# 'MANNER AND FORM': AN IMBROGLIO IN VICTORIA

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## I. INTRODUCTION

The enactment of the *Australia Act*[1] in 1986 may not necessarily have put to rest a contested issue among legal commentators in Australia. The debate still persists because the provisions in s 6 of the *Australia Act* do not, arguably, clarify the issue. Section 6 of the *Australia Act* requires an Australian State Parliament to comply with such 'manner and form' requirement as provided by an earlier law of the State Parliament when it seeks to enact a law "respecting the constitution, powers or procedure of the Parliament of a State". The contested issue simply is whether an Australian State Parliament has to comply with an existing 'manner and form' provision when the Parliament seeks to enact a law which cannot be characterised as a law "respecting the constitution, powers or procedure of the Parliament of the State". The answer to this issue has practical significance, especially when it is canvassed in the context of a recent controversy in the State of Victoria. The controversy related to the alleged invalidity of a bundle of legislation because of the failure by the

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1 *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK). Hereinafter when the phrase "*Australia Act*" is mentioned it refers to both the UK and the Commonwealth legislation unless the context indicates otherwise.

Victorian Parliament to comply with the absolute majority requirement as prescribed by s 18 of the *Constitution Act* 1975 for its enactment. Section 18 of the *Constitution Act* 1975 (Vic) clearly prescribes a 'manner and form' requirement. In this article the conclusion is reached that even though the bundle of legislation would not satisfy the description of laws respecting the constitution, powers or procedure of the Parliament, the Parliament of Victoria is nevertheless bound to enact such legislation with an absolute majority.

## II. THE EVENTS IN VICTORIA

Section 18 of the *Constitution Act* 1975 provides that it shall not be lawful to present to the Governor for the royal assent any Bill which repeals, alters or varies, *inter alia*, Part III of the *Constitution Act* 1975 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 of the Council and of the Assembly respectively.[2] Part III of the *Constitution Act* 1975 contains provisions relating to "The Supreme Court of Victoria". These provisions deal with a number of matters such as eligibility for appointment as a Judge of the Supreme Court and the mode of appointment (s 75); the seal of the Court (s 76); the commissions of Supreme Court Judges (s 77); the Chief Justice and the appointment of an Acting Chief Justice (ss 78-79); the salaries, allowances and

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2 The full text of s18 prior to the enactment of the *Constitution (Jurisdiction of Supreme Court) Act* 1991 (Vic) read as follows:

18 (1) Subject to subsection (2) the Parliament may by any Act repeal alter or vary all or any of the provisions of this Act and substitute others in lieu thereof.

(2) It shall not be lawful to present to the Governor for Her Majesty's assent any Bill:

a) by which an alteration in the constitution of the Parliament, the Council or the Assembly may be made; or

b) by which this section, Part I, Part IIA, Part III, or Division 2 of Part V, or any provision substituted for any provisions therein contained may be repealed altered or varied,

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 of the Council and of the Assembly respectively.

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

(4) Subsection (2) shall not apply to any Bill to:

a) alter the qualifications of electors and members of the Council or the Assembly;
b) establish new electoral provinces or districts or vary or alter any such province or district;
c) appoint alter increase or decrease the number of members of the Council or the Assembly to be elected for an electoral province or district;
d) increase the whole number of members of the Council or the Assembly;
e) alter and regulate the appointment of returning officers; or
f) make provision for the issue and return of writs for the election of members to serve in the Council and the Assembly respectively or for the time place and manner of holding such elections.

pensions of Judges of the Supreme Court (s 82); the proscription of Judges of the Supreme Court from holding any other place of profit (s 84); the powers and jurisdiction of the Supreme Court (s 85); the power of Supreme Court Judges to award a writ of *habeas corpus* (s 86), etc.

Prior to the enactment of the *Constitution (Jurisdiction of Supreme Court) Act* 1991 (Vic), section 85, which is contained in Part III of the *Constitution Act* 1975, provided as follows:

> (1) Subject to this Act the [Supreme] Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.
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> (2) [Repealed]
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> (3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the *Supreme Court Act* 1986.
>
> (4) This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the Court.[3]

The effect of s 18 is to 'entrench' the jurisdiction of the Supreme Court by the requirement of an absolute majority for the passage of legislation which seeks to repeal, alter or vary the jurisdiction of the Supreme Court, except for legislation which seeks to *increase* the jurisdiction of that Court.

Attention should be drawn to two important aspects arising from the operation of ss 18 and 85 of the *Constitution Act* 1975. First, neither s 85 nor any other provision of the *Constitution Act* 1975 contained any definition of the class of bills which would have the effect of repealing, altering or varying s 85. Secondly, where a provision in a bill clearly would have the effect of repealing, altering or varying s 85, the whole bill would be void even if the offending provision was of only very minor importance.

The imbroglio in Victoria arose from the lack of clarity in the concept of a provision in a bill which effected a repeal, alteration or variation of s 85 of the *Constitution Act* 1975. The Victorian Parliament had on many occasions enacted laws which contained a wide variety of provisions which could be regarded as having effected a diminution of the jurisdiction of the Supreme Court. These provisions which would clearly diminish the jurisdiction of the Supreme Court could be exemplified by clauses conferring an exclusive jurisdiction upon a body other than the Supreme Court, and privative clauses (ie a clause which precludes or restricts judicial review of the decisions of an inferior tribunal by the Supreme Court). It might also conceivably be argued that provisions which seek to alter a penalty or abolish a cause of action would have the effect of amending or varying s 85 of the *Constitution Act* 1975.[4]

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3 Section 85(2) before its repeal by the *Supreme Court Act* 1986 provided as follows:

> The Court and the Judges of the Court shall have and may exercise such jurisdictions powers and authorities as were had and exercised by any of the superior Courts in England or the judges thereof or by the Lord High Chancellor of England including the jurisdiction powers and authorities in

For over a decade after the enactment of s 85 the difficulties with the operation of that section did not surface. However, in January 1988, a judge of the Supreme Court of Victoria in a conference paper[5] cast doubt on the validity of the *Retail Tenancies Act* 1986 (Vic) which, *inter alia*, conferred what appeared to be an exclusive jurisdiction upon a body other than the Supreme Court.[6] This provoked "a rash of (hitherto inconclusive) litigation" in the Supreme Court "with a view to testing the validity of a number of Acts on the basis that they operated upon the jurisdiction of the Supreme Court without having been passed by an absolute majority".[7] The State Attorney-General in moving the second reading of the *Constitution (Supreme Court) Bill* said:

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relation to probate and matrimonial cases and administration of assets at or before the commencement of Act No 502.

The *Supreme Court Act* 1986 had also replaced the provisions of s 85(3) which originally provided as follows:

> The Court and the Judges of the Court shall in addition have and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as are now prescribed by any Act as belonging to or exercisable by the Supreme Court of Victoria or the Judges thereof.

