Stirring the Hornet's Nest: Further Constitutional Conundrums and unintended Consequences arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation

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This article, reflecting on other contributions in this collection that deal with aspects of restrictive legislative procedures (manner and form requirements of the legislative process), notes the myriad uncertain and complex problems that may potentially arise in the course of any analysis of their implications, both for the conduct of parliamentary affairs or potential litigation in the courts. It examines a number of specific legislative and constitutional hypothetical examples that illustrate the unsettled parameters that may affect the conclusions that can be drawn about the validity of legislative action, including the internal affairs of Parliament, inviting the conclusion that apparent contradictions and inconsistencies between decisions of the High Court such as Western Australia v Wilsmore and Attorney-General (WA) v Marquet may be more the product of pragmatic policy and democratic considerations rather than strict historic or logical constitutional analysis. That leaves open the prospect that future encounters with manner and form issues are liable to be fraught with complexity that leaves predictions about their outcome highly conjectural. The article also notes that the prospect of judicial determination of these issues is itself subject to a number of unresolved questions about the complex interrelationship and the respective roles of the courts and Parliament in ensuring compliance with the various restrictive procedures in the Western Australian Constitution.

INTRODUCTION

A recurring theme in the articles published in this edition of the *UWA Law Review* is the uncertainties of application that attend the entrenching of statutory provisions in the State's constitutional laws and the potential unintended consequences that

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entrenchment may entail. Examples that have resulted, or may result, from the insertion of s 73(2) of the *Constitution Act 1889* (WA) ('*Constitution Act*') in 1978 include:

(i) the establishment of a partial requirement of symmetric entrenchment;[1]
(i) the entrenchment of the Supreme Court under s 73(6) of the *Constitution Act*;[2]
(iii) challenges to electoral distribution laws in *Burke v Western Australia*[3] and *McGinty v Western Australia*;[4]
(iv) doubts concerning the application of the *Australia Acts* to Western Australia;[5] and
(v) an argument in *Attorney-General (WA) v Marquet* regarding an alleged implied repeal of s 13 of the *Electoral Distribution Act 1947* (WA) ('*EDA*').[6]

Whilst in the last three examples the consequences ultimately have not materialised, these examples are still salutary reminders for legislators considering enacting manner and form protections. Another potential unintended consequence from the 1978 amendments relates to s 46 of the *Constitution Acts Amendment Act 1899* (WA) ('*CAAA*')[7] and the entrenchment of s 2(1) of the *Constitution Act*. This compounds uncertainties surrounding the application of s 73(1) and possibly, indirectly, s 73(2) to ss 64 and 72 of the *Constitution Act*. This article seeks to identify and analyse some of the entrenchment problems that arise in respect to the key financial provisions in the State Constitution and, to the extent possible, offer some tentative conclusions and solutions to those problems. The writers see this as an opportunity to reflect on various scholarly papers included within this special edition to expose at greater depth some of the theoretical issues that are engaged in the topic without necessarily resolving them.

These issues will be addressed sequentially in three suites, the first (PART A) considers the interrelationship between three statutory provisions: ss 2 and 66 of the *Constitution Act* and s 46 of the *CAAA*. This Part is divided into three further sub-parts.

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1 Anne Twomey, '*The Effect of the Australia Acts* on the Western Australian Constitution' (2012) 36(2) *University of Western Australia Law Review* 271, 273.
2 Cf *S (A Child) v The Queen* (1995) 12 WAR 393.
3 [1982] WAR 248.
4 (1996) 186 CLR 140.
5 See, *Yougarla v Western Australia* (1999) 21 WAR 488; Peter Johnston, 'Method or Madness: Constitutional Perturbations and *Marquet's* Case' (2004) 7(2) *Constitutional Law and Policy Review* 25, 33. See also, George Winterton, Monarchy to Republic: Australian Republican Government (Oxford University Press, rev ed, 1994) 142, 190.
6 Peter Congdon, 'The History, Scope and Prospects of Section 73 of the *Constitution Act 1889* (WA)' (2012) 36(2) *University of Western Australia Law Review* 82, 89.
7 The text of s 46 *CAAA* is set forth in the Appendix at the end of this article.

- First, the language of s 2(1) of the *Constitution Act* is outlined and analysed to examine whether the removal of s 66 of the *Constitution Act* and its replacement by s 46 of the *CAAA* in 1921, indirectly affected s 2 of the *Constitution Act*. This analysis considers whether s 46 of the *CAAA* is inconsistent with s 2(1) of the *Constitution Act*, including whether s 46 of the *CAAA* falls within the proviso to s 2(1), 'subject to the provisions of this Act'. The latter issue entails questions regarding the relationship between the *Constitution Act* and the *CAAA* in terms of whether they are distinct and separate legislative Acts.

- Secondly, Part A considers whether the 1921 Act repealing s 66 of the *Constitution Act* and enacting s 46 of the *CAAA* was required to comply with the restrictive procedures in the first proviso in s 73(1) of the *Constitution Act*. Specifically, if there was a failure to comply with s 73 did that non-compliance mean that the repeal of s 66 of the *Constitution Act* was of no legal effect, this issue entailing the further question of why s 73 was efficacious to bind later Parliaments.

- Thirdly, Part A notes possible consequences arising from the entrenchment of s 2(1) of the *Constitution Act* in 1978. These consequences largely depend on the answers to the questions posed in the first two subparts of Part A. If s 46 of the *CAAA* was validly enacted *and* inconsistent with s 2 of the *Constitution Act*, then the former provision impliedly amended the latter provision. This subpart asks then: what was the effect of s 73(2)(e) of the *Constitution Act* entrenching a provision which may have been previously impliedly amended?

This article then identifies a second suite of issues (PART B) regarding the interpretation of the term 'powers' in s 1 of the *Parliamentary Privileges Act 1891* (WA) and s 36 of the *Constitution Act.* It asks whether 'powers' in this context includes the *legislative* powers of the houses so as to raise the same kind of issues of inconsistency that arguably plague s 2 of the *Constitution Act* and s 46 of the *CAAA*.

The third suite of issues (PART C) addresses the application of 73 of the *Constitution Act* to financial legislation. Part C outlines the historical background to constitutional restrictions on the enactment of financial legislation in Western Australia and notes the potential effect of reservation requirements in the second proviso to s 73(1) on the enactment of the *Audit Act 1904* (WA). It then considers potential consequences flowing from the enactment of s 73(2) of the *Constitution Act* in 1978. In particular, the Part examines the ramifications of the entrenched constitutional requirement under s 2(1) of the *Constitution Act* that the two legislative chambers 'shall … *have* all the powers and functions of the now subsisting Legislative Council'. Discrete questions arising from this examination include:

- what powers and functions did the pre-1890 Legislative Council have in respect to appropriations and expenditure?

- what is entailed by s 2(1) of the *Constitution Act* requiring Parliament's two houses to *have* all those powers and functions?

- what effect, if any, does the entrenchment of s 2(1) of the *Constitution Act* have on existing financial legislation?

- does s 2(1) of the *Constitution Act* indirectly entrench the stipulations in s 72 of the *Constitution Act* requiring appropriations from the consolidated revenue fund to be authorised by laws prescribing the purposes of such appropriations?

Since many of the above issues raise questions of the ultimate legal effect of financial legislation passed by Parliament from time to time, this article in PART D considers the role of the courts in enforcing relevant manner and form requirements and whether those issues, especially where they concern Parliament's internal workings, are justiciable. This Part also seeks to identify the jurisdictional and procedural bases on which claims of the kind discussed in this article could be initiated and determined in the courts.

Finally, although the article comes to no specific conclusions regarding the application of procedural restrictions on financial legislation in Western Australia, the analysis does identify and expose the kind of considerations that are relevant to addressing these issues and serves to point out more precisely the procedural problems entailed in passing such legislation. A more comprehensive and definitive treatment aimed at sorting out the tangled issues and loose ends will have to await another day.

