incorporated the Supreme Court provisions into the *Constitution Ac* the next step was to protect them by means of an entrenchment procedure. A the Victorian Constitution, in common with all other State Constitutions, is 'flexible' document, it can be repealed, altered or varied by the Victoria Parliament[106] provided that, where constitutionally required, the restrictiv procedure laid down in the Constitution is followed. Section 18 prescribe that procedure:

(1) Subject to sub-section (2) the Parliament may by any Act repeal alter o vary all or any of the provisions of this Act and substitute others in lie thereof.
(2) It shall not be lawful to present to the Governor for Her Majesty's assen any Bill—
    (a) by which an alteration in the constitution of the Parliament, th Council or the Assembly may be made; or
    (b) by which this section, Part I., Part III., or Division 2 of Part V., o any provision substituted for any provisions therein contained ma be repealed altered or varied —

    unless the second and third readings of such Bill shall have been passe with the concurrence of an absolute majority of the whole number o the members of the Council and of the Assembly respectively.
(3) Any Bill dealing with any of the matters specified in paragraphs (a) an (b) of sub-section (2) which has not been passed with the concurrence o an absolute majority of the whole number of the members of the Coun cil and of the Assembly respectively shall be void.

Sub-section (4) set out a number of exceptions to sub-s (2).[107]

[104] A new sub-s (3) was substituted by s 132(e) of the *Supreme Court Act* 1986 (Vic) whic expressed in 'plain English' the essence of the original sub-ss (2) and (3):
The Court has and may exercise such jurisdiction (whether original or appellate) an such powers and authorities as it had immediately before the commencement of th Supreme Court Act 1986.

[105] Primarily contained in *Constitution Act* 1975 (Vic), ss 75, 77, 82–84.

[106] *Mc Cawley* v *R* [1920] AC 691; *Bribery Commissioner* v *Ranasinghe* [1965] AC 172 *Attorney-General for New South Wales* v *Trethowan* (1931) 44 CLR 394; *Commonwealt Aluminium Corporation Pty Ltd* v *Attorney-General of Queensland* [1976] Qd R 231 *West Lakes Ltd* v *South Australia* (1980) 25 SASR 389.

[107] These are irrelevant for the purposes of this article.

Effect of the Constitution Act on the Power and Jurisdiction of the Supreme Court

In essence, therefore, s 85(1) conferred jurisdiction on the Supreme Court of Victoria 'in all cases whatsoever' and made it 'the superior court of Victoria with unlimited jurisdiction'. This jurisdiction was entrenched by s 18(2)(b) which provided, inter alia, that any Bill which repealed, altered or varied s 85(1) so as to derogate[108] from that jurisdiction without having complied with the absolute majority requirements contained therein would be void in its entirety.[109] Herein lay the roots of the ensuing problems.

IV. THE PROBLEMS

It is notable that, although the *Constitution Act* 1975 provided that any Bill purporting to diminish the powers and jurisdiction of the Supreme Court without having complied with the restrictive procedure would be void, it was unclear which Bills fell into this category.

Indirect Amendments

The problems associated with indirect amendments to Supreme Court power and jurisdiction first became apparent following a speech made by Mr Justice Tadgell, a judge of the Victorian Supreme Court, to the Supreme Court Judges' Conference in Brisbane in 1988.[110] A spate of 'test' litigation ensued[111] in respect of various enactments which, purportedly, indirectly attempted to detract from the jurisdiction of the Supreme Court by granting exclusive jurisdiction to other bodies in respect of certain matters,[112] but which enactments had not been passed in accordance with the restrictive procedure laid down in s 18(2)(b).[113] It appeared that the Parliament had, since 1975, read s 18(2)(b) as applying only to direct amendments to s 85.[114] Thus the indirect 'amendments' mentioned above had merely been passed by standard legislative procedures.

[108] Parliament may *add* to the powers or jurisdiction of the Supreme Court by normal legislative means: see s 85(4) reproduced p 122 supra.

[109] *Constitution Act* 1975 (Vic), s 18(3).

[110] R C Tadgell, 'Judges of the Nineties and Beyond' (unpublished paper delivered to the Supreme Court Judges' Conference in Brisbane in 1988); see also LCC Report, op cit (fn 9) 6; and H P Lee, '"Manner and Form": An Imbroglio in Victoria' (1992) 15 UNSWLJ 516, 519.

[111] LCC Report, op cit (fn 9) 6.

[112] The *Retail Tenancies Act* 1986 (Vic), s 21(4) provided:

> Despite anything to the contrary in the *Commercial Arbitration Act* 1984 or any other Act, a dispute which is capable of being referred to arbitration under this section is not justiciable in any court or tribunal.

The *Planning and Environment Act* 1987 (Vic), s 39(3) provided:

> Any action in respect of a failure to comply with Division 1 or 2 or this Division must be taken before and determined by the Administrative Appeals Tribunal.

[113] See p 122 supra.

[114] *Parliamentary Debates*, Legislative Assembly (Vic), 2 May 1989, 1123.

The Constitution (Supreme Court) Act

To 'avoid the potential disaster of the wholesale invalidation of past and future legislation'[115] the Government introduced the *Constitution (Supreme Court) Bill* 1989 (Vic). According to Mr McCutcheon (then Attorney-General) the Bill was meant to clarify the occasions, both retrospectively and prospectively, on which proposed legislation was required to be passed in accordance with s 18(2)(b).[116]

Retrospectively, the Bill provided that the *Retail Tenancies Act* 1986 (Vic), the *Planning and Environment Act* 1987 (Vic) and 'any other Act enacted or purporting to have been enacted after 1 December 1975[117] and before 1 July 1989'[118] should not be called into question because of a failure to comply with the s 18 procedure.

Prospectively, cl 4 of the Bill provided as follows:

> After section 85(4) of the Principal Act insert—
>
> (5) A provision of an Act conferring jurisdiction or power on a court, tribunal, body or person does not exclude the jurisdiction of the Court and shall not be taken to repeal, alter or vary the provisions of this Part.
> (6) A provision of an Act which may, or which purports to, exclude the jurisdiction of a court or tribunal shall be taken not to exclude the jurisdiction of the Court unless—
> (a) the Act expressly refers to this section and expressly, and not merely by implication, excludes the jurisdiction of the Court; and
> (b) the Bill for the Act is passed in accordance with the requirements of section 18(2).

Clause 4 was, however, removed in its entirety after being committed to the Legislative Council because it was felt that

> the clause had the effect of reinterpreting legislation that had not been passed in accordance with section 18 of the Constitution Act to save it from total invalidity. This approach is now regarded as undesirable because it creates grave uncertainty concerning the meaning of an indeterminate number of Acts.[119]

The Opposition was concerned that this deletion might well result in the same uncertainty arising again in the future.[120] They agreed that cl 4 as it stood was unsatisfactory, but opted rather for it to be redrafted in some way. But, in spite of these concerns, they were reluctant to impede the passage of the Bill as a whole[121] and so it was passed by Parliament and became operative on 2 June 1989. It had been rendered, however, by the deletion of cl 4, to the

[115] LCC Report, op cit (fn 9) 6.
[116] *Parliamentary Debates*, Legislative Assembly (Vic), 19 April 1989, 965.
[117] The date the *Constitution Act* 1975 became operative.
[118] This date was chosen to validate any Act that may have inadvertently been passed during that sessional period of Parliament without the required majority, eg, *Credit (Amendment) Act* 1989 (Vic): see *Parliamentary Debates*, Legislative Council (Vic), 26 May 1989, 1230.
[119] Ibid.
[120] Id 1229.
[121] Id 1228–9.

status of a mere 'stopgap' measure,[122] validating only those dubious enactments passed between 1 December 1975 and 1 July 1989.[123]

V. THE SOLUTION

The Legal and Constitutional Committee Report

The effect of the *Constitution (Supreme Court) Act* 1989 (Vic) ('*C(SC) Act*') therefore clarified and solved the immediate retrospective problem; the long-term prospective problem, however, still remained. Consequently, in response to urgings by the Parliament to provide a 'long-term solution',[124] the entire matter was referred to the LCC by the Governor in Council on 15 September 1989. The resulting report[125] was tabled in Parliament in March 1990.

Terms of Reference

The terms of reference were straightforward. Essentially, the LCC was to consider:

(1) Whether s 85 should continue to be protected by the s 18 restrictive procedure; and if so,
(2) Whether a formal definitional section clarifying the classes of enactments repealing, altering or varying s 85 should be inserted into the *Constitution Act*; and if so,
(3) What consequences should flow in the event that any such enactment(s) so defined failed to comply with the s 18 restrictive procedure.

Thus, the inquiry 'centre[d] around the interaction between ss 18 and 85 of the *Constitution Act* 1975'[126] and was regarded by the LCC as a 'practical problem' to which they were required to provide a 'practical solution'.[127] The LCC identified the problem as being one of 'definitional uncertainty' which, in turn, gave rise to three further problems:[128]

(1) 'Procedural uncertainty' in the Parliament;
(2) 'Legal uncertainty' as to the validity of enactments; and
(3) 'Disproportionality'.