4 Sections 15-17 of the *Small Claims Tribunal Act* 1973 (Vic) provide a very neat illustration of provisions which expressly seek to oust the jurisdiction of the courts and confer it on the Small Claims Tribunal and, furthermore, to limit the supervisory jurisdiction of the courts.

The wide variety of privative clauses pose the interesting question of the extent to which judicial review is effectively ousted. The cognoscenti may dwell upon the doctrine developed in *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147 and the question of its reception in Australia: see M Allars *Introduction to Australian Administrative Law* (1989) especially at pp 223-35. For a recent commentary on current judicial response to the usual privative clauses and those of a limited nature see JW Barnes "Privative Clauses - The Compromise We Had to Have" (1992) 20 *Australian Business Law Review* 169 (discussing the two recent cases of *Public Service Association of South Australia v Federated Clerks' Union of Australia* (1991) 102 ALR 161 and *Svecova v Industrial Commission of NSW* (unreported, New South Wales Court of Appeal, 5 September 1991).

5 In his paper entitled "Judges of the Nineties and Beyond" delivered to the Supreme Court Judges' Conference in Brisbane, Mr Justice Tadgell hinted that the Act, in the absence of passage by an absolute majority, might be invalid. Concerns were expressed in the Supreme Court's *Annual Report* for 1988 (at pp 16-27) about legislation which gives exclusive jurisdiction to tribunals "whose members do not have the permanency of appointment of judges but rely on the Executive for reappointment at the end of a period" (p 22). It was stated in the *Annual Report* as follows (p 27):

> The Supreme Court is and must be the guardian in Victoria of the rule of law. All of the developments to which we have drawn attention in this section of the report impede or threaten the Court in its function as such guardian. The area of the administration of justice according to law by the Supreme Court has been reduced. These developments have been and are profoundly unsettling to the Court as they must also be to the community the Court is expected to serve.

6 For instance s 21 of the *Retail Tenancies Act* 1986 which came into operation on 21 September 1987 provided for a dispute between a landlord and a tenant arising under a retail premises lease (other than a claim by the landlord solely for the payment of rent or a dispute which was capable of being determined by a registered valuer in accordance with the Act) to be referred to arbitration. Section 21(4) provided as follows:

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

In the case of the *Planning and Environment Act* 1987 s 39(3) provided as follows:

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

> Since December 1975 a considerable number of Bills have been passed that contain provisions which confer judicial jurisdiction, power and/or authority on various statutory boards and tribunals. Pursuant to the Standing Orders of Parliament, some of these Bills have been endorsed as having been passed by an absolute majority and some have not been endorsed. Without the endorsement, it is difficult to establish beyond doubt that the Bill was passed by an absolute majority.[8]

To deal with the problem, the *Constitution (Supreme Court) Act* 1989 (Vic) was passed which provided for a form of privative clause in relation to Acts passed between December 1975 and June 1989.[9] However, as the legislation did not operate *prospectively* the problem posed by the interaction of ss 18 and 85 remains unresolved.[10]

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Section 21(4) of the *Retail Tenancies Act* 1986 and s 39(3) of the *Planning and Environment Act* 1987 would have the effect of altering or varying the jurisdiction of the Supreme Court as provided by s 85(1) of the *Constitution Act* 1975.

7 "A Report to Parliament Upon the *Constitution Act* 1975" (*Thirty-Ninth Report to the Parliament prepared by the Legal and Constitutional Committee*, March 1990, hereinafter referred to as *The Constitution Act Report*) p 6. *The Constitution Act Report* cited the following examples: *Mowra Pty Ltd v Roper* (Unreported, Supreme Court of Victoria, Phillips J, 14 March 1989) where the validity of the *Planning and Environment Act* 1987 (Vic) was questioned on the basis that the conferral of an exclusive planning jurisdiction upon the Administrative Appeals Tribunal had the effect of altering or varying subsection 85 (1) of the *Constitution Act* 1975; *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd* [1989] VR 584 involving the *Retail Tenancies Act* 1986 (Vic). Both Phillips J in the former and Ormiston J in the latter did not express any concluded view on the issue: p 6. Ormiston J said that it was unnecesary to consider the matter as "no question was raised as to the validity of the provision in s 21(4) of the *Retail Tenancies Act* excluding this court's jurisdiction upon the ground that it is inconsistent with s 85 of the *Constitution Act*" [1985] VR 584 at 587. In *Antoniou* (1990) 4 AAT Reports (Vic) 158 at 175 the issue was merely adverted to.

8 *Parliamentary Debates* Legislative Assembly Vol 393 p 965.

How does one prove that a piece of legislation has not been passed by an absolute majority as required by s 18(2) of the *Constitution Act* 1975? In the case of the challenge to the validity of the *Planning and Environment Act* the evidence put before the Supreme Court included the *Minutes of Proceedings* and the *Votes and Proceedings* of the Victorian Parliament, which did not record it as having been passed with an absolute majority of the whole number of the members of the Legislative Council and the Legislative Assembly. See *Parliamentary Debates* Legislative Council Vol 394 p 1224. A special privilege attaches to the use of parliamentary proceedings as evidence. D Byrne and JD Heydon said:

> The house may give leave to issue a subpoena for the production of tabled documents and may permit its officers to attend the court to produce the documents. The question whether evidence may be given by a member or by another person as to matters done and things said in parliament is surprisingly obscure. Despite early cases which would render inadmissible any evidence of these matters or things, it is now clear that without the leave of the House, *Hansard* may be tendered or other evidence led from a member or otherwise as to facts that occurred during a sitting." *Cross on Evidence: Fourth Australian Edition* (1991) p 738.

9 The *Constitution (Supreme Court) Act* 1989 (Vic) was passed by an absolute majority in accordance with the requirements of s 18 of the *Constitution Act* 1975. Section 4 of the *Constitution (Supreme Court) Act* 1989 provides as follows:

> 4(1) The enactment or validity of the *Retail Tenancies Act* 1986, the *Planning and Environment Act* 1987 or any other Act enacted or purporting to have been enacted after 1 December 1975 and before 1 July 1989 shall not be called into question in any proceeding in any court or tribunal on the ground that the Bill for the Act contained any provision by which section 85 of the Principal Act [ie the *Constitution Act* 1975] may be repealed, altered or varied and, because the requirements of section 18(2) of the Principal Act were not complied with, the Bill was not lawfully presented for Royal Assent or was void.

