A Tangled Web
Redistributing Electoral Boundaries for Tasmania's Legislative Council

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Last year, the Parliament of Tasmania passed the *Legislative Council Electoral Boundaries Act* 1995 ('the Act'). The Act sets up a Redistribution Committee and Tribunal to redistribute the boundaries for the Legislative Council. For many years, the size of electorates for the Legislative Council has varied greatly. The aim of the Act is to ensure that electorates are, in future, of roughly equal size.

The Legislative Council consists of 19 members, each of whom represents a single-member constitutency.[1] Each Legislative Councillor is elected for a six-year term,[2] but all are not elected at the same time. Instead, the electoral system for the Legislative Council requires that of the 19 members, three retire and face reelection every year.[3] A redistribution under the Act changes electoral boundaries, but cannot change the number of members of the Council, or the terms of office of sitting or future members.[4] Terms of office cease at the end of a six-year period, unless the member is re-elected.

The Redistribution Tribunal redistributed boundaries in accordance with the Act and gave notice as required on 20 April 1996.[5] The new boundaries should have come into operation on July 1 1996 and should govern the elections of May 1997.[6] However, difficulties with

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1 *Constitution Act* 1934 (Tas) ss 18, 19 and 26.

2 Id, s 19(1).

3 Id, ss 19(2) and (3). Section 3A requires that in the sixth year, four rather than three members shall retire so that all 19 members face reelection once every six years.

4 The Act requires that after a redistribution, the number of divisions created equals the number of members of the Legislative Council, set by the *Constitution Act* ss 18, 19. The Act also does not alter members' terms of office or give the Tribunal power to do so as a means of implementing a redistribution.

5 *Tasmanian Government Gazette* (20 April 1996).

6 The Act s 29. The machinery for carrying out and implementing a redistribution is discussed in the next section of the article.

the legislation have cast doubt on the implementation of the redistribution. Problems have arisen from a failure to match the redistribution process to the peculiar electoral system of the Legislative Council, and from doubts about what is required in a redistribution under the Act and the legal effects of redistribution.

Three major problems are delaying the implementation of the redistribution. First, it is not clear when elections are due in the new divisions. It is clear that there are to be elections in three divisions every year, but there is no obvious way of identifying which three divisions are to have an election in any particular year.[7] As noted above, the Act does not change the term of office of any sitting member, so the order in which sitting members vacate their seats is settled. However, as redistribution creates completely new seats which have no legal continuity with the seats they replace, it is not clear in which divisions the elections should be held in any particular year. The Act does not provide a way or give any person a clear power to decide the matter.

The second problem is that it is not clear whether, once a redistribution comes into effect, it is necessary to allocate sitting members to the new divisions created by redistribution, or, if it is necessary, how it is to be done. Again, the Act is silent on the matter.

The third problem arises from the creation of a completely new seat, Rumney, by the redistribution.[8] Although it is inevitable that redistributions will create new divisions, the Act does not enact any special provisions for ensuring an early election in a completely new division. As noted above, there is no power to increase the number of seats or to reduce the number of sitting members at a redistribution. Therefore, when a new seat is created, it can only be achieved by abolishing an existing one. While an existing division may be abolished, there is no power in the Act to shorten the term of the member elected from that division. Although a member's division no longer exists, she will remain a member until her term of office expires. It is impossible to

7 Parliament may have assumed that the Tribunal would determine the order in which each seat would face an election when it determined the redistribution. However, the Tribunal was not given specific power to carry out that function and did not consider the issue.

8 As noted above, under the Act, all divisions after a redistribution are equally 'new' in legal terms. However, most of the new seats have some historical continuity with existing divisions. Completely new seats lack that historical continuity. Similarly, in legal terms the Act abolishes all existing seats. However, most of the old seats have a historical successor. A seat which is truly abolished is incorporated in other seats so that it does not have such a successor.

hold an election for the new seat before the member of the division which has been abolished vacates his or her seat, as to do so would add to the size of the Council. Therefore, because of the rotational electoral system, the electors of a new electorate may have to wait years after the redistribution has been implemented before they have the opportunity to elect a member. For example, if election for the seat of Rumney is not held until the term of office of the member for the seat abolished, Gordon, expires, there will not be an election in Rumney until 2000.

Due to these problems, the Government introduced legislation to implement the first redistribution under the Act. To advise it on the legislation needed, the Government called a Board of Enquiry, which recommended a temporary increase in the number of members of the Council to allow for the immediate representation of Rumney, without shortening the term of office of any sitting members.[9] The Government did not accept the report. Instead, the Government introduced the Legislative Council Electoral Boundaries Amendment Bill 1996, to implement redistribution over time. Under this legislation, there was to be no election for the new division of Rumney until the term of office of the member for Gordon ended in 2000. However, this legislation was defeated in the House of Assembly,[10] which passed a reasoned amendment calling for wider-ranging reform of the Legislative Council. Reforms included the abolition of the rotational electoral system, and its replacement by a system in which there is an election in one half of the divisions every three years. There is now a real possibility of deadlock, with the Legislative Council unlikely to agree to any of the proposals put forward by the House of Assembly.

This article examines the Act and considers how it ought to be interpreted. It also considers the problems to which the Act has given rise and whether legislation is needed to deal with these problems, or whether redistributions can be implemented under the Act without further amendment. This article also examines the situation which may arise if redistributions under the Act cannot be implemented without fresh legislation but the two Houses cannot agree on the terms of that legislation. It examines the argument that in this situa-

9 The Board of Enquiry Report is entitled *The 1996 Report and Recommendations as to Transitional Arrangements in Relation to the Redistribution of Legislative Council Electoral Boundaries* (Department of Premier and Cabinet, Tasmania, 1996). It is referred to below as the 'Nettlefold Report'.

10 Opposition parties (Labor and the Greens) hold a majority in the Assembly and used that majority to defeat the Government.

tion, it may not be possible to hold valid elections for the Legislative Council, so that eventually the Council, and hence Parliament, would not be validly constituted. If this happens, it may be difficult to reconstitute Parliament as no legislature in Australia appears to have the power to reconstitute a State parliament once it ceases to exist. For these, among other, reasons the courts are likely to hold that the Act is complete in itself and that redistributions can be implemented without further enabling legislation.

The Scheme of the Act

The machinery of the Act is designed to depoliticise the process of redistributing boundaries by taking the power to approve a proposed redistribution out of the hands of the Parliament and, in particular, of the Legislative Council. To this end, it establishes permanent machinery for redistributing the boundaries at least every nine years—earlier if, in four or more divisions, the number enrolled varies from the average divisional enrolment by more than 25%.[11]

The Act gives two independent bodies, the Redistribution Committee and the Redistribution Tribunal, the function of redistributing boundaries. The Committee consists of three members: the chairperson, who must be a judge or a retired judge of a State or Territory Supreme Court or the Federal Court; the Chief Electoral Officer; and another person, nominated by the Minister and President of the Legislative Council and approved by resolution of the Council, who has special knowledge of the Tasmanian electoral and parliamentary system and is of demonstrable political impartiality.[12] The Committee has the responsibility of producing an initial redistribution according to the criteria listed in s 13 of the Act. Members of the public may make suggestions about the redistribution and comment on those suggestions.[13] The Committee and Tribunal are bound to consider public submissions in the proposed redistribution. [14]

11 The Act s 10. The section requires the Chief Electoral Officer to ascertain four times per year the number of electors enrolled in each electoral division and the average divisional enrolment. If nine years have passed since the last redistribution or, if in four or more divisions, the number enrolled varies from the average divisional enrolment by more than 25%, the Chief Electoral officer must recommend to the Minister that a redistribution be set in train.

12 Id, s 5.

13 Id, s 11.

14 Id, ss 13(2) and 21(2).

After the Committee has published its initial redistribution,[15] members of the public may lodge written objections to the initial redistribution with the Tribunal.[16] The Tribunal must hold an enquiry into all objections, except those which are frivolous or are similar to suggestions made to the Committee under s 11 of the Act. At the hearing, all objectors and persons who made suggestions to the Committee under s 12 have a right to be heard.[17] If the Tribunal makes changes to the redistribution proposed by the Committee which are, in its opinion, substantial, it must give members of the public a further opportunity to object, and hold another enquiry into those objections.[18] In making its decisions, the Tribunal is also bound to take into account matters listed in s 13.[19]

The aim of a redistribution is to ensure that all electorates contain roughly an equal number of voters. Hence, the Committee's primary role is to ensure that, under its proposed redistribution, electoral divisions in the Legislative Council will contain roughly similar numbers of voters. Section 13 provides that the Committee, in redistributing boundaries, must ensure that the number of voters in a division will not vary from a quota by more than 10% and, as far as possible, that the number of electors enrolled in each division will not, four-and-a-half years after the redistribution, be less that 90% or more than 110% of the average divisional enrolment. The quota is ascertained by dividing the number of voters in Tasmania by the number of divisions.[20] The Tribunal, when it revises the redistribution in the light of objections and the enquiries which it conducts, is under the same responsibility as the Committee.[21] Both the Committee and the Tribunal may take other matters into account, such as community of interest among voters, means of communication and travel within the electorate, physical features and area of the electorate, boundaries of existing electoral divisions, and the establishment

15 The Committee's initial redistribution must be published in accordance with s 15 of the Act.

16 The Act s 17. The Tribunal consists of the members of the Committee, the Surveyor-General and the Deputy Commonwealth Statistician of Tasmania or Auditor-General: s 6.

17 Id, s 20. This section requires that the enquiry be held in public. Section 19 requires that the Tribunal notify members of the public of the enquiry.

18 Id, ss 21 and 22.

19 Id, s 21(2).

20 The method of ascertaining the quota is set out in s 12 of the Act.

21 Id, s 21(2).

or retention of existing natural boundaries. However, these are secondary considerations: the most important aim is to ensure that all divisions do not vary from the quota by more than the permitted amount.

The Act intends that once the Tribunal has finally determined a redistribution, it comes into effect by force of the legislation and governs future elections for the Council. Section 25 provides that the Tribunal must determine the names and boundaries of the electoral divisions for the Legislative Council. After the redistribution has been made, and proper notice has been given,[22] the new boundaries come into effect on July 1 following the expiration of the term of office of a member of the Legislative Council.[23] Although proceedings and decisions of the Committee and Tribunal, and the redistribution itself, must be laid before both Houses of Parliament, neither House has the power to alter or veto the redistribution.[24]

The Effect of the Implementation of New Boundaries

The effect of the implementation of a redistribution under s 29 is a matter of controversy. There are two possible interpretations: first, a narrow interpretation, which limits the effect of a redistribution to determining the boundaries of divisions for future elections, and secondly, a broader interpretation, which argues that the effect is not only to determine electoral boundaries for future elections, but also to determine the divisions which are represented by sitting members.

On the narrower view, sitting members continue to represent the divisions for which they were elected until their terms of office expire. Therefore, there is no need to allocate sitting members to one of the new divisions when a redistribution is implemented. On the broader view, when a redistribution is implemented, the boundaries of the divisions which the members represent change immediately and from that time on members no longer represent the divisions for which they were elected but represent new divisions. By this interpretation, it is necessary to allocate members to new divisions immediately, ensuring the continuance of proper representation.[25]

22 The Act ss 25 and 30 specify the notice requirements.

23 Id, s 29.

24 Id, s 27.

25 It appears that the Committee and Tribunal adopted the narrower interpretation, on the advice of the Solicitor-General that the Act did not empower the Tribunal to allocate sitting members to new electoral divisions or provide otherwise for the

In my opinion, the narrow view is correct. Taken by itself, the Act appears only to provide a method of determining divisional boundaries for future elections. The long title of the Act, 'An Act to provide for the redistribution of electoral divisions and to amend the *Constitution Act* 1934', suggests that the effect of the Act is limited in this way.[26] The divisions which it creates are referred to as 'electoral divisions',[27] and the aim is to ensure that each electorate contains roughly the same number of electors.[28] There are to be periodic redistributions to achieve this aim.[29] Each electorate is to 'return one member'.[30] All of these factors suggest that the Act is merely concerned with the redistribution of boundaries for the purpose of ensuring fair elections.

Some support for the broader interpretation is provided by the way the Act relates to the *Constitution Act*. Particular support is given by the relationship between ss 25 and 29 of the Act and s 18 of the *Constitution Act*, which states that the members of the Legislative Council are elected to 'represent the several Council divisions'. Although the Act amends s 18, these words are retained.[31] The effect of ss 25 and 29 of the Act is to implement a redistribution in accordance with the Act. Once implemented, the new divisions are 'the electoral divisions of the State for the Legislative Council'.[32] If the new divisions are the divisions of the Council for all purposes, it is arguable that they are divisions for the purposes of s 18; that is, they are the divisions which members of the Legislative Council represent from that time on. If this interpretation is accepted, once a redistribution is implemented members of the Legislative Council cease to represent the electorates for which they were elected and represent the new divisions. It follows, on this interpretation, that a redistribution is not completed

election of members.

26 The name of an Act can be taken as a guide to its interpretation when the words of the Act are ambiguous, although it does not prevail over the clear words of the Act: D Pearce and R Geddes, *Statutory Interpretation in Australia* (3rd ed, Butterworths, 1988) pp 88-9.

