When Should History Get in the Way of a Good Idea? A Comparison of Approaches to Interpreting the Commonwealth and Western Australian Constitutions

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This article considers and compares approaches to construing similar Western Australian and Commonwealth constitutional provisions, particularly the use made of the historical context in which the respective constitutional provisions were formulated. The argument is that the High Court has, in considering laws affecting parliamentary elections, tended to approach the construction of State constitutional provisions in a manner which gives greater influence to historical context and, in doing so, has tended to allow for a greater measure of legislative choice (which is not necessarily a bad thing) than under the Commonwealth Constitution.

INTRODUCTION

It is a common human failing to regard one's own judgment as inherently superior to those who may express different views or values. Human institutions, as well as individuals, can be guilty of this vice.

A role of constitutional law in the Australian federation is to determine which institutional view (legislative, executive or judicial; state or federal) ought to prevail in the case of differences as to the policy to which Australian law should give effect. One challenge facing the judicial branch of government, which has responsibility for the demarcation of boundaries of governmental power but which also itself exercises that power, is self-restraint. Curial decisions about constitutional construction may involve defining the circumstances in which non-judicial branches of government may make policy decisions to which the courts must give effect, even if they do not agree with the outcome.

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POLICY DECISIONS AND THE EXERCISE OF JUDICIAL POWER

Policy decisions are not foreign to the exercise of judicial power. Courts are regularly faced with policy choices in the development of common law and equitable principles, the interpretation of statutes and the construction of constitutional provisions.

1. Common Law and Equity

In applying common law and equitable principles the courts must necessarily choose the policy which will inform the content of the 'judge-made' law. However, in this area the doctrine of precedent provides for judicial restraint. Where the policy of the existing law departs from that which a court considers to be desirable, the courts have recognised limits on the extent to which the courts may effect changes to the law. If the controlling precedent is that of the High Court or an intermediate appellate court[1] it will usually only be the High Court which will be in a position to change the law. Even the High Court, however, recognises that there are limits on the extent to which the common law and equity may be changed other than in an incremental manner.[2] Further, decisions about common law or equitable principles are subject to legislative reform.

2. Statutory Interpretation

The interpretation of statutes has recently been described in the following terms:[3]

> [J]udicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. …, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy.

It is, of course, the courts which identify and apply the 'rules of interpretation', and the rules which they adopt may well have policy implications. For example, the 'principle of legality' has assumed recent prominence in decisions of the High Court.[4] The protection offered by this principle to 'fundamental common law principles, rights and freedoms'[5] absent clear and unequivocal language requires the courts to identify those fundamental common law principles, rights and freedoms, and what changes to those identified principles require expression in

1 *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151-2 [135].
2 See *PJA v The Queen* [2012] HCA 21, [29]-[30].
3 *Zheng v Cai* (2009) 239 CLR 446, 455-6 [28].
4 See, for example, *Green v The Queen* (2011) 244 CLR 462, 472-3 [28]; *Lacey v A-G (Qld)* (2011) 242 CLR 573, 582 [17]; *Hogan v Hinch* (2011) 243 CLR 506, 526 [5]; *South Australia v Totani* (2010) 242 CLR 1, 28-9 [31]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [14]-[15].
5 *Lacey* (2011) 242 CLR 573, 582 [17].

the clearest language. That is a judicial task which bears a significant policy aspect.

The rules of interpretation still leave open to Parliaments the ultimate policy choice to be made in a particular case. A Parliament faced with a curial decision of which it does not approve may generally either change the rule of interpretation or amend the statute being construed so as to produce a different result.[6]

3. Constitutional Interpretation

By contrast, in the field of constitutional law it is the courts, construing and drawing implications from entrenched provisions, which have the final say on any issue of policy which they consider to be matters for curial determination under the relevant constitutional provisions.[7] The need for judicial restraint in giving effect to judicial policy is greatest in this context, particularly when drawing implications from the text and structure of a constitution,[8] where the only means for altering the result is usually constitutional change involving a referendum.
As Brennan J noted in *Nationwide News Pty Ltd v Wills*:[9]

> *The only foundation for judicial review of legislation is the subjection of both the Parliament and the courts to the supreme law of the Constitution and the Constitution reposes the function of determining whether a proposed law is for the peace, order and good government of the Commonwealth in the Parliament exclusively. The courts are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise. If the courts asserted a jurisdiction to review the manner of a legislative power, there would be no logical limit to the grounds on which legislation might be brought down.*

CONSTRUCTION OF CONSTITUTIONAL WORDS AND PHRASES

A particular challenge may arise in cases where the courts are required to construe a constitutional term or phrase which may bear a number of meanings. The currently developing jurisprudence in relation to Chapter III of the *Commonwealth Constitution* provides an illustration of what I mean by this. The High Court has recognised that because s 73 of the *Commonwealth Constitution* provides for appeals from the 'Supreme Court' of each State it is implicit that the states must maintain bodies fitting the description of a 'Supreme Court'. A state law which would take from its Supreme Court one of its 'defining characteristics' will

6 Although, as the decisions in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 and *Lacey v A-G (Qld)* (2011) 242 CLR 573 illustrate, finding sufficiently clear and unequivocal language can present a challenge for the parliamentary draftsperson.

7 Subject to constitutional amendment, which has been traditionally difficult to achieve, under s 128 of the Constitution.

8 See the discussion in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 142-4 (Brennan J).

9 (1992) 177 CLR 1, 44.

be inconsistent with this constitutional imperative and therefore invalid.[10] But the identification of what are the defining characteristics of a 'Supreme Court' has defied exhaustive exposition.[11] We now know those characteristics include a requirement that the court be an independent and impartial body which is not subject to legislative or executive direction as to how to deal with particular cases.[12] A Supreme Court must have jurisdiction to review the lawfulness of the acts of other courts and bodies.[13] It is composed of judges who give reasons for their decisions.[14] No doubt other features of a Supreme Court await classification as 'defining characteristics'.

Similar issues arise with the constitutional phrase 'chosen by the people' employed in both state and federal constitutions, and which are discussed in detail below.