On 15 September 1989, His Excellency the Governor in Council referred the problem to the Legal and Constitutional Committee an all party investigating Committee of the Victorian Parliament. The Committee was to examine, among other things, the desirability of amending s 18.[11] It is not proposed here to canvass the various recommendations[12] of the Committee but simply to point out that in its Report, the Committee did not tackle the "numerous and complex legal issues" raised by the operation of ss 18 and 85. The Committee said:

> The Committee's attitude throughout has been to avoid setting itself up as some mock court for the final judgment of such profound constitutional questions. The interpretation of the *Constitution Act* is not a matter for this Committee, eminent counsel, or officers of the Crown. It is a matter firmly reposed in the Supreme Court, and there the Committee is happy to let it lie.[13]

The Victorian Parliament has, pursuant to the Report of the Legal and Constitutional Committee, enacted the *Constitution (Jurisdiction of Supreme Court) Act* 1991 (Vic). The main thrust of the Act is the insertion of four new subsections into s 85 of the *Constitution Act*. The Act also inserted a new subsection (2A) into s 18 of the *Constitution Act*.[14]

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(2) In sub section (1), a reference to a provision in a Bill for an Act does not include a reference to a provision directly amending Part III of the Principal Act by the insertion, substitution, omission or repeal of matter.

(3) Anything done or omitted to be done under the authority or purported authority of an Act to which sub section (1) applies shall not be called in question on the ground referred to in sub section (1).

For the Minister's second reading speech, see *Parliamentary Debates* Legislative Assembly Vol 393 p 965 (19 April 1989); *Parliamentary Debates* Legislative Council Vol 394 p 1221 (26 May 1989).

10 During 1989, the Parliament erred on the side of caution by requiring an absolute majority to be obtained in respect of those bills which might, however remotely, affect the jurisdiction of the Supreme Court: *The Constitution Act Report* p 7.

11 The full terms of reference were as follows:

(1) the desirability of legislation to amend the *Constitution Act* 1975, in order to alter the effect of section 18 of the Act in relation to legislation which repeals, alters or varies section 85 of the Act and, without limiting the generality of the above;

(2) whether the requirement that legislation which repeals, alters or varies s 85 of the *Constitution Act* must be passed by absolute majorities of both Houses of Parliament should be retained;

(3) if the requirement referred to in paragraph (2) should be retained, whether a definition of the types of legislative provision which repeal, alter or vary s 85 of the *Constitution Act* should be inserted into the Act, and if so, what that definition should be;

(4) and, if the requirement referred to in paragraph (2) should be retained, whether the *Constitution Act* should be amended to provide that an Act which contains a provision which purports to repeal, alter or vary s 85 of the *Constitution Act*, but which was not passed by absolute majorities of both Houses of Parliament, is valid, although the provision which purports to repeal, alter or vary s 85 is of no effect;

In investigating these matters, the Committee should note the Government's commitment to the principle that one parliament should not seek to fetter the ability of a subsequent parliament to legislate, other than to the extent necessary to safeguard the continued existence of the fundamental constitutional components of Victoria's system of government.

12 For a summary of these recommendations see *The Constitution Act Report* pp xi-xiii.

13 *Ibid* p 9.

14 Section 18(2A) of the *Constitution Act* 1975 reads as follows:

The new s 85(5) provides that a provision of an Act of the Victorian Parliament shall not be taken to repeal, alter or vary s 85 unless three conditions are met. The State Attorney-General in moving the Second Reading of the Bill explained the nature of the three conditions:

> The first condition is that the Act must expressly refer to s 85, and expressly state that the provision in question is intended to repeal, alter or vary s 85. The effect of this condition is that legislation will not affect the jurisdiction of the Supreme Court, and consequently will not require passage by absolute majority, unless it is completely plain that this is the intended effect of the legislation. Consequently, there will be no risk that legislation will be void as a result of an inadvertent failure to obtain the necessary absolute majorities.
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> The second condition which must be met before legislation will be taken to repeal, alter or vary s 85 is the making of a statement in each House of the reasons for doing so. The purpose of this provision is to ensure that the attention of Parliament is clearly drawn to the issue of the court's jurisdiction.
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> The third condition is that the statement must be made during the second reading speech, or with at least 24 hours notice of intention to make a statement or with the leave of the Council or Assembly. This provision will give the relevant House adequate time to consider the reasons for the change in jurisdiction.[15]

Section 85(6) provides that a Bill which excludes or restricts, or purports to exclude or restrict, judicial review by the Court of a decision of another court, tribunal, body or person is to be taken to repeal, alter or vary s 85 unless the requirements of s 85(5) are satisfied.[16] This new subsection was inserted

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

It should be noted that s 18 of the *Constitution Act* 1975 is itself subject to the manner and form provisions set out herein. To the extent that s 18 relates to the procedures for making statutes, it is a law within the meaning of s 6 of the *Australia Act*.

15 *Parliamentary Debates* Legislative Assembly pp 3125-6 (6 June 1991). Section 85 of the *Constitution Act* 1975 in its amended form now reads as follows:

> (1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.
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> * * * *
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> (3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the *Supreme Court Act 1986*.
>
> (4) This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the Court.
>
> (5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless -
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> (a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and
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> (b) The member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and
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> (c) the statement is so made -
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> (i) during the member's second reading speech; or

because it is not clear whether s 85 in its unamended form would require legislation which restricts judicial review to be passed by absolute majority.

Section 85(7) provides that a provision of an Act which creates, or which purports to create a summary offence shall not be taken, on that account, to repeal, alter or vary s 85.[17]

Section 85(8) provides that a provision of an Act that confers jurisdiction on a court, tribunal, body or person which would otherwise be exercisable by the Supreme Court, or which augments any such jurisdiction conferred on a court, tribunal, body or person, does not exclude the jurisdiction of the Supreme Court unless the s 85(5) procedures are followed.

Another important change effected by the *Constitution (Jurisdiction of the Supreme Court) Act* 1991 is the amendment of s 18 to ensure that *only* the provision of an Act which repeals, alters, or varies s 85 is void if the Bill for the Act is not passed with the necessary absolute majorities.

The Act also provides that the privative clause in s 4 of the *Constitution (Supreme Court) Act* 1989 is extended to cover legislation passed before 1 July 1991.[18]

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

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

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

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

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

16 A number of recent Victorian Acts contain provisions which expressly refer to s 85: for example s 158 of the *Gaming Machine Control Act* 1991, s 36A of the *Medical Practitioners Act* 1970 as inserted by s 14 of the *Medical Practitioners (Amendment) Act* 1991, and s 10 of the *Health (Infectious Diseases) Act* 1991 (inserting a new s 389A into the *Health Act* 1958). Because all these mentioned sections seek expressly to limit the jurisdiction of the Supreme Court they were passed by absolute majorities in both Houses of Parliament.

17 Section 85(7) is intended to resolve any uncertainty that may exist concerning the status of such provisions. The State Attorney-General explained:

> Section 51A of the *Interpretation of Legislation Act* 1984 provides that a prosecution for a summary offence may be heard only in the Magistrates Court. Similar provisions have been included in Victorian legislation throughout the history of the State. They reflect the historical origin of summary offences as offences tried by justices of the peace, without a jury. The higher courts, including the Supreme Court, have never had jurisdiction to determine guilt or innocence in criminal matters without a jury.
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> I do not believe that, in passing the *Constitution Act* 1975, Parliament intended to change such a fundamental principle of the criminal law. Consequently, s 85(7) has been included in the Bill purely for the avoidance of doubt. Note 15 *supra* p 3126.