[122] Id 1229.
[123] *Constitution (Supreme Court) Act* 1989 (Vic), s 4(1).
[124] *Parliamentary Debates*, Legislative Council (Vic), 26 May 1989, 1229 and Legislative Assembly (Vic), 26 May 1989, 2217.
[125] See generally LCC Report, op cit (fn 9).
[126] Id 3, para 1.5.
[127] Id 4, para 1.6.
[128] Id 4–6, para 1.6.

Definitional Uncertainty

The LCC identified this as the 'basic problem' which had arisen because it was 'profoundly unclear' which Bills were required to be passed in accordance with the s 18 restrictive procedure. They regarded the concept of Bills which actually repealed, altered or varied s 85 as 'extremely vague'.[129]

Procedural Uncertainty

According to the LCC, procedural uncertainty flowed as a direct consequence of definitional uncertainty. Because it was unclear which Bills were required to be passed in accordance with s 18, it was extremely difficult for the responsible Parliamentary Officers — the Parliamentary Clerks and Presiding Officers (Speakers) — to determine accurately which Bills should be passed by an absolute majority.[130] If the Parliamentary Officers failed to alert the Parliament to the procedural requirement they not only failed in their constitutional duty but they also caused an otherwise valid enactment to be rendered void. Conversely, if they 'err[ed] on the side of caution' the ordinary parliamentary procedure would be disrupted unnecessarily and the 'free workings of Parliament' hindered.[131]

Legal Uncertainty

The second consequence flowing from definitional uncertainty was the overlapping problem of legal uncertainty and this was regarded by the LCC as far more serious than procedural uncertainty.[132] In the event that a Bill diminishing the powers and jurisdiction of the Supreme Court was passed without complying with s 18 the entire Bill would be void with potentially disastrous legal consequences. The implications of such consequences were patently evident in the series of test cases consequent on the passing of the *Retail Tenancies Act* 1986 and the *Planning and Environment Act* 1987 by standard legislative proceures as already discussed.[133]

Disproportionality

The third associated problem noted by the LCC was the problem of disproportionality.[134] The operation of s 18(3)[135] meant that any Bill which diminished the jurisdiction of the Supreme Court would be rendered entirely void. This was so, even if the offending Bill dealt with a number of other important matters and only incidentally had some very minor, negative effect on Supreme Court jurisdiction.[136]

[129] Id 4, para 1.6.
[130] An absolute majority is a majority of the *whole* number of the members of the respective House (or Houses if a joint sitting) whether or not present and voting.
[131] LCC Report, op cit (fn 9) 4–5, para 1.6.
[132] Id 5, para 1.6.
[133] See p 123 supra.
[134] LCC Report, op cit (fn 9) 4, para 1.5.
[135] See p 122 supra.
[136] LCC Report, op cit (fn 9) 5, para 1.6.

The Recommendations

The first matter the LCC considered was whether or not the constitutional entrenchment of s 85 was justified as 'fundamental to the constitutional well-being of Victoria'.[137] If not, then the practical difficulties of procedural and legal uncertainty and disproportionality created by that entrenchment would be unwarranted as a matter of constitutional principle.[138] Secondly, even if a 'fundamental principle' was concerned, the degree of entrenchment could not be so great as to 'incapacitate a future Parliament from action'.[139] In essence, whilst one Parliament may fetter itself or its successors via a restrictive procedure, it cannot abdicate its own substantive power to legislate without violating the concept of Parliamentary sovereignty[140] thereby invalidating the procedure.[141] The LCC decided that the fundamental principle encapsulated in s 85 was a guaranteed right of access to the Supreme Court. This simply meant, they said, that 'in Victoria, there is to be "Rule of Law" enforced by a court of law'.[142]

The Rule of Law

So what is the Rule of Law? Is it under threat and does it warrant constitutional protection?

The LCC was advised by the then Victorian Chief Justice, Sir John McIntosh Young, that the Rule of Law was a concept that

> implies that all authorities, legislative, executive and judicial and all persons in the State are subject to certain principles which are the same for everyone and which are generally accepted as characteristic of law. These principles are the fundamental notions of fairness, of morals, of justice and of due process. The rule of law involves equality before the law and *it involves consistency and uniformity in the decision of disputes, arrived at by the disinterested and impartial application of legal rules to ascertained facts and not by giving effect to what may appear to be popular moods of the moment or individual predilections.*[143]

The LCC thought that the idea of the disinterested application of the law lay 'at the heart of the Rule of Law' and was the fundamental principle which was encapsulated in s 85.[144] They described the section as the 'bulwark of the liberties of the citizen' and thought it was arguably the 'only constitutionally entrenched right in Victoria' covering to a small degree the sorts of values included in the International Covenant on Civil and Political Rights ('ICCPR').[145]

[137] Id 8, para 1.9.
[138] Id 10, para 2.2.
[139] Ibid.
[140] See p *141 infra*.
[141] See fn 106 supra.
[142] LCC Report, op cit (fn 9) 13, para 2.3.
[143] Ibid (emphasis in original).
[144] Ibid.
[145] The ICCPR was ratified by the Commonwealth Parliament in August 1980: id 14; see *Australian Treaty Series*, 1980 No 23 (published by the Australian Government Publishing Service).

Not surprisingly, therefore, the LCC concluded that the discontinuation of the constitutional protection of s 85 would be 'a singular course' for them to recommend and likewise for any government to follow.[146] They went even further and said that it would be difficult to conceive of a more fundamental constitutional principle than the Rule of Law. 'Without it, the Constitution itself is merely a piece of paper, and the protections guaranteed by law to citizens entirely worthless.'[147]

It was the view held by the LCC that the only circumstance that would warrant s 85 being removed from the ambit of constitutional protection was if, on balance, the problems created by its entrenchment were 'so grave as to entirely preclude that course of action.'[148] Ultimately, the LCC concluded that the practical difficulties were not so great as to justify abandoning the entrenchment of the Rule of Law and, in any case, they believed that they had substantially solved those difficulties. Any 'small difficulties' that might remain would have to be endured as the 'unavoidable price' of a necessary entrenchment.[149] Rather quixotically, the LCC also commented that even if their recommendations failed to remove the uncertainty attaching to s 85, the courts were well-used to resolving legislative ambiguities by applying the normal rules of statutory interpretation.[150]

It is submitted that the LCC read the concept of Rule of Law too narrowly and that it is not at all clear that s 85(1) does encapsulate the Rule of Law. It has been said that the Rule of Law is 'a set of concepts encompassing legal rules, institutions [and] processes of reasoning'[151] and as such 'encompasses a great deal more than Courts' which merely provide a 'physical and institutional site' for the Rule of Law to be exercised.[152] If this is so, then protecting the jurisdiction of the Supreme Court has little to do with protecting the Rule of Law; it is simply protecting the jurisdiction of the Supreme Court.[153]

Of course, in the alternative, it has been argued that if the jurisdiction of the Supreme Court is not protected, Parliament could simply abolish the Court and replace it with a body that was subject to the powers of the executive.[154] To this extent, therefore, the operation of the Rule of Law as we know it, may well be jeopardised, depending as it does on the 'independence' of the judiciary. During debate on the *Constitution (Jurisdiction of Supreme Court) Bill* 1991 (Vic),[155] Mrs Wade (then shadow Attorney-General) said:

The right of access to an independent court is fundamental to the notion of

[146] LCC Report, op cit (fn 9) 15, para 2.5.
[147] Id 14, para 2.4.
[148] Id 15, para 2.5.
[149] Ibid.
[150] Ibid.
[151] Neal, op cit (fn 29) xii.
[152] Id 63.
[153] Id 64; K J Thomson, *Minority Report to the Parliament Upon the Constitution Act 1975* in LCC Report, op cit (fn 9) 64: See also *Mayor, Councillors and Citizens of the City of Collingwood* v *Victoria and Collingwood Football Club Ltd* (unreported, Supreme Court of Victoria, No 11826 of 1992) 20. This decision is hereafter referred to as '*Collingwood (No 2)* case'.
[154] *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3127.
[155] The *C(JSC) Act* is discussed in detail pp 132–7 infra.

> equality before the law . . . . The importance of this Bill is to ensure that the final appeal court in this State is seen to be absolutely independent of the government.[156]

However, it should be remembered that the judiciary in Victoria is not 'absolutely independent' of the will of the Parliament; a rigid, constitutional doctrine of separation of powers does not exist in Australia at a State level.[157] Moreover, any parliament believing in an independent court will arguably also believe in an independent tribunal or other body. Therefore, clearly, the 'disinterested application of the law' is not the exclusive province of a court of law but may be equally well exercised in any number of diverse forums.