These constitutional words and phrases have the potential to become constitutional 'buckets' which are necessarily filled with meaning by decisions of courts. But what are the limits beyond which judicial explanation of these constitutional words and phrases becomes no more than the judge giving effect to his or her own policy preferences?

Historical Context as a Restraint

One of the tools of, and constraints on, constitutional interpretation is historical context. The majority in the *Engineers' case* recognised that the *Commonwealth Constitution* must be read in light of the circumstances in which it was made, with knowledge of the combined fabric of the common law and the statute law which preceded it.[15] An examination of historical context ought disclose, or give guidance as to, the content of constitutional words and phrases by disclosing an appreciation of the manner in which the relevant word or phrase would objectively have been understood at the time it was formulated. Reference to historical context in that manner can provide a touchstone for the meaning of constitutional expressions which does not depend on a judge's personal value judgments or the contemporary values which may be ascribed by the courts to the Australian community (which may sometimes be the same thing).

Significance of the Constitutional Nature of the Instrument being Construed

10 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67-8 [41] (Gleeson CJ), 76 [63] (Gummow, Hayne and Crennan JJ).

11 Ibid 76 [64] (Gummow, Hayne and Crennan JJ); *South Australia v Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

12 *Kable v DPP* (NSW) (1996) 189 CLR 51; *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

13 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

14 *Wainohu v New South Wales* (2011) 243 CLR 181.

15 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 151-2.

1. Commonwealth Constitution

In construing the *Commonwealth Constitution* the High Court has recognised that:[16]

> [I]t is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.

That sentiment does not deny that the task of interpreting the *Commonwealth Constitution* is an exercise in statutory construction similar to that applicable to any statute.[17] However, the character of the *Constitution* as an instrument of government under which laws are to be made is a factor to be taken into account when undertaking that exercise.[18] This approach to construction has implications for the manner in which history is regarded as an interpretive constraint. As with any statute, the historical context of a constitutional document is relevant to its proper construction. However, adopting the sentiment expressed in the above quotation, the courts will be more reluctant to construe the *Commonwealth Constitution* in a manner which makes the language, and thereby the Australian community, a prisoner to history.

The manner in which history may be relevant to the interpretation of the *Commonwealth Constitution* was adverted to by the High Court in *Cole v Whitfield*,[19] when identifying the protection given to interstate trade, commerce and intercourse by s 92 of the *Constitution*. Reference to history was made not for the purpose of identifying the subjective intention of the framers of the *Constitution* but for the purpose of:

> identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.

However, having undertaken a detailed historical examination in both *Cole v*

16 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 81 (Dixon J). To similar effect, see also, *Jumbunna Coal Mine NL v Victorian Coal Miners Association* (1908) 6 CLR 309, 367-8 (O'Connor J). The sentiment has often been repeated, including in *Betfair v Western Australia* (2008) 234 CLR 418, 453 [19] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ). These passages were relied upon by McHugh J, as well as in the dissenting judgment of Toohey J, in *McGinty v Western Australia* (1996) 186 CLR 140, 200, 231.

17 See, for example, the comments of O'Connor J in *Tasmania v The Commonwealth* (1904) 1 CLR 329, 358-9, referred to by Heydon J in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 140 [414]. See also *McGinty v Western Australia* (1996) 186 CLR 140, 230-1 (McHugh J) and cases there cited.

18 *A-G (NSW) ex rel Tooth & Co Ltd v The Brewery Employees Union of New South Wales* ('*The Union Label Case*') (1908) 6 CLR 469, 611-2 (Higgins J); *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479, 493-5 [19]-[22].

19 (1988) 165 CLR 360, 385.

Whitfield and the subsequent decision in *Betfair v Western Australia*,[20] the Court in the latter case also recognised the relevance of 'significant developments in the last twenty years in the Australian legal and economic milieu in which s 92 operates',[21] including the development of electronic commerce[22] and the development of the National Competition Policy.[23] On that approach, while regard to historical context is legitimate, the Court's hands are not tied by the 'dead hands' of the framers,[24] and greater weight may be given to the modern context in which the provisions operate.

2. State Constitution

It is more difficult to find the expression of similar sentiments in cases dealing with the construction of Western Australia's constitutional instruments, which for the purposes of this discussion[25] principally comprise the *Constitution Act 1889* (WA) ('1889 Act'), the *Constitution Acts Amendment Act 1899* (WA) ('1899 Act') and entrenched provisions of electoral legislation.[26] As I will contend below, the constitutional status of these instruments seems to have had less, and the historical context in which they were enacted has had greater, influence on the result of cases arising under the State Constitution.

There may be a number of reasons for this. The State constitutional instruments are in fact Acts of the Western Australian Parliament. In contrast to the *Commonwealth Constitution*, they were not enacted by a paramount legislature and approved by a direct vote of the people of the State.[27] Relatively few of the statutory provisions are entrenched, so that the instruments generally are subject to amendment and repeal (including implied amendment and repeal) in the same manner as an ordinary statute.[28] Further, many of the entrenched provisions are protected by manner and form provisions which require only a special majority in each parliamentary chamber for the passage of the Bill. Section 73(2) of the 1889

20 (2008) 234 CLR 418.

21 Ibid 452 [12].

22 Ibid 452 [14].

23 Ibid 452-3 [16].

24 Some common ground may exist here between judges with general approaches to constitutional construction which might be regarded as somewhat discordant: compare *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 187 [534] (Heydon J) with *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-3 (Deane J).

25 It can reasonably be said that the State's principal constitutional instrument is the *Commonwealth Constitution*, which creates the State as a body politic (see *Victoria v The Commonwealth (Pay-roll Tax Case)* (1971) 122 CLR 353, 395-6 (Windeyer J)), which by ss 106-8 makes continuing provision for state constitutions and laws and which operates to constrain the legislative power of state Parliaments in various respects. However, the purpose of this paper is to compare approaches to construction of the *Commonwealth Constitution* with that taken in relation to other state constitutional instruments.