PART A: THE PROBLEMATIC RELATIONSHIP BETWEEN SECTION 46 OF THE *CAAA* AND SECTION 2 OF THE *CONSTITUTION ACT*

In 1921, the *Constitution Act Amendment Act 1921* ('1921 Act') deleted s 66 of the *Constitution Act* and, in its place, enacted s 46 of the *CAAA*. Section 66 had provided that '[a]ll Bills appropriating any part of the Consolidated Revenue Fund or for imposing, altering or repealing any tax, duty or impost *shall originate with the Legislative Assembly*'. To similar effect, s 46(1) of the *CAAA* provides '[b]ills appropriating revenue or moneys, or imposing taxation, *shall not originate in the Legislative Council*'. Three salient questions arise from the removal of s 66 from the *Constitution Act* and the introduction of its counterpart in s 46(1)[8] of the *CAAA* in 1921:

8 See further, Peter Johnston, 'The Constitution of Western Australia: Controversial Aspects of Money and Financial Arrangements, Prliamentary Control of Revenue, Relations between the Houses and Funding Disputes (2012) 36(2) *University of Western Australia Law Review* 113.

(i) Did the removal of s 66 from the *Constitution Act* and the enactment of s 46 of the *CAAA* have the effect of altering in a relevant respect the provenance and operation of s 2 of the *Constitution Act* so as to constitute an amendment of s 2;

(ii) Did s 73 of the *Constitution Act* protect s 2, as modified by s 66, from ordinary amendment; and, if so,

(iii) Did the 1921 Act comply with the requirement for absolute majorities in each house?

The first question is considered by analysing the language of s 2 of the *Constitution Act* and examining the section's interaction with s 66 of the *Constitution Act* and s 46 of the *CAAA*.

1. Section 2 of the *Constitution Act*

(a) '[The] Council and Assembly shall … have all the powers and functions of the now subsisting Legislative Council'

As originally enacted, s 2 of the *Constitution Act* provided that the '… Council and Assembly shall, *subject to the provisions of this Act*, have *all* the *powers and functions* of the now subsisting Legislative Council'.[9] Leaving aside the proviso for the moment, the straightforward and literal meaning to be ascribed to those words is seemingly that if one identifies the content and extent of the Legislative Council's powers immediately prior to the coming into effect of the *Constitution Act* in 1890[10] the totality of those powers should be taken to have been conferred on *both* houses of the State Legislature[11] to be shared concurrently and equally. That this view was open was recognised by a former Clerk of the Legislative Council, the late Mr Marquet, who, when commenting on the powers of the houses *inter se*, remarked:

> The relations between the Houses, particularly in relation to money bills, have provided fertile grounds for constitutional debate. Two factors complicate rational solution: first, the elective nature of the Legislative Council, and second, the fact that each House has the powers of the Commons. Were it not for specific provisions inserted in the Constitution, those two factors, coupled with section 2(1) of that Act, would have preserved for the Legislative Council the powers that it had possessed

9 The *Acts Amendment (Constitution) Act 1978* (WA) redesignated the original s 2 as s 2(1) and inserted two additional subsections to s 2, sub-ss (2) and (3).

10 Sarah Murray and James A Thomson, 'A Western Australian Constitution?: Documents, Difficulties and Dramatis Personae' (2012) 36(2) *University of Western Australia Law Review* 1, 20.

11 The distinction is here made between the *Legislature* which consists of the two houses of Parliament and *Parliament* itself which by virtue of s 2(2) of the *Constitution Act* consists of the two houses which pass bills, together with the Queen, represented by the Governor, who assents to them.

> in relation to all bills prior to 1890. As it was, the framers of the 1889 Act clearly intended that the Assembly would be the Chamber in which the financial initiative and privileges of the Crown would be exercised.[12]

It is, however, at that point that one must have regard to the proviso 'subject to the provisions of this Act'. This necessarily requires consideration of s 66 of the *Constitution Act*, as it was originally enacted. As noted above, until its repeal in 1921, s 66 provided that all money bills were to originate with the Legislative Assembly. Section 66 thus imposed one significant limitation on the Legislative Council's powers, thereby giving effect to the qualification in s 2 of the *Constitution Act*. That section operated to alter the equality between the houses otherwise prevailing in respect to the legislative process by which bills became laws.

The proviso therefore resolved this *prima facie* inconsistency between ss 2 and 66 of the *Constitution Act*. Following 1921, a similar inconsistency existed between s 2 of the *Constitution Act* and s 46 of the *CAAA*. The question is then whether, as considered below, s 46 of the *CAAA*, like s 66 of the *Constitution Act*, fell within s 2's proviso so as to resolve this *prima facie* inconsistency.

A contrary argument may be made with a view to reconciling the ostensible inconsistency between s 46 of the *CAAA* and s 2 of the *Constitution Act.* Section 2, as suggested above, may be read as addressing the totality and full compass (i.e. the *content*) of the powers granted to the new legislature, while provisions such as s 66 (as it then was) prescribed *distributively* how those powers were *procedurally* to be exercised. The allocation of procedural responsibilities between the houses should therefore be treated as an *adjectival* and *not substantive* matter affecting the quantum of the legislative power. This arguably dissolves any inconsistency that might otherwise arise. The High Court's interpretation of s 32 of the *Australian Constitutions Act 1850 (No 2)* (Imp) ('1850 *Imperial Act*') in *Yougarla v Western Australia* provides some support for this argument.[13]

Section 32 of the 1850 *Imperial Act* authorised Western Australia's Governor and Legislative Council to replace the existing Legislative Council with a Council and a House of Representatives or other separate Legislative Houses, and to:

> vest in such Council and House of Representatives or other separate Legislative Houses the Powers and Functions of the Legislative Council for which the same may be substituted.

The preamble[14] to the *Constitution Act 1889* recites this authority and provides:

12 Laurence Marquet, 'The Law and Custom of the Parliament of Western Australia, 1890-1990' in David Black (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832-1990* (Western Australian Parliament, 1991) 343, 353.

13 (2001) 207 CLR 344.

14 See, *Interpretation Act 1984* (WA), s 31(1).

> Whereas it is expedient that the powers vested by the said Act [1850 Imperial Act] in the said Governor and Legislative Council should now be exercised, and that a Legislative Council and a Legislative Assembly should be substituted for the present Legislative Council, with the powers and functions hereinafter contained.

It is against this legislative background that s 2(1) of the *Constitution Act* needs to be interpreted. In *Yougarla*, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ considered 'the true operation of [s 32] of the 1850 [*Imperial*] *Act* was to empower the Legislative Council established in 1870 to … establish … a bicameral legislature and … *vest in that bicameral legislature ... the powers and functions of the Legislative Council*'.[15] The italicised text indicates that the powers and functions conferred under s 32 of the 1850 *Imperial Act* may have been granted to the Assembly and Council jointly, not severally. If so, then s 2(1) may be interpreted similarly. Yet, a distributive reading may not give sufficient regard to the phrase 'subject to the provisions of this Act' in s 2(1) of the *Constitution Act*. Arguably, it is this aspect of s 2(1), not the substantive conferral of power, which effects the procedural distribution of powers between the Houses. However, a statutory provision stating that 'A is subject to B' does not itself mean that without the phrase there would be a conflict between A and B. If there is no conflict, the phrase does nothing.[16] Accordingly, the phrase 'subject to the provisions of this Act' in s 2 of the *Constitution Act* gives rise to no necessary implication that without that phrase there would have been a conflict between s 2 of the *Constitution Act* and the provisions of that Act as originally enacted.

(b) Section 2's proviso – 'Subject to the provisions of this Act'

(i) '[S]ubject to'

It is therefore necessary to examine the phrase 'subject to' in considering the substantive effect of s 46 of the *CAAA* on s 2 of the *Constitution Act*. The phrase 'subject to' indicates which of two or more statutory provisions prevail if there is any inconsistency between those provisions.[17] As Miller JA explained in *S v Marwane*:

> The purpose of the phrase 'subject to' in such a context is to establish what is dominant and what subordinate or subservient; that to which a provision is 'subject', is dominant - in case of conflict it prevails over that which is subject to it.18

15 (2001) 207 CLR 344, 363 [43].

16 In those circumstances, it simply has no work to do: *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 580-1 (Gaudron J) quoting *C & J Clark Ltd v IRC* [1973] 1 WLR 905, 911 (Megarry J) and citing *Harding v Coburn* [1976] 2 NZLR 577, 582 (Cooke J).