In any event, the Rule of Law does not guarantee fairness or morality and indeed, is perfectly compatible with immoral rules, eg, racist laws.[158] The essence of the Rule of Law is that no one is above the law; it says nothing about the content of the law itself. As Neal says, 'the rule of law is a political concept.'[159] Thus, when the former Chief Justice spoke of the Rule of Law encompassing fairness, morality, justice and due process, the terms were relative to the particular legal system; there is no general standard. In fact, the Rule of Law may not, in particular circumstances, encompass any of these qualities. For example, there is no exact correlation between morality and the law even within our own society at the present time. Adultery is immoral but it is not illegal; alternately, failing to register one's dog may be illegal but it is not inherently immoral.

Therefore, it is submitted that while it is undoubtedly true that it would be difficult to find a more fundamental constitutional principle than the Rule of Law in any given society, entrenching s 85 does little to protect it in real terms.

The Entrenchment

As a necessary part of their inquiry, the LCC also considered the nature and sufficiency of the entrenchment procedure in s 18 and decided that the absolute majority requirement therein was 'comparatively weak'[160] and 'very modest'.[161] There was, therefore, no question that the procedure even remotely approached an abdication of Victorian parliamentary sovereignty; the question was rather whether it was a sufficient protection at all. The concern was that, standing alone, the majority requirement might degenerate into a

[156] *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3127–8.
[157] Although a 'general' doctrine of separation of powers does operate as a matter of constitutional convention: R D Lumb, *The Constitutions of the Australian States* (5th ed, 1991) 132, 137; see also *Building Construction Employees and Builders' Labourers Federation of NSW* v *Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 per Street CJ.
[158] Neal, op cit (fn 29) 67–8.
[159] Id 193.
[160] LCC Report, op cit (fn 9) 10, para 2.1.
[161] Id 12, para 2.2.

ritualistic mechanism whereby the Government Whip[162] was simply concerned with assembling the requisite numbers to pass the relevant Bill. If this happened, the whole purpose of the entrenchment, which was to draw Parliament's attention to the fundamental importance of the proposed amendments[163] and so avoid any inadvertent diminution of Supreme Court jurisdiction, would be lost.

To solve this problem the LCC suggested that some additional protection was needed. They proposed that, as well as the absolute majority requirement, the Minister responsible for the Bill should also provide the House with a statement of reasons for the proposed amendments. This statement should be made within a particular time frame to ensure that the Parliament has ample time to fully debate the issue.[164] The LCC also recommended that any failure to comply with the entrenchment procedures laid down in s 18(2) should not, as before, render the entire Bill void, but should only invalidate the offending provision. The fate of the remainder of the Bill should then be dealt with according to the normal rules of severance.[165]

Which Bills Pose a Threat to the Rule of Law?

As already noted, an integral part of the overall problem involved the identification of those Bills which purport to repeal, alter or vary s 85.[166] The LCC felt that it was impossible to define such a class of Bills comprehensively because the definition would have to take into account 'every possible facet of the Supreme Court's multi-faceted jurisdiction', beginning with the apparently indefinable definition of 'jurisdiction' itself.[167]

To help identify such Bills, the LCC proposed that an express declaration clause be included in the *Constitution Act*. Any Bill that did not expressly declare its intention to repeal, alter or vary s 85 would have no effect whatsoever on the jurisdiction of the Supreme Court.[168] The similarity between this proposal and the earlier rejected insertion — s 85(6)(a) — in cl 4 of the *C(SC) Bill* 1989 (Vic) should be noted.[169] However, even at this stage, the LCC realised that such a clause would not clarify the situation as well as a substantive definition clause although they believed it would remove most of the existing definitional uncertainty.[170]

[162] The Parliamentary Whips are largely responsible for the smooth and efficient running of the parliamentary machine. Their chief duty is to arrange the business of their party in the House and inform their members of all forthcoming business. The expression 'whip' is derived from the whippers-in or whips employed by a hunt to look after the hounds and keep them together in the field: C J Boulton, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed, 1989) 202–3; S C Hawtrey and H M Barclay, *Abraham & Hawtrey's Parliamentary Dictionary* (3rd ed, 1970) 233–4; and see LCC Report, op cit (fn 9) 16, para 2.6.

[163] LCC Report, op cit (fn 9) 11, para 2.2.

[164] Id 16–17, para 2.6.

[165] Id 32–3, para 4.2.

[166] See pp 125–6 supra.

[167] LCC Report, op cit (fn 9) 19–20, para 3.2.

[168] Id 20, para 3.3.

[169] See p 124 supra.

[170] LCC Report, op cit (fn 9) 20, para 3.3

The Definition

By combining the requirements of the Ministerial statement of reasons together with the express declaration clause, the LCC believed they had come up with a workable and practical solution to the problems of procedural and legal uncertainty. In a nutshell, if the proposed Bill did not comply with the combined requirements it would be ineffective to diminish Supreme Court jurisdiction and, consequently, it would not be required to be passed in accordance with the s 18 restrictive procedure.

As to the legal validity of the solution, the LCC was of the opinion that the Victorian Parliament, being sovereign, was entirely able, both on legal and constitutional principles, to restrictively bind itself and its successors in this way by showing its intention to define Bills which purported to repeal, alter or vary s 85 as *those Bills which complied with the definitional requirements of s 85(5).*[171]

Other Potential Problem Provisions

The LCC recognised that there might already be in existence various provisions which would be affected by the proposed express declaration clause — for example, exclusive jurisdiction clauses and privative (ouster) clauses.[172]

Exclusive Jurisdiction Clauses

An exclusive jurisdiction clause in respect of another body, by definition, is inconsistent with s 85 which gives unlimited jurisdiction to the Supreme Court in all cases whatsoever.[173] To resolve any potential difficulties, the LCC proposed that any such provisions purporting to vest some form of exclusive jurisdiction on another body should be construed as conferring a concurrent jurisdiction upon the Supreme Court. They stressed that the Supreme Court was in no way bound to exercise that jurisdiction[174] and, in fact, as a matter of established principle, would be unlikely to do so.[175]

[171] Id 21, para 3.3; also see *South Eastern Drainage Board* v *Savings Bank of SA* (1939) 62 CLR 603 and J D Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 MULR 403, 408, 417–20, 422–3.

[172] Apart from these two, there are a number of other types of clauses included in this category which are not pertinent for the purposes of this article: see LCC Report, op cit (fn 9) 24–5, para 3.7.

[173] See pp 121–2 supra in respect of the nature and content of Supreme Court jurisdiction, power and authority.

[174] *Constitution Act* 1975 (Vic), s 87(1):

> Except as provided by any Act or the rules of the Court the Court and the Judges thereof shall not be bound to exercise any jurisdictions powers or authorities in relation to any matters in respect of which jurisdiction is given by any Act to any other Court tribunal or body.

[175] LCC Report, op cit (fn 9) 22–3, para 3.5.

Privative (Ouster) Clauses

A privative clause precludes or limits judicial scrutiny of certain matters. In the context of its inquiry, the LCC was concerned with the ramifications of such a clause purporting to oust the Supreme Court's ability to review[176] the decisions of inferior bodies. The LCC expressed some doubt as to whether or not such a clause constituted an actual amendment or variation of Supreme Court jurisdiction.[177] However, because of the importance of the Supreme Court's supervisory role, they thought it was appropriate that such a clause should be 'deemed' to be altering or varying s 85 and so be subject to the definitional requirements and hence the s 18 procedure.[178]

Administrative Mechanisms

As a corollary to the above recommendations, the LCC considered it vital that Ministers and Departments, Parliamentary Officers and Parliament itself should all be adequately informed of their obligations and duties in respect of Bills which might affect Supreme Court jurisdiction.[179] To answer this need, the LCC proposed that Parliamentary Counsel[180] should advise the relevant Minister(s) and Department(s) where appropriate and should also inform the Parliamentary Officers in the event that special procedural action is required. They also believed that where a Bill conformed with the definitional and procedural requirements it should bear a Presiding Officer's certificate to that effect on its face. Finally, the LCC recommended that the *Parliamentary Committees Act* 1968 (Vic) be amended to give the Committee, inter alia, a scrutiny of Bills function in respect of s 85 of the *Constitution Act*.

The Constitution (Jurisduction of Supreme Court) Act

The *Constitution (Jurisdiction of Supreme Court) Bill* 1991 (Vic) was based on the LCC Report.[181] After considerable debate and substantial amendment,[182] the Bill was passed and the following sections inserted into the *Constitution Act*:

85(5) A provision of an Act, other than a provision which directly repeals

[176] Judicial review is distinct from a superior court's statutory jurisdiction to hear appeals from inferior courts and tribunals. It refers to the inherent supervisory jurisdiction of superior courts (ie, the Supreme State and Territorial Courts, the Federal Court of Australia and the High Court of Australia) to control the decision-making of inferior courts, tribunals and other administrators via the prerogative writs (or their statutory equivalents) and the equitable remedies of declaration and injunction. A court exercising supervisory jurisdiction may only adjudicate on questions of law.