26 Previously s 13 of the *Electoral Distribution Act 1947* (WA); currently s 16M of the *Electoral Act 1907* (WA).

27 The power to make the 1889 Act at the time of its enactment was derived from the *Western Australian Constitution Act 1890* (Imp) ('1890 Imperial Act') and other Imperial statutes.

28 *McCawley v The King* [1920] AC 691.

Act is the only provision which requires a referendum as part of the process which protects the provisions to which it applies against amendment or repeal.

Approach to History in Construing s 73(1) of the 1889 Act

1. Provisions of s 73(1) of the 1889 Act

Section 73(1) is a manner and form provision which was included in the original 1889 Act. The High Court has been called upon to construe this provision on four occasions.

Section 73(1) contains three sentences, the last two of which lack grammatical structure considered on their own. The first is that:

> Subject to the succeeding provisions of this section, 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.

The second sentence is as follows:

> 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.

The third sentence contains a second 'proviso' in the following terms:

> Provided also, that every Bill which shall be so passed for the election of a Legislative Council at any date earlier than by Part III provided, and every Bill which shall interfere with the operation of sections 69, 70, 71, or 72, 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.

2. *Wilsmore*

Western Australia v Wilsmore[29] concerned a challenge to a 1979 amendment to the *Electoral Act 1907* (WA). The 1979 amendment altered the qualifications of electors for the Western Australian Parliament, disqualifying persons detained in custody after having been found not guilty of an offence on grounds of unsoundness of mind. The Bill effecting that amendment had not been passed by an absolute majority in the Legislative Assembly on its third reading. Mr Wilsmore, who was disqualified by the amendment, contended that this was a law which effected a change in the Constitution of the Legislative Assembly and Legislative Council which had not been passed by the required absolute majority of each House.

29 (1982) 149 CLR 79.

Wilsmore also contended that the first proviso in s 73(1) of the 1889 Act had an effect beyond merely qualifying the substantive provision set out in the first sentence of that section. This second argument was necessary because provision for the qualification of electors of State Parliament had, since 1907, been contained in the *Electoral Act* rather than the 1889 Act or 1899 Act. Therefore, the 1979 amendment clearly did not repeal or alter the provisions of the 1889 Act for the purposes of the first sentence in s 73(1) of the 1889 Act.

All members of the Court held that the second sentence in s 73(1) operated as a qualification on the grant of power to repeal or alter 'this Act' rather than as an independent enactment. In doing so all members of the Court, other than Murphy J, placed weight on the historical context in which s 73(1) was enacted. This included:

- the terms of the 1890 Imperial Act which authorised assent to the 1889 Act;[30]
- the terms of other constitutional statutes in other colonies and the manner in which those provisions were enacted and understood;[31]
- the drafting style of the latter part of the 19th Century;[32] and
- parliamentary practice since 1889, in particular the manner in which amending Acts were treated.[33]

As Gibbs CJ noted, the most compelling consideration against the construction adopted by the Court was that the resulting limitation on the power of the legislature was 'curiously weak and ineffectual'. However, he regarded the history of the provisions to show that s 73 could not have been intended to be a great constitutional safeguard.[34]

Although not strictly necessary for the purposes of determining *Wilsmore*, Wilson J, with whom Gibbs CJ, Stephen and Mason JJ concurred, expressed the view that the reference to 'this Act' in s 73(1) was to the 1889 Act only and did not include the 1899 Act.[35] That is, the 1899 Act was regarded as a principal Act, and legislation amending the 1899 Act should not be regarded as also amending the 1889 Act.

3. Marquet

At least in this last respect there may be an inconsistency between the approach adopted in *Wilsmore* and that subsequently taken by the High Court in *Attorney-*

30 Ibid 83 (Gibbs CJ), 91 (Aickin J) 100 (Wilson J) (Gibbs CJ, Stephen and Mason JJ concurring), 103-4 (Brennan J).

31 Ibid 84-5 (Gibbs CJ), 88-9 (Aickin J), 100 (Wilson J) (Gibbs CJ, Stephen and Mason JJ concurring).

32 Ibid 88 (Aickin J) 100 (Wilson J) (Gibbs CJ, Stephen and Mason JJ concurring).

33 Ibid 90 (Aickin J), 95, 102 (Wilson J) (Gibbs CJ, Stephen and Mason JJ concurring).

34 Ibid 83-4.

35 Ibid 101-2 (Wilson J).

General (WA) v Marquet.[36] The latter case principally concerned the effect of s 13 of the *Electoral Distribution Act 1947* (WA), which required absolute majorities for 'any Bill to amend this Act'.

The *Electoral Distribution Act* provided for the establishment of electoral divisions for the Legislative Council and Legislative Assembly which were significantly malapportioned. Non-metropolitan electorates contained significantly fewer electors per elected member than metropolitan electorates.[37] This arrangement had operated to the practical political advantage of conservative parties which, in very general terms, enjoyed a greater level of support in non-metropolitan areas than the Australian Labor Party and Greens. This was particularly the case in the Legislative Council which had been effectively controlled by the conservative parties throughout its history.

The Hon Jim McGinty MLA had, in opposition, unsuccessfully challenged the validity of the then existing electoral distribution regime. Subsequently, as Attorney-General, he introduced two Bills into Parliament to reduce the level of malapportionment. The first, the Electoral Distribution Repeal Bill 2001 (WA), purported to repeal the *Electoral Distribution Act*. The second, the Electoral Amendment Bill 2001 (WA), introduced provisions into the *Electoral Act* dealing with the distribution of electorates in a manner which did not involve the malapportionment required by the *Electoral Distribution Act*.

One question which arose in *Marquet* was whether the Bill to repeal the *Electoral Distribution Act* was a Bill to 'amend' that Act. The Attorney-General contended that it did not. In rejecting that contention the plurality of the High Court paid particular regard to the legal context in which s 6 of the *Redistribution of Seats Act 1904* (WA) ('1904 Act'), the legislative predecessor to s 13 of the *Electoral Distribution Act*, was enacted. After examining the history, the plurality concluded that:[38]

> Because definition of electoral boundaries is legally essential to the election of the Parliament, repealing the Electoral Distribution Act must necessarily be a precursor to the enactment of other provisions on that subject of electoral boundaries. To read 'any Bill to amend this Act' as confined to a Bill which will leave at least one provision of the Electoral Distribution Act remaining in force, whether with the same or different legal operation, would defeat the evident purpose behind the introduction of the provision in 1904. That purpose was to ensure that no change could be made to electoral districts save by absolute majority of both Houses. And when identical provision was made in subsequent legislation there is no reason to read the phrase more narrowly. The evident purpose of the provision should not be defeated by preferring form over substance.

