MANNER AND FORM IN WESTERN AUSTRALIA: AN HISTORICAL NOTE

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The constitutional history of Western Australia began with a piece of Imperial sunset legislation called "The Swan River Act 1829"[1] which was intended to operate only until 31 December 1834. It was extended by successive orders in council until overtaken by later Imperial legislation applying to all Australian colonies. It provided for the appointment of three or more persons resident in the Colony "to make, ordain and establish all such Laws, Institutions and Ordinances and to Constitute such Courts and Offices as may be necessary for the Peace, Order and good Government of His Majesty's subjects and others within the said Settlements".[2]

In 1850, another Imperial statute, the Australian Colonies Government Act,[3] set up a charter for self-government in the Australian colonies. Section 9, relating to Western Australia, provided that on the petition of not less than one-third of the householders of the Colony seeking the establishment of a legislative council it would be lawful for the appointed legislature to pass laws to establish that council. One-third of its members would be Crown appointments and the balance elected by the inhabitants of the Colony. Section 14 conferred power upon the Governors of the Australian Colonies, with the advice and consent of their respective legislative councils, to make

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1. 10 Geo IV c 22.
2. On the other side of the continent, constitutional evolution was further advanced. The Australian Constitutions Act 1842 (5 & 6 Vict c 76) established a legislative council for New South Wales to be composed of 36 members, 12 to be appointed and 24 elected. By s 29 of the Act the Governor of the Colony, acting with the advice and consent of the legislative council, was given power to make laws for the peace, welfare and good government of the colony.
3. 13 & 14 Vict c 59.

laws for the peace, welfare and good government of the colonies. A proviso to this section required that "no such law shall be repugnant to the Law of England or interfere in any manner with the sale or other appropriation of the lands belonging to the Crown within any of the said Colonies". The legislative councils were also permitted to amend laws in force under the Act relating to elections, including the qualifications of electors and members, and to establish bicameral legislatures. This power of amendment was subject to a requirement that any such law be reserved for the royal assent and be laid before both Houses of the British Parliament for at least 30 days.

Because the Australian Colonies Government Act 1850 did not authorise the colonial legislatures to deal with Crown lands, proposed constitutions conferring that power required specific authorisation by the British Parliament. The New South Wales and Victorian Constitution Acts of 1855, having been passed by the colonial legislatures, were scheduled to Acts of the British Parliament which gave them their legal force. A power to amend the Constitution Act in each case was conferred by the covering statute of the British Parliament.[4]

These Acts were empowering in their effect, putting the colonial legislatures in charge of their own constitutional destinies. To the extent that those constitutions imposed restrictions relating to the procedures for their own amendment, the Imperial statutes allowed them to be repealed or altered by simple majority. An example of those restrictions was found in section 15 of the Constitution Act 1855 (NSW) by which the legislature could alter the system of representation. Laws passed for that purpose, however, could not be presented to the Governor for the royal assent unless they had been passed with an absolute majority in the Legislative Council and a two-thirds majority in the Legislative Assembly. This was one of the earliest examples in Australia of a manner and form provision.[5]

4. In the British statute relating to the New South Wales Constitution Act (18 & 19 Vict c 54) s 4 provides:

> It shall be lawful for the Legislature of New South Wales to make Laws altering or repealing all or any of the Provisions of the said reserved Bill, in the same Manner as any other Laws for the good government of the said Colony, subject, however to the Conditions imposed by the said reserved Bill on the Alteration of the Provisions thereof in certain Particulars, until and unless the Conditions shall be repealed or altered by the Authority of the said legislature.

The corresponding section with respect to Victoria (18 & 19 Vict c 55), also s 4, was in similar terms.

5. For the purpose of this paper that term shall be taken to apply to a section of a constitution regulating the way in which the constitution or laws made under it may be amended.

It was a matter of some significance that section 4 of the Imperial statute, authorising the amendment of the New South Wales and Victorian Constitutions, allowed the special majority restrictions to be themselves repealed or amended by simple majority. This was contrary to the wishes of the colonial proponents of the Constitution, most notably Mr W C Wentworth. He described the introduction of section 4 in the form permitting simple majority amendments as a "dangerous and subversive change".[6] It seems that the Imperial authorities had a better developed sense of the sovereignty of parliament and were not used to the idea of entrenched constitutions.[7]

THE COLONIAL LAWS VALIDITY ACT 1865

The Constitution Act 1856 (SA) was enacted under the Australian Colonies Government Act 1850 and was not otherwise authorised by the British Parliament. By section 34, it required that no amendment to the constitution of the Legislative Council or House of Assembly could be made unless the second and third readings of the Bill had been passed with an absolute majority in each House.