17 *Maclean Shire Council v Nungera Co-operative Society Ltd* (1995) 86 LGERA 430, 433.

18 1982 (3) SA 717 (A), 747-8 quoted by Gaudron J in *Newcrest Mining (WA) Ltd v*

Accordingly, the qualification to s 2 of the *Constitution Act* establishes that if there is a conflict between s 2 and 'the provisions of *this Act*', the latter prevail to the extent of that inconsistency. When s 2 is read alongside s 73's grant of power to Western Australia's Parliament to amend '*this Act*', s 2 arguably indicates an intention to admit ambulatory changes to the content and distribution of the Houses' powers and functions, provided that the core notion in s 2 remains intact.[19] That is, there is a strong argument that s 2's proviso, in conjunction with s 73's grant of constituent power, provides a means for altering or amending 'the provisions of *this Act*' without any effect on s 2 itself. However, s 2's proviso does not extend to provisions falling outside '*this Act*'. Section 2's proviso does not state that the conferral of powers and functions on the Houses is subject to such provisions. Therefore, s 2 may be inconsistent with provisions outside of the scope of s 2's phrase 'this *Act*' which affect the distribution and content of the Houses' powers and functions. This then raises two questions. First, what exactly constitute 'the provisions of *this Act*'? Secondly, is s 46 of the *CAAA* a 'provision of *this Act*' within the meaning of that phrase in s 2 of the *Constitution Act*?

(ii) '[T]he provisions of this Act'

These two questions again throw the seemingly innocuous phrase 'this Act' back into the constitutional limelight. One question lies at the core of both questions: should the *Constitution Act* and the *CAAA* be regarded as a single composite legislative arrangement or are they to be treated as separate legislative instruments? The High Court grappled with this question in both *Western Australia v Wilsmore*[20] and *Attorney-General (WA) v Marquet*.[21] Unfortunately, the two cases point in opposite directions and the more recent case, *Marquet*, makes no reference to *Wilsmore* in this respect. The answer to this question affects the meaning ascribed to the phrase 'this Act' in s 2 of the *Constitution Act* and, ultimately, whether s 2 of the *Constitution Act* and s 46 of the *CAAA* are inconsistent.

Wilsmore

In *Wilsmore*, the phrase 'this Act' in s 73 of the *Constitution Act* was considered in relation to the scope of s 73's first proviso. The High Court held that the manner and form requirement was merely a proviso to s 73's grant of power to amend 'this Act'.[22] On this basis, amendments to the *Electoral Act 1907* (WA) were not subject to manner and form requirements in s 73(1) of the *Constitution Act*. Whilst this disposed of the action, Wilson J held that the *CAAA*[23] 'notwithstanding its

Commonwealth (1997) 190 CLR 513, 580-1.

19 The authors are grateful to Justice James Edelman for drawing their attention to the force of this argument.

20 (1982) 149 CLR 79.

21 (2003) 217 CLR 545.

22 (1982) 149 CLR 79, 83-4 (Gibbs CJ), 85 (Stephen J), 85 (Mason J), 87 (Murphy J), 91-2 (Aickin J), 98-102 (Wilson J), 104-5 (Brennan J).

23 The legislative history concerning the enactment of the *Constitution Act 1889* and the *CAAA* and the relationship between them is discussed by Wilson J in *Western Australia v*

short title … is itself a principal Act'.[24] His Honour considered the *CAAA* to have 'an identity which is quite distinct from … the [*Constitution*] *Act*'.[25] Amendments to the *CAAA* were also not subject to s 73(1) of the *Constitution Act's* manner and form requirements since the latter should be read as applying only to the residue of provisions in the *Constitution Act* itself.[26] In *Attorney-General (WA) ex rel Burke v Western Australia*, Burt CJ and Wickham J applied Wilson J's *obiter dictum* and held that amendments to the state ministry's size under s 38 of the *CAAA* were not subject to s 73(1) of the *Constitution Act*.[27]

On that reasoning, s 46 of the *CAAA*, since its enactment in 1921, has not fallen within the phrase 'subject to the provisions of *this Act*' in s 2 of the *Constitution Act*. This prompts the question: since s 46 is not in that 'Act', does it constrain, as s 66 of the *Constitution Act* did, the lawful exercise by the Legislative Council of its legislative power under s 2 of the *Constitution Act*? If not, then arguably this gives rise to an inconsistency between s 46 of the *CAAA* and s 2 of the *Constitution Act*. This inconsistency stems from ss 46(1) to (3) of the *CAAA* purporting to place limits on the Legislative Council's powers to initiate and amend money bills that were no longer contained in the *Constitution Act* itself. As noted above, s 2 of the *Constitution Act* provides that both Houses of Parliament are to have 'all the powers and functions of the now subsisting Legislative Council', subject to 'the provisions of this Act'. On the first interpretation of that phrase noted above, subject to the *Constitution Act's* provisions, s 2 granted the Legislative Council the power to initiate money bills as a power held by the former Legislative Council immediately prior to the *Constitution Act's* proclamation in 1890. Of course, consistent with Westminster constitutional principles, s 66 of the *Constitution Act* denied the Legislative Council the power to initiate money bills by vesting that power exclusively in the Legislative Assembly. Following 1921, however, the *Constitution Act* has contained no relevant limits on the Legislative Council's powers in this respect. Arguably, the removal of the restrictions on the Legislative Council from the *Constitution Act* restored the pre-1890 position on a plain reading of s 2 of the *Constitution Act*. This limit was instead imposed under s 46(1) of the *CAAA* which did not form part of the corpus of the *Constitution Act*. It may be argued, on the other hand, that since s 46 of the *CAAA* was cast in terms that were substantially identical to s 66 of the *Constitution Act* no *change* actually occurred to the relationship between the houses, maintaining the *status quo*. Section 46(1) of the *CAAA* largely replicated s 66 of the *Constitution Act*. However, ss 46(2)-(3) imposed limitations on the Legislative Council's power to amend money bills which were not previously codified in the *Constitution Act* itself.[28] The problem is, however, that, as argued above, the limiting effect of s

Wilsmore (1982) 149 CLR 79, 94-5 and see further, Murray and Thomson, above n 10, XX.

24 (1982) 149 CLR 79, 102. But see, below n 106-7 and accompanying text.

25 (1982) 149 CLR 79, 95.

26 (1982) 149 CLR 79, 102.

27 [1982] WAR 241, 245-6.

28 See, *Constitution Act Amendment Act 1893* (WA) s 23; *Constitution Acts Amendment Act 1889* (WA) s 46. See also, FR Beasley, 'The Legislative Council of Western Australia'

66 no longer restrained the Legislative Council's legislative power, affecting the basis on which it could be exercised under s 2 of the *Constitution Act*.

Marquet

It may be that s 2(1)'s reference to 'this Act' is interpreted differently to how the *Wilsmore* Court interpreted 'this Act' in s 73 of the *Constitution Act*. As Mr RM Mitchell SC has noted elsewhere in this issue, the *Marquet* majority diverged from *Wilsmore* in this respect.[29] It is implicit in the *Marquet* majority's historical analysis of Western Australian electoral legislation that their Honours considered the *CAAA* to fall within the phrase 'this Act' in s 73 of the *Constitution Act*.[30] Additionally, the *EDA*'s reference to 'this Act' was interpreted broadly to include changes to the electoral system, not simply to the *EDA's* provisions.[31] This aspect of the *Marquet* majority's judgment has been subject to criticism.[32] At any rate, if the phrase 'this Act' in s 2(1) of the *Constitution Act* is interpreted similarly, s 46 of the *CAAA* is not inconsistent with s 2(1). Section 46 of the *CAAA* falls within the proviso to s 2(1) of the *Constitution Act* on this interpretation of the expression 'this Act'.