36 (2003) 217 CLR 545.

37 The extent of the malapportionment is described by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140, 224-6.

38 (2003) 217 CLR 545, 565-6 [52].

4. Differences of Approach in *Wilsmore* and *Marquet*

In common with the approach taken in *Wilsmore*, the plurality in *Marquet* looked to history to define the purpose of the provision being construed. However, unlike the approach taken in *Wilsmore*, the plurality in *Marquet* was concerned not to prefer 'form over substance'.

Further, the plurality in *Marquet* appeared to regard the 1899 Act as part of the 1889 Act, which was protected by s 73(1) of the 1889 Act. This can be seen from the manner in which the Court regarded the Bill for the 1904 Act. At the time that Bill was introduced provisions for electoral distribution were contained in the 1899 Act.[39] The plurality described the effect of the 1904 Act as being:[40]

> to move from the 1889 Constitution (as it had been amended from time to time) those provisions governing elections to the Western Australian Parliament which drew the electoral boundaries.

That passage does not regard the 1899 Act as principal legislation. Further, the plurality later said:[41]

> It therefore follows from s 73 of the 1889 Constitution that the definition of electoral districts set out in the 1889 Constitution (as amended to 1904) was amenable to change only by the absolute majorities referred to in that section.

However, provisions for electoral distribution had been removed from the 1889 Act in 1893,[42] and by 1904 were contained in the 1899 Act. Section 73 of the 1889 Act would have required absolute majorities in 1904 only if its reference to 'this Act' encompassed an amendment to the 1899 Act. The plurality in *Marquet* regarded this as being the case, notwithstanding the earlier holding to the contrary (albeit not as part of the *ratio* of the case) in *Wilsmore*. The remark was a critical step in the path of the plurality's reasoning which depended on construing s 6 of the 1904 Act in its historical context.

Given that the plurality in *Marquet* departed in these two respects from the approach taken in *Wilsmore*, it is somewhat surprising that the plurality did not undertake any critical examination of the decision in *Wilsmore*. The plurality refers to *Wilsmore* only in two footnotes in connection with propositions unrelated to their critical holding.[43] *Wilsmore* is not overruled or referred to with disapproval. Yet, at least in the second respect noted above, the approach taken in *Wilsmore* is inconsistent with that adopted in *Marquet*

39 In particular ss. 5, 6, 18 and 19 of the 1899 Act.

40 (2003) 217 CLR 545, 559 [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

41 (2003) 217 CLR 545, 562 [39] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

42 By the *Constitution Act Amendment Act 1893* (WA). Those provisions of the 1893 Act were repealed and substituted by the *Constitution Act Amendment Act 1896* (WA). The 1899 Act repealed the 1893 and 1896 Acts and made its own provision for electoral distribution.

43 (2003) 21 CLR 545, 557 [15] n56, 573 [77] n92.

5. Other Decisions

Two other decisions of the High Court in relation to s 73(1) may also be noted. First, in *Clydesdale v Hughes*,[44] the Court held that a Bill changing the qualifications of members of Parliament did not effect any change in the Constitution of the Legislative Council or Legislative Assembly. That aspect of the decision has not received acclaim, but neither has it been overruled, in subsequent cases in the High Court.[45] Secondly, in *Yougarla v Western Australia*,[46] the High Court held that the second proviso in s 73(1) of the 1889 Act had been complied with in repealing s 70 of the 1889 Act. Section 70 made provision for appropriations to the welfare of what it identified as 'the aboriginal natives' and for the issue of annual sums by the Treasurer to the Aborigines Protection Board.

6. Overview

None of the reasons in any of the above cases convey a sense that the Court gave significance to the fact that 'it is a Constitution we are interpreting'. In all cases the High Court engaged in a task of statutory construction in a manner which would be expected for any statute. Due regard is had to the language, structure and purpose of the legislation as well as its historical context. The Court's view of historical context played a significant role in the outcome of each case.

Section 73(2) of the 1889 Act.

1. Provisions of s 73(2) of the 1889 Act

The other principal manner and form provision in the Western Australian Constitution is s 73(2) of the 1889 Act. That provision applies to a Bill that:

- provides for the abolition of or alteration in the office of Governor;
- provides for the abolition of the Legislative Assembly or Legislative Council or a reduction in the number of their members;
- provides, in s 73(2)(c), for those chambers 'to be composed of members other than members chosen directly by the people'; or
- affects certain sections of the 1889 Act.

Section 73(2) requires that such a Bill be passed by absolute majorities of each of the parliamentary chambers and be approved by a majority of electors at a referendum.

Section 73(2) was introduced by the *Acts Amendment (Constitution) Act 1978* (WA) ('1978 Act'). The Bill for the 1978 Act was passed by Western Australia's

44 (1934) CLR 518.

45 See, *Western Australia v Wilsmore* (1982) 149 CLR 79, 85 (Stephen J), 102-3 (Wilson J); *A-G (WA) v Marquet* (2003) 217 CLR 545, 573 [77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

46 (2001) 207 CLR 344.

Parliament during the second term of the first Court Liberal/National Country government, apparently out of concern that the Australian Labor Party would seek to abolish the Legislative Council or office of Governor.[47]

However, despite that evident motivation, the language of s 73(2)(c) referring to 'members chosen directly by the people' has an obvious parallel to the language of ss 7 and 24 of the *Commonwealth Constitution*, which require that both Houses of the Australian Parliament be composed of members 'directly chosen by the people'. This phrase has been associated with limitations on legislative power related to political speech and the conduct of elections.