27 See, for example, the *Constitution Act* 1934 ss 3, 9, 13, 15, 25 and 40.

28 The Act ss 13 and 21(2).

29 Id, s 10.

30 Id, s 40.

31 The Act s 39, which amended s 18 so as to remove references to the old divisional boundaries established by the *Constitution Act* 1934, Schedule 2. The effect of this amendment is discussed below under the heading 'Difficulties in Implementing Redistributions'.

32 Id, s 25(1).

until the divisions are allocated among sitting members, because, until that allocation is made, it is impossible to determine which member represents each division under s 18 of the *Constitution Act*.

There are many arguments against this interpretation. First, it is not required by the words of s 18 of the *Constitution Act*. The intention of s 18 is that members are elected to represent the divisions which elected them. This intention is consistent with the narrow interpretation, because after a redistribution, sitting members will continue to represent the divisions for which they were elected until their terms of office expire. At that point, an election will be held under the new boundaries and a newly elected member will represent the new division for which she or he was elected.

Secondly, if it is necessary to allocate new seats among sitting members to complete a redistribution, the Committee and Tribunal will have the responsibility of making the allocation. Until this is achieved, a redistribution will be incomplete and cannot be implemented.[33] It will not be easy for the Committee and Tribunal to make such an allocation. While the Act gives clear guidelines with respect to the matters to be taken into account in redistributing electoral boundaries,[34] it contains no criteria to guide the Committee and Tribunal in the allocating of seats to the sitting members. It would have been difficult to devise such guidelines within the parameters of the Act. As noted above, the Committee and Tribunal do not have the power to alter the number of members of the Council, or to shorten the term of office of its members. Therefore, when an existing seat is abolished and a new seat created in another part of the State, it will be difficult to allocate seats in a rational manner. The Committee and Tribunal may have little option but to allocate the new seat to the sitting member for the old seat, although that member is unlikely to have any association with the electorate of the new seat.

The fact that the Tribunal has been given no clear authority or guidelines for dealing with these difficulties suggests that it has no power to allocate the new divisions to sitting members as part of a redistribution. If this view is correct, the legal effect of a redistribution

33 It would also follow that the procedures of the Act have not been complied with in the current redistribution, because the initial redistribution proposed by the Committee was not complete as it did not include a proposed allocation of seats among sitting members. Therefore, the Committee would have to make good that defect in its report and give objectors the chance to comment before the Tribunal could begin its deliberations: s 17 of the Act.

34 Id, s 13.

under the Act is limited to determining the boundaries of the divisions for future elections, and the members continue to represent their old divisions until their terms of office expire.[35]

This view of the Act raises both political and legal issues. First, it remains unclear whether it is possible to implement the Act without enabling legislation.[36] In particular, at the very least, some mechanism is needed to determine the order in which elections are to be held under the rotational system. Secondly, it is not clear whether it is desirable to implement the legislation as it is, or whether further legislation is needed to deal with issues of fairness raised by the Act. In the next section, the article considers whether the only way to implement redistributions under the Act is by another Act of Parliament, or whether there are other options, before going on to consider the desirability of further legislation.

Difficulties in Implementing Redistributions

As noted above, the Act does not contain machinery for identifying which three divisions are to have an election in any particular year. This problem could be solved either by allocating the new divisions to sitting members, so that elections are held in the division to which a sitting member has been allocated when that member's term of office expires, or by some other mechanism for determining the order of elections. The problem is most acute in the new divisions of Rumney and Murchison. Rumney has been created on the Eastern Shore, while Murchison combines the old West Coast seat of Gordon with the far-North-West seat of Russell.[37] Rumney does not replace any existing division and has no predecessor whose place it can take in the electoral cycle. On the other hand, Murchison replaces two seats, and therefore there are two places for it in the cycle. Both the sitting members for Gordon and Russell have an interest in the next election for Murchison, held at the end of their six-year term.

35 There will still be problems in determining how to ensure proper representation for a new seat. However, those problems will not have to be solved by the Committee and Tribunal as part of the redistribution. Instead, they will have to be resolved when the order in which elections are to be held in the new divisions is determined. The problem is dealt with in more detail below in the section headed 'The Desirability of Further Legislation'.

36 The Solicitor-General has taken the view that enabling legislation is needed: Nettlefold Report, p 1.

37 For the boundaries of the new electorates see the Tribunal's report, *Tasmanian Government Gazette* (20 April 1996).

No Legal Continuity Between Old and New Divisions

However, the problem is more complicated because although there is historical continuity between some of the old and new divisions (in that the names are the same and boundary changes are minimal), this historical continuity does not amount to legal continuity. There is nothing in the Act to equate any of the new divisions with the old divisions. Instead, the Act establishes a Redistribution Tribunal and imposes on it the duty of determining the names and boundaries of electoral divisions for future Legislative Council elections. It requires the Tribunal to take into account existing electoral divisions and their boundaries, but this is of secondary importance.[38] The Tribunal is not under a duty to retain existing names and boundaries where possible or to indicate how existing seats relate to new seats. All of the divisions on which the Tribunal decides are, in legal terms, equally new.[39]

In electoral systems where the whole chamber faces the people at one election, lack of legal continuity between old electorates and new ones created by redistribution does not cause a problem as there is no need to determine the order in which elections are to be held. Members whose seats disappear in a redistribution have to decide whether to nominate for a different seat. This is a political, not a legal, problem. A legal problem will, however, be caused in a system of rotational elections, such as that for the Legislative Council, because before valid elections can be held there has to be some method of determining in which divisions elections are due.

As nothing in the Act equates any new divisions with old ones, there is nothing which determines when an election must be held in any particular division. This must still be decided. It is not clear whether the Act gives any person the power to make such a decision. Therefore, additional legislation may be needed to decide the order in which elections will be held in the various divisions.

It is not clear on what basis elections for the Council will be held if no legislation is passed before the next round of Legislative Council elections, due in May 1997.[40] There have been suggestions that the issue should have been resolved by July 1 1996, the date at which the new boundaries took effect.[41] This view is wrong because even if the

38 The Act ss 13(3) and 25(3).

39 Id, s 25(1).

40 The *Constitution Act* 1934 requires that periodic elections for the Legislative Council be held on the fourth Saturday in May every year.

41 An amendment was introduced into the House of Assembly by the leader of the

new boundaries take effect from that date, no election need be held until May of the next year. There is no need to make any decisions with respect to the order in which elections are to be held in each division until May. If the only effect of the Act is to determine new divisions for future elections, members of the Council continue to represent the divisions for which they were elected, rather than the new divisions, until they finish their six-year terms. Therefore, there is no legal requirement that they be allocated to those divisions until elections are due next May.[42]

Can There Be an Election Under the Old Boundaries?

As matters now stand, it may be possible to continue to hold elections under the old boundaries, rather than the new ones, until legislation setting up a procedure for determining the order in which elections are to be held is passed. The old boundaries are set out in sections 18 and 26 of the *Constitution Act*. Part 4 of the Act amends these sections to implement the new boundaries. However, although the rest of the Act came into effect when it received the royal assent on 23 May 1995, those amendments do not come into effect until they have been proclaimed.[43] The Act does not require proclaimation by any date, or impose a duty to proclaim amendments in a reasonable time. Therefore, if Parliament does not pass legislation determining the order in which elections are to be held in the new divisions, elections may be held under the old boundaries until these amendments are proclaimed. There are political objections to adopting this course as it delays implementation of electoral reform. However, in my opinion, there are no legal objections.

It may seem that no election may be held under the old boundaries after 1 July 1996 because under s 29 of the Act, the redistribution takes effect on that date.[44] This view would only be correct if s 29

Greens putting the crucial date for the implementation of redistribution back to November 1 to allow time for a compromise. This amendment was unnecessary and seems to have been moved as much to protect the Greens from charges of wrecking as to avoid a crisis.

42 Politically, delay is likely to cause embarassment, because if members of the Council and the public—particularly prospective candidates—do not know the divisions in which elections are to be held until the elections are due, they will find it difficult to mount effective campaigns.

43 The Act s 2. The intention of the Government is not to proclaim them until transitional provisions have been agreed to.

44 Section 29 reads:

amends ss 18 and 26 of the *Constitution Act*. As s 29 does not mention those sections, it could only amend them if it were inconsistent. On its face, s 29 appears inconsistent because it gives effect to the redistribution of electoral boundaries while ss 18 and 26 require that elections be held under the old boundaries. However, the courts would be reluctant to find such an inconsistency because an amendment requiring future elections be held under the new boundaries would make Part 4 unnecessary. This is an unlikely result, particularly as it is the intention of the Act that Part 4, and hence the requirement that elections be held under the new boundaries, is not to come into operation immediately.

If elections may continue to be held under the old boundaries until Part 4 is proclaimed, it seems that s 29, which sets the date for the taking effect of any redistribution under the Act, is unnecessary. However, the inconsistency is not as dramatic as it may appear. The purpose of the Act is not to achieve a single redistribution but to establish machinery for periodic redistributions.[45] Once Part 4 is proclaimed and the whole Act is in force, later redistributions will automatically come into effect on the date set by s 29. It is only the coming into effect of the current redistribution which may be delayed by a failure to proclaim Part 4.

It has been suggested that s 25 of the Act[46] has the effect of impliedly repealing ss 18 and 26 of the *Constitution Act* to the extent that elec-

(1) In this section, 'prescribed date' means the date on which the term of office of a member of the Legislative Council is due to expire next following the publication of the redistribution under s 25.

(2) A redistribution of the State under s 25 takes effect on 1 July which next follows the prescribed date.

Notice of the redistribution was given as required by s 25 on 20 April 1996, making the prescribed date, for the purposes of s 29, May 1996, when the terms of office of three members expired. Therefore the redistribution came into effect in accordance with s 29(2) on 1 July 1996.

45 The Act s 10, discussed above, requires a redistribution at least every nine years, sometimes earlier.

46 Section 25 reads:

(1) The Redistribution Tribunal must, in accordance with sub-section (3), determine by notice published in the Gazette, the names and boundaries of the electoral divisions into which the State is to be distributed and those electoral divisions are, until altered by a determination under this subsection, to be the electoral divisions of the State for the Legislative Council.

(2) The Redistribution Tribunal must make a determination under subsection (1) as soon as is practicable after it has considered, in accordance with Division 4, all the initial objections and any further objections.

tions may no longer be held under the old boundaries after 1 July, and that no elections may be held under the new boundaries until Part 4 of the Act is proclaimed.[47] If this interpretation is accepted, no valid elections can be held until Part 4 is proclaimed. This interpretation is based on two arguments. The first is that it is the intention of the Act that, after a redistribution has been finalised, there cannot be elections under the old boundaries. The second is that Part 4 must be proclaimed before elections may be held under the new boundaries because, until it amends s 18 of the *Constitution Act*, the section does not allow Council members to be elected under the new boundaries.

These arguments should not be accepted because they adopt an inconsistent view of the relationship between s 25 of the Act and ss 18 and 26 of the *Constitution Act*. Section 18 requires the Legislative Council to consist of 19 members and those members to be elected from the old divisions. Section 26 of the Act refers to Schedules 2 and 3 of the *Constitution Act* which set out the names and boundaries of those divisions. The argument treats s 25 of the Act, before the proclamation of Part 4, as repealing ss 18 and 26 of the *Constitution Act* to the extent that elections can no longer be held under the old divisions established by those sections. This does not extend to amending the sections allowing elections under the new divisions. However, once the requirement in ss 18 and 26 that elections must be held in accordance with the old boundaries is repealed, there is no other barrier to holding elections under the new boundaries. The Act, in ss 25 and 29, stipulates that the new boundaries, as determined by the Redistribution Tribunal, are to be the electoral divisions for the Legislative Council and states when they are to come into effect.[48] Section 18, as

> (3) The determination is to distribute the State into electoral divisions equal in number to the number of members of the Legislative Council and is to be made in accordance with section 13 as if references in that section to the Redistribution Committee were references to the Redistribution Tribunal.
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> (4) The Redistribution Tribunal must, when it makes a determination under subsection (1), publish a notice in accordance with section 30 specifying -
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> (a) the substance of its findings or conclusions concerning the initial objections and any further objections; and
>
> (b) its determination.

47 Duncan Kerr MHR, *Opinion as to the effect of the failure of the Tasmanian Parliament to pass legislation for transitional arrangements settling which members of the Legislative Council are to be regarded as holding particular seats under the new electoral boundaries*, prepared for Michael Field, Leader of the Opposition, referred to with the kind permission of Messrs Kerr and Field. The opinion is referred to below as 'Kerr'.

48 Section 39 in Part 4 expressly amends s 18 of the *Constitution Act*. This merely repeals the requirement that elections be held in accordance with the old bounda-

amended in the way suggested, requires that members be elected to represent the Council divisions. Nothing more is needed for elections to be held under the new boundaries. Therefore the only issue is whether, in the light of Part 4, ss 25 and 29 of the Act may be taken to have amended ss 18 and 26 of the *Constitution Act* at all. If they have amended those sections, they have done so to allow elections under the new boundaries.