Within a few years of its passage, Benjamin Boothby, a judge of the Supreme Court of South Australia, began holding various of the laws of that Colony invalid for repugnancy to the laws of England and failure to comply with a requirement that they be reserved for royal assent.[8] Boothby J gave like treatment to certain aspects of the Constitution Act 1856 (SA). This led ultimately to his removal as a judge and to the passage of three British statutes to put the validity of the impugned colonial law-making process beyond doubt. The first, passed in 1862, was entitled, "An Act ... for the Better Government of Her Majesty's Australian Colonies".[9] The second was, "An Act to confirm certain Acts of Colonial Legislatures 1863".[10] The third, passed in 1863, bore the long title, "An Act to remove Doubts as to the Validity of Colonial Laws".[11] This became better known as The Colonial Laws Validity Act 1865. The rationale of that Act appears from an opinion written on 28 September 1864 by two Law Officers, Roundell Palmer and R P Collier, to the Colonial Office in London. In the course of their opinion,

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6. A C V Melbourne *Early Constitutional Development in Australia* (Brisbane: Uni of Qld, 1963) 422.
7. *Western Australia v Wilsmore* (1982) 149 CLR 79, Gibbs CJ, 84.
8. He so held with respect to the Real Property Act 1857 (SA).
9. 25 & 26 Vict c 11.
10. 26 & 27 Vict c 84.
11. 28 & 29 Vict c 63.

they wrote:

> Having in view the unfortunate disposition manifested upon the bench of South Australia to favour technical objections against the validity of Acts of the Colonial Legislature, and the confusion and general sense of insecurity which it must be the tendency of such a state of things to produce, we think it will be very expedient to pass an Imperial Act for the purpose of empowering the Legislature of that Colony (and of any other Colonies or Colony which may be in like circumstances) to alter its own constitution, and at the same time to confirm absolutely all South Australian Acts, which down to this time have received the assent of Her Majesty or of the Governor in Her Majesty's behalf. We think that the suggestion of the Colonial Attorney-General to this effect is far preferable to any more limited form of remedy.[12]

Their opinion concluded with a resounding denunciation of Boothby J:

> The reasoning ... of Mr Justice Boothby, travels in a vicious circle, and results in repugnant and absurd conclusions. But we think if it were better founded it would be properly and sufficiently met by such legislation as that which we have had the honour to recommend in our answer to the preceding question.[13]

So it was that the Colonial Laws Validity Act 1865, described by Professor A V Dicey as "the charter of colonial legislative independence",[14] came to pass and the phrase "manner and form" was born into the Australian constitutional pantheon. For section 5 of the Act provided:

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

The section was the repository of paradox. For while giving full power to colonial legislatures to alter their constitutions, it also gave them a tool to bind their successors by imposing procedural shackles upon the law-making process. By attaching requirements of manner and form in the alteration of the constitution, a legislature could make its alteration almost impossible. And by the process of "double entrenchment", it is arguable that the means of altering a law on any topic could be prescribed and the prescription itself protected from amendment by a manner and form requirement.[15] In *West*

12. D P O'Connell & A Riordan *Opinions on Imperial Constitutional Law* (Melbourne: Law Book Co, 1971) 72.
13. Id, 73.
14. W G McMinn *A Constitutional History of Australia* (Melbourne: OUP, 1979) 82.
15. See *West Lakes Ltd v South Australia* (1980) 25 SASR 389, Zelling J, 414.

Lakes Limited v South Australia, Zelling J commented in passing:

> It may seem somewhat quaint that in 1980 this Court has to consider an Imperial Statute passed in the high noon of Empire, when today every tiny archipelago of islands is automatically freed from the operation of the Colonial Laws Validity Act at the time when it attains independence. However our fathers of 50 years ago thought differently, and so the Colonial Laws Validity Act remains to trouble us today.[16]

Given the role of the Supreme Court of South Australia in the genesis of the Act, there was a certain irony about this observation.