2. Freedom of Political Speech

(i) Commonwealth Constitution

Sections 7 and 24 and related sections of the *Commonwealth Constitution* protect freedom of communication between the people concerning political or government matters which enable the people to exercise a free and informed choice as electors.[48] The implied limitation on legislative power operates to invalidate such a law where:

- the law effectively burdens freedom of communication about government or political matters in its terms, operation or effect;[49] and
- the law is not reasonably appropriate and adapted to serve a legitimate object or end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure for submitting a proposed amendment to the Constitution to the informed decision of the people which the Constitution prescribes.[50]

These provisions of the *Commonwealth Constitution* impose a limitation on both state and Commonwealth legislative power. However, to engage the implied constitutional limitation on state legislative power it is necessary to show some burden on communication about political or government matters relevant to the Commonwealth elections and referenda provided for by the *Commonwealth Constitution*.[51] The implied limitation therefore only extends to communications concerning state legislation and politics to the extent that those communications have the requisite connection to the above Commonwealth matters.[52] The

47 Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 307-9 (Sir Charles Court – Premier).

48 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

49 Ibid 567.

50 Ibid, as modified in *Coleman v Power* (2004) 220 CLR 1, 50 [92]-[93] (McHugh J), 77-8 [196] (Gummow and Hayne JJ), 82 [211] (Kirby J).

51 *Lange* (1997) 189 CLR 520, 561, 567; *Levy v Victoria* (1997) 189 CLR 579, 596 (Brennan CJ), 626 (McHugh J); *Coleman v Power* (2004) 220 CLR 1, 30-1 [28]-[31] (Gleeson CJ), 43-5 [76]-[80] (McHugh J), 77-8 [195]-[197] (Gummow and Hayne JJ), 110 [292], 112 [298] (Callinan J).

52 *Levy v Victoria* (1997) 189 CLR 579, 596 (Brennan CJ), 622, 626 (McHugh J). See also *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571-2. Contrast *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 232 (Mason CJ, Toohey and Gaudron JJ), 257 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 75-6 (Deane and

communication must expressly or inferentially involve acts or omissions of the federal legislature or executive government.[53]

(ii) ***State Constitution***

The question of whether s 73(2)(c) of the 1889 Act carried an implied limitation on state legislative power in relation to the regulation of speech about political or government matters was considered by the High Court in *Stephens v West Australian Newspapers Ltd*.[54] That case concerned an action in defamation brought by members of the Legislative Council in respect of a publication which imputed that travel purportedly undertaken for the purposes of a parliamentary committee was a 'junket'.

Stephens was argued and determined at the same time as another defamation case, *Theophanous v Herald & Weekly Times Ltd*,[55] in which the Court formulated a defence to an action in defamation drawn from the *Commonwealth Constitution*. In *Stephens* the plaintiffs relied on a similar defence drawn from s 73(2)(c) of the 1889 Act.

The plurality concluded that:[56]

> We do not consider that s 73 provides a foundation for any suggestion that the Western Australian Constitution contemplates the possibility that it will be amended in such a way that representative democracy will be abolished. On the contrary, s 73(2) was plainly enacted with the object of reinforcing representative democracy and placing a further constitutional impediment in the way of any attempt to weaken representative democracy. And, so long, at least, as the Western Australian Constitution continues to provide for a representative democracy in which the members of the legislature are 'directly chosen by the people', a freedom of communication must necessarily be implied in that Constitution, just as it is implied in the *Commonwealth Constitution,* in order to protect the efficacious working of representative democracy and government.

Brennan J was prepared to draw a similar implication to that which he perceived in the Commonwealth Constitution by 'parity of reasoning'.[57]

This is one case where the provisions of s 73 of the 1889 Act were recognised as having an effect which was indistinguishable from that which was then attributed to similarly worded provisions of the *Commonwealth Constitution*. However, it

Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 142 (Mason CJ), 169 (Deane and Toohey JJ), 216-7 (Gaudron J); *Theophanous v The Herald & Weekly Times* (1994) 182 CLR 104, 122, 124-5 (Mason CJ, Toohey and Gaudron JJ).

53 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 360 [63] (McHugh J). Contrast *APLA* (2005) 224 CLR 322, 440 [347] (Kirby J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 298-9 (Mason CJ).

54 (1994) 182 CLR 211.

55 (1994) 182 CLR 104.

56 (1994) 182 CLR 211, 233-4 (Mason CJ, Toohey and Gaudron JJ).

57 Ibid 237.

should also be recognised that at the time *Stephens* was decided the law in relation to freedom of communication about government or political matters under the *Commonwealth Constitution* was still developing. The imperative to tie the scope of any implication to the language and structure of the *Commonwealth Constitution*, which led to a narrowing of the implication drawn from the *Commonwealth Constitution* in *Lange* and the rejection of the concept of a 'free-standing' implication, was not well appreciated at that time. The majority in *Stephens* did not, therefore, find it necessary to address other provisions identifying the kind of representative government for which the State Constitution provides.

It may also be said that the implication recognised in the State Constitution in *Stephens* is of limited practical significance. The plurality in *Stephens* took the view that the implication drawn from the *Commonwealth Constitution* extended to protect communication about all government matters, including matters concerning state politics. While that proposition no longer finds acceptance, in practical terms there are very few matters which do not have any federal aspect to them.[58] It remains the case that there will be very few cases in which a law, which does not offend the limitation on legislative power now recognised in the *Commonwealth Constitution*, might be contrary to a similar implication derived from s 73 of the 1889 Act.

3. Electoral Laws: *McGinty*, *Roach* and *Rowe*

(i) *McGinty*

As noted above, malapportionment has been a feature of the Western Australian electoral system for most of the State's constitutional history. In 1996 a challenge by a number of Western Australian politicians to the validity of the then existing provisions of the *Electoral Distribution Act* was heard by the High Court. That challenge was based on the alleged inconsistency between the provisions of that Act and those of both the State and Commonwealth Constitutions. The challenge failed. Brennan CJ, Dawson, McHugh and Gummow JJ held against the plaintiffs, with Toohey and Gaudron JJ dissenting.