The argument also leads to the absurd result that unless Part 4 is proclaimed, after 1 July 1996 it will be impossible to hold valid elections for the Council. This will prevent the Council from being properly constituted of 19 members (as required under s 18 of the *Constitution Act*). There may be doubts as to whether the Council, and hence the Parliament, could exercise its powers validly in such circumstances.[49]

Clarifying the Order of Future Elections

If elections may still be held under the old boundaries, no problems arise in allocating seats or deciding the order in which elections are to be held. If elections must be held under the new boundaries, there may be doubts about the validity of the elections because there is no machinery for determining the order in which the divisions come up for reelection.[50] Although it would be sensible for Parliament to legislate to clarify the order for future elections and avoid all doubts about their validity, it may be possible to solve the problem without recourse to Parliament.

The *Constitution Act* requires a Legislative Council election every year for three divisions.[51] Under the *Electoral Act* 1985, the Governor must issue writs for those elections.[52] The purpose of the *Constitution Act*, the *Electoral Act* and the present Act is to ensure that Tasmania has a parliament, including a Legislative Council, validly elected in accordance with the provisions of these Acts. It may therefore be argued that the Governor has an overriding duty to issue valid writs in order

ries. It does not add a requirement that future elections be held in accordance with boundaries determined under the Act because that is unnecessary.

49 This issue is discussed below under the heading 'Does Tasmania Face a Constitutional Crisis?'.

50 However, there is no doubt about the order in which members come up for reelection, as each faces reelection when his or her six-year term of office expires; see text accompanying notes 1-4 above.

51 *Constitution Act* 1934 s 19.

52 *Electoral Act* 1985 s 77.

to ensure that a properly constituted parliament continues to exist.[53] The grant of power to perform that duty may be interpreted as including a grant of all power necessary to enable the duty to be performed.[54] If no other machinery for allocating seats or determining the order of elections exists, that grant may include the power to decide which seats should come up for election each year as part of the duty to issue writs for an election. The argument that the power and duty to issue writs for elections includes this power is strong, in that if no person has the power to determine the order in which elections are to be held, it will be impossible to hold valid elections. If valid elections cannot be held, eventually Parliament will not be validly constituted and will not be able to exercise its powers.[55]

If the argument that there is no legal continuity is correct, the Governor between any of the divisions existing before a redistribution would not be bound to issue writs for any particular division in any particular year, but would have a broad discretion in exercising the power. The Governor would have to exercise that power reasonably, and failing to do so, or taking into account irrelevant considerations, could open the decisions to challenge in the courts.[56]

What constitutes an irrelevant consideration would have to be determined by reference to the overall purposes of the legislation. The overall purpose is to establish a system of representation based on

53 In interpreting the scope of the Governor's power and duty to issue writs for Legislative Council elections, an interpretation which promotes the purpose or object of the Act is to be preferred to one which does not: *Acts Interpretation Act* 1931 s 8A.

54 Grants of legislative power such as those in the Commonwealth Constitution are interpreted as including all powers necessary to effectuate the grant of power: see the discussion in RD Lumb and G Moens, *The Constitution of the Commonwealth of Australia Annotated* (5th ed, Butterworths, 1995) pp 288-93. Similarly, companies have been allowed to exercise implied powers where reasonably necessary to implement powers granted in their objects: see *Small v Smith* (1884) 10 App Cas 119 at 129 per Lord Selborne LC. There is no reason why a grant of power to an executive officer should not include a grant of whatever power is necessary to carry into effect the power granted.

55 This possibility and the difficulties in reconstituting a parliament once it is no longer constituted according to law are discussed below under the heading 'Does Tasmania Face a Constitutional Crisis?'.

56 The exercise of broad administrative discretions are normally reviewable by the courts on grounds of reasonableness and irrelevant considerations: see the discussion in SD Hotop, *Principles of Australian Administrative Law* (6th ed, Law Book Co, 1985) Ch 7. The old barriers to challenging the exercise of powers by the Governor no longer apply: see *FAI Insurances v Winneke* (1982) 151 CLR 342; *SA v O'Shea* (1987) 163 CLR 378.

universal adult suffrage and single-member constitutencies in which all members are responsible to their electorates. This broad purpose suggests that considerations relevant to the exercise of the power may include attempting to ensure that, as far as possible, all voters have the opportunity to vote once every six years, and sitting members whose terms of office are about to expire are similarly given an opportunity to contest divisions with boundaries which are the same as, or similar to, the ones which they have been representing. It is probable that sitting members whose terms of office expired in the year in question would have a right to a hearing before the Governor made his or her decision. Their right to a hearing stems from a legitimate expectation that their interests in recontesting seats with similar boundaries to the ones which they were about to vacate would be taken into account in determining the seats in which elections were to be held.[57]

It may also be possible to determine the order in which electorates go to the polls by regulation. The Act contains a power to make regulations for the purposes of the Act.[58] As the Act requires a redistribution at least every nine years, similar problems may arise in the future. Arguably, the Government could, by regulation, seek to deal with the problem on a permanent basis by providing a method for determining the order in which seats come up for reelection after a distribution. In my opinion, the regulation-making power would not be sufficiently broad to allow the matter to be dealt with by regulation.

There are a number of arguments against allowing this use of the regulation-making power. The first is that determining the order in which elections are to be held affects the rights of sitting members. As a general rule, regulations cannot take away rights conferred by the enabling Act, or by other Acts of parliament.[59] However, it is not

57 Whether retiring members would only be entitled to make written submissions, or whether they would be entitled to a full hearing, would depend upon the court's assessment of the nature of their interest or expectation: *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353; *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564. As the Governor acts on the advice of ministers, the hearings would be held by them, or by persons responsible to them, rather than by the Governor him or herself.

58 The Act s 37.

59 Regulations cannot be used to limit rights conferred by the enabling Act, or to impose liabilities in addition to those imposed by that Act: *Ira, L & AC Berk Ltd v Commonwealth* (1930) 30 SR (NSW) 119; *Taylor v Dental Board of SA* [1940] SASR 306. Regulations which are inconsistent with other Acts on the same topic are also invalid: see *Powell v May* [1946] KB 330 and *Stevens v Perrett* (1935) 53 CLR 449.

clear that regulations determining the order in which elections are to be held in the new divisions would take away, or limit, any person's rights. The regulations could not be used to shorten the term of office of any member because each member is guaranteed a six-year term of office by the *Constitution Act*.[60] Nor would such regulations interfere with any right retiring members have to recontest the seat which they are vacating, because the legal right to contest the seat is no greater than the legal right of any citizen to contest any seat. Under the *Constitution Act*, any elector who meets the requirements of that Act and the *Electoral Act*, has the right to nominate as a candidate for any division.[61] The right of a member whose term of office has just expired is no greater than the right to nominate as a candidate.[62] Even if this interest can be regarded as a right, regulations determining the order in which elections are to be held in the various divisions protect, rather than limit, that right. Without some determination of the order in which elections are to be held, there can be no elections. If elections are not held, the rights of retiring members to contest the elections are completely destroyed.

Although regulations determining the order in which elections are to be held would not be invalid on the grounds that they interfere with rights, they probably are invalid on broad grounds of inconsistency. The content of any regulation is limited by the terms of the regulation-making power to make regulations for the purposes of the Act.[63] Regulations made under such broad grants of power may be used to complement the Act, provided they do not widen the purposes of, or depart from, the plan of the Act.[64] The argument that the regulation-making power is sufficiently broad to support regulations determining the order in which elections are to be held in the new divisions appeals to the plan of the Act and its place in the general constitutional structure. The plan of the Act is to provide a mechanism for the redistribution of electoral boundaries for Legislative Council elections ensuring that present and future divisions contain roughly equal numbers of voters. Once mechanisms are in place, it is the intention

60 *Constitution Act* 1934 s 19(1). Although this Act only has the status of an ordinary Act of Parliament, it is clear that regulations which are inconsistent with an Act other than the enabling Act are invalid: see note 59 above.

61 Id, s 14.

62 However, it may give rise to legitimate expectations for the purposes of the law of natural justice: see text accompanying notes 56 and 57 above.

63 The Act s 37.

64 *Carbines v Powell* (1925) 36 CLR 88.

of the Act that future elections be held in divisions established in accordance with its provisions.[65] However, before this plan can be implemented, there must be a mechanism for determining the order in which each division is to go to the polls. If regulations are used to provide that mechanism, they are complementing the legislation by fulfilling the plan of the Act. It may therefore be argued that regulations determining the order in which the divisions face electors would not be invalid on that ground. The test is one of intention and proportionality: are the regulations consistent with, or reasonably proportionate to, the purposes of the Act?[66]

It may seem that determining the order in which elections are to be held in the new divisions is too important to be determined by regulations, because of the impact it may have on the composition and balance of political forces in the Legislative Council. This argument cannot be accepted. First, in applying the test for determining validity of regulations, it is the consistency of regulations with the purposes of the Act which is relevant, not the importance of the policy decisions embodied in the regulations. Regulations which meet the tests of consistency and proportionality are not invalid merely because they deal with important topics.

However, the importance of the topic may be indirectly relevant in applying the test of proportionality. In applying that test, one first asks whether the end is in power. If so, it is necessary to consider whether the means have such disadvantageous consequences that they may be reasonably disproportionate to the legitimate end. If the means deal with important matters which are not closely related to the legitimate end, or if they interfere in a major way with civil rights, they may be disproportionate and the regulations may be invalid.[67]

It may seem that regulations implementing new boundaries by determining the order of future elections would not fail this test. The means appear closely related to and indeed necessary to achieve the legitimate end; that is, the implementation of the new electoral divisions. As they would not interfere with, or take away, the rights of

65 The Act s 40.

66 *Shanahan v Scott*, (1956-7) 96 CLR 245; *Williams v Melbourne Corp* (1933) 49 CLR 142; *Morton v Union Steamship Co* (1951) 83 CLR 402; *Utah Construction v Pataky* [1966] AC 629; *Willocks v Anderson* (1970) 124 CLR 298; *SA v Tanner* (1988-9) 166 CLR 165.

67 The leading exposition of the principles of the proportionality test is that of Mason CJ in *Nationwide News v Wills* (1992) 177 CLR 1 at 30-31; 108 ALR 681 at 690-91.

sitting members, there are no disadvantageous consequences which could be disproportionate to the legitimate end.

Secondly, while such regulations may have important short term political implications with the capacity to affect the balance of political forces in the Legislative Council, they would not have major policy implications: all important policies to do with redistributions, and the principles on which they are to be conducted, are contained in the Act. The only decisions left to be determined by regulations are those with respect to the implementation of a redistribution after the content of the redistribution has been determined. It is arguable that these decisions are not major decisions of policy.[68]

In spite of the strength of these considerations, it is probable that the power to make regulations conferred by the Act does not extend to regulations determining the order in which elections are to be held in the new divisions. Such regulations go beyond the purposes of the Act, which are limited to implementing a redistribution. It may be conceded that elections cannot be held in accordance with the electoral system for the Legislative Council until the order in which elections are to be held in the new divisions is determined. However, the Act does not require that such elections be held. The requirement to hold rotational elections is a requirement of the *Constitution Act*, not the Act itself. The Act is consistent with any electoral system in which there are single-member constituencies determined in accordance with its provisions. Therefore regulations implementing a particular electoral system go beyond the purposes of the Act.

Objections may arise that the Act amends relevant provisions of the *Constitution Act* dealing with Legislative Council elections (ss 18 and 26) to ensure that those elections are held under the new boundaries, and that it is therefore incorrect to limit the purpose of the Act to carrying out a redistribution. Instead, those purposes extend to ensuring that future elections are held in divisions the boundaries of which are determined in accordance with the Act. This may be conceded, but is not sufficient to authorise such regulations. The

68 This argument is open to the objection that, in determining how a redistribution is to be implemented, the regulations would have to determine basic questions such as how to ensure representation for 'new' divisions like Rumney. However, as it would be impossible to deal with this problem by regulation other than by holding the election for the 'new' division when the term of office of the member for the division which it replaces expires, the policy on this issue may be seen as determined by the Act, rather than by regulation. The issue is discussed in more detail below.

amendments to ss 18 and 26 of the *Constitution Act* merely require that future elections be for single-member constituencies defined in accordance with the Act. Section 19 of the *Constitution Act*, which establishes the system of rotational elections, is not affected by the Act. It is therefore impossible to conclude that the purpose of the Act extends to implementing new boundaries for a system of rotational elections. Hence, the regulation-making power does not extend to regulations implementing the system of rotational elections by determining the order in which they are to be held in the new divisions.

In conclusion, it may be possible for the Governor to determine the order in which elections are to be held in the new divisions. It is reasonably necessary to do so in order for the Governor to exercise the power and duty which he has to call rotational elections under s 77 of the *Electoral Act*. However, the power to make regulations for the purposes of the Act would not extend to making regulations determining the order in which such elections are to be held.

Practical Difficulties

Whether or not these powers are legally available, there are practical difficulties in determining the order in which elections are to be held (either by regulation or by allowing the Governor to decide the matter). Any redistribution may create new divisions. These new divisions may not be represented for a number of years in the new Parliament. Often there will be a strong case for giving them immediate representation, both as a quick way of implementing one of the more important features of a redistribution and to ensure that a block of electors is not unrepresented.[69] To give a new division immediate representation, without depriving some other division of representation, would require amendments to the Act. It cannot be done by regulation, or by the Governor when he or she issues the writs, because the only fair way to ensure that a new seat is represented is by increasing the number of seats in the Legislative Council, or by shortening the term of office of a sitting member.