THE DUBIOUS ENACTMENT OF SECTION 46 OF THE *CAAA* IN 1921

1. The *Constitution Act Amendment Act 1921* and s 73 of the *Constitution Act*

In *McCawley v The King*, the Privy Council held that for the most part, state constitutions are 'uncontrolled'.[33] Subject to applicable manner and form requirements, Western Australia's Parliament may amend or repeal the *Constitution Act's* provisions in the same manner that it alters the '*Dog Act* or any other Act'.[34] If s 46 of the *CAAA* is inconsistent with s 2 of the *Constitution Act*, the question arises whether the 1921 Act fell within the ambit of manner and form requirements under what was then s 73 and now s 73(1) of the *Constitution Act*. If not, s 46 of the *CAAA* may have impliedly amended s 2 of the *Constitution Act*. However, if the amendments were required to comply with s 73, there is some doubt whether the 1921 Act was passed in accordance with that provision.

(1946) 3 *Res Judicatae* 149, 152. As originally enacted, s 66 of the *Constitution Act* may have been interpreted as impliedly prohibiting the Legislative Council amending money bills: *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1107 (Griffith CJ).

29 RM Mitchell, 'When Should History Get in the Way of a Good Idea? A Comparison of Approaches to Interpreting the Commonwealth and Western Australian Constitutions' (2012) 36(2) *University of Western Australia Law Review* 211, 220.

30 *A-G (WA) v Marquet* (2003) 217 CLR 545, 559 [28], 562-3 [39]-[41] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

31 Ibid 565 [48], [52], 567 [57] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See, Peter Johnston, 'Attorney General (WA) v Marquet: Ramifications for the Western Australian Parliament' (2005) 20(1) Australasian Parliamentary Review 117, 122.

32 See, Peter Johnston, Manner and Form Provisions in the Western Australian Constitution: Their Judicial Interpretation (SJD Thesis, University of Western Australia, 2005) 202.

33 [1920] AC 691, 706.

34 Ibid 704.

Section 73(1) of the *Constitution Act* grants Western Australia's Parliament 'full power and authority … by *any Act*, to repeal or alter any of the provisions of *this Act*'. This grant of constituent power is subject to, amongst other things, two provisos contained in s 73(1) itself. The first proviso requires any bill effecting a change in either legislative chamber's 'Constitution' to obtain absolute majorities on both its second and third readings in both Houses of Parliament.[35] *Wilsmore* establishes that legislation *removing* from the *Constitution Act* matters touching either House's 'Constitution' must observe this manner and form requirement.[36]

It appears that the Constitution Act Amendment Bill 1921 ('1921 Bill') did not obtain absolute majorities on its second and third readings in the Assembly or its second reading in the Council. The *Votes and Proceedings of the Legislative Assembly* and the *Minutes of the Proceedings of the Legislative Council* record that on these readings the 1921 Bill was merely 'put and passed'.[37] *Hansard* also provides no indication that absolute majorities were obtained at these stages of the Bill's passage.[38] However, the *Minutes of the Proceedings of the Legislative Council* reveal that on its third reading in the Council the 1921 Bill was 'put and passed by an absolute majority'.[39]

At this time, the parliamentary practice was for the Speaker of the Legislative Assembly and President of the Legislative Council to record whether a chamber passed a Bill considered to fall within s 73 of the *Constitution Act* by an absolute majority.[40] The Speaker or President indicated attainment of an absolute majority by either a bare declaration,[41] a count following a division, or, more

35 It relevantly reads:
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. 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.

36 (1982) 149 CLR 79, 100 (Wilson J).

37 Legislative Assembly: Votes and Proceedings of the Legislative Assembly During the First Session of the Eleventh Parliament (1921-22), No. 28, 29 September 1921, 152 (2nd reading); Votes and Proceedings of the Legislative Assembly During the First Session of the Eleventh Parliament (1921-22), No. 36, 20 October 1921, 215 (3rd reading). Legislative Council: Minutes of the Proceedings of the Legislative Council (1921-22), No. 30, 8 November 1921, 107 (2nd reading).

38 Western Australia, Parliamentary Debates, Legislative Assembly, 29 September 1921, 1046 (2nd reading); Legislative Assembly, 20 October 1921, 1367 (3rd reading); Legislative Council, 8 November 1921, 1535-6 (2nd reading).

39 Legislative Council: Minutes of the Proceedings of the Legislative Council (1921-22), No. 40, 30 November 1921, 148 (3rd reading).

40 For example, both Houses of Parliament passed the *Parliament (Qualification of Women) Act 1920* (WA) by absolute majorities on its second and third readings which were considered necessary to comply with s 73 of the Constitution Act. See, Congdon, above n 6, 107.

41 This may be sufficient evidence of the fact that an absolute majority was obtained: Akar v

problematically, a declaration inferentially based on the presence of an absolute majority of members in the chamber with no dissentients.[42] On the other hand, Miragliotta explains that '[o]n those occasions where constitutional majorities were not expressly attained it was thought the relevant amendment did not affect the "constitution" of either [House] … and was therefore not subject to section 73'.[43] The 1921 Bill's passage highlights a problem with the vague concept of effecting a change to either House's 'Constitution' under s 73: Bills may have been passed without any regard for s 73 since it was not seen to apply, but subsequent interpretive changes may bring that assumption into question.[44] The picture is complicated in regards to the 1921 Bill since an absolute majority was recorded for the Bill's third reading in the Council. However, as the 1921 Bill did not obtain the absolute majorities prescribed under s 73, the question arises whether the 1921 amendments effected a change to either House's 'Constitution' under s 73.

As is evident from other articles in this edition[45] a range of different views have been expressed about what exactly falls within that concept under s 73.[46] At one end of the spectrum, Burt CJ in *Attorney-General (WA) ex rel Burke v Western Australia* construed s 73 of the *Constitution Act* very narrowly, limiting each chamber's 'Constitution' to its number of members and electoral districts.[47] On the other hand, in *Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ interpreted 'constitution' in s 6 of the *Australia Acts* relatively broadly.[48] If 'Constitution' in s 73(1) is interpreted in a similarly expansive manner,[49] s 73(1)'s first proviso arguably applies to laws such as the 1921 Act dealing with the powers of the houses *inter se*. More directly, s 73 is arguably attracted if the *powers* exercised by the Parliament, particularly the lawmaking and constituent powers under ss 2 and 73 of the *Constitution Act* respectively, form part of the Constitution of the houses.[50]

A-G (Sierra-Leone) [1970] AC 853.

42 See, Johnston, 'Method or Madness', above n 5, 34.

43 Narelle Miragliotta, 'Western Australia: A Tale of Two Constitutional Acts' (2003) 31(2) *University of Western Australia Law Review* 154, 158.

44 See, Congdon, above n 6, 107-8. For example, *Clydesdale v Hughes* (1934) 51 CLR 518 and *Western Australia v Wilsmore* (1982) 149 CLR 79 indicate that absolute majorities may not have been required for the *Parliament (Qualification of Women) Act 1920* (WA).

45 See, President CJ McLure, 'Key Judicial Decisions on the *Constitution Act 1889* (WA) and the *Constitution Acts Amendment Act 1899* (WA)' (2012) 36(2) *University of Western Australia Law Review* 233; RM Mitchell, above n 29; Congdon, above n 6, 104-5.

46 See, *Clydesdale v Hughes* (1934) 51 CLR 518; *Wilsmore v Western Australia* [1981] WAR 159; *Western Australia v Wilsmore* (1982) 149 CLR 79; *A-G (WA) ex rel Burke v WA* [1982] WAR 241.

47 [1982] WAR 241, 244.