In the same year that the Colonial Laws Validity Act 1865 was passed, the householders of Western Australia presented a petition to the British Parliament calling for the establishment of a representative legislative council under section 9 of the Australian Colonies Government Act 1850. The petition was inspired by the knowledge that transportation of convicts to the State would cease in 1868. It was frustrated by delays in which the then Governor, Dr Hampton, seems to have had some part.[17]

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16. Id, 410.
17. J C Battye *Western Australia — A History from its Discovery to the Inauguration of the Commonwealth* (Perth: UWA Press, 1978) 276–285. In 1860, with the arrival of Governor Weld, the movement took on new life. He had been Premier of New Zealand from 1864 to 1865 and had strong views in favour of representative government. In a letter to the Secretary of State for the Colonies, Lord Granville, dated 1 March 1870, he wrote:

> I see no reason to suppose that under the present system the colonists will ever become more fitted for self-government, and I greatly dread that if its introduction be long deferred they will become far less fitted. At present there are still men among them whose English education and English reminiscences would guide them in the almost forgotten path; the younger generation may grow up with less political education and far less thought, I fear, of the real responsibilities of good citizens and loyal subjects. An almost primitive simplicity and kindness of manners, very pleasing to see, strangely enough co-exists in the same country that holds a large proportion of the criminal class; and I should be unjust were I not to point out with gratification that it is not uncommon to find men formerly belonging to the latter classes who have made good settlers and have raised themselves to a position of respectability and independence.

On 1 June 1870, an Ordinance (33 Vict No 13) was enacted to provide for the establishment of a Legislative Council pursuant to the Australian Colonies Government Act 1850. The Ordinance provided for the establishment of a Legislative Council comprising 18 members, 6 of whom were to be appointed by the Crown and the remainder elected by the inhabitants.

RESPONSIBLE GOVERNMENT IN WESTERN AUSTRALIA

Responsible government did not come to Western Australia until 1890. In the preceding year the Legislative Council passed a Constitution Bill. The Bill had to be brought into effect by the Imperial Parliament since it went beyond the legislative powers conferred on the colonial legislature by the Australian Colonies Government Act 1850. The exchange of correspondence between Governor Broome and the then Colonial Secretary, Lord Knutsford, over the 18 months from April 1888 to October 1889, regarding the contents of the proposed constitution, makes interesting reading. The desire for a bicameral legislature rather than a single chamber parliament was advanced by the Governor in terms which did not reflect an unqualified confidence in the ability of the people to govern themselves. The following passage from his letter to Knutsford of 28 May 1888 is indicative:

> To initiate such a hitherto unheard of development of democracy would also be to strike a blow at the position, already attacked by some, of the Upper Houses which are the safeguards of the other Australian States. As for Western Australia itself, the danger of carrying the democratic precept to its highest pitch at one bound in a young and politically untried community, with the special past circumstances of this Colony, would surely be very great.[18]

In the event, the Upper House (the Legislative Council) initially consisted of 15 persons appointed by the Governor. The Constitution Act 1889 (WA) provided that after six years, or when the population reached 60 000, it was to become elective.

In the draft Constitution Bill which Governor Broome forwarded to Knutsford in May 1888 there were two substantial clauses, 56 and 57, imposing manner and form requirements upon the power of the proposed legislature to alter the system of electoral representation and the provisions of or in force under the Constitution respectively. In relation to electoral change, including the number of members of the Houses of Parliament, the proposed requirement was that it would not be lawful to present such a Bill to the Governor for royal assent unless it had been passed by an absolute majority at the second and third readings in the Legislative Council and Legislative Assembly and a joint address presented by the two chambers to the Governor stating that the Bill had been so passed. In respect of the broader category of changes affecting constitutional laws, the requirement was again

18. WA Legislative Council Votes & Proceedings No 139 *Despatches between His Excellency the Governor and the Right Honourable the Secretary of State for the Colonies — Responsible Government* (Perth: Govt Printer, 1888) ¶ 14.

for absolute majorities in both chambers, a joint address to the Governor stating that the amending Bill had been so passed and a requirement that every such Bill should be reserved for royal assent and laid before both Houses of the Imperial Parliament for a period of 30 days.

Knutsford condensed the manner and form provisions into a proposed clause 61 of a draft Bill which ultimately became section 73 of the 1889 Act. He made this comment:

> I have not thought it necessary to retain clause 56 of your draft which gives special power to alter the system of representation. The first clause of the Bill contains a general power of making laws; and clause 61 of the draft Bill gives power to alter the provisions of the Bill, although it requires special majorities for certain purposes. These clauses appear sufficiently to provide power for varying the details of the electoral laws by legislation in the ordinary way, while any change in the constitution of either House will require the assent of an absolute majority of the members of each House.[19]

The same procedure was used to give effect to the proposed constitution as had been used in Victoria and New South Wales. The Constitution Act 1889 was scheduled to an Act of the British Parliament entitled "The Western Australia Constitution Act 1890". Section 5 of the covering Act embodied a provision using basically the same language as section 4 of the Imperial Constitution Acts of 1855 for New South Wales and Victoria.[20]

In 1893, when the population of Western Australia had reached 60 000, the Constitution Act Amendment Act 1893 (WA) was passed. It effectively took out of the Act of 1889 the provisions relating to the composition of the Legislative Assembly and Legislative Council and also dealt comprehensively with the franchise and qualifications for membership of the two chambers. The Legislative Council was henceforth to consist of 21 members representing seven provinces, elected for two year terms under a property franchise. The

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19. Id, No 81 ¶ 19 (31 August 1888).