69 Politically, they will have some representation from the members of the old divisions from which the new division was created: see the analysis of representation in the next section. However, there is a strong case for giving a new seat, such as Rumney, immediate representation because the old divisions are likely to vary greatly in size and hence be completely inconsistent with the principles for determining new boundaries laid down by the Act: see the next section, 'The Desirability of Further Legislation'.

The reason for this becomes clear upon examination of the proposed redistribution. That redistribution recommended the creation of a new seat of Rumney. As the Council already has 19 lawfully elected members, if an election were held for Rumney immediately, the number of members would be increased to 20, unless the term of one of the sitting members was reduced. As there is no legal continuity between the old and new divisions, it may be legally possible to hold an election for Rumney at the next periodic election in May 1997. However, that will not solve the problem, as the three members due to retire at that election represent divisions which have equivalents under the redistribution. If no election is held in one of these equivalent divisions to enable an election in Rumney, that division will be effectively unrepresented.

The only way to ensure that another division is not deprived of representation is to delay the election for Rumney until a member is due to retire from a division which does not have an equivalent under the redistribution. The only divisions that do not have equivalents are Gordon and Russell, which are to be combined. However, the sitting members in these divisions are not due to retire until 1999 and 2000 respectively. Therefore, an election in Rumney cannot be held before 1999 without denying representation to another division, unless the size of the Council is increased temporarily or the term of office of a sitting member is shortened. As the Act does not confer power to alter representation through these methods, the only fair way to allow the new seat of Rumney (and any other new seat created in the future) to be represented immediately is by amending the Act.

Legal and political difficulties may arise if the order in which elections are to be held is determined by regulation or by the Governor when issuing writs for elections. As either House of Parliament may disallow regulation by resolution,[70] and the majority of the House of Assembly now favours the abolition of rotational elections for the Legislative Council,[71] it is likely that the House would disallow any attempt to implement the boundary changes by regulation.[72] Either solution may also provoke a legal challenge. Although such a challenge is likely to fail, it could cause problems by delaying the elec-

70 *Acts Interpretation Act* 1931 s 47(4).

71 This is discussed in detail below.

72 It is not clear that the Legislative Council would allow such regulations which may be opposed by a coalition of members who favour greater change and those who want no change at all.

tions, or by preventing newly elected members from taking their seats immediately. Therefore, in many ways, the best solution would be further legislation.

The Desirability of Further Legislation

The Government has proposed the Legislative Council Electoral Boundaries Amendment Bill. This Bill was designed to set down the order of elections in new divisions. It did not implement the redistribution immediately, but over the six-year electoral cycle of the Legislative Council. The Bill suffered from two obvious defects, one legal and the other political. The legal defect was that it only solved the immediate problem of determining the order of elections after the 1996 redistribution.[73] It contained no machinery for dealing with similar problems likely to arise after later redistributions, making further legislation necessary.[74] The political defect was that it did not provide for an election in the new seat of Rumney until the year 2000.[75] As noted above, there are strong arguments for an immediate election in that seat because its electors are under represented.

The proposed legislation also failed to deal with a number of important, but less pressing, issues. The need for legislation to implement redistributions gives an opportunity to consider problems arising from redistributions in a system of rotational elections, some of which were flagged by the Board of Enquiry's Report. The Act deals with few of these problems. Some are intractable and raise basic questions about the fairness of implementing periodic redistributions by means of periodic elections.

Are Rotational Elections Too Slow?

The first issue is whether rotational elections are an unreasonably slow method of implementing a redistribution. The major problem with implementing a redistribution by means of the rotational electoral system is that it may take years before the membership of the

73 The Legislative Council Electoral Boundaries Amendment Bill 1996 s 2 lays down the order in which elections are to be held over the next six years and thereafter until the next redistribution.

74 It is unlikely that if the current difficulties are resolved by legislation it would be politically acceptable to deal with the problem in the future, either by regulations or by leaving the matter to be resolved by the Governor when he or she issues writs for periodic elections.

75 Legislative Council Electoral Boundaries Amendment Bill 1996 s 2.

Council fully reflects the boundary changes and embodies the principle that all votes should have equal weight. The Act was not designed to change the electoral system of periodic elections but to ensure that future elections were held under fair boundaries. It provides for periodic redistributions and intends that each of those redistributions be implemented by periodic elections. Hence, it will take approximately six years to implement any redistribution, including the first one. By then, as the Act itself contemplates, the redistribution may no longer be fair.[76]

There may be an argument for implementing the first redistribution by an election for the whole Council or in some method other than the normal rotational system of elections. The current boundaries are more grossly inconsistent with the requirements of the Act than boundaries are likely to be in the future. Inconsistencies occur as there has not been a redistribution for fifteen years and the last redistribution was not consistent with the standards for determining boundaries laid down in the Act.[77] However, the Legislative Council is likely to resist any call for a one-off spill and general election because a general election may lead to an increase in the number of members who represent political parties.

After the first redistribution has been implemented, the argument that periodic elections are too slow in implementing boundary changes loses force as there will, in future, be periodic redistributions. The Act requires that these take place if four-and-a-half years have passed from the last redistribution and if, in four or more divisions, the number of persons enrolled varies by more than 25% from the average divisional enrolment.[78] These provisions are likely to ensure that discrepancies in the size of divisions do not become too great.

Preserving Electors' Opportunity to Vote

The timing of the periodic redistributions required by the Act gives rise to other problems. If redistributions are to be implemented by means of the rotational electoral system, they ought to be imple-

76 Under the Act, there may have to be another redistribution four-and-a-half years after the first, that is, before the six-year cycle of elections has been completed: s 10. If that happened, a redistribution may never be fully implemented in the sense of a full cycle of elections being held under its boundaries.

77 The last redistribution of Legislative Council Divisions was by the *Constitution Amendment Act* 1980.

78 The Act s 10(2).

mented at the end of a complete cycle of elections, that is once every six years. Each redistribution would establish the boundaries for the next cycle and those boundaries would not be changed until an election had been held in accordance with them in every division. This would ensure, as far as possible, that all electors have the opportunity to vote once, and only once, in that six-year cycle.[79] This is important, as each cycle may be equated with a general election for the Council because an election for every seat will be held in that time.

The Act does not ensure this, in that it requires a redistribution at a minimum of four-and-a-half, and a maximum of nine, years after the last redistribution.[80] This could have the effect of depriving substantial numbers of electors the opportunity to vote in a six-year cycle, the equivalent of being denied the vote in a general election. Consider the case of a redistribution after nine years. Redistribution would come into effect half way through the second cycle of elections under the old boundaries. Electors could be moved from a division in which there had not been two elections since the previous distribution, to one in which there had. The move would deny them the opportunity to vote once in that six-year cycle. Other electors may be moved from an electorate which had voted in the second cycle to one that had not. They would gain a second vote in that cycle. These problems can be removed by opting for a redistribution at the completion of the cycle every six years.

These two problems are simply dealt with by changes to the legislation. There are however other, less tractable, problems. A basic requirement of a fair electoral system is to ensure that at all times electors have the opportunity to participate in the election of a sitting member. Implementing a redistribution by a rotational electoral system has the potential to deny some electors this opportunity for periods of up to five years. During these periods, there will be no sitting member for whom substantial portions of the electorate have the opportunity to vote. Although it may be possible to minimise the numbers of those who are disenfranchised in this way, it is likely that the problem cannot be avoided entirely, raising questions about the fairness of the system.

79 It will not be possible to ensure that every person has this opportunity because some people will move from one electorate to another during the cycle and hence may lose their right to vote, if they move from an electorate which has not voted to one that has. This is an unavoidable consequence of the system of periodic elections.

80 The Act s 10.

The system of rotational elections is designed to ensure the opportunity to participate in the election of a sitting member by assigning all electors to a division and holding an election in each division once every six years when the term of office for that division ends.[81] Provided there are no boundary changes and no electors move from one division to another, at any given time there will be a sitting member for whom each elector, except new electors, has had the opportunity to vote. Periodic redistributions implemented by moving electors from one division to another will upset this system and entail loss of opportunity to participate in the election of any sitting member. Electors who are moved in a redistribution from a division in which an election is due to one in which an election has been held recently, will not participate in the election of a sitting member until an election is held in the division to which they have been moved. If they had last voted in the previous election for the division from which they were moved, once the term of office of the member elected at that election expired, they would be in the position of not having had the opportunity of voting for any sitting member and may not have that opportunity for another five years.[82]

If redistributions are implemented by rotational elections, it is not possible to ensure that all electors have the opportunity of participating in the election of a sitting member. As the Board of Enquiry conceded, it is inevitable in a redistribution that some electors will be moved from an electorate in which an election is due to one in which no election will be held for a few years.[83] The problem could only be overcome by a spill and general election, or by an election in which the whole State voted as one electorate. The Board did not recommend a spill to implement the current redistribution and probably did not have the authority to do so.[84] As the Act provides for periodic re-

81 *Constitution Act* 1934 ss 18, 19 and 26.

82 For example, imagine a voter who is moved from the division of Hobart to that of Newdegate in the 1995 redistribution. Assume that the last election for Hobart was in 1991, so that the next election is due in 1997, the first year after the redistribution. The voter who is moved will not be able to vote in that election. Instead, his or her next opportunity to vote will be in the next election for Newdegate. If the last election for Newdegate was in 1996, the last election under the old boundaries, the voter will not have another oportunity until 2002. Therefore, the voter will have to wait eleven years before being able to vote again, and after the term of office for the member for Hobart expires in 1997, will not have had the opportunity to vote in the election of a sitting member.

83 The Nettlefold Report, p 6.

84 Id, p 7. The Board rejected this option because it was likely to endanger the status of the Council as a house relatively free of party representatives.

distributions, the problem will arise after current and future redistributions. Periodic redistribution is a permanent feature of the system established by the Act and if resolved by a spill in this case, there would be equally good arguments for resolution by a spill after every redistribution. This would effectively force the abandonment of the system of periodic elections because redistributions will take place at least once every nine years,[85] in the middle of every second electoral cycle. Problems of periodic redistribution cannot be avoided completely, but can be minimised if taken into account in redistributing boundaries and in determining the order in which elections will be held in the new divisions.

Problems in Implementation

There may be other, equally difficult, problems in ensuring that all electors are represented fairly. Redistributions could be implemented in one of two ways, each of which has its own difficulties. First, they could be viewed as merely determining the boundaries of divisions for future elections.[86] On this view, sitting members would continue to represent the divisions for which they were elected until their terms of office expired. If this interpretation is accepted, it is not necessary to allocate a sitting member to each of the new divisions immediately a redistribution is implemented. Secondly, redistributions could be seen as altering the boundaries of the divisions that each sitting member represents as soon as they are implemented. If redistributions are to have this effect, the Act needs to be amended to provide machinery for allocating the sitting members to the new divisions. The Board of Enquiry argued that this broader view of the effects of a redistribution was preferable.[87]

Neither view of the way redistributions ought to be implemented is without problems. If a redistribution is seen as merely determining the boundaries for new elections, immediately after a redistribution, all sitting members will continue to represent the old divisions for which they were elected. As those divisions covered the whole State, all electors will be represented. However, after elections have been held under the new boundaries, some members will represent old divisions and others will represent new divisions. In this situation, it

85 The Act, s 10.

86 In my opinion, this is the correct interpretation of the Act: see above under the heading 'The Effect of the Implementation of New Boundaries'.

87 The Nettlefold Report, pp 5-7.

will be possible for electors to be outside the boundaries of any represented division and hence unrepresented.[88] Leaving electors unrepresented in this way may be avoided by allocating new divisions to sitting members immediately a redistribution is implemented, but only at the cost of having some electors represented by members for whom they did not have the opportunity to vote.

Theories of Representation

The dilemma may be more apparent than real. It is based on a legalistic approach to the idea of representation. Representation is a political, rather than a legal, doctrine. Members of parliament do not have any legal obligation to represent their electors; for example, electors do not have the right to give legally binding instructions to members regarding the manner in which they should carry out their duties. Similarly, electors do not have power to dismiss a member who fails to act in a way of which they approve. If electors had such powers, it would be indefensible for electors to find themselves outside the boundaries of any division, or represented by a member for whom they did not have the opportunity to vote, because that would deny those electors the opportunity to exercise their legal right to control their members.

Not all political theories of representation require such a close tie between the electors and their representatives. There are many theories of representation and it is a matter of argument which is appropriate to the Legislative Council. It is probable that the members of the Legislative Council represent the electorate in a number of different ways.

First, according to the Whig theory of representation, every member of parliament represents the whole people, not just the electorate for which they were returned.[89] According to this theory, if members of

88 The Board of Enquiry gave the example of the division of Derwent. There is likely to be an election in Derwent under the new boundaries in 1997. Some electors who were in the old division of Derwent have been moved to neighbouring divisions in the redistribution. There is unlikely to be an election in these divisions in 1997. If their members continue to represent the old divisions, the electors moved from the division of Derwent will not be in a represented division: see the Nettlefold Report, p 6.

89 The Whig theory, developed in the United Kingdom in the eighteenth century, was the accepted theory of representation in the nineteenth century and is still very influential. For an account of the theory see 'The Whig Theory of Representation' in A Birch, *Representation* (MacMillan, 1972) pp 37-40.

parliament only represent their electors, and not the whole people, they would not be entitled to take the interests of the whole people into account in their decisions. Members would be required to put the interests of their constitutents first, even where those interests are inconsistent with the interests of the state as a whole. The Whig theory claims that members must be able to put the interests of the state ahead of the interests of their constituents in order to represent the whole state. If this theory of representation is applied to the Legislative Council, it may not be important to identify electors whom each member of the Council represents, as members represent the whole people, rather than those particular electors, and are required to put the interests of the whole people first.