[177] The author submits that the ouster of the court's supervisory jurisdiction clearly amounts to a diminution of Supreme Court jurisdiction but this aspect will not be discussed further in this article.

[178] LCC Report, op cit (fn 9) 23–4, para 3.6.

[179] Id 25, para 3.8.

[180] Refers to barristers who are employed as civil servants (in Victoria by the Justice Department of Victoria) to draft government Bills and government amendments to such Bills: Hawtrey and Barclay, op cit (fn 162) 149.

[181] *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3125.

[182] See pp 133–4 infra.

or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless —

(a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and

(b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and

(c) the statement is so made —

(i) during the member's second reading speech; or

(ii) after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or

(iii) with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

(6) A provision of a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary this section and to be of no effect unless the requirements of sub-section (5) are satisfied.

(7) A provision of an Act which creates, or purports to create a summary offence is not to be taken, on that account, to repeal, alter or vary this section.[183]

(8) A provision of an Act that confers jurisdiction on a court, tribunal, body or person which would otherwise be exercisable by the Supreme Court, or which augments any such jurisdiction conferred on a court, tribunal, body or person, does not exclude the jurisdiction of the Supreme Court except as provided in sub-section (5).

The *Constitution (Jurisdiction of Supreme Court) Act* 1991 (Vic) ('*C(JSC) Act*') was passed to overcome the deficiencies of the *C(SC) Act* 1989 (Vic). In the interim, Parliament had resorted to a 'sort of administrative solution' which involved passing Bills by absolute majorities whenever there was the slightest chance that they might affect Supreme Court jurisdiction. This was inconvenient, time-consuming and politically inappropriate.[184]

The *C(JSC) Bill* was first introduced into the Parliament in November 1990, but was found to be inadequate in a number of major respects. Essentially, the Bill failed to implement a number of the LCC's recommendations; it also created an 'enormous loophole'[185] which potentially could have rendered the constitutional protection of Supreme Court jurisdiction nuga-

[183] Historically, neither the Supreme Court nor the County Court of Victoria exercised jurisdiction to hear summary offences; they were traditionally heard in the Magistrates' Court. Currently, s 52 of the *Interpretation of Legislation Act* 1984 (Vic), as inserted by s 119 of the *Sentencing Act* 1991 (Vic), provides that, unless a contrary intention appears, a summary proceeding must be heard in the Magistrates' Court. Thus, s 85(7) of the *Constitution Act* preserves the status quo and resolves any uncertainty that may exist in respect of the status of such provisions: *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3126; and *Parliamentary Debates*, Legislative Council (Vic), 28 November 1990, 1631.

[184] *Parliamentary Debates*, Legislative Council (Vic), 19 March 1991, 188.

[185] *Parliamentary Debates*, Legislative Council (Vic), 4 June 1991, 2119.

tory. Six months of discussion and negotiation between the government and the opposition followed before a mutually acceptable resolution was reached.[186]

The 'Loophole'

The LCC had always been aware that while the 'solutions' proposed in its report should largely alleviate the problems associated with Bills of amendment,[187] they would not necessarily solve the difficulties raised by House amendments[188] during debate. Nevertheless, the LCC had been 'content' to restrict the ministerial statement requirement to Bills as introduced into Parliament, preferring to rely on the Parliamentary process to resolve any difficulties.[189]

However, cl 4(6) of the original Bill went a step further and expressly exempted House amendments from the requirements of s 85(5) as follows:

> Sub-section (5)(b) does *not* apply in relation to a provision that is not included in the Bill before the motion for the second reading is passed by the Council or the Assembly, as the case requires.[190]

This exemption would have enabled any amendment made during the Committee stage to derogate from Supreme Court jurisdiction without complying with the definitional procedures therein[191] as only amending Bills were caught by s 85(5). However, the situation was subsequently remedied by the deletion of cl 4(6) and by the insertion of s 85(5)(c)(ii) and (iii) which provide for the relevant member to give a statement of reasons to the House at specified times before the third reading of the Bill.[192] Thus, both types of 'amendments' purporting to repeal, alter or vary s 85 are now covered as follows:

[186] *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3129.

[187] Refers to Bills which are introduced for the express purpose of amending the principal Act: Mr Matthew Tricarico, Usher of the Black Rod, Legislative Council in a telephone conversation with the author on 8 July 1993. The *Constitution (Supreme Court) Bill* 1989 (Vic) is a classic example.

[188] Refers to amendments made to Bills at the committee stage which comes at the end of the second reading speech (called the 'Committee of the whole'). The House breaks into committees to discuss the Bill clause by clause: Mr Matthew Tricarico, Usher of the Black Rod, Legislative Council, in a telephone conversation with the author on 8 July 1993. Obviously, the opportunity for Parliamentary Counsel to consider all such amendments and their effects would be almost non-existent; likewise in respect of LCC scrutiny of Bills: LCC Report, op cit (fn 9) 30–1, para 3.11.

[189] LCC Report, op cit (fn 9) 17, para 2.6.

[190] Emphasis added. In essence s 5(b) required the relevant member to provide the respective House with a statement of the reasons for repealing, altering or varying s 85.

[191] As to House amendments and amending Bills see fns 152 and 153 supra; also see *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3130 and Legislative Council (Vic), 19 March 1991, 196.

[192] See p 133 supra; see also *Parliamentary Debates*, Legislative Council (Vic), 4 June 1991, 2119.

Amending Bills

Amending Bills require an express declaration stating the intention to repeal, alter or vary s 85 and a Ministerial statement of reasons within a certain time-frame.

House Amendments

No express declaration is required because a House amendment is, by its very nature, not contained in an amending Bill, but arises 'informally' during the Committee of the whole stage. However, a Ministerial statement of reasons is required to be made in accordance with the time-frame set out in s 85(5)(c)(ii) and (iii).

Direct Amendments

There is one other type of 'amendment' that needs to be considered. Provisions that directly amend or directly repeal any part of s 85 are not required to comply with the definitional requirements laid out in s 85(5).[193] The LCC thought this exemption was 'appropriate' [194] and the point was expanded by Mr Kennan (then Attorney-General) in his second reading speech:

> Subsection (5) does not apply to legislation which expressly repeals or amends the words of section 85 itself, since there is no possibility that Parliament could pass legislation in that form without full awareness of the nature of the proposed amendment.[195]

This exemption was criticised by Mrs Wade (then Shadow Attorney-General) who thought that direct amendments should also conform to the s 85(5) requirements; specifically, that the Minister should still give a statement of reasons for the amendment to the Parliament and that this would be expected, in any case, by the Opposition.[196] In the interests of simplicity, expediency, consistency and on constitutional grounds it is submitted that this criticism is a valid one.

LCC Recommendations Omitted from the Act

Three LCC recommendations have been omitted from the *C(JSC) Act*. Recommendation 7, dealing with administrative mechanisms, has not been included.[197] Neither does the Act confer a scrutiny of Bills function upon the

[193] But note that even though direct amendments do not have to comply with s 85(5), they do have to comply with the restrictive procedure laid down in s 18(2A).
[194] LCC Report, op cit (fn 9) 21, Recommendation 3.
[195] *Parliamentary Debates*, Legislative Assembly (Vic), 6 June 1991, 3126.
[196] Id 3130.
[197] Parliamentary Counsel does not, even as a matter of informal practice, undertake to advise Ministers, Departments, Presiding Officers or Parliamentary Clerks in the manner proposed by the LCC in Recommendation 7. This information was obtained via a telephone conversation with Parliamentary Counsel, Justice Department of Victoria on 1 July 1993.

LCC (Recommendation 8);[198] nor does it require the Speaker to ensure that a certificate appears on the face of any Bill that has complied with the s 85(5) definitional requirements (Recommendation 9).[199]

The Final Entrenchment

The LCC also recommmended, 'purely by way of an abundance of caution', that the *Constitution Act* should be further amended to emphasize the fact that compliance with the definitional requirements of s 85(5) did not relieve the Bill of the requirement that it also had to comply with the absolute majority procedure in s 18.[200] The LCC referred to cl 4(6)(b) of the *C(SC) Bill* 1989 (Vic)[201] by way of example. To achieve this, s 5 of the *C(JSC) Act* excluded s 85 from the ambit of s 18(2)(b) of the *Constitution Act* and inserted a new provision, s 18(2A), which reads as follows:

> A *provision* of a Bill by which section 85 may be repealed, altered or varied is void *if the Bill is not passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.* [emphases added]

This provision not only had the effect of implementing Recommendation 10 of the LCC Report so that only the offending provision, rather than the entire enactment, would be void in the event that the absolute majority requirement was not met, it also eliminated the requirement that the Bill be passed by an absolute majority at both the second and third readings.[202] Thus, on the words of the section, an absolute majority at the third reading stage would be sufficient.

Validation of Acts Passed Since 1 July 1989

Finally, to ensure that all legislation enacted since 1 July 1989 was valid beyond doubt, s 6 of the *C(JSC) Act* extended the validating provision of s 4 of the *C(SC) Act* 1989 (Vic) to cover legislation passed up to 1 July 1991.