18 Section 6 of the *Constitution (Jurisdiction of Supreme Court) Act* 1991. However, the Act preserves the right of parties to litigation who before 1 May 1991 have sought to challenge the validity of an Act

The Legal and Constitutional Committee had thus proceeded on the assumption that s 18 imposed a valid, and therefore binding, manner and form requirement on the Victorian Parliament in relation to legislation falling within the ambit of s 85. The Committee's elaborate recommendations and the subsequent enactment of the *Constitution (Jurisdiction of Supreme Court) Act* 1991 by the Victorian Parliament were based on that assumption. What will be canvassed is whether there is justification for this assumption.

## III. IMPLIED REPEAL

At the outset it should be said that the argument that s 2(4) of the *Retail Tenancies Act* 1986 and s 39(3) of the *Planning and Environment Act* 1987 were valid because they had impliedly repealed or amended s 18 of the *Constitution Act* 1975 (Vic) is untenable. The doctrine of implied repeal comes into play only if the later inconsistent law is a valid enactment of the Parliament. Its validity would depend upon the efficacy of the 'restriction' which exists; this in turn entails the question of the extent to which a State Parliament can bind a successor Parliament.

Undoubtedly the doctrine of implied repeal is applicable to the Australian States by virtue of the authority of the case of *McCawley v R.*[19] In that case the Privy Council held that the legislature of the then colony of Queensland had the power by a mere majority vote to pass an Act that was inconsistent with the provisions of the existing Constitution of the colony as to the tenure of judicial office. The Act was held to be valid because of the operation of the doctrine of implied repeal. However, the Privy Council did not stop there. It went on to say:

> The Legislature of Queensland is the master of its own household, except insofar as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal.[20]

The Privy Council in *Bribery Commissioner v Ranasinghe*[21] expressed much the same view when it stated:

> [T]he proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

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passed since 1 July 1989 on the grounds that the s 18(2) requirements in respect of Bills varying the Supreme Court's jurisdiction has not been complied with: s 7.

19 [1920] AC 691.

20 *Ibid* at 714.

21 [1965] AC 172 at 198.

## IV. MANNER AND FORM RELATING TO 'CONSTITUTION, POWERS OR PROCEDURE'

Prior to the enactment of the *Australia Act*, the analysis of a problem involving the efficacy of a manner and form in the Australian States depended in the main upon the operation of s 5 of the *Colonial Laws Validity Act* 1865 (UK), which provided as follows:

> ... every representative legislative shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

The *Australia Act* incorporated the substantive aspects of s 5 of the *Colonial Laws Validity Act* 1865. Section 6 of the *Australia Act* provides as follows:

> "... 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 a 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.

The operation of the provisions of s 6 of the *Australia Act* requires a two-stage analysis. First, the later law must be capable of being characterised as a law respecting the 'constitution, powers or procedure' of the State Parliament. Secondly, if the later law can be so characterised it is then necessary to ask whether a 'manner and form' requirement has been prescribed by an earlier law. As s 6 of the *Australia Act* is substantially in *pari materia* with s 5 of the *Colonial Laws Validity Act* 1865 the cases decided under the latter provisions are still relevant.

In the landmark case of *Trethowan*[22] the impugned Bills (a Bill to abolish the Legislative Council of New South Wales and a Bill to repeal s 7A of the New South Wales *Constitution Act* 1902) could not lawfully be presented to the State Governor for the royal assent without complying with the requirements of s 7A.

Section 7A was inserted into the New South Wales *Constitution Act* 1902 in 1929. That section required, among other things, that a Bill to abolish the Legislative Council must be put to a referendum after it has been passed by both Houses of Parliament of New South Wales. Section 7A contains sub section 6 which provides for a double entrenchment of the provisions of s 7A, ie s 7A itself cannot be repealed or amended without complying with the manner and form prescribed by s 7A.

The State Government in 1930 having secured the passage of both Bills through the Legislative Assembly and the Legislative Council proposed to submit the Bills to the Governor for the royal assent without putting the Bills to a referendum as required by s 7A. The view of the High Court of Australia and

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22 *Attorney-General for New South Wales v Trethowan* (1931) 44 CLR 394. For the background to the case, see K Turner *House of Review?* (1969) Chapter 1.

the Privy Council[23] was clear. The Bills fell within the description of laws respecting 'constitution, powers or procedure' and thus for such Bills to be validly enacted into law the provisions of s 7A had to be complied with.

The reasoning in *Trethowan*, insofar as it focussed on the characterisation of the later law, is logically impeccable. However, it was concerned with a manner and form requirement which applied to a later law which answered the description of a law respecting constitution, powers or procedure of the legislature. "The case is therefore binding authority only in relation to the manner and form proviso [in s 5 of the *Colonial Laws Validity Act*] ...".[24] Legislation of the Victorian Parliament which detracts from the jurisdiction of the Supreme Court of Victoria (such as the *Retail Tenancies Act* (1986) (Vic)) does not answer the description of a law respecting the constitution, powers or procedure of the Victorian Parliament.[25] Is there any judicial authority for the proposition that a manner and form requirement can apply to all laws regardless of their categorisation?

## V. LAWS WHICH DO NOT RELATE TO 'CONSTITUTION, POWERS OR PROCEDURE' OF THE LEGISLATURE

Some support for the view that a manner and form requirement can govern the enactment of a law which does not deal with constitution, powers or procedure of Parliament can be found in *Trethowan* itself. In *Trethowan* Rich J stated that independently of s 5 of the *Colonial Laws Validity Act* there was another method of "controlling the operations of the Legislature".[26] This alternative basis endorses the proposition asserted before the Court that the Parliament of New South Wales "can alter its own constitution and transfer the law-making power to a different group of bodies or to a group of bodies differently constituted".[27] This alternative mode of justifying the validity of a manner and form provision is often referred to as the 'reconstitution' argument, ie, the State legislature can be composed of different elements "for the purpose of legislation upon different subjects".[28] If this alternative mode, the

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23 [1932] AC 526, affirming the decision of the High Court.

24 J Goldsworthy "Manner and Form in the Australian States" (1987) 16 *Melbourne University Law Review* 403 at 407.

25 Unless one adopts the analysis of Hoare J who dissented in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General of Queensland* [1976] Qd R 231. Justice Hoare's analysis requires the later law to be characterised by reference to the earlier law imposing a manner and form requirement. The very fact that the later law conflicted "with a law which provides for a manner and form" would bring the later law within the description of a law respecting constitution, power or procedure. This analysis has never been judicially endorsed in any case. For a discussion of Justice Hoare's analysis see Goldsworthy note 24 *supra* at 414-7.

26 Note 22 *supra* at 418.

27 *Ibid* at 407-8.