Although the Whig theory does not require ability to identify electors represented by each member, it does require that all electors have an equal opportunity to vote and that their votes carry roughly equal weight. Different electors will have different views of the best interests of the state. Therefore, to be fairly represented, each should have a roughly equal opportunity to choose a member who shares his or her views. In addition to requiring that equal weight be given to the votes of all electors, this theory of representation requires that at any given time, every elector has the oportunity to participate in the election of a sitting member. The system of periodic redistributions in a rotational electoral system is able to guarantee roughly equal weight to all votes, but is not able to ensure that at any given time all electors have the opportunity to participate in an election.

The Whig theory cannot be accepted as the only theory of representation appropriate to the Legislative Council. Clearly, members also represent their constituents and are entitled to put the interests of their constituents before the public interest, or at least before the government's perception of the public interest. It is accepted that Legislative Councillors are entitled to make representations to government on behalf of their constituents when government policy adversely affects their interests. The electoral system for the Legislative Council favours the view that the members represent their electors first and the general community second. The system of rotational elections is designed to ensure that elections for the Council are fought on local issues and encourage electors to consider who is best able to represent the local community, rather than being fought on issues of concern to the whole State.

If members of the Legislative Council are seen as representing their electors rather than the whole people, it appears important that all electors be within the boundaries of a division which is currently rep-

resented and represented by a member for whom they have had the opportunity of voting. Unless this is the case, electors may have no member to represent their particular interests, or are represented by a member who was elected to represent the interests of others. The system of rotational elections and periodic redistributions contemplated by the Act appears unable to provide representation which meets these criteria. At any particular time there may be electors who have not participated in the election of a sitting member[90] and, depending on whether the new divisions are allocated to sitting members immediately after a redistribution, other electors who are either outside the boundaries of any division or represented by a member for whom they did not vote.

This analysis depends upon a legalistic interpretation of the role of a representative as encompassing either one geographic area or another. There are two choices for that area: the old area which the member was elected to represent, or the new area as defined in the redistribution. It is incorrect to consider the issue in this way, however. Theories of representation describe a political relationship between members of parliament and their electors. The strength of political relationships depend upon the motives of parties for maintaining the relationship, rather than on the law. In general, sitting members have two motives for representing the interests of their constituents: duty, because they undertook that responsibility when they offered themselves for election, and self-interest, because they have an interest in retaining their electors' votes at the next elections.

When a redistribution takes place, members have a relationship with two sets of electors: those who had the opportunity to participate in their election under the old boundaries, and those who will have the opportunity to participate in elections under the new boundaries. Duty will define the member's relationship with the former group, self-interest with the latter. Each motivation provides strong reasons why the member should seek to represent both groups, rather than just one. It is proper to view electors who are moved from one division to another in a redistribution as represented by two members (for their new and old division) rather than by none. There is no reason why their interests should not be effectively represented.

The group who will not be so represented are those who have not had, at any particular time, the opportunity to participate in the elec-

90 The reasons for this are set out above in the text accompanying note 82.

tion of any sitting member, because they will only be represented by the member of the new division to which they have been allocated. Any fair redistribution will seek to limit their number to a minimum.

If this analysis of representation is accepted, a system of periodic redistributions implemented at rotational elections can generally provide a fair system of representation, ensuring that electors are represented by members who have a duty and an interest in representing their interests. It also suggests that there is no pressing need to determine which newly created division each sitting member represents immediately a redistribution is implemented. However, it is necessary to determine immediately the order in which elections will be held after a redistribution. As the order in which sitting members face elections is already determined, a division will effectively be allocated to each sitting member, giving that member good reasons to represent that division as well as the division for which he or she was elected.

Who Should Determine the Order of Elections?

Any amending legislation ought to give responsibility for determining the order in which elections are to be held to the Committee and Tribunal, for two reasons. First, the determination of the order in which elections are to be held in the new divisions ought to be taken into account in any redistribution. As noted, after a redistribution there will, at particular times, be some electors who have not had the opportunity to participate in the election of any sitting member. The number of such electors must be minimised in a redistribution. This can only be taken into account if the order of elections is determined by the Tribunal. Secondly, the order of elections may have an impact on the balance of political forces in the Council. The order must be determined by an independent body to avoid manipulation for political gain. The Tribunal is the obvious body to undertake this responsibility.

The principles for determining the order of elections should be set out in the Act. There ought to be two guiding principles. First, the majority principle, which was one of the guidelines given to the Board of Enquiry in its terms of reference.[91] Secondly, the order of elections should, as far as possible, minimise the number of electors who will not have had the opportunity of voting for a sitting member.

91 Terms of Reference, cl 3.2. The terms of reference are attached to the Nettlefold Report as Attachment A.

The majority principle, in the terms of reference, requires that sitting members be allocated to the new division where the electors from the member's current division comprise the majority of electors in the new division. If, as I have suggested, no allocation is needed, the principle could be used to determine the order of elections in new divisions. If the principle is used to determine the order of elections, it would require that on expiration of each sitting member's term of office an election be held, when possible, in that new division where the electors from the member's old division comprise the majority of electors.

Providing for New Divisions

The final issue that must be dealt with by legislation is providing for representation of newly created seats. As argued above, it may be impossible to ensure representation of newly created divisions immediately after a redistribution without enlarging the Legislative Council temporarily or shortening the term of a sitting member.[92] Both options require legislation. This raises the issue of whether special provisions providing for the immediate representation of newly created divisions is necessary.

It is arguable that there is no need to provide for immediate representation of newly created divisions. Rumney can be seen as a special case, being an area grossly under represented which, if the Government's proposal is adopted, will not be better represented until 2000. However, once the system of periodic redistributions contemplated by the Act is implemented, it is arguable that there will not be a similar case for immediate elections for newly created divisions. As redistributions are required after four-and-a-half years if four electorates vary by more than 25% from the average divisional enrolment, it is unlikely that an area will be as grossly under-represented as Rumney. The system contemplates implementation of redistributions in stages as normal periodic elections occur. To allow immediate elections in newly created divisions departs from that principle and would be difficult to implement fairly as a similar case for an immediate election can be made out for divisions which have undergone radical changes in their boundaries. Large numbers of new voters in those electorates could claim legitimately that they are not properly represented by the

92 The Board of Enquiry reached the conclusion that the Council ought to be enlarged to allow for the immediate representation of the new seat of Rumney: see the Nettlefold Report, pp 8-10.

member elected under the old boundaries and that therefore there should be an immediate election.

Despite these considerations, there must be provision for immediate elections in new divisions. First, even in a system of periodic redistributions, there will be no need to create new divisions unless an area is badly under-represented. Creating a new seat is a way of overcoming gross malapportionment and an immediate election is a quick remedy for the problem. Secondly, if there is not an immediate election in a newly created seat, electors in that division will, in practice, be under represented. I have argued above that two motives induce elected members to act as representatives, duty and self-interest. After a new division is created in a redistribution, electors of the new division will not be completely unrepresented as the member of the division to which they formerely belonged has a duty to represent them. However, electors may not be effectively represented because it will not be in the member's interest to do so. To give electors equality of representation, an interested member is required to represent them.

Although electors who are moved into a different division may have to rely, in part, on a member for whom they did not have the opportunity to vote, they are at least represented by a member with an interest in doing so, as well as by a member with a duty to do so. They are substantially better represented than the electors of a new division.

If provision is to be made for immediate elections in new divisions, criteria is needed for distinguishing new divisions. It may appear difficult to develop such criteria because, as argued above, after a redistribution all divisions are legally 'new'.[93] There is however sufficient historical continuity between most new divisions and those existing before redistribution to distinguish divisions which are to be considered 'new', for the purpose of an immediate election. To discover a seat which is 'new' for this purpose, it is necessary to allocate the sitting members to the divisions created by the redistribution. Before a sitting member can be allocated to a division created by redistribution, a sufficiently close connection between the member and the division must be established for it to be reasonable that the member represent its electors. Although no hard-and-fast rules governing such an allocation exist, relevant principles include the majority principle, used by the Board of Enquiry to allocate the new divisions

93 See above under the heading 'The Effect of the Implementation of New Boundaries'.

among sitting members.[94] A 'new' division, for the purposes of an immediate election, could be identified as one having insufficient connection to any sitting member not allocated to another division.[95] As a division can only be created if another is abolished, it would be possible to allocate the member from the newly abolished division to the newly created one. This will rarely be an adequate solution, as the member from the recently abolished division may have no connections with, or knowledge of, the newly created division.[96]

The proposed amendments do not provide for immediate elections when new divisions are created as a general principle, or as a special case for the seat of Rumney. In refusing an immediate election in the seat of Rumney, the Government rejected recommendations of the Board of Enquiry, which it had set up to report on the transitional arrangements needed to implement the redistribution.[97]

Does Tasmania Face a Constitutional Crisis?

One reason for the rejection of the Legislative Council Electoral Boundaries Amendment Bill was the failure of the Government to provide for an immediate election for the division of Rumney. On this basis, the House of Assembly passed a reasoned amendment that the Bill be withdrawn and redrafted to implement the redistribution by an election at large for all Legislative Council seats by 25 May 1997, and to embody the Morling Enquiry[98] recommendation that there be elections for one half of the members of the Legislative Council every three years thereafter.[99] The passing of the reasoned

94 For this principle see the Terms of Reference of the Board, published as Attachment A of the Nettlefold Report. For the way in which the principles were used see the Nettlefold Report, pp 3-12.

95 'New' divisions are likely to have close connections to sitting members who have been allocated to another seat because they will be created out of existing divisions. For example, in the present redistribution the sitting member for Monmouth qualified under the majority principle to be allocated to the 'new' division of Rumney. However, the Board recommended that he should be allocated to the division of Monmouth as his connections with that division were closer: the Nettlefold Report, pp 4, 12 and 18.

96 The Report of the Board of Enquiry rightly rejected this as a solution to the problem of providing representation for the new seat of Rumney because there was no reason to believe that the sitting member for Gordon, the seat which was abolished, was competent to represent the electors of Rumney.

97 The Nettlefold Report.

98 *Report of the Board of Enquiry into the Size and the Constitution of the Tasmanian Parliament* (Department of the Premier and Cabinet, Tasmania, 1994).

99 The reasoned amendment also provided for a number of other reforms, both to

amendment makes it less likely that the problem will be solved by new legislation because the Legislative Council is unlikely to accept its principles.

If no legislation is passed, a constitutional crisis is unlikely. For reasons given above, elections may continue under the old boundaries until Part 4 of the Act is proclaimed. If this opinion is incorrect, and if future elections must be held under the new boundaries, the order in which elections are to be held for the new divisions may be determined by a decision of the Governor when he or she issues the writs for periodic elections under the *Electoral Act*.[100] A constitutional crisis could only arise if the elections must be held under the new boundaries but there is no legal way of determining the order in which those elections are to be held. If this were the case, it would be impossible to hold valid elections under the old or new boundaries.

If elections are not held when due, it is arguable that there would no longer be a validly constituted Legislative Council and therefore no validly constituted parliament. Under the *Constitution Act*, the Legislative Council consists of 19 members.[101] Three members' terms of office expire every year and the only constitutionally permitted method of replacing them is by election in accordance with s 19 of that Act. If the elections are not held, the retiring members could not be replaced and the House would no longer consist of 19 members. In this situation it is arguable that the House would not be properly constituted and therefore could not exercise its constitutional functions.

Failure to hold elections may not initially affect the validity of the Legislative Council because the Council could continue to exercise its constitutional functions even if no periodic elections were held or it ceased to consist of the constitutionally required 19 members. If, for example, no nominations were received for an election in a division, the election could not be held, the division would be unrepresented and the Council would consist of only 18 members. It is however dif-

the process for electing the Council and to the powers of the Council. The latter reforms were designed to resolve deadlocks between the Houses in favour of the House of Assembly. They are beyond the scope of this paper.

100 For an analysis of the Governor's powers to determine the order of elections see above under the heading 'Difficulties in Implementing Redistributions'.

101 *Constitution Act* 1934 s 18.

ficult to perceive whether this would affect the validity of the Council or its ability to exercise its constitutional powers.[102]

It may be that the situation would be different where vacancies in the Council arise not from a failure of candidates to nominate but from a failure to call an election. There is no duty on any person to nominate as a candidate; however, there is a constitutional duty to call periodic elections every year.[103] As there is a duty to call elections, it is arguable that a failure to call would affect the validity of the Council and its ability to exercise its powers in a way which a failure of any person to nominate would not. If refusal to call an election does not affect the ability of the Council to exercise its powers, governments may be able to refuse to call elections where they believe they can gain a political advantage by not doing so.