[198] The *Parliamentary Committees Act* 1968 (Vic) was amended in 1992 to insert a new s 4D which established the Scrutiny of Acts and Regulations Committee in place of the LCC. The new committee has more extensive powers and functions than the LCC, including, pursuant to s 4D(b)(i)–(iii), the power to scrutinise Bills which purport to repeal, alter or vary s 85 *Constitution Act* and to report to the Parliament on the desirability and full implications of any such amendments. The new section became operative on 17 November 1992.

[199] The Parliamentary Clerks continue to certify these Bills in the usual way as set out in the Standing Orders: Victoria, *Standing Orders and Rules of the Legislative Assembly* (1982) SO 34; Victoria, *Standing Orders of the Legislative Council* (1992) SO 299.

[200] LCC Report, op cit (fn 9) 21, Recommendation 3.

[201] See p 124 supra.

[202] Compare this with the s 18(2) absolute majority requirement at *both* the second *and* third readings: see p 122 supra.

The Effect of the C(JSC) Act

Ironically, the implementation of the LCC's 'practical solution' appears to have created yet another problem and one which was first recognised by the LCC itself, albeit reluctantly, when it said:

> It would be virtually inconceivable that a bill operating upon the jurisdiction of the Supreme Court would be passed without an absolute majority: ... it is difficult to see how the absolute majority requirement could, *in ordinary circumstances, be other than deliberately breached*, and in the event of deliberate breach, it is entirely appropriate that the provision in question be invalid.[203]

This potential problem was also adverted to in the Parliament by the Hon J Guest who made the comment that the *C(JSC) Bill* would require a 'certain alertness' to ensure that a government does not try to 'surreptitiously' introduce legislation with the purpose of derogating from Supreme Court jurisdiction.[204]

VI. ANOTHER PROBLEM

The latest problem focuses on indirect amendments to Supreme Court jurisdiction and power. As a necessary starting point, it needs to be remembered that s 85 is now protected from indirect amendments by the combined effects of ss 85(5) and 18(2A) of the *Constitution Act*. Section 85(5) defines those provisions which indirectly repeal, alter or vary s 85 and if a provision is so defined, s 18(2A) is activated to protect s 85.

But how effective is this bipartite protection? Its effectiveness or otherwise is a crucial question and one that both the LCC and the Hon J Guest had in mind when they considered the possibility that the protective procedures might be able to be deliberately breached or circumvented.

The Indirect Amendment Circumvention Argument

The indirect amendment circumvention argument is based on the following premisses:

(i) Section 18(2A) lays down a manner and form requirement to protect s 85;
(ii) Section 18(2A) is activated if a particular provision is classified as one indirectly purporting to repeal, alter or vary s 85;
(iii) To be such a provision, it must come within the s 85(5) definition;
(iv) If the provision does not come within the s 85(5) definition then it is not a provision purporting to repeal, alter or vary s 85;
(v) If it is not such a provision then s 18(2A) is not activated; and
(vi) If s 18(2A) is not activated, then the offending provision will not be rendered void and will still be on foot.

[203] LCC Report, op cit (fn 9) 21, para 3.3 (emphasis added).
[204] *Parliamentary Debates*, Legislative Council (Vic), 4 June 1991, 2119.

Therefore:

> If the offending provision is still on foot and s 18(2A) is not activated, there is nothing preventing the Parliament from repealing, altering or varying s 85 by standard legislative procedures.

Thus, the question is: Could a government, wishing to derogate from the Supreme Court's power or jurisduction, but doubtful that it could raise the requisite numbers to pass the Bill, deliberately frame a provision that indirectly amended s 85 but failed to conform with the requirements of s 85(5) in an attempt to circumvent the absolute majority requirement in s 18(2A)?

The problem, of course, is not limited to deliberate acts of unscrupulous governments wanting to beat the system. A government might have a perfectly legitimate reason for circumscribing Supreme Court jurisdiction, for example, on public interest grounds, but may be thwarted because of an inability to meet the majority requirements or, alternately, by a simple failure to realise that the pursuit of its policy may be constitutionally invalid. Justice Harper of the Supreme Court of Victoria considered this basic proposition in the case of *City of Collingwood* v *State of Victoria and Anor* ('the *Collingwood (No 1)* case').[205] His judgment was delivered on 27 October 1992.

The Collingwood (No 1) Case

The *Collingwood (No 1)* case dealt with a dispute between the Collingwood Council and the Collingwood Football Club in respect of the land known as Victoria Park. Harper J made it clear that there was no question of the Parliament trying to derogate from the jurisdiction of the Supreme Court by devious means as it openly sought to restrict Supreme Court jurisdiction on public interest grounds. He acknowledged that

> legislation which removes certain disputes from the jurisdiction of the Courts is not necessarily repugnant to the principles which ought to obtain in a Parliamentary democacy under the rule of law.[206]

Brief Factual History

The freehold title to Victoria Park had been held by the Council since 1882 subject to a covenant requiring that the land be used as a public resort for recreational purposes. It therefore could not be sold to private individuals.[207] The Council had leased the land to the Club since the latter's establishment in 1892 and the current forty-year lease (rental $1000 per annum) was due to expire in 1996.[208]

The Council and the Club wanted to enter into a number of new agreements in relation to the land involving the sale of the social club site (about 10% of

[205] [1993] 2 VR 66.
[206] Id 69.
[207] *Parliamentary Debates*, Legislative Assembly (Vic), 1 November 1990, 1747.
[208] Ibid.

the total land) to the Club for $1.75 million over fifteen years, with the remainder of the land to be leased to the Club over a fifty year period. The Club also agreed to invest $3.5 million over twenty years improving the leased land and further undertook that seven home football games would be played at the ground each year. Additionally, Collingwood residents were to be offered a special $18 per year social club membership on non-match days.[209]

There were, however certain doubts about the Council's rights to deal with the land in view of the covenant which had originally been set in place to protect the public interest and ensure the Council's accountability when dealing with public assets. This was no longer thought to be necessary in view of the protection offered by the *Local Government Acts* 1958 and 1989 (Vic).[210] To remove these doubts the Victorian Parliament enacted the *Collingwood (Victoria Park) Land Act* 1990 (Vic) ('*C(VP)L Act*') to discharge the covenant and any associated trusts. This meant that the Council was free to sell the land to the Club.[211]

In May 1991 an Agreement to Lease was executed by both parties (the rental had been increased to $25 000 per annum) and in August 1991 the Council passed a resolution to sign the Contract of Sale of the land to the Club (the purchase price had subsequently been negotiated to $4 million via a loan agreement with the Council at 10% interest).[212] However, negotiations broke down between the parties due to a council election and a subsequent change in the composition of the Council. The new Council passed another resolution in November 1991 to defer the sale indefinitely and, in response, the Club instituted legal proceedings against the Council to enforce the Contract of Sale.

Several unsuccessful attempts were made to resolve the matter out of court. The then Attorney-General, Mr Kennan, indicated that the government would be prepared to legislate to give effect to the agreements on public interest grounds if the negotiations failed. The dual rationalisation for this step was the conservation of public monies and to give effect to the original intention of Parliament. Effectively, Parliament had, in the *C(VP)L Act*, removed the encumbrances from the Victoria Park land at the specific request of both parties to enable the contract of sale to proceed. The intention had not been to give the Council the 'tremendous potential advantage' it obviously had now gained.[213]

The Council, however, remained adamant. Consequently, the government introduced the *Collingwood Land (Victoria Park) Bill* 1992 (Vic) ('*CL(VP) Bill*') into the Parliament on 15 April 1992 to implement the arrangements between the Council and the Club. But, despite this, the Council commenced proceedings in the Supreme Court on 4 May 1992 seeking declarations that neither the execution of the Agreement to Lease on 3 May 1991 nor anything

[209] *Parliamentary Debates*, Legislative Council (Vic), 29 November 1990, 1725–6.
[210] *Parliamentary Debates*, Legislative Assembly (Vic), 1 November 1990, 1747–8.
[211] Id 1747.
[212] *Parliamentary Debates*, Legislative Council (Vic), 27 May 1992, 1059.
[213] Id 1063.

done thereafter bound it to sell or lease any part of Victoria Park to the Club.[214]

The Case

The *Collingwood Land (Victoria Park) Act* 1992 (Vic) ('*CL(VP) Act*') received the Royal Assent on 2 June 1992[215] and on 22 June 1992 the Council brought another action in the Supreme Court, this time against the State of Victoria and the Club. This matter came before Harper J on 31 August 1992.

It was alleged that by legislating to give effect to the agreements between the Council and the Club, the Parliament had, as a necessary consequence, effectively ousted the jurisdiction of the Supreme Court to consider the matter. On this basis, the Council argued that the *CL(VP) Act* indirectly altered and varied s 85(1) of the *Constitution Act* and therefore, as it had not been passed in accordance with the definitional and procedural requirements of s 85(5) and s 18(2A),[216] was ineffective to derogate from Supreme Court jurisdiction. Thus, reading the *CL(VP) Act* together with the *Constitution Act*, the Supreme Court was still free to determine and resolve the dispute between the parties[217] irrespective of the parliamentary intention as expressed in the *CL(VP) Act*.