48 (2003) 217 CLR 545, 572-4 [74]-[79]. Section 6 of the Australia Acts reads: "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 a law made by that Parliament, whether made before or after the commencement of this Act." (Emphasis added)

49 See, Johnston, 'Method or Madness', above n 5, 32-3.

50 One could infer a contrary construction based on the maxim expressio unius est exclusio

The *Marquet* majority held that Parliament's 'constitution' under s 6 of the *Australia Acts* 'includes (perhaps it is confined to) its own "nature and composition"',[51] which in the case of Western Australia is 'bicameral and representative'. However, the concepts of bicameralism and representativeness are not applied at a high level of abstraction. For example, in respect of bicameralism, 'constitution' under s 6 is not limited to laws abolishing a House of Parliament.[52] Instead, their Honours held that the *compositional* aspect of Parliament's 'constitution' includes features dealing 'with matters that are encompassed by the general description "representative" and *go to give that word its application in the particular case*'.[53] Symmetry of reasoning suggests a similar approach applies to the concept of Parliament's *nature* as an aspect of Parliament's 'constitution'. That is, Parliament's 'constitution' includes features going to give bicameralism 'its application in the particular case'. If so, it most likely includes laws respecting the powers of the houses *inter se*. Lijphart distinguishes strongly and weakly bicameral parliaments based on two variables: incongruence and symmetry. When both houses of a legislature are democratically elected, whether the chambers are *symmetrical* under Lijphart's classification depends on the relative constitutional powers of the two houses *vis-à-vis* the other.[54] Accordingly, the constitutional powers of the houses *inter se* may affect Parliament's 'constitution' as a feature going to whether a particular Parliament is strongly or weakly bicameral.

Accepting this entails the assumption that the 1921 Act fell within s 73's first proviso by removing a matter touching the Constitution of both Houses from the *Constitution Act*. Since the manner and form provisions in s 73(1) were not observed, s 46 of the *CAAA* would therefore not have been validly enacted. If so, then the purported repeal of s 66 of the *Constitution Act* would have been ineffective. Ironically, this would preserve the limitations on the Legislative Council's powers in the *Constitution Act*. However, a narrower reading of 'Constitution' in s 73(1), confining it to institutional composition, would mean that

alterius ('the express mention of one thing excludes all others') that the common use of the tripartite, differentiated expression 'constitution, powers, and procedure' [of the legislature] in provisions like s 5 of the *Colonial Laws Validity Act 1865* (Imp) and s 6 of the *Australia Acts 1986* (UK and Cth) recognises a distinction between 'constitution' and the separately included term, 'powers', of Parliament. The High Court has, however, cautioned on occasions that resort to that maxim should always be approached with great care: see e.g. *Houssein v Under Secretary of Industrial Relations & Technology (NSW)* (1982) 148 CLR 88, 94. Accordingly, rejecting the maxim, one can contemplate some attribute of the houses as being open to dual characterisation as pertaining to both their constitutions and their powers.

51 (2003) 217 CLR 545, 572 [75] (Gleeson CJ, Gummow, Hayne and Heydon JJ) citing *A-G (NSW) v Trethowan* (1931) 44 CLR 394, 429 (Dixon J).

52 Ibid 573 [76] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

53 Ibid (emphasis added).

54 Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, 1999) 206-7. The political science concepts of Professor Lijphart have been favourably cited by the High Court: see, *McGinty v Western Australia* (1996) 186 CLR 140, 185 n 220 (Dawson J), 248 n 485 (McHugh J) and A-G (WA) v Marquet (2003) 217 CLR 545, 577 [89] n 100 (Kirby J) where reference is made to his work, Electoral Systems and Party Systems, (1994).

these manner and form requirements did not apply to the 1921 Act's enactment. On that view, upon its enactment, s 46 of the *CAAA* was a *valid* law although, arguably, *ineffective* to legally *bind* the Legislative Council since it is purportedly judicially unenforceable.[55]

2. The Sources of Legal Efficacy applying to the 1921 Act's Enactment

Assuming the 1921 Act fell within s 73 of the *Constitution Act*, this leaves the question of whether a source of legal efficacy bound Western Australia's Parliament to observe s 73's first proviso when enacting the 1921 Act. In *Wilsmore*, Wilson J considered it unnecessary to examine:

> [w]hether the proviso is of binding force because of s 5 of the Colonial Laws Validity Act 1865 (Imp), s 5 of the Western Australian Constitution Act 1890 (Imp), s 106 of the Australian Constitution or simply because, on such authority as may be gleaned from Ranasinghe, it finds a place in the Constitution Act itself.[56]

However, the High Court in *Wilsmore*, in giving an exclusive although ambulatory effect to s 73(1) as limited to changes in the continuing part of the *Constitution Act* at any time,[57] held that such an operation of s 73 was consistent with s 5 of the *Western Australia Constitution Act 1890* (Imp) ('1890 *Imperial Act*') that either approved or gave legal effect and authority to the *Constitution Act*.[58]

55 Jeffrey Goldsworthy, in 'Manner and Form Revisited: Reflections on Marquet's Case' in M Groves (ed), *Law and Government in Australia: Essays in Honour of Enid Campbell* (Federation Press, 2005) 18, at 25, offers an alternative thesis that s 2 of the Australia Acts authorises state parliaments to validly entrench certain provisions in their constitutions which may be enforceable independently of s 6 of the Australia Act 1986 (Cth and UK) for their legal efficacy. This is provided they do not destroy or diminish a state Parliament's substantive legislative powers. He was there developing a theme he had first expounded in J Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403 (where he had identified s 2 of the Australia Acts as a source of state legislative power). On this view special procedural requirements such as absolute majorities or quorum requirements in order to pass certain classes of Bills are effective per se. If this view were to be accepted it could provide a basis on which provisions like ss 46(6) and (7) of the CAAA requiring appropriation and taxation Bills to deal only with appropriation and imposition of taxation respectively, would be judicially enforceable. However, s 46(9) of the CAAA imposes a significant, if not insurmountable, hurdle to this argument by declaring compliance with s 46 is not judicially enforceable: But see, below n 113. The possibility of s 2 of the Australia Acts entrenching s 46 will not be further discussed since Goldsworthy's premise, as yet, has not received judicial recognition.

56 (1982) 149 CLR 79, 96. Of course, Wilson J was speaking prior to the enactment of the *Australia Acts 1986* (Cth and UK). Section 3(1) of the *Australia Acts* provided that the *Colonial Laws Validity Act 1865* (UK) was to have no application to future Australian state laws. However, s 6 of the *Australia Acts* is substantially *in pari materia* with s 5 of the *Colonial Laws Validity Act*, ensuring the continued application of manner and form provisions to laws respecting Parliament's 'constitution, powers or procedure'.

57 An alternative way of describing this is to say that the proviso in s 73(1) has only a 'wasting' operation, applying to only the residue of the *Constitution Act*.

58 See, regarding the effect of the *Imperial Act 1890* in ratifying the *Constitution Act 1889* (WA): Murray and Thomson, above n 10, 40.

Section 5 of the 1890 *Imperial Act* gave effect to *only* those procedural limitations 'imposed by the scheduled Bill on the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature'. This appears to narrow the effect of s 5 of the *Colonial Laws Validity Act 1865* ('*CLVA*') (Imp) in relation to Western Australia.[59] Section 5 of the *CLVA* provided among other things that every representative colonial Legislature 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, … or Colonial Law for the time being in force.[60]

Arguably, however, s 5 of the *CLVA* continued to apply comprehensively to the manner and form provisions in the Western Australian Constitution after 1890, notwithstanding the existence of s 5 of the 1890 *Imperial Act*. These conundrums again show the uncharted hazards that can exist if one ventures into the manner and form minefield.

In *Wilsmore v Western Australia*, Smith J viewed the *CLVA* as 'a component part of the constitution of Western Australia'.[61] His Honour, quoting Isaacs and Rich JJ in *McCawley v R*,[62] held that the *CLVA* 'is to be read as "written into the *Constitution Statute* but without being itself subject to alteration by the local Legislature"'.[63] Wallace J also hinted at a relationship between these two statutes by characterising s 5 of the *CLVA* as 'the forerunner of s 73 of the *Constitution Act*'.[64] On this basis, s 5 of the *CLVA* may have provided an additional source of legal efficacy binding Western Australia's Parliament to observe s 73 of the *Constitution Act* when enacting the 1921 Act. If the 1921 Act effected a change in the 'Constitution' of either legislative chamber under s 73 of the *Constitution Act*, it was also most likely a law respecting the legislature's 'constitution' for the purposes of s 5 of the *CLVA*. Additionally, the 1921 Act, by prohibiting tacking within taxation bills, may have also been a law respecting the Legislature's 'powers' under s 5 of the *CLVA*.[65]

The possible interconnection between s 73 of the *Constitution Act*, s 5 of the *CLVA* and s 5 of the 1890 *Imperial Act* raises another question: should the *Australia Acts*

59 See, Murray and Thomson, above n 10, 33-4. Following *Wilsmore*, doubts were expressed regarding the effectiveness of the *CLVA* to bind Australian state legislatures: Bruce Okely, '"Constitutional Majority" – Effect of Australian High Court Decision in the *Wilsmore* Case' (1983) 64(1) *Parliamentarian* 22, 25.