28 The 'reconstitution' argument is based on the premise that the definition of 'Parliament' is not a static one. This view was given some implicit approval in *Clayton v Heffron* (1960) 105 CLR 214 wherein

'reconstitution' argument, is upheld then there is no reason why a manner and form provision to be valid must be confined to a law respecting constitution, powers or procedure.

Moreover, if one accepts the relevance of Justice Dixon's dicta in *Trethowan*, the reliance placed upon s 2(2) of the *Australia Act* as supplying a continuing constituent power which a State Parliament cannot abdicate or restrict becomes weakened. In *Trethowan*, Dixon J remarked as follows:

> It must not be supposed, however, that all difficulties would vanish if the full doctrine of parliamentary supremacy could be invoked. An Act of the British Parliament which contained a provision that no Bill repealing any part of the Act including the part so restraining its own repeal should be presented for the royal assent unless the Bill were first approved by the electors, would have the force of law until the Sovereign actually did assent to a Bill for its repeal. In essence it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors. If, before the Bill received the assent of the Crown, it was found possible, as appears to have been done in this appeal, to raise for judicial decision the question whether it was lawful to present the Bill for that assent, the courts would be found to pronounce it unlawful to do so.[29]

The implication in Justice Dixon's remarks is clear: the British Parliament would be bound by a manner and form requirement prescribed by an earlier law, even where there is no equivalent of s 5 of the *Colonial Laws Validity Act*. However, stronger judicial authority is provided by *Bribery Commissioner v Ranasinghe*.[30]

In *Ranasinghe* a simple majority for the ordinary law-making process was prescribed by the *Ceylon (Constitution) Order-In-Council* 1946. This normal process was rendered subject to s 29(4) which required a Bill for the amendment or repeal of any of the provisions of the Order to have endorsed on it a certificate by the Speaker to the effect that "the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present)." The Speaker's certificate was to be conclusive for all purposes and could not be questioned in any court of law. The impugned *Bribery Amendment Act* 1958 which was inconsistent with the Order-In-Council did not have such a Speaker's certificate.

Under the *Bribery Amendment Act* 1958, bribery tribunals were created and invested with jurisdiction to hear, try and determine prosecutions for bribery. Members of the tribunals were to be chosen from a panel appointed by the Governor-General on the advice of the Minister for Justice. However, the appointment, transfer and disciplinary control of judicial officers was required by s 55 of the Order-in-Council to be vested in a judicial service commission.

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Dixon CJ, McTiernan, Taylor and Windeyer JJ opined: "There are many reasons for assuming that the assent of the Crown must always remain necessary but what ground is there for supposing that the legislature must always remain defined in terms of two houses?" at 251.

29 Note 22 *supra* at 426.

30 [1965] AC 172.

The Privy Council held that in the case of amendment and repeal of the Ceylon Constitution the Speaker's certificate was a necessary part of the legislative process and that any Bill which did not comply with "the condition precedent of the proviso" was invalid and *ultra vires.* The Privy Council stated the following principle: "[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law".[31] The significance of this principle lies in the fact that at the time of this case the provisions of s 5 of the *Colonial Laws Validity Act* no longer applied to Ceylon. This observation was also true in relation to South Africa where the Appeal Court in *Harris v Minister of the Interior*[32] held that the South African Parliament was bound by s 152 of the *South Africa Act* to pass the *Separate Representation of Votes Acts* 1951 by a two-thirds majority at a joint sitting of both houses.

Is there any constitutional impediment to the invocation of the *Ranasinghe* principle in relation to the Australian States? At first glance, it would be argued that the principle is precluded by the decision of the High Court in *South-Eastern Drainage Board v Savings Bank of South Australia.*[33] In that case the Court had to deal with the question whether the Parliament of South Australia in enacting the *South-Eastern Drainage Amendment Act* 1900 (SA), which was inconsistent with the *Real Property Act* 1886 (SA), was required to enact expressly that the 1900 Act was to apply "notwithstanding the provision of the *The Real Property Act* 1886" as prescribed by the 1886 Act. Section 6 of *The Real Property Act* 1886 provided that:

> no law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply notwithstanding the provisions of *The Real Property Act* 1886.

The High Court approached the question by asking whether s 6 of *The Real Property Act* 1886 could be characterised as a law respecting the constitution, powers or procedure of the legislature. The Court found that s 6 was not such a law. Thus Dixon J said:

> Section 6 of the *Real Property Act* is, in my opinion, not a law respecting the constitution, power or procedure of the South Australian legislature. It is scarcely necessary to say that it has nothing to do with the constitution of the legislature. That it is not a law respecting its powers seems to me to appear clearly enough from its content. It does not profess to limit or qualify the power of the legislature in any way. Nor is it concerned with the procedure of the legislature.[34]

The prevailing consensus among commentators[35] is that the fundamental flaw in the Court's reasoning lay in the puzzling characterisation of the 1886

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31 *Ibid* at 197.

32 [1952] 2 SALR 428.

33 (1939) 62 CLR 603.

34 *Ibid* at 625.

35 See for example E Campbell "Comment on State Government Agreements" (1977) 1 *Australian Mining and Petroleum Law Journal* 53 at 54; G Carney "An Overview of Manner and Form in Australia" (1989) 5 *Queensland University of Technology Law Journal* 69; PJ Hanks, *Australian Constitutional Law:*

Act. It has been asserted that the question should have been whether the 1900 Act was a law respecting constitution, power or procedure of the legislature. Only if it did satisfy this description would the next question be asked, namely, whether the 1886 Act prescribed a genuine manner and form provision.

It may not be the case that the reasoning of the High Court in the *South-Eastern Drainage Board Case* was defective. Could it not be argued that, implied in the Court's analysis is the premise that for a genuine manner and form provision to be valid and controlling, it must be prescribed by a law which must itself be a law respecting the constitution, power or procedure of the legislature. In other words, the High Court was possibly proceeding on the basis that s 6 of the *Real Property Act* 1886, to be controlling, must satisfy the following two requirements:

(i) Section 6 had to be a law respecting the constitution, power or procedure of the legislature;

(ii) The recitation of the words "notwithstanding the provision of *The Real Property Act* 1886" had to amount to a genuine manner and form requirement.

Latham CJ, Dixon, Starke and McTiernan JJ were, it could be argued, concerned with the requirement (i).[36] The prescription of a recitation of a special form of words was, according to the Court, not a law respecting constitution, power or procedure of the legislature. Hence, Dixon J said: "The section is ... not a definition or restriction of the powers of the legislature".[37]

Even if *South-Eastern Drainage Board* can be defended in this way, it is still not an impediment to the operation of the *Ranasinghe* principle for the case did not grapple with the issue whether it was also necessary to characterise the later 1900 law as one respecting constitution, power or procedure.

Professor Enid Campbell has asserted as follows:

> [I]rrespective of s 5 of the Colonial Laws Validity Act, valid manner and form requirements control the making of all parliamentary enactments to which these

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*Materials and Commentary* (4th ed, 1990) p 130; G Winterton "Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?" (1980) 11 *Federal Law Review* 167 at 186 n 36; RD Lumb *The Constitution of the Australian States* (4th ed, 1991) pp 117-8.