The issue, therefore, before Harper J was whether or not the *CL(VP) Act* was in conflict with the *Constitution Act* and, if so, what consequences flowed therefrom.[218] Harper J asked two questions: Was the Victorian Parliament competent to pass the *CL(VP) Act* and, if so, did the *CL(VP) Act* purport to alter or vary s 85 of the *Constitution Act*?[219]

Parliamentary Competence to Pass the CL(VP) Act

The question of parliamentary competence to pass *CL(VP) Act* depended on three considerations:

(1) Parliamentary sovereignty;
(2) The effect the *CL(VP) Act* had on the relationship between the Council and the Club; and
(3) Separation of powers at a state level.

214 This matter has still not been heard in the Supreme Court: *Collingwood (No 2)* case (unreported, Supreme Court of Victoria, No 11826 of 1992) 1.
215 The Act became wholly operative on 1 July 1992.
216 The *CL(VP) Act* was passed by standard legislative procedures at the third reading stage in both Houses, in the Legislative Assembly on 19 May 1992 and in the Legislative Council on 27 May 1992.
217 Supreme Court proceedings (No 2098 of 1992) commenced by writ on 4 May 1992.
218 *Collingwood (No 1)* case [1993] 2 VR 66, 69.
219 Id 71–2.

Parliamentary Sovereignty

The common law concept of parliamentary sovereignty has been described as 'the most fundamental rule'[220] of British law and simply means that Parliament[221] can make or unmake any law whatsoever on any subject matter whatsoever. Section 16 of the *Constitution Act* gives a plenary power to the Parliament 'to make laws in and for Victoria in all cases whatsoever' and this power is confirmed by s 2(2) of the *Australia Act* 1986 (Cth)/*Australia Act* 1986 (UK). However, the power is modified in three major ways: by the Commonwealth Constitution,[222] by extra-territorial jurisdictional limitations and by 'manner and form' requirements.[223] The Victorian Parliament's ability to enact the *CL(VP) Act* is not affected by either of the first two modifications; as to manner and form, Harper J proceeded with his judgment in the *Collingwood (No 1)* case on the assumptive basis that ss 18(2A) and 85(5) were valid and binding restrictive procedures.[224]

The Effect of the CL(VP) Act on the Relationship of the Parties

Simply put, this issue turned on whether the *CL(VP) Act* was creating the relationship between the parties or merely giving effect to an already existing relationship between them. Section 1 of the Act set out the purpose of the legislation which was to 'provide for the implementation of arrangements'[225] between the parties and to give 'legal effect to those arrangements'.[226] Section 4 of the Act provided for the deposit of various documents with the Registrar-General including the Contract of Sale[227] and a document containing details of the Agreement to Lease.[228] These documents, known as 'deposited documents'[229] were to 'replace and supersede'[230] any previous arrangements and were to 'have effect as binding and enforceable agreements between the Council and the Club'.[231]

According to Harper J, these provisions

> purport *not* to create, affect or alter rights, but *simply . . . facilitate the enjoyment of rights already created* as a result of what it [the Act] refers to as

220 S A de Smith, *Constitutional and Administrative Law* (4th ed, 1981) 73.
221 *Constitution Act* 1975 (Vic), s 15, provides that the Parliament of Victoria consists of the Crown, the Legislative Council and the Legislative Assembly.
222 Commonwealth Constitution, ss 106 and 107.
223 See P J Hanks, *Australian Constitutional Law Materials and Commentary* (4th ed, 1990) 115–44 on restrictive procedures.
224 This aspect will not be pursued in this article. As to Parliamentary ability to bind itself in respect of a law that cannot be characterised as a law 'respecting the constitution, powers or procedure of the Parliament of the State' (ie as here, a law respecting the Supreme Court of Victoria), see Lee, op cit (fn 110) 516–39.
225 *CL(VP) Act* 1992 (Vic), s 1(a).
226 *CL(VP) Act* 1992 (Vic), s 1(b).
227 *CL(VP) Act* 1992 (Vic), s 4(2)(a).
228 *CL(VP) Act* 1992 (Vic), s 4(2)(b).
229 *CL(VP) Act* 1992 (Vic), s 3.
230 *CL(VP) Act* 1992 (Vic), s 6(1)(a).
231 *CL(VP) Act* 1992 (Vic), s 6(1)(b).

"the completed negotiations" between the council and the club "for the sale and leasing of the land".[232]

The establishment of this conclusion[233] was vital to the consideration of state parliamentary competence in the context of the separation of powers.

State Separation of Powers

The doctrine of the separation of powers states that there are three separate organs of government — the legislature, the executive and the judiciary — and that each should carry out its function independently without interference from, and without interfering with, any other organ of government. This doctrine is well-established (with some exceptions) at a Commonwealth level in respect of judicial power[234] but, generally speaking, it is otherwise in respect of the States.[235]

Harper J considered the application of the doctrine to the present case primarily in the context of the the two *BLF* cases: *The Australian Building Construction Employees' and Builders Labourers' Federation* v *The Commonwealth of Australia* ('the *Commonwealth BLF* case')[236] and *Building Construction Employees and Builders' Labourers Federation of New South Wales* v *Minister for Industrial Relations* ('the *NSW BLF* case').[237] A distinction between substantive parliamentary interference, on the one hand, and directive parliamentary interference, on the other, emerged from these decisions.

Substantive Parliamentary Interference

The *Commonwealth BLF* case centred around the deregistration of the BLF by the Commonwealth Parliament pursuant to s 3 of the *Builders Labourers' Federation (Cancellation of Registration) Act* 1986 (Cth). Just prior to the passing of this Act the BLF had applied to the High Court of Australia for a writ of *certiorari* to quash a decision of the Australian Conciliation and Arbitration Commission empowering the Minister for Employment and Industrial Relations to deregister the Union, and a writ of prohibition to prevent the Minister from acting on that decision. However, before the application could be heard, the Act was passed, deregistering the Union and thereby

232 *Collingwood (No 1)* case [1993] 2 VR 66, 74 (emphasis added); and see *CL(VP) Act* 1992 (Vic), Preamble.

233 Harper J's conclusion was criticised and rejected by the Full Court of the Victorian Supreme Court in the *Collingwood (No 2)* case (unreported, Supreme Court of Victoria, No 11826 of 1992) 29; see also p 147 infra.

234 This aspect will not be dealt with in this article, but see *New South Wales* v *Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia* v *J W Alexander Ltd* (1918) 25 CLR 434; *R* v *Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; and Hanks, op cit (fn 223) 227–61.

235 *Building Construction Employees and Builders' Labourers Federation of NSW* v *Minister for Industrial Relations* (1986) 7 NSWLR 372; *Nicholas* v *State of Western Australia* [1972] WAR 168; *Liyanage* v *The Queen* [1967] AC 259.

236 (1986) 161 CLR 88.

237 (1986) 7 NSWLR 372.

'making redundant'[238] the application for judicial review. The BLF argued that the Act was either an improper exercise of the judicial power of the Commonwealth or an interference with that power; the argument was based on the doctrine of separation of powers at the Commonwealth level.

This was undoubtedly an instance of the Parliament legislating in such a way as to affect rights pending in litigation, but the High Court decided that it was a substantive interference. As such, it did not interfere with the judicial process itself; it simply made the outcome of the litigation 'irrelevant'.[239] Thus it was held to be within Commonwealth legislative power.

Directive Parliamentary Interference

The *NSW BLF* case was also concerned with the deregistration of the BLF. The New South Wales Minister for Industrial Relations cancelled the BLF's registration and the BLF brought proceedings in the Administrative Law Division of the Supreme Court of New South Wales on natural justice grounds. The case failed and the BLF appealed to the New South Wales Court of Appeal.

The NSW Parliament then enacted the *Builders' Labourers Federation (Special Provisions) Act* 1986 (NSW), validating the Minister's action 'notwithstanding that any proceedings were instituted before the commencement of this Act.'[240] In so doing the NSW Parliament acted in a directive manner that amounted to an interference in the judicial process of the court by directing the outcome of a pending case. While such an interference is plainly unconstitutional at the Commonwealth level, the doctrine of the separation of powers does not apply in New South Wales so as to prevent the Parliament from passing an act that amounts to a legislative judgment.[241]

The Victorian Position

In the light of these decisions, Harper J then proceeded to consider the present case and, as already discussed above, decided that the *CL(VP) Act* did not substantively alter rights as in the *Commonwealth BLF* case, but rather directed the court as to its conclusion, as in the *NSW BLF* case — ie, Parliament directed the Court not to consider the legal relationship between the parties.