For the purposes of this paper it is the analysis of the reasons regarding the State Constitution which is of primary concern. That aspect of the plaintiffs' argument was rejected principally by reference to history.

The preamble to the 1978 Act, which introduced s 73(2) into the 1889 Act, indicated that the purpose of the 1978 Act was to 'confirm the established constitutional provision'. The degree of malapportionment in 1978 was greater than that which existed in 1996 when *McGinty* was determined.
Brennan CJ referred to this history and concluded that it was inconsistent with the plaintiffs' contention that s 73(2)(c) of the 1889 Act carried an implication that electoral power be distributed equally among the people or electors of the State.

58 *Hogan v Hinch* (2011) 243 CLR 506, 543-4 [48]-[49] (French CJ); see also 556 [99] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

To so hold would be to find a legislative intention destructive of the means by which the enacting Parliament was elected.[59] Dawson J expressed his agreement with the Chief Justice on this point.[60] McHugh and Gummow JJ were of a similar view.[61]

It is interesting to compare the approach of the High Court in *McGinty* to the construction of the State Constitution to that taken in relation to the Commonwealth Constitution. All members of the Court in *McGinty* found that any implication about equality of voting power derived from the *Commonwealth Constitution* had no application to state Parliaments. However, the members of the Court adopted different views in relation to the requirements of the *Commonwealth Constitution* in relation to federal elections. Dawson and McHugh JJ did not see equality of voting power as an essential component of the representative government provided for by the *Commonwealth Constitution* at all. By contrast, Toohey and Gaudron JJ saw equality of voting power as an inherent part of representative democracy as provided for in both state and federal constitutions, although the provision in the *Commonwealth Constitution* was confined to the Commonwealth Parliament. Gummow J saw relative parity in numbers as being the single most important concern under the *Commonwealth Constitution* in relation to the House of Representatives. However, the *Commonwealth Constitution* did not apply that requirement to state Parliaments. Brennan CJ was prepared to assume that the *Commonwealth Constitution* contained some restrictions on disparities in voting power, but held that any such restriction did not apply to state Parliaments.

The approach taken by Gummow J was most interesting from the perspective of comparing approaches to construing the state and federal constitutions. Gummow J referred, with apparent approval, to the decision of the Supreme Court of Canada in *Reference Re Electoral Boundaries Commission Act*.[62] In that case the Canadian Supreme Court held that the right to vote contained in the Canadian Charter of Rights and Freedoms carried with it the right to 'effective representation', to which relative parity of voting power was the prime condition.[63]

After having referred to this Canadian decision with apparent approval Gummow J noted:[64]

> *That being the position as regards the Commonwealth,* the question then is whether, by force of the Constitution, any (and if so what) restraint is imposed upon the legislative power of the States to provide for the manner of representation in their legislatures.

He went on to conclude that the *Commonwealth Constitution* contained no such

59 (1996) 186 CLR 140, 178.
60 Ibid 189.
61 Ibid 253-4 (McHugh J), 298-300 (Gummow J).
62 (1991) 81 DLR (4d) 16.
63 Ibid 35-6.
64 (1996) 186 CLR 140, 289 (emphasis added).

requirement. That is, Gummow J seemed to regard a requirement for electoral equality as a requirement of the *Commonwealth Constitution* in relation to federal elections which was not imposed on state Parliaments. He accepted that variations in numbers of electors or people in single member electoral divisions could be so grossly disproportionate as to deny the ultimate control by popular election for the Commonwealth Parliament required by the *Commonwealth Constitution*. Such a question was to be determined 'by reference to the particular stage which has then been reached in the evolution of representative democracy'.[65]

It seems implicit in Gummow J's reasons in *McGinty* that if the degree of malapportionment then present in the electorate for the Western Australian Parliament had existed in the House of Representatives, the Commonwealth electoral law which brought about that result would be invalid. However, as McHugh J noted, the franchises at federation, which were adopted by s 30 of the *Commonwealth Constitution* until the Commonwealth Parliament otherwise provided, were greater than was the case in Western Australia in 1996.[66] The approach of Gummow J appeared to give greater recognition to the capacity for 'evolution' of the democratic requirements mandated by the *Commonwealth Constitution* than those applying under the State Constitution.

This suggests a difference of approach to the construction of Commonwealth and State constitutional provisions cast in similar terms.[67] In the case of the *Commonwealth Constitution*, history is relevant but not controlling. The *Commonwealth Constitution* may prohibit the Commonwealth Parliament from enacting laws adopted by the *Commonwealth Constitution* itself at federation. By contrast, the fact that the State electoral legislation in force at the time of the enactment of s 73(2) of the 1889 Act failed to provide for electoral equality was held to be fatal to the plaintiffs' argument in *McGinty*.

(ii) *Rowe and Roach*

The difference in approach to the construction of similar state and Commonwealth constitutional provisions may also be discerned by comparing the approach to history taken in relation to the State Constitution in *McGinty* with that adopted in relation to the *Commonwealth Constitution* in *Roach v Electoral Commissioner*[68] and *Rowe v Electoral Commissioner*.[69]

Roach and *Rowe* both concerned challenges to the validity of amendments to the *Commonwealth Electoral Act 1918* (Cth) by the *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) ('2006 Act'). The 2006

65 Ibid 286-7.

66 Ibid 242 (McHugh J), where the electoral ratios for colonial elections prior to federation are tabulated.

67 Gummow J at (1996) 186 CLR 140, 300 considered the phrases as 'inseverable' and as conveying the same concept.

68 (2007) 233 CLR 162.

69 (2010) 243 CLR 1.

Act, introduced into Parliament by the Howard Liberal National government as an election approached, included two presently relevant changes.
The first was to disqualify from voting in federal elections persons serving a sentence of imprisonment, of any duration, for an offence against a Commonwealth, State or Territory law. Prior to that amendment, by a provision introduced in 2004, only prisoners serving custodial sentences of three years or longer were disqualified.