36 Evatt J however, expressed the following view:

> In my opinion the legislature of South Australia has plenary power to couch its enactments in such literary form as it may choose. It cannot be effectively commanded by a prior legislature to express its intention in a particular way. ... I think that the command in s 6 was quite ineffective and inoperative. Note 33 *supra* at 633-4.

Evatt J seemed to have concentrated on the issue whether s 6 prescribed a genuine manner and form. On this interpretation of Justice Evatt's stand it has been suggested that his view was erroneous: see note 24 *supra* at 419.

Another instance where there was characterisation of the earlier law (containing the manner and form) as a law respecting constitution, powers or procedure can be found in Justice Dunn's judgment in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General of Queensland* note 25 *supra*.

37 Note 33 *supra* at 625.

> requirements relate and not merely enactments respecting the constitution, power and procedure of the legislature.[38]

In support of her assertion, Professor Campbell invoked the authority of *Clayton v Heffron*. In the case, the High Court referred to the first paragraph of s 5 of the *Constitution Act* 1902-1956 (NSW) which provided as follows: "The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever". The Court said:

> The first paragraph confers a complete and unrestricted power to make laws with reference to New South Wales. There is doubtless a territorial limitation implied in the reference to New South Wales but there is no limitation of subject matter. The laws may be constitutional or at the other extreme they may deal with subjects of little significance (1960).[39]

Professor Campbell described the case as having established "that the power of State Parliaments to enact manner and form requirements derives from the Parliament's general authority to make laws for the peace, welfare and good government of the State, and that such requirements can bind even if they are expressed to apply to all Bills, whatever their subject matter".[40]

Another argument which is invoked to deny the binding effect of a 'manner and form' requirement which relates to a law other than a law relating to the constitution, powers and procedure of the legislature is based on the maxim *expressio unius est exclusio alterius*. This argument is not fully tenable. Section 6 of the *Australia Act* preserves the manner and form provisions originally embodied in s 5 of the *Colonial Laws Validity Act*. The purpose of s 5 of the *Colonial Laws Validity Act* was "to set aside doubts that had arisen as to the powers of the South Australian Parliament to amend laws relating to its constitution, powers and procedure, *and* to establish that all representative legislatures possessed such a power with respect to this class of laws".[41] It cannot necessarily be inferred that the purpose was also to provide an exhaustive formulation of the applicability of a manner and form provision.

It has also been suggested that the *Australia Act*, through s 2(2), confers "a continuing constituent power which, subject to s 6, the State Parliaments

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38 Campbell note 35 *supra* at 55.

39 Note 28 *supra* at 250.

40 Campbell note 35 *supra* at 54. See also Winterton note 35 *supra* at 189-90.

In recent times a debate has sprung up as to whether the 'peace, welfare and good government' formula could be used as the basis for imposing constraints on the sovereignty of a State Parliament. In *Building Construction Employees and Builders' Labourers Federation v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372, there were suggestions by Street CJ and Priestley JA of the NSW Supreme Court that the formula could be "the source of power" for all courts to strike down laws "inimical to, or which do not serve, the peace, welfare and good government of our parliamentary democracy". Mahoney JA and Kirby P disagreed. The view was also refuted by the High Court in *Union Steamship Co of Australia Pty Ltd v King* (1988) 82 ALR 43. See generally ID Killey "'Peace, Order and Good Government': A Limitation on Legislative Competence" (1989) 17 *Melbourne University Law Review* 24. Deference has been paid to the High Court's view: see *Eastgate v Rozzoli* (1990) 20 NSWLR 188.

41 Lumb note 35 *supra* p 116. See also DB Swinfen "The Genesis of the Colonial Laws Validity Act" [1967] *Juridical Review* 29-61.

themselves cannot abdicate or restrict".[42] Section 2(2) declares and enacts that "the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State". Goldsworthy takes the view that restrictive procedures in relation to laws respecting the constitution, powers or procedure of a legislature may be binding on the ground of s 6 of the *Australia Act*. In relation to restrictive procedures which may or may not relate to constitution, powers or procedure, they may be binding if the 'reconstitution' argument is invoked, or if they fall within what he terms 'pure procedures or form'.[43] Goldsworthy does not accept that *Ranasinghe* has added any additional ground for the bindingness of restrictive procedures. On any other interpretation, he says, the *Ranasinghe* principle "would not be good law in Australia because it would conflict with sub section 2(2) of the *Australia Act*".[44] As Goldsworthy elaborates:

> As for reconstitution, that power is not diminished by a law which merely reconstitutes the body which possesses it (the legislature): thenceforth the power can still be exercised, but only by the legislature *in its reconstituted form*. As for pure procedure or form, the legislature is not even partially deprived of that power by having to comply with a procedure or form in exercising it, provided that compliance is not excessively difficult, costly or time-consuming. These alternatives seem logically to exhaust the ways in which restrictive procedures can be established without impinging on that power; no third alternative to the manner and form proviso suggests itself.[45]

On Goldsworthy's submission, a restrictive procedure would be binding on a State Parliament even if the later law is not a law with regard to 'constitution,

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42 Note 24 *supra* at 411.

43 Goldsworthy does not accept the view that s 106 of the Commonwealth Constitution provides for an *additional* and independent ground for holding restrictive procedures to be binding. Section 106 provides as follows:

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

Reliance was placed by some commentators on dicta of the Western Australian Supreme Court in *The State of Western Australia and Others v Wilsmore* (1981) 33 ALR 13. The Court had said:

> Section 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed: at 18 per Burt CJ.

I agree with Goldsworthy that s 106 does not supply an additional ground. Goldsworthy places emphasis on the words "in accordance with" to mean "not in violation of". I would argue that it could be implied in the dicta a reference to a "valid (ie binding)" manner and form. The words "until altered in accordance with the Constitution of the State" in s 106 should be construed as "until altered in accordance with the *valid restrictive procedures* in the Constitution of the State".

The phrase "Constitution of a State" is problematic. Does it simply mean the formal "Constitution Act" of a State or does it encompass all those "formal Acts, unwritten conventions, customary rules, and common law principles, which, *in toto*, define and regulate the legislative, executive, and judicial elements" which constitute the State polity? For a discussion of the different modes of definition see CD Gilbert "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council From State Supreme Courts" (1978) 9 *Federal Law Review* 348 at 350-7.