The Victorian Parliament, he said, like that of New South Wales, is competent to legislatively interfere in the judicial process, but with one major difference — s 85 of the *Constitution Act*. There is no equivalent of s 85 in the *Constitution Act* 1902 (NSW). This means that although the Victorian Parliament can legislatively direct the Supreme Court, it must do so in

[238] (1986) 161 CLR 88, 96.
[239] *Collingwood (No 1)* case [1993] 2 VR 66, 75.
[240] *Builders' Labourers Federation (Special Provisions) Act* 1986 (NSW), s 3(3).
[241] *Clyne* v *East* (1967) 68 SR (NSW) 385.

accordance with the procedures laid down in ss 85(5) and 18(2A) — the Victorian *Constitution Act* is a more 'controlled' document.[242]

Did the CL(VP) Act Purport to Alter or Vary s 85 of the Constitution Act?

With respect to the second question, Harper J considered the facts of the case in the context of ss 85(5) and 18(2A) and concluded that the *CL(VP) Act* did not affect the Supreme Court's jurisdiction to hear and determine the dispute as it did not operate directly on s 85 and nor did it, as an indirect amendment, comply with the statutory requirements in s 85(5).

Counsel for the State of Victoria (the then Acting Solicitor-General Mr Finkelstein) did not dispute this conclusion; in fact, paradoxically, the defence depended on this proposition being true because it relied on the indirect amendment circumvention argument outlined above.[243] In essence, if s 18(2A) had not been activated, the *CL(VP) Act* was a valid enactment and therefore binding on the Supreme Court. Thus, it was argued that the Court could not determine the relationship vis à vis the parties as the Court could only declare rights 'insofar as such a declaration is not inconsistent with rights established by the Parliament'. Therefore, at most, the Court could make a ruling as to costs.[244]

Harper J was unimpressed with this argument both on policy and on statutory interpretation grounds. As to policy, he said:

> Such a construction is in my opinion so obviously contrary to the intention of Parliament in passing the 1991 amendments to the *Constitution Act* as to be put to one side. If adopted, it would allow Parliament to subvert the protection which the *Constitution Act* affords the jurisdiction of the Court. Were Parliament minded to do so, it could if this construction were adopted pass in the usual way legislation which, although having the effect of emasculating that jurisdiction, does not express an intention to repeal, alter or vary s.85 and which is not introduced in conformity with that section. This is the very vice which, in my opinion, the 1991 amendments were designed to prevent.[245]

To reinforce this view, he referred to the LCC Report, wherein the LCC commented that in the absence of conformity with s 85(5), the offending Bill would have 'no effect upon s 85 or the jurisdiction of the Supreme Court whatsoever'.[246]

Harper J also rejected the argument on statutory interpretation grounds; he said that the Acting Solicitor-General's construction involved

> tortuous reasoning which unnaturally constricts the operation of the expression "is not to be taken." There is nothing in those words themselves, or in the context in which they appear, to indicate that they should be read

[242] *Collingwood (No 2)* case (unreported, Supreme Court of Victoria, No 11826 of 1992) 33.
[243] See pp 137–8 supra.
[244] *Collingwood (No 1)* case [1993] 2 VR 66, 73–4.
[245] Id 78.
[246] Ibid; and see LCC Report, op cit (fn 9) 20, para 3.3.

> as meaning "is not to be taken for the purposes only of s.18(2A) of this Act".[247]

These comments refer to the opening words of s 85(5) which state that an offending provision 'is not to be taken to repeal, alter or vary' s 85 unless it complies with the definitional requirements set out in s 85(5)(a)-(c) inclusive. Essentially, therefore, the offending provision will not affect the jurisdiction of the Supreme Court at all unless it complies with s 85(5). If it complies with s 85(5), it must then also comply with s 18(2A) otherwise it will be rendered void by that provision. Alternately, if it does not comply with s 85(5), it will not be void, because s 18(2A) is not activated, but it will be ineffective or inoperative according to the plain, ordinary meaning of the words of s 85(5) itself. Consequently, Harper J decided the case in favour of the Council. He concluded that the Parliament was competent to enact the *CL(VP) Act* but, because the Act had not complied with the manner and form requirements laid down in s 85(5), it was ineffective to oust the jurisdiction of the court.

The new Liberal government responded quickly to this judgment and just over two weeks later on 11 November 1992, introduced a third Bill, the *Victoria Park Land Bill* 1992 (Vic) ('*VPL Bill*'), into the Parliament in the continuing legislative saga to resolve the issue. In her second reading speech the Attorney-General, Mrs Wade, referring to the previous *CL(VP) Bill*, stated that

> one of the main intended effects of the Bill was to limit the jurisdiction of the Supreme Court to adjudicate upon the contractual dispute between the club and the council in order to give legal certainty to the entire situation.[248]

Harper J's judgment in the *Collingwood (No 1)* case had, therefore, effectively rendered the *CL(VP) Act* 'ineffective in achieving its intended purpose'.[249]

The new Act was a re-enactment of the *CL(VP) Act* in almost all relevant respects.[250] However, in order to comply with s 85(5)(a), it also contained an express provision stating an intention to limit the jurisdiction of the Supreme Court[251] and the required s 85 Ministerial statement of reasons was made during the second reading speeches in each House,[252] thereby complying with s 85(5)(b) and (c). The *Victoria Park Land Act* 1992 (Vic) ('*VPL Act*') was

[247] *Collingwood (No 1)* case [1993] 2 VR 66, 78.
[248] *Parliamentary Debates*, Legislative Assembly (Vic), 13 November 1992, 1072.
[249] Ibid.
[250] Ibid.
[251] *VPL Act* 1992 (Vic), s 18:
> It is the intention of this section to alter or vary section 85 of the Constitution Act 1975 to prevent the Supreme Court—
> (a) awarding compensation or damages in respect of anything done under or arising out of this Act, or because of the variation or termination by this Act of any agreement or arrangement or the creation, variation or extinguishment by or under this Act of any liability or right except in circumstances set out in section 16; or
> (b) entertaining an action of a kind referred to in section 17.

[252] *Parliamentary Debates*, Legislative Assembly (Vic), 13 November 1992, 1072; Legislative Council (Vic), 17 November 1992, 731.

passed by an absolute majority at the second and the third reading stages both in the Assembly[253] and in the Council.[254] Sections 1-4 of the Act became operative on 24 November 1992 and the remainder on 1 February 1993.

This was not, however, the end of the story. On 15 December 1992 the Collingwood Council brought a third action in the Supreme Court, once more against the State of Victoria and the Club, seeking similar declaratory relief as before. Hayne J directed the matter to the Full Court of the Supreme Court.

The Collingwood (No 2) Case

The case of *Mayor, Councillors and Citizens of the City of Collingwood* v *Victoria and Collingwood Football Club Ltd* ('the *Collingwood (No 2)* case')[255] was heard before Brooking, Southwell and Teague JJ. Brooking J delivered the principal judgment on 10 November 1993. This time the Council contended that the *Constitution Act* 1975 had introduced the doctrine of separation of powers into Victoria and argued that the *VPL Act* infringed that doctrine and was therefore constitutionally invalid.[256]

The Court held that, as a matter of construction, the separation of powers doctrine did not apply in Victoria on the basis that Part III of the *Constitution Act* was concerned 'not with the Victorian Judicature, but simply with the Supreme Court of Victoria. It makes no reference to the judicial power of the State.'[257] Brooking J said:

> All that can be said is that Part III vests in the Supreme Court part of the judicial power of Victoria or preserves the effect of the previous investing. The Act recognises that the judicial power of the Supreme Court is not sacrosanct: it may be augmented or diminished by Parliament, subject to the observance of any applicable requirement of the Act. The whole of Part III may be repealed if the requirements of ss.18 and 85 are observed.[258]

There was no suggestion that the *Constitution Act* proscribed legislative interference in the judicial process. In fact, according to Brooking J, s 85(4), (6), (8) and (9) clearly showed the converse and ss 18 and 85(5) actually prescribed the way in which the parliament could interfere.[259] In any case the Court was of the opinion that even if such interference was prohibited, the *VPL Act* would still be constitutionally valid[260] as the interference was substantive rather than directive.[261] On this point, the Full Court differed from Harper J in the *Collingwood (No 1)* case as the latter, in that case, had characterised the interference as directive, that is, not creating rights but rather facilitating

253 *Parliamentary Debates*, Legislative Assembly (Vic), 13 November 1992, 1072.
254 *Parliamentary Debates*, Legislative Council (Vic), 17 November 1992, 732.
255 *Collingwood (No 2)* case (unreported, Supreme Court of Victoria, No 11826 of 1992).
256 Id 11.
257 Id 17.
258 Id 20–1.
259 Id 21.
260 Id 21–2.
261 Id 26–7.

existing rights and his conclusions were 'largely founded upon [that] view'.[262] Brooking J stated:

> This is a view which I cannot, with respect, accept. The provision that the documents by force of the Act have effect as binding and enforceable agreements is a provision which by its express terms creates rights.[263]

Obviously, therefore, the Full Court would have found in favour of the defendants (the State of Victoria and the Club) in the *Collingwood (No 1)* case and the enactment of the *VPL Act* as a remedial measure would have been unnecessary.