60 A possible counter-argument is that s 5 of the *CLVA* applies only to so much of the content of the *Constitution Act* as remains by force of s 5 of the 1890 *Imperial Act.*

61 [1981] WAR 159, 172.

62 (1918) 26 CLR 9, 52.

63 [1981] WAR 159, 172.

64 Ibid 169.

65 Sir Owen Dixon, 'The Law and the Constitution' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (LawBook, 1965) 38, 49.

have repealed s 5 of the 1890 *Imperial Act* in addition to the *CLVA*? The *Statute Law (Repeals) Act 1989* (UK) expressly repealed another Imperial enactment previously affecting state constitutions, the *Australian States Constitution Act 1907* (Imp) ('1907 *Imperial Act*'). In *Sue v Hill*, the High Court plurality noted that the *Australia Acts* may well have previously impliedly repealed the 1907 *Imperial Act*.[66] This followed from the abolition of residual reservation requirements under ss 8 and 9 of the *Australia Acts* and the general provision in s 10 that the United Kingdom Government was to have no further responsibility for the states. Arguably, the *Australia Acts* may have similarly extinguished the remaining effect of the 1890 *Imperial Act*.[67]

THE EFFECT OF THE ENTRENCHMENT OF S 2(1) OF THE *CONSTITUTION ACT* ON S 46 OF THE *CAAA*

If the 1921 Act was validly enacted, further questions arise regarding s 46's operation following the 1978 amendments to the *Constitution Act*. Under those amendments, s 2 of the *Constitution Act* was redesignated as s 2(1) and entrenched by s 73(2)(e).[68] Any inconsistency between s 46(1) of the *CAAA* and s 2 of the *Constitution Act* remained after these amendments. If s 46 was validly enacted, it is necessary to consider what effect, if any, did the redesignation and entrenchment of s 2(1) of the *Constitution Act* in 1978 have on s 46? However, this question is predicated on the assumption that s 46 of the *CAAA* was validly enacted. If so, s 2 of the *Constitution Act* may have been impliedly amended in 1921 before being purportedly entrenched by s 73(2)(e) in 1978.

Yet another question follows: what was the consequence or effect of s 73(2)(e) purportedly entrenching a provision, in this instance, s 2 of the *Constitution Act*, which may previously have been impliedly amended? There appears to be little, if any, judicial or academic consideration of this issue. One possibility is that any past implied amendment is not an issue. That is, s 2(1) of the *Constitution Act's* redesignation and entrenchment may have rescinded the effects of any past

66 (1999) 199 CLR 462, 494-5 [72] (Gleeson CJ, Gummow and Hayne JJ). See also, *Yougarla v Western Australia* (2001) 207 CLR 344, 367 [58] n 68 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

67 Chief Justice David Malcolm, 'The State Judicial Power' (1991) 21 *University of Western Australia Law Review* 7, 16; Joshua Thomson, 'The One-Percent Case (*Yougarla v Western Australia*)' (2001) 1(2) *Oxford University Commonwealth Law Journal* 269, 269.

68 It provides, relevantly: 'A Bill that …
(e) expressly or impliedly in any way affects any of the following sections of this Act, namely —
sections 2, …… and 73,
shall not be presented for assent by or in the name of the Queen unless —
(f) the second and third readings of the Bill shall have been passed with the concurrence of an *absolute majority* … of the members … of the Legislative Council and the Legislative Assembly..; and
(g) the Bill has also prior to such presentation *been approved by the electors* in accordance with this section,
and a Bill assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.

implied amendment of s 2 by s 46 of the *CAAA*. Section 2(1) of the *Constitution Act* should therefore accordingly be treated essentially as a 'fresh enactment' when entrenched in 1978. If so, then whether s 2(1) of the *Constitution Act*, following its entrenchment in 1978, was inconsistent with s 46 of the *CAAA* turns in part on the interpretation of the phrase 'the *now* subsisting Legislative Council' in s 2(1).

Arguably, if s 2(1) was a 'fresh enactment', then following the 1978 entrenchment of s 2, the phrase may refer to the Legislative Council's powers in 1978. On that reading, 'the powers of the *now* subsisting Legislative Council' would include the limits imposed under s 46 of the *CAAA*. If that is the case, it may have resulted in s 73(2)(e) of the *Constitution Act* indirectly entrenching s 46 of the *CAAA*. However, the sounder interpretation seems to be that '*now* subsisting Legislative Council' refers to the Legislative Council in 1890. This is especially the case if s 2(1) is an exhaustive statement of the functions and powers conferred on the two Houses. If so, then since the Assembly *and* Council are to have the functions and powers 'of the now subsisting Legislative Council', an interpretation of this phrase as referring to the Legislative Council existing in 1978 would entail neither house having the power to initiate money bills. Instead, the temporal reference to the Legislative Council is anchored to 1890, the point of time when Western Australia changed from a unicameral to bicameral Parliament. Problematically, however, this interpretation uses the Legislative Council's powers in 1890 to interpret a provision which may have been impliedly amended in 1921 but then redesignated and entrenched in 1978. This provides another example of a significant problem the High Court faced when considering manner and form provisions in *Marquet* and *Yougarla*: namely, the resolution of constructional issues in an inter-temporal context.[69]

PART B: THE *PARLIAMENTARY PRIVILEGES ACT 1891* AND THE LEGISLATIVE POWERS OF PARLIAMENT'S TWO HOUSES

In the passage quoted above,[70] Mr Marquet stated that, but for specific provisions in the *Constitution Act*, 'the fact that each House has the powers of the Commons … coupled with s 2(1) of [the *Constitution Act*], would have preserved for the Legislative Council the powers that it had possessed in relation to *all bills* prior to 1890'. This assumes that the symmetry between the powers of the Legislative Council and the House of Commons includes the Commons' powers in its law-making function. The fact that the Council has the powers of the House of Commons is a result of statute, not the common law.[71]

Section 36 of the *Constitution Act* as originally enacted, granted Western Australia's

69 Johnston, *Manner and Form Provisions*, above n 32, 216.

70 See, above n 12 and accompanying text.

71 Colonial Legislatures did not automatically inherit all of the powers and privileges of the House of Commons, but only those which were reasonably necessary to their existence and the proper exercise of their functions: *Kielley v Carson* (1842) 4 Moo PC 63, 88.

Parliament the power to 'define the privileges, immunities, and *powers* to be held, enjoyed and exercised' by Parliament's two Houses and their members.[72] Pursuant to this power, Parliament enacted the *Parliamentary Privileges Act 1891* (WA) ('*Parliamentary Privileges Act*'), s 1 of which relevantly provided that:

> The Legislative Council and Legislative Assembly of Western Australia respectively … shall hold, enjoy and exercise such and the like privileges, immunities, and powers as … at the time of the passing of this Act, or shall hereafter for the time being be, held enjoyed, and exercised by the Commons House of Parliament of Great Britain and Ireland … so far as the same are *not inconsistent with the said recited Act* [the *Constitution Act*] or this Act.

In 2004, s 36 of the *Constitution Act* and s 1 of the *Parliamentary Privileges Act* were amended to provide that the relevant privileges, immunities and powers would be based on those of House of Commons as at 1 January 1989 'to the extent that they are *not inconsistent with this Act*'.[73]

Assuming the enactment and amendment of s 1 of the *Parliamentary Privileges Act* were valid,[74] does the reference to 'powers' in s 1 of the *Parliamentary Privileges Act* include the Houses' powers with respect to bills? Mr Marquet's

72 This power was originally subject to the proviso that the two Houses' 'privileges, immunities and powers' were not to exceed 'those for the *time being* held, enjoyed, or exercised by the Commons House of Parliament, or the members thereof'. The relationship between the *Parliamentary Privileges Act 1891* and s 36 of the *Constitution Act 1889* is noted in *Aboriginal Legal Service of Western Australia (Inc) v Western Australia* (1992) 9 WAR 297, 302 (Rowland J), 310-2 (Nicholson J). See also, *Corruption and Crime Commission of Western Australia v McCusker AO QC* [2009] WASC 44.