20. S 73 of the Constitution Act 1889 provided that:

> The legislature of the Colony shall have full power and authority, from time to time, by any Act to repeal or alter any of the provisions of this Act. Provided always, that it shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which any change in the Constitution of the Legislative Council or of the Legislative Assembly shall be effected, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members, for the time being of the Legislative Council and the Legislative Assembly respectively. Provided also, that, every Bill which shall ... interfere with the operation of sections sixty-nine, seventy, seventy-one, or seventy-two of this Act, or of Schedules B, C, or D, or of this section shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon.

Legislative Assembly was redefined to comprise 30 members elected for four year terms, also under a property franchise.

1899 saw the enactment of the Constitution Acts Amendment Act (WA). Its stated purpose was to amend the Constitution Act 1889 and to amend and consolidate other amending Acts. It again altered the composition of the two chambers of the Parliament. The amendment continued the process of cell-like division begun in 1893 which led to the contents of the original Constitution Act 1889 being distributed in that Act, the Act of 1899 and the Electoral Act 1907. This had consequences for the application of the manner and form provisions of section 73 to those provisions of the later Acts which related to the constitution of the Legislative Council and the Legislative Assembly. For the restrictions imposed by section 73 on amendments to the law regulating the constitutions of the two Houses only protected so much of the Constitution as was to be found in the Act of 1889. This was because section 73 authorised the repeal or alteration of the provisions of "this Act", that is to say, the Act of 1889. And as the High Court held in *Western Australia v Wilsmore*,[21] the manner and form requirements of the section applied only to those provisions. Gibbs CJ acknowledged that the limitation thus imposed on the power of the legislature was curiously weak and ineffectual,[22] but was of the view that this was intended by the framers of the statute. He referred to the history of the 1855 Constitution Acts of New South Wales and Victoria and to the fact that section 4 of the covering Act in each case permitted the manner and form provisions to be amended by simple majorities.[23] In that connection it may be significant that section 73 was the product of an Imperial and not a local draftsman. For the original manner and form provisions, clauses 56 and 57 in the draft transmitted to Knutsford by Governor Broome, were not limited by reference to "this Act". They would have applied the absolute majority and joint address provisions to defined subject matters. Clause 57 spoke of a power "to alter the provisions or laws for the time being in force under this Act or otherwise concerning the Legislative Council or Legislative Assembly". Wilsmore, whose challenge to the validity of certain sections of the Electoral Act,[24] disenfranchising him, failed because those provisions were not contained in the 1889 Act, may have been the victim of an Imperial draftsman's sleight of hand.

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21. (1982) 149 CLR 79.
22. Id, 83–84.
23. Id, 84.
24. S 18 of the Electoral Act 1907 (WA), as amended by s 7 of the Electoral Act Amendment Act (No 2) 1979 (WA).

At the end of the nineteenth century, the Western Australian constitution was to be found in the Constitution Act 1889, the Constitution Acts Amendment Act 1899, the Constitution Act 1890, the Colonial Laws Validity Act 1865 and possibly the Australian Colonies Government Act 1850. Within a short time, the Western Australian Constitution was further redefined by the Commonwealth of Australia Constitution Act 1900.[25]

I will not attempt to explore the scope of that redefinition beyond a reference to section 106 of the Commonwealth Constitution, which provides:

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

The last words of that section, "until altered in accordance with the Constitution of the State", seem to assume or posit compliance with the manner and form requirements of State constitutions. In *Western Australia v Wilsmore*, Burt CJ in the Full Court of the WA Supreme Court said:

> [S]ection 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.[26]

In this way manner and form provisions in State Constitutions are supported by the Commonwealth Constitution.