The courts would be reluctant to accept the conclusion that a failure to call periodic elections means there is not a validly constituted Legislative Council, due to the problems which would arise. If the Legislative Council could not exercise its proper functions, it is arguable that there would be no constitutionally valid parliament because, under the *Constitution Act*, Parliament consists of the Governor, Legislative Council and House of Assembly,[104] and the assent of both Houses is needed for all legislation, including tax and appropriation acts.[105] If the Legislative Council was not properly constituted it would be impossible to pass legislation or authorise spending of government money. In the past, the courts have shown an understandable reluctance to adopt arguments which entail the invalidity of parliament.[106] Courts are unlikely to accept that the Tasmanian Par-

102 In *PS Bus Co Ceylon Transport Board* (1960) 61 NLR 491, Sinnetamby J of the Supreme Court of Ceylon reached a similar conclusion. In that case, legislation was challenged on the basis that the House of Representatives, the lower house of the Ceylon parliament, was not properly constituted, in that it consisted of one-too-few members. In obiter, the learned judge stated that, in his opinion, if the Parliament did not have the required number of members, because there had been no candidate for a particular seat, that would not affect the validity of any legislation which it passed.

103 *Constitution Act* 1934 s 19. The Governor has the responsibility of issuing writs: see notes 51-53 and accompanying text above.

104 Id, s 10.

105 Id, s 44 gives the Council power to reject all bills, including appropriation bills. Section 45 gives the Council and the Assembly equal powers, except that money bills must originate in the Lower House (s 37) and some money bills cannot be amended by the Council (s 44).

106 See for example the majority judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ in *Clayton v Heffron* (1960) 105 CLR 214 at 246-8 who held that the

liament is invalid merely because the Legislative Council does not have the required 19 members.

There may be a point at which the argument that a valid parliament no longer exists becomes much stronger. If only one periodic election for the Legislative Council is not held, there will still be 16 validly elected members, enough for the Council to continue to function. If no valid elections are held, however, the Council will eventually cease to have a quorum[107] and finally, will have no members at all. When the Council can no longer function, the argument that a validly constituted parliament no longer exists cannot be easily dismissed.

It does not automatically follow that if there is no properly constituted Legislative Council, and therefore no properly constituted parliament, the courts will declare invalid the purported legislation of an improperly constituted parliament. There is a long tradition in the common law to consider parliament supreme and master of its own household with the ultimate power to determine whether it is properly constituted and whether it has complied with its own procedures. If this approach were adopted, and if the House of Assembly and Governor decided that, in absence of a properly constituted Legislative Council, they could exercise the law-making powers of Parliament, it is arguable that no court would have the power to overturn their decision.[108]

It is doubtful that the doctrine establishing parliament as a master of its own household could be relied on to validate the laws of the House of Assembly acting alone. It is a British doctrine and of limited

requirement that there be a conference of managers of the two houses before a joint sitting to resolve a deadlock was directory rather than mandatory, because to give it a mandatory construction could lead to Parliament being declared invalid. See also the dicta of Barwick CJ, Gibbs and Stephen JJ in *Victoria v Commonwealth* (the *PMA* case) (1975) 134 CLR 81 at 120, 156-7 and 178 to the effect that an election held after an improper double dissolution of the Federal Parliament under s 57 of the Constitution could not be overturned by the courts and therefore the resulting Parliament was valid.

107 The quorum of the Council is nine. It is not competent to despatch business unless a quorum is present: *Constitution Act* 1934, s 20. It is not clear whether legislation which passed a Council without a quorum would be valid or not. The Houses of Parliament have control over the enforcement of rules governing their internal deliberations, such as standing orders: *Cormack v Cope* (1974) 131 CLR 432 at 454, per Barwick CJ. However, it is not clear whether the requirement for a quorum is an internal requirement which Parliament is left to enforce, or whether it is a justiciable requirement which must be complied with to produce a valid law.

108 For reasons discussed below, in my opinion the argument is not correct.

application in Tasmania due to the different nature of parliament in this State. Unlike the British Parliament, Tasmanian Parliament was created and had its powers defined by legislation.[109] If it exceeds the powers which have been granted to it, its legislation is invalid. This reflects its colonial origins.[110] Although the colonial limitations have now been removed by the *Australia Act* 1986, the Parliament remains one of limited powers defined by legislation and, if it exceeds those powers, the courts may declare the offending law invalid.[111]

If the Governor and House of Assembly purported to legislate alone, the issue would not be one of parliament exceeding the limits on its powers, but of there being no properly constituted parliament able to exercise any of its powers. This raises different issues. It is not clear how the courts would characterise the problem if the House of Assembly and the Governor attempted to legislate alone in the absence of a properly constituted Legislative Council. The court could note the absence of a properly constituted Legislative Council and deal with the issue on the basis that, as the Legislative Council is an integral part of Parliament, there is no Parliament. Alternatively, the court could look at the issue as one in which Parliament had not legislated in accordance with required procedures and had not gained approval of the Legislative Council to the legislation in question, as required by Part IV of the *Constitution Act*.

109 Originally, the powers of the Tasmanian Parliament were granted in the *Australian Constitutions Act* 1850 (Imp), which granted Tasmania a representative legislature and gave it power for 'the peace, order and good government of Tasmania': s 14. Other Imperial Acts confirmed and added to its powers, as did the *Australia Act* 1986.

110 Many of the original limitations on the powers of the Tasmanian Parliament flowed from Tasmania's status as a colony and were contained in the *Colonial Laws Validity Act* 1865, now repealed. Originally, there was some authority for the view that once a country ceased to be a colony, the limits on the powers of its parliament were removed: *Moore v A-G (Irish Free State)* [1935] AC 484 and *Ndlwana v Hofmeyr* [1937] AD 229. However, there has been little support for this view in Australia: *A-G for NSW v Trethowan* (1931) 44 CLR 394 at 426 per Dixon J and *Victoria v Commonwealth (PMA* case) (1975) 134 CLR 81 at 162-4 per Gibbs J. It was also rejected by the Privy Council in *Bribery Commissioner v Ranasinghe* (1965) AC 172 (on appeal from Ceylon) and by the Supreme Court of South Africa in *Harris v Minister for the Interior* [1952] 2 AD 428, overruling *Ndlwana v Hofmeyr*.

111 The High Court has only considered the position of the State parliaments once since the *Australia Act* 1986, in *Union Steamship v King* (1988) 166 CLR 1. That case makes it clear that some limits on the powers of State parliaments have survived the *Australia Act* and are enforceable by the courts. The case dealt with the extraterritorial powers of State parliaments. For a full discussion of the limits on State powers which have survived the *Australia Acts* see Lee, 'The Australia Act: Some Legal Conundrums' (1988) 14 *Monash Law Review* 298.

The courts would be more likely to intervene if the issue were characterised as an attempt to legislate by an improperly constituted parliament, rather than as a failure to comply with the required procedures. Although the courts have jurisdiction to enforce substantive limits on the powers of State parliaments, the better view is that they do not have the power to enforce parliamentary procedures, except in a small number of defined cases. Section 6 of the *Australia Act* deals with the cases in which, if parliament does not comply with the procedures for legislating, it fails to produce a valid law. Section 6 only applies if the law in question is on the topic of 'the constitution powers and procedures of parliament', suggesting that the courts will not invalidate laws on other topics for failure to comply with law-making procedures.[112] The power of the courts to invalidate State legislation for failure to comply with procedures should be limited to the cases covered by s 6.

It is arguable that s 6 only applies to failures to comply with special law-making procedures, leaving the issue of whether the courts should intervene when there has been a failure to comply with the ordinary procedures to be determined by general principles governing the relationship between parliament and the courts. Although there is nothing in the words of s 6, or in the words of its predecessor, s 5 of the *Colonial Laws Validity Act* 1865, to suggest that it is so limited, the policy behind s 6 appears to require compliance with special procedures adopted for amendments to the constitution, powers and procedures of parliament.[113] Section 6 was, in particular, designed to

112 The issue was considered by Gummow J in *McGinty v WA* (1996) 134 ALR 289 at 396-7. He concluded that State parliaments do not have the power to impose manner and form requirements other than under s 6 of the *Australia Act* 1986. The issue was also raised under the predecessor of s 6, s 5 of the *Colonial Laws Validity Act* 1865. In *South Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603, the High Court decided that the South Australian Parliament did not have to comply with a special procedure to amend the law on a topic other than that of the 'constitution, powers and procedures of parliament'—in that case, land title—lending support to the view expressed in the text. *West Lakes v South Australia* (1980) 25 SASR 389 also adopted a narrow view of the extent to which the courts should enforce parliamentary procedures. These issues are considered at length in JD Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403.

113 The original policy behind the *Colonial Laws Validity Act* 1865 s 5 seems to have been to allow colonial representative legislatures to change their constitutions as long as they complied with provisions designed to ensure a degree of imperial control over such changes (for example the requirement that such bills be reserved for the royal assent). However, the provision was used later to allow parliaments to impose special requirements such as referenda or special majorities in both houses

ensure that after repeal of the *Colonial Laws Validity Act*, State parliaments would retain the capacity to impose procedural restraints on their ability to alter their own constitutions.

If s 6 only applies to special procedures, it is doubtful the courts would intervene to invalidate laws for failure to comply with ordinary procedures, even if these laws were on the topic of the constitution, powers and procedures of parliament.[114] To date, there have been no cases in Australia in which legislation has been challenged on the grounds that ordinary procedures have not been complied with. However, there are strong arguments for limiting review on procedural grounds as narrowly as possible, to review of special procedures adopted under s 6.

Dixon J in *A-G (NSW) v Trethowan*[115] took a broader view and suggested that if a parliament, including the British Parliament, legislated to impose special procedures on itself, the courts should enforce those procedures until the parliament legislated to change them. This view has little to recommend it. First, unlike review for lack of power, unlimited review on procedural grounds has the capacity to threaten the stability of the whole political system, because laws on any topic, including laws altering the constitution, may be open to challenge on procedural grounds.[116] More importantly, the position of a parliament which imposes restrictive procedures[117] on itself differs from that of a parliament which has restrictive procedures imposed on it by a written constitution. A constitution is usually the result of lengthy deliberation and negotiation and is often endorsed by the people in a referendum or series of conventions. A parliament which imposes restrictive procedures on itself, however, may do so by ordinary legisla-

which had to be met to change the constitution of parliament: *Trethowan v A-G for NSW* (1931) 44 CLR 394; [1932] AC 526 and *Clayton v Heffron* (1960) 105 CLR 214.

114 It is accepted that the State constitutions are essentially uncontrolled and, unless they have adopted special procedures, can be changed by ordinary legislation: *McCawley v R* [1920] AC 691. This suggests that apart from s 6 of the *Australia Act* 1986, the validity of laws altering the constitution of parliament would only be reviewable on procedural grounds on the same basis as other laws.

115 (1931) 44 CLR 394 at 425-6.

116 Some of the problems which can arise from review of legislation on procedural grounds are discussed in *Clayton v Heffron* (1960) 105 CLR 214. The courts' attitude to questions affecting the validity of the whole system is discussed below.

117 Restrictive procedures are given the meaning given by P Hanks in *Constitutional Law in Australia* (2nd ed, Butterworths, 1996) pp 85-99; that is, a special procedure which must be complied with to produce a valid law.

tion. As a result of the ease with which procedures can be adopted, self-imposed restrictions are far more likely to be designed to give a political advantage to one political party than are constitutional limitations which are the result of a broad political consensus. Self-imposed restrictions also allow one parliament to make it more difficult for later parliaments, and hence future generations, to alter policies and legislation. This infringes on what Michael Detmold has called the principle of 'inter-temporal equivalence'—that the people of one time should be, through their parliament, as free to introduce changes as their predecessors and their successors.[118] Therefore, Dixon J's argument is not supported by the principle laid down in *Bribery Commissioner v Ranansinghe*,[119] and endorsed by the High Court in *Cormack v Cope*[120] and *Victoria v Commonwealth* (the *PMA* case),[121] that a parliament is not free to ignore the procedures for making valid laws laid down in the constitution which establishes it.[122]

If these views are accepted, it is arguable that the courts would not invalidate laws passed by the House of Assembly and the Governor in the absence of the Legislative Council, at least if the laws were not on the topic of the 'constitution, powers and procedures of parliament'. The courts are likely to leave Parliament free to decide whether it had complied with its own procedures. The House of Assembly and the Governor would therefore be able to legislate effectively in the absence of a properly constituted Legislative Council. If however s 6 were applied to require compliance with ordinary as well as special procedures to change the constitution, powers and procedures of parliament, the House of Assembly would not be able to reconstitute the Parliament, by formally abolishing the Upper House for example.[123]

118 M Detmold, *The Australian Commonwealth* (Law Book Co, 1985) pp 207-9; see also P Hanks, *Constitutional Law in Australia*, pp 95-8.

119 [1965] AC 172.

120 (1974) 131 CLR 432.

121 (1975) 134 CLR 81.

122 In *McGinty v WA* (1996) 134 ALR 289 at 396, Gummow J expressed doubts about the propriety of allowing States to impose restrictive procedures by ordinary legislation, and suggested that a law imposing such a procedure ought to be enacted in accordance with that procedure.

123 However, on this view it may be possible for the House of Assembly and the Governor to legislate for fresh elections to the Upper House because it appears that electoral laws are not laws on the constitution, powers and procedures of parliament; see P Hanks, *Constitutional Law in Australia*, pp 136-7 for an analysis of what constitutes a law on the 'constitution, powers and procedures of parliament'.