73 *Parliamentary Privileges Act 1891* (WA), s 1(b), as inserted by *Constitution (Parliamentary Privileges) Amendment Act 2004* (WA).

74 See, Marquet, above n 12, 345-6 (noting that, as originally enacted, s 1 of the *Parliamentary Privileges Act 1891* exceeded the power conferred under s 36 of the *Constitution Act*). However, ss 2 and 73 of the *Constitution Act* seemingly provide sufficient bases for Western Australia's Parliament to legislate inconsistently with s 36 of the *Constitution Act*: *Aboriginal Legal Service of Western Australia (Inc) v Western Australia* (1992) 9 WAR 297, 312 (Nicholson J). This then raises the question of whether amendments to s 36 of the *Constitution Act* (and s 1 of the *Parliamentary Privileges Act*) engage or attract the special procedures provided for in s 73 of the *Constitution Act*. In relation to the Constitution (Parliamentary Privileges) Amendment Bill 2004 ('2004 Bill'), the Solicitor-General noted the possibility that such amendments may effect a change to the 'constitution' of the Houses: Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 5166. In the context of the *Colonial Laws Validity Act 1865* (Imp), two Privy Council decisions point in opposite directions as to whether Parliament's 'privileges' form part of Parliament's 'constitution': compare *Fielding v Thomas* [1896] AC 600, 610 and *Chenard & Co v Arissol* [1949] AC 127, 133. Given this uncertainty, a cautious approach was adopted with absolute majorities sought and recorded for the second and third readings of the 2004 Bill in the Legislative Assembly. However, problematically, the Speaker declared the existence of an absolute majority based on the presence of an absolute majority of members in the chamber with no dissentients: Legislative Assembly, *Votes and Proceedings*, No. 142, 25 August 2004, 1418; see above n 42. In the Legislative Council, the 2004 Bill was merely 'put and passed' on its second and third readings: *Minutes of Proceedings*, No. 167, 28 October 2004, 1352.

analysis of the Legislative Council's powers, on the surface at least, assumes an affirmative answer. On this basis, s 1 would confer on the Legislative Council the same powers as the House of Commons with respect to money bills (i.e. initiation), except to the extent of any inconsistency with the *Parliamentary Privileges Act* (and prior to 2004, the *Constitution Act*). If so, s 1 of the *Parliamentary Privileges Act* potentially could give rise to similar inconsistency issues to those arising between s 46 of the *CAAA* and s 2(1) of the *Constitution Act*.

However, it is submitted that the better view is that, when read in context, 'powers' in s 1 does not encompass the Houses' *law-making* powers. Instead, 'powers' is more properly interpreted as referring to the Houses' powers that are *incidental* to the exercise of its legislative powers, such as the Houses' powers to punish for contempt of Parliament, compel the production of documents, summon witnesses to give evidence and to suspend and expel members. In *Arena v Nader*, a similar distinction was drawn between a Legislative chamber's law-making powers and its powers in relation to privileges in interpreting the term 'powers' under s 7A(1)(a) of the *Constitution Act 1902* (NSW).[75] Given the likelihood that a court would interpret 'powers' in s 1 of the *Parliamentary Privileges Act* similarly, s 1 should not raise the same kind of inconsistency problems as those arguably surrounding s 2(1) of the *Constitution Act* and s 46 of the *CAAA*.

PART C: THE EFFECT OF SECTION 73 (1) AND (2) OF THE *CONSTITUTION ACT* ON FINANCIAL LEGISLATION IN WESTERN AUSTRALIA

The interrelationship between ss 2(1) and 73(2)(e) of the *Constitution Act* and s 46 of the *CAAA* is another instance of difficulties plaguing the application of manner and form provisions in the Western Australian Constitution to financial legislation. It has been noted elsewhere in this issue that similar complexities arise when considering whether the first proviso in s 73(1) of the *Constitution Act* applies to financial legislation inconsistent with ss 64 and 72 of the *Constitution Act*.[76] This section addresses other effects that s 73 of the *Constitution Act* may have on Western Australian financial legislation.

The Enactment of Financial Legislation Prior to 1920

For the first couple of decades following the *Constitution Act's* proclamation, two factors required financial legislation in Western Australia to observe applicable constitutional restrictions. First, the second proviso in s 73 of the *Constitution Act* required any bill interfering with the operation of s 72 to be reserved for Her Majesty's assent. Secondly, in *Cooper v Commissioner of Income Tax (Qld)*, Griffith CJ and Barton J expressed the view in *obiter dictum* that State legislatures could not disregard the existing provisions of the State's *Constitution Act* without

75 (1997) 42 NSWLR 427, 436. See also, *Arena v Nader* (1997) 71 ALJR 1604, 1605 (Brennan CJ, Gummow and Hayne JJ) (refusing special leave to appeal to the High Court).

76 Johnston, 'Controversial Aspects of Money and Financial Arrangements' above n 8, 129.

first *directly* altering the *Constitution Act* itself.[77] That is, provisions in State *Constitution Acts* were not subject to implied repeal by subsequent inconsistent legislation passed by a State legislature. On this basis, the Queensland Supreme Court in *Australian Alliance Assurance Co v Goodwyn* held that:

> [T]he appropriation of any part of the consolidated revenue of the State, otherwise than in accordance with the provisions of the *Constitution Act* is not only unauthorised, but is contrary to law and forbidden by statute.[78]

Two significant changes to state constitutional law altered this position. First, the 1907 *Imperial Act* significantly limited the categories of bills requiring reservation. In *Burt v R*, Dwyer J rejected the plaintiff's argument that emergency financial legislation enacted during the Great Depression was invalid because it 'interfered' with s 72 of the *Constitution Act*, but contrary to s 73, had not been reserved for His Majesty's assent.[79] His Honour noted that following the 1907 *Imperial Act*, pre-1907 provisions relating to reservation of bills passed by Australian State Legislatures largely 'went by the board'.[80] Secondly, as noted above, in *McCawley*, the Privy Council overturned the principle in *Cooper's* case and established that state constitutions are predominantly 'uncontrolled'.[81] In *New South Wales v Bardolph*, Evatt J considered *McCawley's* effect on the enactment of state financial legislation.[82] Section 45 of the *Constitution Act 1902* (NSW), a provision analogous to s 72 of the *Constitution Act 1889*, contemplated the Consolidated Revenue Fund should be subject to be appropriated to such 'specific purposes' as may be prescribed by an Act. His Honour noted, however, that:

> [T]his section [s 45 of the *Constitution Act 1902* (NSW)] is necessarily subject to the terms of any subsequent Act passed by Parliament, this part of the Constitution of New South Wales being of a flexible character. For the principle of *McCawley v The King* is that, in dealing with public moneys or indeed any other subject not governed by a special method of law-making, Parliament is not bound to adhere to the letter or spirit of s 45, but is, on the contrary, empowered to make any provision it thinks fit, whether consistent or not with s 45.[83]

Following *McCawley's* case, it therefore became necessary to consider whether any relevant restrictive procedure conditioned the State Parliament's power to enact financial legislation.

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77 (1907) 4 CLR 1304, 1314 (Griffith CJ), 1317 (Barton J).

78 [1916] St R Qd 225, 252-3 (Lukin J), 240 (Cooper J agreeing), 272 (Shand J agreeing with Lukin J on this point), 275 (Real J agreeing with Shand J), 275 (Chubb J agreeing with Shand J).

79 (1935) 37 WALR 68.

80 Ibid 71.

81 See above, n 34.

82 (1934) 52 CLR 455.