44 Note 24 *supra* at 426.

45 *Ibid* at 409.

powers or procedure' if the restrictive procedure amounts to either a 'reconstitution' of Parliament or 'pure procedures or form'. On what basis does Goldsworthy justify the 'pure procedures or form' rule? His justification is simply that when a Parliament enacts a law respecting pure procedures and forms of law-making, the legislature "is not even partially deprived of that power" (ie the legislative power). This is surely another way of saying that manner and form will bind if it does not deprive Parliament of its law-making power. By further insisting on the proviso that "compliance is not excessively difficult, costly or time-consuming", the question whether a manner and form is binding becomes a question of degree. In other words, if his submission is extrapolated, any restrictive procedure is binding provided it does not diminish the sovereignty of Parliament by depriving it of the power to make laws. This rationale could thus underpin the applicability of manner and form to any type of law. It could be the same rationale for upholding the 'conditions of law-making' as mentioned in *Ranasinghe*: not any condition of law-making but those which amount to a genuine manner and form. In other words, the 'pure procedures or form' alternative can be subsumed into the *Ranasinghe* principle.

How would the bindingness of a requirement that Bills be passed by a special majority in either or both of the Houses of Parliament be justified? Goldsworthy has suggested that a possible argument is that this requirement would be part of "the constitution of Parliament".[46] A reference was then made to *Harris v Minister of the Interior* where it was "implicit in the judgment" of the South African Supreme Court that procedural requirements could form part of the definition of 'Parliament'.[47]

If the possible argument by Goldsworthy is adopted, a conundrum is posed. If, say, a restrictive procedure requires 95 per cent of the members of a House to approve the proposed law, by characterising the law containing the restrictive procedure as a reconstitution of Parliament it is surely not possible to turn round and invalidate the requirement on the basis of a substantive deprivation of the powers of Parliament. Goldsworthy recognises the conundrum for he says:

> [T]o characterise special majority requirements as altering the *constitution* of Parliament for particular purposes ... may appear logically to raise different questions - it is less obvious that a special majority requirement restricts Parliament's powers, if its effect is that Parliament *consists* of bodies acting for some purposes by special majority: inaction, it could be argued, shows that Parliament, so constituted, *chose* not to act, rather than that it was *unable* to act.[48]

Could the conundrum be evaded by creating two categories of reconstitution: 'procedural' and 'structural'? If the special majority requirement is labelled 'procedural' one can then question its validity by determining whether it amounts to a substantive restriction of Parliament's power. However, a double characterisation of the special majority requirement is not acceptable: if it is regarded as a 'structural' aspect of Parliament it cannot at the same time be a

46 *Ibid* at 408.
47 *Ibid* at 408 n 34.
48 *Ibid* at 420.

procedure regulating the process of law-making. This view must be implicit in Hood Phillips' complaint that classifying a special majority requirement as a redefinition (ie reconstitution) of Parliament amounts to "a fiction or formula designed to avoid classifying the matter as 'procedural'".[49]

Goldsworthy recognises the problems posed by his analysis:

> [T]he choice between these two alternative characterisations of special majority requirements seems to be arbitrary: no good reason is apparent for choosing one rather than the other. ... The same principles should apply whatever alternative is chosen: it should not be possible to curb the freedom of Parliament by making what would otherwise be an external fetter of its internal constitution.[50]

The problem arises because Goldsworthy creates a choice. It is submitted that there is no choice in the characterisation: a special majority requirement is not a reconstitution of Parliament. The issue is simply a choice between whether it is a 'manner and form' provision or a substantive restriction of Parliament's power. The answer would then depend on how onerous is the special majority requirement. In the case of a special majority requirement which does not fall within the operation of s 6 of the *Australia Act*, the 'reconstitution' argument or Goldsworthy's proposed 'pure procedure and form', the binding effect of a special majority requirement must lie in the invocation of the *Ranasinghe* principle.

An issue arising from the invocation of the *Ranasinghe* principle is whether for a manner and form to be valid it must be located in a formal 'constitution'. *Trethowan, Ranasinghe* and *Clayton v Heffron* all deal with restrictions provided by the constitutional instrument. There is no reason why a manner and form cannot be located in an ordinary Act of Parliament. This is confirmed by the clear reference in s 6 of the *Australia Act* to "such manner and form as may from time to time be required by a law made by that Parliament". A "law made by that Parliament" does not refer only to a constitutional amendment.[51]

In *Victoria v The Commonwealth and Connor*[52] Gibbs J, after referring to both *Ranasinghe* and *Harris,* said:

> In all these cases it happens that the restrictions on the manner of the exercise of legislative power that had to be considered related to amendments of the Constitution, but the principle which has evolved is not limited to constitutional amendments.[53]

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49 H Phillips and P Jackson *Constitutional and Administrative Law* (6th ed, 1978) p 85.

50 Note 24 *supra* at 420.

51 Further support for the proposition that a manner and form can be located in ordinary legislation (as opposed to the Constitution Act of a State) can be derived to some extent from s 16(3) of the *Australia Act*. Section 16(3) provides as follows:

> A reference in this Act to the Parliament of a State includes, in relation to the State of New South Wales, a reference to the legislature of that State as constituted from time to time in accordance with the Constitution Act, 1902, *or any other Act of that State,* whether or not, in relation to any particular legislative act, the consent of the Legislative Council of that State is necessary.

The *Australia Act* therefore provides for recognition of the Parliament of New South Wales even though the reconstitution is set out in "any other Act of that State".

52 (1975) 134 CLR 81.

53 *Ibid* at 163. Gibbs J at 164 also said:

Justice Gibbs' comment has elicited some responses from the South Australian Supreme Court in *West Lakes Ltd v South Australia.*[54] Matheson J said:

> This statement was obiter and not expressed by any of the other Justices, but be that as it may, I do not think his Honour meant that all acts of parliament, no matter what their subject matter, can contain manner and form requirements which bind successive parliaments.[55]

In the same case, King CJ described the issue as one of "great constitutional significance" but found it unnecessary to decide the question. He added:

> Whilst I accept, without deciding, that it is possible to have a section entrenched by a manner and form provision which does not fall within s 5 of the *Colonial Laws Validity Act*, nevertheless, given the general rules that the Acts of one Parliament do not bind its successors, it would require very clear words before a court would find that that was what had happened. It is one thing to find manner and form provisions in a statute affecting the constitution, it is quite another to find Lord Birkenhead's proverbial Dog Act or a provision thereof elevated to constitutional status.[56]

In *Commonwealth Aluminium Corporation Ltd v Attorney-General (Qld)*[57] Hoare J of the Supreme Court of Queensland expressed the following view:

> Even apart from the express provisions of the proviso to s 5 of *The Colonial Laws Validity Act*, if there is an express legislative provision concerning the manner and form of subsequent legislation, then that manner and form must be observed: *Bribery Commissioner v Ranasinghe* [1965] AC 172, distinguishing *McCawley v The King* [1920] AC 691.

However, by citing *Ranasinghe,* it is uncertain whether Hoare J was asserting a universal application of his proposition in the sense that a manner and form provision can control even the making of ordinary laws.