The 2004 and 2006 amendments were subject to challenge in *Roach* by a prisoner serving an effective term of six years. The High Court upheld the challenge to the 2006 amendment (Gleeson CJ, Gummow, Kirby and Crennan JJ, Hayne and Heydon JJ dissenting) but unanimously rejected the challenge to the 2004 amendment. The plurality concluded that the phrase 'chosen by the people' admitted a requirement of 'a franchise which is held generally by all adults or all adult citizens unless there be substantial reasons for excluding them'.[70] In the view of the plurality, a reason would be substantial if it is reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government.[71]

Gleeson CJ resolved the case on the basis that it was consistent with the constitutional concept of choice by the people for Parliament to treat those who have been imprisoned for serious criminal offences as having suffered a temporary suspension of their connection with the community, reflected at the physical level in incarceration and reflected also in temporary deprivation of the right to participate by voting in the political life of the community.[72] The exclusion of all prisoners from voting, irrespective of the nature or seriousness of the offence for which they were imprisoned, was found to fail the above tests, although the exclusion of prisoners serving a sentence of three or more years imprisonment did not.

The plurality in *Roach* considered the exclusion of all prisoners from voting without regard to the degree of culpability of the prisoner went beyond what was reasonably appropriate and adapted to the maintenance of representative government.[73]

The second amendment was to reduce the time after the issue of electoral writs for electors to enrol or transfer their enrolment between electoral districts. At the time of the 2006 amendment there was a statutory seven day grace period in which claims for new enrolment and transfer of enrolment could be made by an elector who would still be entitled to vote in the election. The effect of the 2006 amendment was to close the rolls to new enrolments at 8 pm on the day writs were issued and close the rolls to transfers of enrolment three days thereafter.

70 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198 [83], 199 [85] (Gummow, Kirby and Crennan JJ). See also, *Roach* (2007) 233 CLR 162, 174 [7] (Gleeson CJ).
71 Ibid 199 [85] (Gummow, Kirby and Crennan JJ).
72 Ibid 179 [19].
73 Ibid 200-2 [89]-[95] (Gummow, Kirby and Crennan JJ).

This second amendment was subject to challenge in *Rowe*. Again, a majority of the Court upheld the challenge (French CJ, Gummow, Crennan and Bell JJ, Hayne, Heydon and Kiefel JJ dissenting). In broad terms the majority applied the test articulated by the plurality in *Roach* to reach this conclusion.

The purpose of referring to *Roach* and *Rowe* in this paper is not to set out the detail of the reasoning of the Court for reaching these conclusions. Rather, it is to note that the majority of the Court did not regard the historical context in which ss 7 and 24 of the *Commonwealth Constitution* was enacted as controlling the result of the case.

That is not to say that the majorities in *Roach* and *Rowe* disregarded historical context. The judgments in both cases contain an extensive review of electoral laws existing at the time of federation and subsequently.

That history shows that state franchises, which were applied by the *Commonwealth Constitution* itself to federal elections until Parliament otherwise provided, contained a number of restrictions which would today be regarded as deeply undemocratic. Women were excluded from voting in all States other than South Australia and Western Australia. Indigenous Australians were generally excluded. Property qualifications existed in a number of States.[74] It would be impossible to identify any substantial reason which a court might today regard as justifying those exclusions from the franchise. The difficulty is in drawing an implication about a democratic ideal from the terms of a document which expressly adopted these restrictions as the basis for the franchise of at least the first federal election.

In contrast to the approach adopted in *McGinty* in relation to s 73(2)(c) of the 1889 Act, the Court in construing ss 7 and 24 of the *Commonwealth Constitution* has been prepared to hold invalid arrangements which provided for a franchise that was the same as, or more inclusive than, that which existed at federation and which was adopted by the *Commonwealth Constitution* until Parliament otherwise provided. Two members of the Court in *Rowe* recognised that provision for enrolment at federation did not accommodate enrolment or transfer of enrolment after the issue of electoral writs.[75] That did not prevent a majority of the Court from holding invalid provisions which gave greater capacity for late enrolment than existed at federation.

The reasons which explain this outcome were well expressed by Gleeson CJ in *Roach*,[76] in the following terms:

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74 These provisions are summarised by McHugh J in *McGinty v Western Australia* (1996) 186 CLR 140, 242-3.

75 *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 17 [16] (French CJ), 97-100, [294]-[301], [304] (Heydon J).

76 (2007) 233 CLR 162, 174 [7]. This passage was substantially adopted in *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 18-9 [20] (French CJ), 48-9 [123] (Gummow and Bell JJ); to similar effect, see, 115 [356] (Crennan J).

> In *McKinlay*,[77] McTiernan and Jacobs JJ said that 'the long established universal adult suffrage may now be recognised as a fact'. I take 'fact' to refer to an historical development of constitutional significance of the same kind as the developments considered in *Sue v Hill*[78]. Just as the concept of a foreign power is one that is to be applied to different circumstances at different times, McTiernan and Jacobs JJ said that the words 'chosen by the people of the Commonwealth' were to be applied to different circumstances at different times. Questions of degree may be involved. They concluded that universal adult suffrage was a long established fact, and that anything less could not now be described as a choice by the people. I respectfully agree. As Gummow J said in *McGinty v Western Australia,*[79] we have reached a stage in the evolution of representative government which produces that consequence. I see no reason to deny that, in this respect, and to this extent, the words of ss 7 and 24, because of changed historical circumstances including legislative history, have come to be a constitutional protection of the right to vote.

The approach taken in *Roach* and *Rowe* can be seen as having some of the attributes of a ratchet. Once Parliament decides to expand the franchise or increase opportunities for electoral participation it may need to find substantial reason for subsequently making less inclusive provisions. It might be argued that the difference between the approaches to historical context in *McGinty*, on the one hand, and *Roach* and *Rowe*, on the other hand, is that the ratchet had not substantially turned in Western Australia by 1996. The provisions challenged in *McGinty* provided for greater, rather than less, electoral equality than existed in 1978, or at any time in the intervening period.

However, the approach adopted by the majority in *Roach* and *Rowe* is a more sophisticated tool than a ratchet, and I do not think that the differences in regard to history in the cases can be wholly explained on that basis.