The Council, in this second case, also argued that the requirements of s 85(5) had not been adequately met in respect of the *VPL Act*. They contended that the whole Act purported to alter or vary s 85 but that s 85(5) had only been complied with in relation to ss 16 and 17,[264] thus the rest of the Act should be regarded as having no operation.[265] The Full Court rejected this on the basis that there was no impermissible interference by the Parliament with the exercise of judicial power[266] and, in any case, the Court did not believe that the rest of the Act purported to alter or vary s 85 anyway.[267]

Thus, on the basis of this decision it would appear that the jurisdiction of the Supreme Court has been validly limited by the Victorian Parliament: the Court cannot overturn the previous agreements to sell and lease between the Council and the Club, nor can it judicially review the Parliament's policy decision that those agreements are to have the force of law.[268] Finally, any agent appointed by the Minister to act on behalf of a recalcitrant party will not be personally liable for any authorised acts.[269]

VII. CONCLUSION

It was contended at the beginning of this article that the constitutional protection of the Supreme Court is unnecessary and unwieldy and that there is no justification on historical, juristic, pragmatic or human rights grounds for its continuation.

Historically, it has been shown that, prior to 1975, the Supreme Court of Victoria operated successfully and uncontroversially as the premier judicial body of the State. There has never been a suggestion that its operation as an independent adjudicator has been compromised or threatened so as to warrant constitutional entrenchment. And, Australia aside, arguably the best historical example to cite is that of Great Britain as the source and original model of all the present common law jurisdictions. The English judiciary is

[262] Id 28; and see pp 141–2 supra.
[263] Unreported, Supreme Court of Victoria, No 11826 of 1992, 29.
[264] See fn 256 supra.
[265] Unreported, Supreme Court of Victoria, No 11826 of 1992, 30.
[266] Id 31.
[267] Id 35.
[268] *Parliamentary Debates*, Legislative Assembly (Vic), 13 November 1992, 1072.
[269] *VPL Act* 1992 (Vic), s 17.

totally dependent on the will of the Westminster Parliament. As pointed out by Mr K J Thomson,[270] the British Parliament may alter the jurisdiction of the High Court of Justice, which is the counterpart of the Victorian Supreme Court, by standard legislative procedures.[271]

Juristically, it is evident from the *Collingwood* cases that the legal problems generated by the entrenchment of the jurisdiction of the Supreme Court still remain. As Mr Thomson commented, 'whatever Parliament does, the ultimate decision about whether a Bill should have required an absolute majority lies with the Supreme Court';[272] a fact which had already been recognised by the LCC itself in its report.[273] In the light of the *Collingwood* cases this would certainly seem to be true and the problem of legal uncertainty is still legislatively unresolved.

Pragmatically, the procedural problems are also unresolved. The LCC had been concerned that many Bills were unnecessarily passed by absolute majorities, thereby disrupting ordinary parliamentary procedure.[274] This problem was also alluded to during parliamentary debate on the *C(JSC) Bill* as 'the spectacle of countless votes taken in this House in which absolute majorities were sought'[275] merely as a precautionary measure. In spite of the insertion of s 18(2A) an element of this problem still remains. It appears that even though an absolute majority is now required only at the third reading stage, the Presiding Officers still inexplicably require any relevant Bills to be passed at both the second and the third reading stages by absolute majorities;[276] neither have the Standing Orders of either House been altered to reflect the single requirement.[277]

From a human rights perspective, the argument for constitutional entrenchment is also unimpressive. As already discussed above, it is highly questionable whether the entrenchment of the Supreme Court amounts to the entrenchment of the Rule of Law.[278] And even if it did, as Harper J said in the *Collingwood (No 1)* case, a diminution of judicial power is not necessarily repugnant to the Rule of Law.[279] It is often highly desirable on public policy grounds or in the interest of expediency and expertise to enact legislation to curtail judicial power, as in the *Collingwood* cases or under the new *Accident Compensation (WorkCover) Act* 1992 (Vic),[280] or to set up specialist tribunals

[270] Thomson, op cit (fn 153) 57–64.
[271] Id 58–9.
[272] Id 62.
[273] See p 128 and fn 150 supra.
[274] LCC Report, op cit (fn 9) 5, para 1.6; see also p 126 supra.
[275] *Parliamentary Debates*, Legislative Council (Vic), 19 March 1991, 188.
[276] For example, *Victoria Park Land Act* 1992 (Vic); *Accident Compensation (WorkCover) Act* 1992 (Vic); *City of Melbourne Act* 1993 (Vic).
[277] See fn 203 supra.
[278] See pp 127–9 supra.
[279] See p 138 supra.
[280] The *Accident Compensation (WorkCover) Act* 1992 (Vic), s 63 limits Supreme Court intervention in respect of certain decisions of the County Court, the Magistrates' Court and Medical Panels. The rationalisation for this is to keep costs low, awards of damages reasonable and to facilitate voluntary settlements between the parties: *Parliamentary Debates*, Legislative Assembly (Vic), 30 October 1992, 311–12.

in particular areas. In any case, entrenchment via an absolute majority procedure is hardly an effective human rights protection[281] and would do little to discourage a parliament bent on undermining the independence of the judiciary. Thus, there is much to be said for the view that it is misleading to suggest that s 85 has any special human rights significance in this regard.[282]

However, it is also true that even such a mild fetter as an absolute majority may be unattainable by a government with a small majority or where the balance of power is held by some other faction(s), thereby rendering a democratically elected government impotent to change a particular law at all and thus, in a practical sense, amounting to a pseudo abdication of power. So, on these grounds as well it seems evident that any parliament should be extraordinarily cautious before entrenching so-called 'fundamental principles'.

Thus, it seems that the solutions have, in real terms, merely brought us the full circle, back to the courts applying the rules of statutory interpretation as the LCC itself thought it might.[283] The definitional provision in s 85(5) is still

[281] The Victorian Parliament has had no problem passing the *City of Melbourne Act* 1993 (Vic) in accordance with the requirements of ss 85(5) and 18(2A) of the *Constitution Act*. Section 27 of the *City of Melbourne Act* purports to oust the Supreme Court's supervisory jurisdiction as follows:

> No proceedings—
> (a) seeking the grant of any relief or remedy in the nature of certiorari, prohibition, mandamus or quo warranto, or the grant of a declaration of right or an injuction; or
> (b) seeking an order under the Administrative Law Act 1978—
> may be brought against any person in respect of, or calling into question, any action taken or purported to have been taken or proposed to be taken pursuant to sections 7(1), (2), (3) or (4), 14(3) or 20(1) of this Act.

This is a significant limitation as the *City of Melbourne Act*, inter alia, reconstitutes the municipality of the City of Melbourne (by altering the boundaries of South Melbourne, Port Melbourne, Essendon and Fitzroy) and provides for the dissolution of the existing Council and for the appointment of Commissioners to administer the municipality during a transitional period (duration unspecified). The actual and potential economic and social ramifications are legion. The s 27 ouster clause effectively means that no one can seek judicial review of various Orders in Council made to implement key aspects of the reconstitution, eg, in relation to the appointment of Commissioners and the setting of municipal boundaries for the first election of the Melbourne City Council, etc. It has been argued that the Act is an 'abuse of local democracy' as the residents will be denied an elected Council (arguably as guaranteed by s 74A(1) *Constitution Act* which itself is constitutionally entrenched by s 18(2)(b) *Constitution Act*) during the transitional period: see *Parliamentary Debates*, Legislative Council (Vic), 29 September 1993, 326–9, 19 October 1993, 500–33; Legislative Assembly (Vic), 21 October 1993, 1249–53, 10 November 1993, 1621–48;

As to the constitutional argument that a Victorian Local Council must be democratically elected see *The Mayor, Councillors and Citizens of the City of South Melbourne* v *Roger Hallam, Minister for Local Government and the Attorney-General for the State of Victoria* (unreported, Supreme Court of Victoria, No 9605 of 1993) and *The Mayor, Councillors and Citizens of the City of Port Melbourne* v *Roger Hallam, Minister for Local Government and the Attorney-General for the State of Victoria* (unreported, Supreme Court of Victoria, No 9742 of 1993). Both cases were heard together in the period 28 February to 3 March 1994 before Tadgell, Ormiston and Coldrey JJ; the judgment was delivered on 12 April 1994.

[282] Thomson, op cit (fn 153) 64.

[283] LCC Report, op cit (fn 9) 15, para 2.5; and see p 128 supra.

too broad and vague to be consistently applied by the Parliamentary Officers and the procedural requirements in s 18(2A) are not being properly utilised and, in any case, do not offer sufficient protection to warrant the inconvenience. It is proposed, therefore, that we return to the pre-1975 position and that the constitutional entrenchment of the powers and jurisdiction of the Supreme Court be discontinued.