RECENT DEVELOPMENTS

Despite the "curiously weak and ineffectual" operation of section 73 in its original form, sub-sections have been added which seek to protect the office of Governor, the Legislative Council structure, the principles of direct election to the Legislative Assembly and Legislative Council and the present numbers of those two chambers. They also apply to any alteration to section 73 itself, thus doubly entrenching the protected areas. To enact laws of the kind referred to in section 73(2), it is necessary that they be passed by absolute majorities of both chambers and approved by a referendum of electors. If there has been a failure to comply with those provisions, electors may apply to the Supreme Court for a declaration or injunction to enforce the manner and form requirements either before or after presentation of the impugned Bill for royal assent.

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25. 63 & 64 Vict c 12.
26. (1981) 33 ALR 13, 18; Lavan SPJ & Jones J concurring.

In 1985 and 1986, the Australia Acts were passed in the British, Commonwealth and State Parliaments. The object of the legislative scheme, which was the product of an agreement between the Commonwealth and the States, was "to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation". Significantly for the present topic, section 1 of the Australia Act 1986 (UK) provides that no subsequent (UK) Act shall extend or be deemed to extend to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, State or Territory. Section 2(2) provides:

> It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this sub-section confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.

Section 3(1) terminates the operation of the Colonial Laws Validity Act 1865 in connection with subsequent State legislation.[27] Specifically, in relation to manner and form provisions of State constitutions, section 6 provides:

> Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the Constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by law made by that Parliament whether made before or after the commencement of this Act.

The effect of this has yet to be worked out. The Australia Act 1986 (UK), however, remains an Act of the British Parliament and the argument is certainly open that section 1 could be repealed by that same Parliament.[28] The manner and form provisions of the State constitutions seem, as they were before, to be supported by British law.

Outside the area of operation of doubly entrenched manner and form provisions, the Constitution is properly described as "uncontrolled" in the sense that no special procedures are required to amend or repeal any part of it. As Lord Birkenhead said in giving the judgment of the Privy Council in *McCawley v The King*:

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27. S 3(1) of the Australia Act 1986 (UK) provides: "The Act of the Parliament of the United Kingdom known as the Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State."

28. M Moshinsky *Re-enacting the Constitution in an Australian Act* (1989) 18 Fed L Rev 134, 137; J A Thomson, *The Australia Acts 1986: A State Constitutional Law Perspective* (1990) 20 UWAL Rev 409.

> It was not the policy of the Imperial Legislature, at any relevant period, to shackle or control ... the legislative powers of the nascent Australian Legislatures. Consistently with the genius of the British people what was given was given completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.[29]

But the operation of section 6 of the Australia Act 1986 (UK), as with section 5 of the Colonial Laws Validity Act 1865 before it, seems to establish a basis, still rooted in Imperial law, whereby a legislature may control its own future actions.

The role of section 5 of the Colonial Laws Validity Act 1865 was considered in *Attorney-General (NSW) v Trethowan*,[30] where Dixon J posed the question: How far does section 5 allow a constituent legislature to adopt a rigid constitution? The provision, he said, recognised that the exercise of the legislative power may to some extent be qualified or controlled by law. The extent to which a State law may control the power to make laws respecting the Constitution, and powers and procedures of the legislature, is limited:

> It cannot do more than prescribe the mode in which laws respecting these matters must be made. To be valid, a law respecting the power of the legislature must 'have been passed in such manner or form as may from time to time be prepared by any ... colonial law' (sc, a law of that legislature) 'for the time being in force'. Its validity cannot otherwise be affected by a prior law of that legislature. In other words no degree of rigidity greater than this can be given by the legislature to the constitution.[31]

Section 6 of the Australia Act 1986 (UK) seems to present the opportunity arising previously from section 5 of the Colonial Laws Validity Act 1865 for State legislatures to bind their successors to particular procedures.

Procedural requirements under State constitutions have typically applied to the alteration of laws relating to the constitution of the legislature. Questions have arisen whether manner and form provisions may be used to protect agreements between State governments and miners or developers by appropriate conditions on any variation to the agreements: see *Comalco Ltd v Attorney-General*[32] and *West Lakes Limited v State of South Australia*.[33] It may well be the case that there are other activities and principles deserving of protection by manner and form legislation. The independence of the State judiciary might be one area that could be addressed and better protected; the

29. [1920] AC 691, 706.
30. (1931) 44 CLR 394, 430.
31. Id, 431.
32. [1976] Qd R 231.
33. Supra n 15.

independence of Parliament itself from the influence of the Executive is another. A State Bill of Rights could also conceivably be so entrenched. The positive possibilities of constitutional manner and form requirements should not be overlooked. Their vice in limiting the scope of action of subsequent legislatures suggests, however, that they should be applied with considerable caution.