Room for Legislative Judgment

Decisions on ss 7 and 24 of the *Commonwealth Constitution* do emphasise that the *Constitution* leaves substantial room for legislative judgment in relation to the provision for its own electoral system which Parliament may validly make. However, as the plurality noted in *Roach*:[80]

> [W]hat is involved here is a category of indeterminate reference, where the scope for judgment may include matters of legislative and political choice. But that does not deny the existence of a constitutional bedrock when what is at stake is legislative disqualification of some citizens from exercise of the franchise.

The more willing the courts are to identify the constitutional bedrock the less

77 (1975) 135 CLR 1, 36.
78 (1999) 199 CLR 462.
79 (1996) 186 CLR 140, 286-7.
80 2007) 233 CLR 162, 198 [82] (Gummow, Kirby and Crennan JJ).

room there is for legislative choice by the Parliaments whose members are elected by that franchise. But if the courts' decisions give effect to a policy of advancing democratic principles is this a bad thing, particularly if those who enact electoral laws are prone to be affected by the self-interest of facing the next election under the laws which they have made?

Self-interest has always been an ingredient in the preparation of electoral laws. As we have seen above, many of the challenged electoral laws have benefitted the political parties which have enacted or supported the laws. Western Australian Liberal/National governments benefitted from the malapportionment between electorates which members of the Australian Labor Party (with converse political interests) sought to challenge. The amendments introduced in 2006 by the Howard Liberal/National government may be thought to have been to the electoral advantage of the incumbent government facing a difficult election (prisoners, young people and the itinerant people who were most affected by those laws being less likely to be conservative voters). Even the introduction of s 73(2) to the 1889 Act may be seen to have a political motivation. Is this not a reason why the courts should be astute to intervene to protect the democratic nature of Australia's government?

One difficulty in the courts adopting this approach is that the courts lack the capacity to exclude the effects of self-interest of legislators. There are a myriad of features of an electoral system which, either alone or in combination, may have a significant effect on the fortunes of different political groups at elections. It is necessarily for Parliaments to make these choices, which are not prescribed by any constitutional provision. Are electoral divisions to have single or multiple members? Are electoral divisions to be geographic or is some other basis for division to be adopted? If geographic, where are the boundaries of electoral divisions to be located? Is voting to be compulsory? Is a 'first past the post' or preferential system to be adopted? The answers to these questions will have a significant effect on the identity and political persuasion of the members of Parliament who are returned after an election. Yet these are not matters which are apt for curial examination.

Secondly, it is relevant to note that advances in the evolution of democracy in Australia have been brought about by legislative rather than curial reform. That is the case for the extension of the franchise to women, indigenous Australians and persons of Asian descent. It is also the case that provision for greater equality of voting value in the Western Australian electorates was achieved by Parliament rather than the courts. In 2005 the Western Australian Parliament passed legislation[81] which provided for electoral districts to be determined in accordance with the principle that, for each district, the number of electors the district would have at the relevant day must not be more than 10% greater, or more than 10%

81 The *Electoral Amendment and Repeal Act 2005* (WA) and the *Constitution and Electoral Amendment Act 2005* (WA).

less, than the average district enrolment.[82]

A strength of the provisions of the federal and state constitutions is that they allow for the electoral system to evolve in a manner which reflects changing community attitudes. If, for example, the *Commonwealth Constitution* had been more prescriptive in relation to the franchise and other aspects of the electoral system it must be doubted whether provisions for extending the franchise to women and persons of non-European descent would have secured acceptance among a majority of delegates to the Constitutional Conventions held at the end of the 19th Century. The strength of existing Australian democracy lies in large part in the absence of prescriptive provisions in the *Commonwealth Constitution* in relation to most elements of the nation's electoral system.

Thirdly, there is an aspect of the kind of representative government provided for by the Australian and Western Australian constitutions which sometimes does not receive as much emphasis as it should. That is, with relatively few exceptions the constitutions confer on a Parliament, composed of members chosen by the people, the ultimate responsibility for making policy decisions about what the law which applies to the relevant community shall be. In the case of the State Constitution, s 2 of the 1889 Act confers legislative power on the State Parliament in the broadest terms: to make laws for the peace, order and good government of the State. That language is apt to confer the broadest capacity for legislative choice.[83] At federal level, the Commonwealth Parliament is given power to makes laws for the peace, order and good government of the Commonwealth with respect to various subject matters including those matters in respect of the Commonwealth electoral system for which the *Constitution* makes provision until Parliament otherwise provides.[84] These provisions suggest that it is for Parliaments to be able to determine the policy of the law about a range of matters, including electoral laws. That is one of the purposes for which members of Parliament are chosen by the people.

The elected members of those Parliaments are better placed than the courts to gauge contemporary community standards. At least they have an incentive, provided by the need to regularly face the electors, to do so. Courts do not have that institutional incentive against transferring the personal views of their members onto the community. Elected legislators are accountable to the community through the electoral system for the policy decisions which they make. Australian courts are not.

Of course, the power to make good laws carries with it the power to make bad laws on the same topic, and not all bad laws should be regarded as unconstitutional. However, I would regard it as no bad thing that the approach taken in *McGinty*

82 Section 16G of the *Electoral Act*. An exception exists for districts with an area greater than 100,000 square kilometres, where the allowance for an electorate is up to 10% greater, or 20% less, than the average district enrolment on the relevant day.

83 *Union Steamship Co of Australia Ltd v King* (1988) 166 CLR 1, 9-10.

84 Section 51(xxxvi) of the *Commonwealth Constitution*.

in relation to the State Constitution has regard to historical context in a manner which leaves a large measure of legislative choice for the State Parliament. Parliamentarians are chosen by the people to make policy choices in relation to matters which include the electoral system, and to be accountable to the electorate for the decisions which they make. The term 'representative democracy' invokes the idea of participation by the governed in the formulation of the laws which apply to them through the election of representatives who may make those decisions on their behalf. The choices which the representatives may make will be constrained by limitations on legislative power expressed or implied in constitutional instruments. But caution is justified when drawing, from a constitutional statement of the democratic nature of government, an implication which limits the choices available to elected representatives.