It is, however, unlikely that the courts would characterise the issue as one of failure to comply with procedures, rather than an attempt to legislate by an improperly constituted parliament. Argument for characterisation as a failure to comply depends upon the way in which the issue comes before the courts. Courts are unlikely to issue an injunction to stop the House of Assembly from considering a law in the absence of a properly constituted Legislative Council, or to prevent the Governor from giving the royal assent to a law passed solely by the House of Assembly.[124] Courts are unlikely to order the House of Assembly to cease considering legislation in the absence of the Legislative Council, or to order the Governor not to give the royal assent to any legislation which has not passed both Houses. Rather, courts will wait until after a bill has received the royal assent, and consider its validity at the suit of an interested party. The result of this procedure will be that the courts may be asked to rule on the validity of particular Acts which were passed without consent of the Legislative Council, but not on the validity of the way in which Parliament is constituted. Looking at each Act separately, it will be possible to argue that although the proper procedures may not have been followed, in that the Legislative Council did not give its approval, the courts should leave Parliament to administer those procedures, except in cases falling within s 6 of the *Australia Act*.

In spite of the way the issue may appear before the courts, the courts are unlikely to characterise the issue as a failure to comply with procedures rather than as an attempt to legislate by an improperly constituted parliament. Even the English courts, whose powers to review the validity of Acts of parliament are far more limited than those of Australian courts, will not accept the validity of a law which was

124 The general rule is that courts will not issue injunctions to prevent a parliament from considering legislation, or to interfere with its operations in any way. For example, the High Court refused to order the Federal Parliament not to consider bills in a joint sitting held under s 57 of the Constitution when it was clear that those bills could not become valid law if passed at the joint sitting: *Cormack v Cope* (1974) 131 CLR 432. The courts have only been slightly less reluctant to intervene to prevent legislation receiving the royal assent. In *Trethowan v Peden* (1930) 31 SR (NSW) 183, the NSW Supreme Court intervened to order the Governor not to give the royal assent where the legislative process had not been complied with. However, a majority of the High Court has twice expressed doubts as to the correctness of that decision: see *Hughes and Vale v Gair* (1954) 90 CLR 203 at 204-5 per Dixon CJ, with whom Webb, Fullagar, Kitto and Taylor JJ agreed, and *Clayton v Heffron* (1960) 105 CLR 214 at 233-5 per Dixon CJ, McTiernan, Taylor and Windeyer JJ.

passed by an improperly constituted parliament in so far as the defect appears on the face of the record.[125]

In England, the crucial aspect of the record is the enacting clause, and if there is a defect in that clause the courts will not treat the law as valid.[126] Australian courts are also likely to invalidate laws if the enacting clause is not in proper form.[127] If the House of Assembly and the Governor attempted to exercise the powers of Parliament alone, because the Legislative Council was not properly constituted, that fact would be likely to appear in the enacting clause. Legislation in which the enacting clause ignored the fact that the bill had not been assented to by the Legislative Council would be unlikely to be presented to the Governor for the royal assent. As courts may not invalidate a bill which has not passed the Legislative Council, but must leave it to the Parliament to administer its own procedures, it would be appropriate for the Governor to be presented with the bill. It would not be appropriate to present a bill in which the enacting clause is misleading. In Tasmania, bills are normally presented to the Governor for the royal assent by the President and Clerk of the Legislative Council. Each bill is accompanied by a certificate signed by the Attorney-General, as the chief Law Officer of the Crown, attesting that the bill passed all required stages of the law-making procedure. If a bill does not pass all stages, the certificate would reveal this, unless the Attorney-General falsely signed the certificate. Before giving the royal assent, the Governor would be entitled to require that the enacting clause reflect the true state of affairs, or that the Government publicly advise him in writing why that was not required.

125 *Prince's* case (1606) 8 Co Rep 1a.

126 Ibid.

127 The Australian position differs from the English position in that the English courts would not go behind the record—in particular the enacting clause, if it was in the proper form—to determine if the law was enacted in the proper way or if parliament was properly constituted. This is because the United Kingdom parliament is a court of record. Australian parliaments are not courts of record, and Australian courts are prepared to go behind the record, at least in some cases, to ensure that procedures are complied with. The fact that Australian courts may go behind the record to ensure that parliament has complied with law-making processes does not mean the courts will not invalidate the Act if the record—the Act itself and especially the enacting clause—is defective on its face. In *Osborne v Commonwealth* (1911) 12 CLR 321, the majority of the High Court was of the opinion that the second limb of s 55 of the Constitution probably gave rise to justiciable issues because any failure to comply with that section would appear on the face of the Act: see especially pp 355-6 and 362-4 per O'Connor and Isaacs JJ.

As the courts have jurisdiction to declare any Act in which the enacting clause is defective invalid, they have jurisdiction to determine the validity of any legislation passed by the House of Assembly and the Governor in the absence of a properly constituted Legislative Council. The requirement that the Legislative Council assent to legislation is so fundamental that a failure to comply with it would be apparent from the enacting clause, and will not be treated as a procedural matter which, except in the cases falling within s 6 of the *Australia Act*, the courts allow Parliament to administer itself.

In spite of these considerations, two arguments have been suggested to support the view that Parliament will be able to operate without a functioning Legislative Council. The first argument claims that if the Legislative Council ceases to function it will be by virtue of valid legislation, that is, the combined, if unintended, effect of the *Constitution Act* and the *Legislative Council Electoral Boundaries Act*. As Parliament knows of the combined effect of these Acts, it may be taken to have adopted them unless it legislates to produce different results. Therefore, unless Parliament legislates to allow valid Council elections, it may be taken to intend that the Council cease to exist. As Parliament has the power to abolish the Legislative Council, the fact that the Council ceases to exist by virtue of the operation of a law of Parliament is tantamount to abolition. Parliament has exercised its power to abolish one of its constituent Houses, and this does not affect the ability of the remaining House and the Governor to constitute a valid parliament.[128]

This argument cannot be accepted, as it ignores the fundamental principle that to change the law, Parliament's intention must be expressed in legislation. There is nothing in the legislation, either express or implied, suggesting an intention to abolish the Legislative Council. To abolish the Council, Parliament must expressly, or by implication, amend s 10 of the *Constitution Act*, which provides that the Parliament of Tasmania consists of the Governor, Legislative Council and House of Assembly. Parliament must also amend Part 3, Division 2 and Part 4 of the *Constitution Act*, which deal with the constitution and powers of the Council. No express or implied amendment of these provisions can be derived from the Act, the purpose of which is to provide for a redistribution of electoral boundaries for the Council. Clearly the Act contemplates that the Council continue to exist, not that it be abolished. Nor can any amendment be

128 A similar argument was advanced in Kerr pp 2-3: note 47 above.

implied from a failure by Parliament to legislate to create machinery to determine the order of elections in new divisions. This would be a failure to legislate which cannot amend or repeal existing legislation. If the Legislative Council ceases to exist for want of valid elections, nothing Parliament has done can be taken to have abolished it, or to have given the Governor and House of Assembly the power to exercise the powers of Parliament alone.

The second argument appeals to a principle of necessity. If the Legislative Council ceases to exist because valid elections cannot be held, affecting the validity of the Parliament as a whole, it may be difficult and time consuming to reconstitute a valid parliament. If there is no valid parliament, no valid legislation can be passed and, perhaps more importantly, no money for government spending can be appropriated and all government spending for the ordinary purposes of government would cease at the end of the financial year.[129] The Tasmanian Parliament could not reconstitute itself, because it would have to pass a new constitution or enabling legislation to allow valid elections for the Council to be held under the old constitution. Either way, Parliament would have to legislate. If it is not a valid parliament, by definition it has no power to legislate. The Commonwealth could not legislate to reconstitute the Tasmanian Parliament, because the Commonwealth Constitution s 106 has been interpreted as denying it the power to legislate with respect to State constitutions.[130] Section 106 would prevent the Commonwealth from granting the State a new parliament.

Until the *Australia Act*, the United Kingdom Parliament had the power to reconstitute State parliaments. The *Australia Act* however, ended all residual legislative powers over Australia and vested them in

129 In an emergency, the *Financial Management and Audit Act* 1990 s 16 allows the Governor to make money available for government spending without an appropriation by Parliament. However, it is not clear that this provision could be used to justify spending without an appropriation for the time that it may take to reconstitute Parliament.

130 This limit on Commonwealth power protects the States from laws which interfere with their basic constitutional functioning and autonomy: see *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 and *Re Australian Education Union; Ex parte Victoria* (1995) 128 ALR 609 for instances of situations in which the High Court has applied the immunity to protect the States. The immunity also prevents the Commonwealth from altering basic constitutional rules of State constitutions, such as the principle that moneys cannot be taken from State funds to meet obligations which the State has under Commonwealth law without an appropriation by the parliament of the State: *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319.

the parliament of the relevant State.[131] These additional powers can, like all of the powers of a State parliament, be exercised by a legally valid parliament. Therefore, the Tasmanian Parliament now has a power to reconstitute itself. Possession by the Tasmanian Parliament of a power to reconstitute itself would, however, be obsolete where there is no longer a validly constituted parliament to exercise the power.

This problem could not be resolved by the Commonwealth legislating at the request of, and with the consent of, the State parliaments under either s 15 of the *Australia Act*, which allows the Commonwealth Parliament to amend the *Australia Act*, or under cl 51(xxxviii) of the Constitution, which gives the Commonwealth Parliament power to exercise all of the powers of the United Kingdom Parliament with respect to Australia at the request of, and with the consent of, the States. Even if either of these powers is sufficiently broad to allow for the reconstitution of a State parliament, it could not be validly exercised in this case as there would be no valid Tasmanian parliament to request, and consent to, the legislation.

It may, however, be possible to reconstitute the Tasmanian Parliament by amending the Commonwealth Constitution, by a referendum under s 128, to give Federal Parliament the power to reconstitute a State parliament in circumstances such as those under consideration.[132] Nothing in the *Australia Act* would affect the legality of such a referendum. Although the *Australia Act* vests some legislative powers in the Parliament of Tasmania (a parliament which, in the circumstances under consideration, would no longer exist) and entrenches the grant, it would not invalidate a referendum giving the Commonwealth power to establish a new legislature and confer on it the powers of the old one.[133] Considerable time may, however, be required to organise such a referendum. It is possible that during this

131 *Australia Act* 1986 ss 1, 2 and 3.

132 The referendum would probably have to be passed not only by a majority overall and in a majority of States but by a majority of voters in Tasmania, because it alters the Constitution of Tasmania. However, in the circumstances, this would probably be easily achieved.

133 The *Australia Act* 1986 does not limit the powers which may be conferred on the Commonwealth Parliament by referendum, so that it may be amended not only by request and consent legislation under s 15(1), but also by legislation of the Commonwealth Parliament exercising additional powers conferred under s 128 of the Constitution: see *Australia Act* 1986 s 15(3).

period, the Tasmanian Government may run out of money, or be faced with some other crisis that can only be dealt with by legislation.

If it were impossible to reconstitute the Parliament within a reasonable time, it is arguable that of necessity, the courts would have to recognise the Governor and House of Assembly as the Parliament of Tasmania (at least for some limited purposes such as passing an Appropriation Act). Absence of such recognition would entail lack of a parliament able to grant supply, and government would not be able to continue. The issue is difficult and it is not clear what the courts would decide if such a case came before them. Similar problems have arisen where much of the legislation of a jurisdiction has been declared invalid, as a result of a failure to comply with mandatory constitutional law-making requirements,[134] and after coups which have purported to suspend or abolish the constitution or the parliament of a country, without purporting to replace all existing institutions of government or the courts.

Where there has been a coup, there is some authority for the view that the courts should allow edicts of the new government some operation if it is the only effective authority in existence. As the *de jure* government no longer exists, the choice for the courts is to recognise the acts of the *de facto* government, or to hold that, as the *de facto* government has no constitutional legitimacy, there is no government. If there is no government, all acts of the *de facto* authorities must be ignored by the courts, creating the potential for anarchy.[135]

134 Examples include *Re Manitoba Language Rights* [1985] 1 SCR 721, and the constitutional crisis in Pakistan which was considered in three cases: *Federation of Pakistan v Tamizuddin Khan* PLR 1956 WP 306; *Usif Patel v The Crown* PLR 1956 WP 576; and *Special Reference No 1 of 1955* PLR 1956 WP 598. These cases are discussed in PW Hogg, 'Necessity in a Constitutional Crisis' (1989) 15 *Monash Law Review* 253.

135 The courts have had to consider their approach to unconstitutional usurpations of authority in many countries and at many times, beginning in the common law tradition with *Bagot's* case (1469) Y B 9 Edw IV, Pasch, pl 2. Major cases in the last fifty years include *State v Dosso* (Pakistan) PLD 1958 (1) SC (Pak) 533; *Madzimbuto v Lardner-Burke* (Rhodesia) 1968 (2) SA 284, [1968] 3 WLR 1229, on appeal to the Privy Council, [1969] 1 AC 645; and *Uganda v Commissioner for Prisons; ex parte Matovu* [1966] EA 514. There is also a huge literature on the subject which cannot be considered in this article. For a good summary of some of the most important cases from common law jurisdictions, and of the issues and the approaches which have been adopted in them, see Dr Farooq Hassan, 'A Juridical Critique of Successful Treason: A Jurisprudential Analysis of the Constitutionality of a Coup D'Etat in the Common Law' (1984) 20 *Stanford Journal of International Law* 191.