83 Ibid 466.

2. Manner and Form Provisions and Financial Legislation in Western Australia

(i) Section 73(1) of the *Constitution Act*

As noted above, until the passage of the 1907 *Imperial Act*, bills interfering with s 72's operation were required to be reserved under the second proviso in s 73(1). Under s 72 of the *Constitution Act*, 'all the Consolidated Account shall be appropriated to such *purposes* as any Act of the Legislature shall prescribe'. It is implicit in s 72 of the *Constitution Act* that:

(i) payments from consolidated revenue must be authorised by statute;[84] and

(ii) such statutes must prescribe the purposes of the appropriation.[85]

Prior to its repeal, s 31 of the *Audit Act 1904* (WA) *('Audit Act')* provided 'no money shall be drawn from the Public Account except under appropriation made by law, *or* by the authority the Governor'. During the 1984 *Royal Commission into Parliamentary Deadlocks*, James Thomson noted that the Governor's authority was seemingly sufficient warrant for money to be drawn from the Public Account under s 31 of the *Audit Act*.[86] That is, an Act of the Legislature was not necessary to appropriate money from the Public Account.

Before 1978, s 31 of the *Audit Act* was relied upon to appropriate moneys during 'hiatus periods' when Parliament had not passed a Supply Act before the start of a financial year.[87] Section 31A of the *Audit Act* was enacted following advice from the Solicitor-General that this established practice breached s 72 of the *Constitution Act*.[88] Accordingly, s 31 of the *Audit Act*, by authorising expenditure by the Governor without an Act of the Legislature, arguably 'interfered' with the operation of s 72 of the *Constitution Act*. The alternative argument is that s 31 of the *Audit Act* may itself have constituted a parliamentary authorisation of such appropriations. However, in *Auckland Harbour v The King*, Viscount Haldane explained parliamentary authorisation of appropriations in terms of *distinct* authorisations.[89] At any rate, contrary to s 72 of the *Constitution Act*, s 31 of the *Audit Act* did not prescribe the purposes of appropriations.

The reservation requirements under s 73 of the *Constitution Act* applied to the *Audit Act's* enactment since this preceded the now repealed 1907 *Imperial Act*.

84 John Waugh, 'Evading Parliamentary Control of Government Spending: Some Early Case Studies' (1998) 9 *Public Law Review* 28, 30.

85 See, *Alcock v Fergie* (1867) 4 WW & a'B (L) 285, 316 (Stawell CJ). See also, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 544.

86 Western Australia, Royal Commission into Parliamentary Deadlocks, *Final Report* (1984-85) vol 2, 19.

87 Ibid.

88 Ibid. See also, Western Australia, *Parliamentary Debates*, Legislative Assembly, 3 May 1978, 1285.

89 [1924] AC 318, 326-7. See also, *Alcock v Fergie* (1867) 4 WW & a'B (L) 285, 318.

However, the *Audit Act* was not reserved for His Majesty's assent. The *Audit Act* may therefore have been invalid. If so, then the practice of drawing money from the Public Account in reliance on s 31 of the *Audit Act* lacked legal authority until Parliament retrospectively granted authority. Ultimately, s 76A of the *Interpretation Act 1984* (WA) may have retrospectively validated the *Audit Act*. If valid, s 76A negates previous reservation requirements by purportedly giving the *Australia Acts* a retrospective operation.[90]

(ii) Section 73(2) of the *Constitution Act*

There may be another manner and form provision, in addition to s 73(1) that is relevantly capable of applying to financial legislation: s 73(2) of the *Constitution Act*. On the one hand, any law breaching s 73(1) of the *Constitution* may necessarily and automatically also breach s 73(2).[91] More significantly, s 73(2) entrenches s 2(1) of the *Constitution Act* which requires the Council and Assembly to 'have … *all* the powers and *functions* of the now subsisting Legislative Council'. An Appropriation Act inconsistent with ss 64 or 72 of the *Constitution Act* may potentially affect this requirement under s 2(1).

The starting point is identifying what the terms of s 2(1) of the *Constitution Act* require. That is, what is entailed by s 2(1) mandating that the two legislative chambers 'shall … *have* all the powers and functions of the now subsisting Legislative Council'? The term 'functions' ordinarily includes 'powers, duties and responsibilities'.[92] Sometimes, however, the expressions 'powers' and 'functions' are used interchangeably.[93] It is presumed though that where different words are used in a statute they are intended to mean different things.[94] That is, the term 'functions' in s 2(1) of the *Constitution Act* is not coextensive with 'powers' and extends to the Legislative Council's duties and responsibilities in 1890. A distinction may be drawn between the legislative chambers *having* a power and *exercising* that power. However, it is arguable that the term 'functions' in s 2(1) of the *Constitution Act* connotes performance of the functions, at least to the extent that those 'functions' include duties and responsibilities.[95]

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90 See, *Yougarla v Western Australia* (1999) 21 WAR 488; Twomey, *Constitution of New South Wales*, above n 85, 288-91.

91 Section 73(2)(e) applies to bills that in any way *affect* s 73. Bills passed contrary to s 73(1) seemingly *affect*, at least *indirectly*, the operation of s 73 by seeking to displace its consequence of rendering the law otherwise 'unlawful'. However, the practical consequences of how s 73(1) fits with s 73(2) may be limited. Once a law falling within s 73(1) obtains the requisite absolute majorities, it could not be said to *affect* s 73. A referendum under s 73(2) would therefore be unnecessary, unless the bill otherwise fell within s 73(2).

92 See, *Interpretation Act 1984* (WA) s 5.

93 *Edelsten v Health Insurance Commission* (1990) 27 FCR 56, 63 (Northrop and Lockhart JJ).

94 *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579, 590.

95 See, *Interpretation Act 1984* (WA) s 48. See also, *Rugs-A-Million (WA) Pty Ltd v Walker* [2005] WASC 288, [58].

(a) The Legislative Council's Powers and Functions in 1890

The next step in determining s 2(1)'s meaning and effect is to ascertain the powers and functions of the Legislative Council in respect of appropriations immediately prior to the *Constitution Act's* proclamation. In 1869 a householders' petition was presented to Western Australia's Legislative Council pursuant to s 9 of the 1850 *Imperial Act* requesting the establishment of a partially representative Legislative Council. The existing Council passed a Bill the following year providing for a new Legislative Council.[96] The other provisions of the 1850 *Imperial Act* applied to the new Legislative Council upon its establishment.[97] Section 14 of the 1850 *Imperial Act* provided that Western Australia's Governor, with the advice and consent of the Legislative Council, had:

> Authority to make Laws for the Peace, Welfare, and good Government of the said Colonies respectively, and … *by such Laws* to appropriate to the public Service within the said Colonies respectively the whole of Her Majesty's Revenue within [the] Colon[y].

Local legislation also regulated gubernatorial expenditure. Concerns amongst Legislative Councillors about expenditure not provided for in gubernatorial Estimates resulted in the passage of the *Audit Act 1881* (WA).[98] Section 16 of the *Audit Act 1881* (WA) required the Legislative Council to elect four of its members to form a Finance Committee to advise the Governor on questions of public expenditure when necessary during recesses. No vote of public money was to be exceeded or unauthorised expenditure incurred until the Governor invited the Committee's written opinion on the proposed expenditure. Under s 16, the Governor had a limited power, in any case of *emergency*, to incur expenditure contrary to the Committee's advice if the Governor deemed it expedient in the public interest. However, the Governor was still required to lay a full statement of the circumstances of the case before the Legislative Council at the first convenient opportunity. Leaving aside emergencies, the clear combined effect of local and Imperial legislation was to vest the Legislative Council, or its Finance Committee, with the power to authorise and control appropriations of monies from Consolidated Revenue. This power arguably formed part of the Council's *function* of controlling public expenditure.

(b) Section 2(1) of the Constitution Act and Appropriation Legislation

What consequences follow from s 2(1) of the *Constitution Act* requiring Parliament's two houses to retain '*all* the powers and functions' held by the Legislative Council in 1890 in respect of appropriations and expenditure? Presumably, Parliament's two houses may not abdicate any power, or divest

96 33 Vict. No. 13.

97 RD Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 3rd ed, 1972) 38.

98 Brian De Garis, 'Constitutional and Political Developments, 1870–1890' in David Black (ed), *The House on the Hill: A History of the Parliament of Western Australia 1832-1990* (Parliament of Western Australia, 1991) 41, 59.