Courts which have recognised some or all of the acts of the *de facto* government have done so on the basis that it is a lesser evil than to hold all government acts invalid. It is more important to ensure that there is some effective authority in the community than to ensure the authority has constitutional legitimacy. This involves a value judgment with which not all reasonable persons would agree. There is a strong argument for the view that, in these situations, the courts, as guardians of constitutional legitimacy, should not recognise the acts of usurpers acting in defiance of the constitution. It is difficult to argue that there is a principle of law which requires the courts to give legal sanction to the acts of *de facto* authorities with no constitutional basis. The principle is one of necessity and requires the courts to make a prudential, rather than legal, judgment as to what is in the best interests of the community. It is not a safe or proper guide to the approach the courts should take in Tasmania if faced with an invalidly constituted parliament.[136]

The Tasmanian situation may be distinguished from the coup d'etat cases as it is not a case of the violent overthrow of the existing constitutional order, but of a failure to take the steps necessary to ensure the continuation of a properly constituted parliament. In the Tasmanian situation, the case for recognising extraordinary measures designed to ensure that government can continue and to reconstitute the Parliament is much stronger than in the case of a coup because the courts would be asked to recognise measures designed to reestablish constitutional government, rather than overthrow it. Therefore the courts would not have to weigh a duty as guardians of the legal order not to recognise illegal acts of violence against the need to recognise some authority in order to prevent a slide into anarchy. An analogous issue, whether, and on what conditions, courts should enforce invalid laws if most of the legislation within a jurisdiction is invalid, has arisen in a number of cases: *PS Bus Co v Ceylon Transport Board*[137] from Sri Lanka; the Pakistani case of *Reference by His Excellency, the Governor-General, Special Reference No 1 of 1955*;[138] and the Canadian case of *Re Language Rights under the Manitoba Act 1870*.[139]

136 Kerr disagrees with this view and argues that in these situations the law admits to the doctrine of necessity: Kerr, p 2.

137 (1958) 61 NLR 491.

138 PLD 1955 FC 435; PLR 1956 WP 598.

139 (1985) 19 DLR (4th) 1.

PS Bus Co dealt with a challenge to the validity of legislation nationalising bus companies in Sri Lanka, on the grounds that the parliament which enacted it was improperly constituted. It gives some weak support for the proposition that, out of necessity, the courts will recognise the legislation of an invalidly constituted parliament. The case is not strong authority because, first, and for good reason, the court was of the opinion that the Parliament was not invalidly constituted. The argument for the petitioner, a bus company which had been given notice that its buses were to be compulsorily acquired, was that as the Lower House, which passed the legislation, consisted of 94 members rather than the constitutionally required 95, it was invalidly constituted and hence the law was invalid. This argument was rightly rejected.[140] Secondly, the remedy sought by the petitioner was a prerogative writ of quo warranto or certiorari to quash the notice of acquisition. These are discretionary remedies and the court gave some credence to the principle of necessity by refusing to exercise the discretion in favour of the petitioner on the grounds that first, there was no evidence that the nationalisation Act would not have been passed if the House had consisted of the full 95 members, and that secondly, to grant the writ made all the legislation of the Parliament open to challenge. This would have thrown the government of the country into chaos.[141] This case is not strong authority for the principle that out of necessity the courts will recognise the Acts of an invalidly constituted parliament, because the remedy sought was dicretionary. It is not clear what the result would have been if the remedy had not been discretionary—for example if the petitioner had sued for conversion after the buses had been expropriated.

The Pakistani case of *Reference by His Excellency, the Governor-General, Special Reference No 1 of 1955*[142] is stronger authority for a limited principle of necessity in such situations. This case arose from earlier decisions of the Federal Court of Pakistan. These cases held, first, that 44 Acts of the Constituent Assembly of Pakistan and much provincial legislation exercising powers conferred by the Constituent Assembly were invalid because the Acts of the Constituent Assembly had not received the royal assent as required by the constitution[143] and secondly, that the Governor-General did not have any constitu-

140 (1958) 61 NLR 491 at 496.

141 Id at 496-7.

142 PLD 1955 FC 435; PLR 1956 WP 598.

143 *Federation of Pakistan v Tamizuddin Khan* PLD 1955 FC 240; PLR 1956 WP 306.

tional power to retroactively validate the Acts by back-dating the royal assent to the date when they purported to become law.[144] It was conceded in the three cases that the Constituent Assembly, if it had been sitting, would have had the power to validate all of the laws retroactively. However, as it had been dissolved, there was no constitutional way to validate the legislation until it had been recalled. To avoid chaos, the Governor-General issued a proclamation validating the legislation temporarily, until the Constituent Assembly could be recalled and given the opportunity to validate it permanently. The Federal Court of Pakistan upheld the proclamation by a majority to avoid the chaos that would follow from a decision that a large proportion of the country's legislation was invalid. The principle of necessity required that the Governor-General be allowed the power to validate legislation temporarily until the Constituent Assembly could be recalled to deal with the issue.

Re Language Rights under the Manitoba Act 1870[145] reached a similar conclusion, although the court did not base its decision on the principle of necessity. In that case, there was a reference to the Canadian Supreme Court by the Governor-General of questions under the *Manitoba Act* 1870, under which Manitoba became a province of Canada. Section 23 of that Act required publication of all legislation of Manitoba in both English and French, a requirement that had been abandoned in 1890. The Supreme Court held that publication in both languages was a mandatory manner-and-form requirement which had to be complied with to produce valid legislation. As it had not been followed since 1890, all of the legislation of Manitoba since that date was invalid. However, the court allowed temporary validity to those laws for the period necessary for the Manitoba Parliament to carry out its constitutional duty of reenacting and publishing the laws in both languages. It based this decision on a principle which it called an aspect of the rule of law, but which is akin to that of necessity. The principle is that the rule of law requires the creation and maintenance of a system of positive law to ensure that both officials and private individuals are subject to legal limits on their actions. To allow even a short period in which there was no legal system, and in which all legal rights and obligations were invalid and non-existent, was inconsistent with this principle.

144 *Usif Patel v The Crown* PLD 1955 FC 387; PLR 1956 WP 598.
145 (1985) 19 DLR (4th) 1.

In both the *Reference by His Excellency, the Governor-General, Special Reference No 1 of 1955* and *Re Language Rights under the Manitoba Act 1870*, the courts stressed that the principle of necessity, and related principles, only justified interim measures. In both cases, the courts held that they would only recognise the invalid laws in question until the legislature had an opportunity to validate them.[146] In a different context, the Court of Appeal of Cyprus in *Attorney-General for Cyprus v Mustapha Ibrahim*[147] supported the view that the principle of necessity only allows unconstitutional measures of a temporary nature, and the authority for those measures ends when their necessity ends. The Constitution of Cyprus provided for mixed courts, consisting of judges from both the Greek and Turkish communities, to try some criminal offences, and a constitutional court consisting of judges from both communities. When fighting erupted between the two communities, the Turks refused to participate in mixed courts. In response, the Parliament of Cyprus purported to pass a law abolishing mixed courts for the duration of the emergency and conferring the jurisdiction of the Constitutional Court on the Court of Appeal. The Court of Appeal upheld the law, although it was inconsistent with the Constitution, as a temporary measure which was operable only for the duration of the emergency.[148]

Applying these principles in the present case, if there were no validly constituted Legislative Council, the courts would be likely to hold that there was no valid parliament. After the *Australia Act*, the only constitutional way in which the Parliament of Tasmania could be reconstituted is by amending the Australian Constitution to confer the power to do so on the Federal Parliament. In the interim, the courts are likely to allow the House of Assembly to exercise such powers necessary to ensure that moneys are appropriated to enable the government to continue. These powers would be temporary and would expire once it is possible to reconstitute the Parliament in accordance

146 In *Reference by His Excellency the Governor-General, Special Reference No 1 of 1955* PLD 1955 FC 435; PLR 1956 WP 598, Muhammad Munir CJ for the majority distinguished the emergency proclamation considered in that case from the attempt to give the royal assent retroactively in *Usif Patel v The Crown* PLD 1955 FC 387; PLR 1956 WP 598, on the basis that the proposal in *Usuf Patel* was that the executive impose a permanent solution, whereas the proposal in *Reference by His Excellency the Governor-General, Special Reference No 1 of 1955* was for a temporary executive measure until the Constituent Assembly could be recalled and the emergency measures validated: PLD 1955 FC 435 at 478.

147 [1964] *Cyprus Law Review* 195.

148 See especially the judgment of Josephides J: Id at 265-7.

with the Constitution. It is doubtful whether the courts would allow the House of Assembly and the Governor to exercise any other legislative powers because, arguably, other powers are not necessary to enable government to continue until the Parliament is properly constituted. In particular, the courts may be reluctant to allow the House of Assembly and the Governor to exercise the power to reconstitute Parliament conferred by the *Australia Act* as legislation reconstituting the Legislative Council would not be a temporary, but a permanent, measure. As there is another constitutional way to reconstitute the Parliament, that is, by a referendum to give the Commonwealth Parliament the power, the courts would not be likely to allow the House of Assembly to do so until it is clear that the Commonwealth Parliament is unable or unwilling to act.[149] If the courts give the House of Assembly and the Governor the power to reconstitute the Parliament, it is likely that the power would be limited to ensuring that the Legislative Council is reconstituted according to the current Constitution, including the existing electoral system, rather than on a different basis. Otherwise, the courts would be allowing the Assembly and the Governor the power to amend the Constitution, a power which is not necessary to reestablish constitutional government.[150]

The courts are likely to decide that a failure to hold periodic elections does not invalidate Parliament, at least while the Legislative Council has sufficient members to continue operating; however, it is not clear whether they would intervene to invalidate a particular periodic election at the suit of an interested party. A decision that a particular periodic election cannot be held because there is no valid way to determine the divisions in which the election is to be held does not, for reasons given above, automatically threaten the existence of a valid parliament. There may therefore be less reluctance on the part of the courts to invalidate an election.

149 For example, a referendum to give the Commonwealth Parliament the power to reconstitute the Tasmanian Parliament might fail, or the Commonwealth may only be prepared to act on conditions which are unacceptable to the Tasmanian Government.

150 The judgment of Muhammad Munir CJ for the majority in *Reference by His Excellency the Governor-General, Special Reference No 1 of 1955* PLD 1955 FC 435 at 478 makes it clear that the legislative power conferred on the Governor-General by the principle of necessity only extended to temporarily validating those laws the invalidity of which had caused the crisis, not to making any changes in them. By analogy, any power which the House of Assembly and Governor would have out of necessity to reconstitute the parliament only extends to reconstituting it as it was, not to making any changes.

The High Court in *A-G (Commonwealth); Ex rel McKinlay v Commonwealth*[151] decided that a general election which was held in breach of s 24 of the Constitution did not invalidate the resulting parliament or any legislation it enacted.[152] However, in that case, if the election were invalid, the resulting parliament would also have been invalid, a result too disruptive of good government to contemplate. This case can be distinguished from the present situation, where to invalidate a periodic election would not necessarily invalidate the Parliament unless it left the Legislative Council without the numbers necessary to exercise its powers. It is arguable that the courts would invalidate a periodic election for the Legislative Council where the viability of the Parliament would not be threatened. It may also be possible to challenge an election before it is held on the ground that to hold it would be invalid.

A challenge to periodic elections on the grounds that there is no proper way of determining the order in which elections are to be held is, however, likely to fail because the result would not merely quash an invalid election but decide that no valid election could be held. The courts would be slow to reach such a conclusion, as it ignores the clear duty to hold elections imposed by the *Constitution Act* s 18 and the *Electoral Act* s 77, and ultimately threatens the validity of the Parliament.

Conclusion

Until Part 4 of the Act is implemented, elections must be held under the old boundaries. Once Part 4 is implemented, strong arguments support the view that the Act allows determination by the Governor of the order in which elections are to be held after a redistribution, when he or she issues writs for periodic elections under s 77 of the *Electoral Act*. It is not inconsistent with the scheme of the Act to determine the order in which periodic elections are to be held when writs for those elections are issued. No arguments of general legal principle exist which make it inappropriate to determine the order of elections in this way.

151 (1975) 135 CLR 1.

152 The decision is supported by dicta in *Victoria v Commonwealth* (*PMA* case) (1975) 134 CLR 81 at 120, 156-7 and 178 per Barwick, Gibbs and Stephen JJ, to the effect that if an election were called under s 57 without legal sanction, the resulting parliament would be valid.

It is therefore unlikely that the courts would hold that Parliament must legislate to determine the order of elections before valid elections can be held. Such a decision would threaten the existence of Parliament because if there is no validly constituted Legislative Council, there is no validly constituted parliament. The argument that legislation contemplates the possibility that the Legislative Council could cease to exist, so that Parliament would consist of the Governor and the House of Assembly alone, is clearly wrong and cannot be accepted.

If there is no validly constituted parliament, the only way of reconstituting it would be by legislation of the Federal Parliament exercising the additional power to cure defects in State constitutions conferred by s 128 of the Constitution. It may be that, in the circumstances, courts would recognise the Governor and House of Assembly as a *de facto* legislature for some, or all, purposes, until Parliament is reconstituted so that government can continue. However, it is only possible to speculate on the basis on which the courts would do this, as the decision would be based on necessity rather than law. To avoid such necessities, the courts are likely to reject any interpretation of the Act which threatens the validity of Parliament.