It is submitted that a manner and form provision can control the making of legislation which may not satisfy the description of laws respecting the constitution, powers or procedure of the Parliament, or which does not deal with amendments to the Constitution Act. There is no doubt that a fundamental issue of public policy is involved here. As Carney puts it:

> One could argue that the expression of the people's will through the deliberations of Parliament as a democratically elected body should not be restricted by earlier Parliaments representing the people of another age or time. This argument asserts that the sovereignty of the people should remain intact and unfettered. The counter argument to this, is that if one accepts the possibility that at some time in the future either the will of the people might become distorted in relation to certain issues or that the parliamentary system itself might be manipulated to disregard the rights of minority groups or the majority of the people even, then the adoption of safeguards to protect a state from such occasional lapses in good

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> Where an attempt has been made to enact laws by a means which the Constitution permits to be used only subject to certain conditions, and those conditions have not been satisfied, this Court is bound to declare the invalidity of the resulting product.

54 (1980) 25 SASR 389.

55 *Ibid* at 422.

56 *Ibid* at 413.

57 Note 25 *supra* at 247.

> government are fully justified, particularly in sensitive areas connected with the constitution of the state and the guarantees provided by legislation of the status of a bill of rights. This is an attractive view but for its failure to appreciate that the capacity to introduce safeguards against undesirable legislative measures or undesirable government, is a capacity which can also be used to entrench undesirable laws. There is no guarantee that this capacity to bind future Parliaments will only be exercised in the general public interest.[58]

Hanks also refers to "a basic policy issue" which underlies the whole question of restrictive legislative procedures. He asks:

> "[H]ow far should one Parliament be permitted to impose on a future Parliament restrictive procedures; procedures with which the first Parliament was not obliged to comply? Should the courts accept that an elected Parliament, facing a series of contemporary problems, may not deal with those problems in the way which seems appropriate to it, because an earlier Parliament (not faced with those problems but claiming clairvoyance) had decreed that a special and restrictive procedure must be followed by any future Parliament? Are the courts to endorse what is, essentially, a denial by yesterday's legislators that today's legislators lack prudence and sound judgment?[59]

Disagreement over the policy issue will continue to excite jurists.[60] There is really no need to be bogged down in the policy debate. Section 6 of the *Australia Act* has permitted a Parliament to bind a future Parliament in relation to laws respecting the constitution, powers or procedure of the Parliament. The courts, nevertheless, have sought to ensure that today's Parliament continues to exercise its sovereignty by distinguishing between a genuine manner and form provision from one which abrogates the Parliament's power to legislate. If the courts are entrusted with this function, it is surely possible to extend this function to determining whether certain ordinary legislation, apart from legislation which deals with the constitution, powers or procedure of Parliament, or which seeks to amend the State's Constitution Act, can be entrenched. In this connection, the courts will have to take into account the fundamental values which are sought to be protected. The Victorian Legal and Constitutional Committee has endorsed this approach.[61] The Committee said:

> The rationale behind the proposition that the entrenchment of fundamental constitutional values, principles and structures is acceptable is not that certain matters should be totally beyond the reach of a validly constituted Parliament. On the contrary, the sovereignty of Parliament is central to the constitutional structure of Victoria, and that sovereignty is in no way compromised by the moderate entrenchment of particular features of the Constitution Act.[62]

Although the Committee's remarks endorsing "the moderate entrenchment of fundamental constitutional values" is confined to amendments to the Constitution Act, it is submitted that the approach can be applied to ordinary

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58 Carney note 35 *supra* at 73.

59 Hanks note 35 *supra* pp 138-9.

60 See for example MJ Detmold *The Australian Commonwealth - A Fundamental Analysis of its Constitution* (1985) ch 11.

61 *The Constitution Act Report* pp 10-15. See also R Elliot "Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values" (1991) *Osgoode Hall Law Journal* 215.

62 *The Constitution Act Report* pp 10-11.

legislation, provided the subject-matter of the legislation can be regarded by the courts as having fundamental importance. For example, if the Victorian Parliament were to enact a statutory Bill of Rights, the manner and form provision which requires an absolute majority for its amendment or repeal can be accepted as an effective and binding manner and form provision to control future legislation which seeks to amend or repeal one of the substantive provisions of the Bill of Rights because of the fundamental importance of the Bill.[63] This approach (suggesting a scale of importance of legislation) must be implicit in Chief Justice King's statement in *West Lakes Ltd v South Australia:* "It is one thing to find manner and form provisions in a statute affecting the constitution, it is quite another to find Lord Birkenhead's proverbial *Dog Act* or a provision thereof elevated to constitutional status".[64]

Coming back to the imbroglio in Victoria, the manner and form is located in the Victorian Constitution Act. The legislation which operated upon the jurisdiction of the Supreme Court of Victoria clearly does not satisfy the description of laws respecting the constitution, powers or procedure of the Parliament of Victoria. Nevertheless, in the light of the above discussion, s 18 of the *Constitution Act* 1975 which requires an absolute majority of the whole number of the members of the Council and of the Assembly respectively for the valid enactment of such legislation must be complied with, provided the absolute majority requirement constitutes a *genuine* manner and form.

## VII. IDENTIFYING GENUINE MANNER AND FORM REQUIREMENTS

The courts have drawn a distinction between restrictive procedures which amount to a genuine manner and form and those which constitute an abdication or deprivation of law-making powers.[65] Through the dichotomy between a manner and form and an 'abdication' provision the courts are in a position to

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63 Goldsworthy takes the following position: "[T]he substantive provisions of the Bill - those setting out the protected rights - which are entrenched by the restrictive procedure, are *themselves* laws respecting the powers of the Parliament, because they specifically purport to restrict future legislation ... Therefore, a later law passed in the ordinary manner, expressly purporting to amend or repeal one of those substantive provisions, *would* be a law respecting the powers of the Parliament, even if it ignored the restrictive procedure ...": note 24 *supra* at 417. This characterisation of the later law can be challenged. If the later law seeks to amend or repeal the entrenching provision of the Bill of Rights, then the characterisation of a law respecting the 'powers' (or even the 'procedure') of the Parliament is acceptable. However, it is hard to see how such a characterisation can be maintained in the case of a law seeking to amend, for example, the substantive provisions in the Bill of Rights which guarantee freedom of speech or freedom from arbitrary arrest.

64 Note 54 *supra* at 413.

65 For instance, McTiernan J dissenting in *Trethowan* held that s 7A(6) was not in 'substance' a law dictating 'manner': "[I]t [was] in substance a law depriving the Legislature of power": note 22 *supra* at 442.

retain a fair degree of flexibility in ensuring that the 'representative' nature of the legislature is not subverted.[66]

Is the prescription of an absolute majority a genuine manner and form requirement? Fairly recent cases in Australia have provided some indicia as to what would constitute a genuine manner and form requirement.

In *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General of Queensland*[67] Wanstall J of the Queensland Supreme Court concluded that a manner and form provision, to be effective, must be one which is "operative on the legislative process".[68] In *West Lakes Ltd v South Australia*[69] King CJ of the Supreme Court of South Australia devoted a considerable part of his judgment to the question of when a particular statutory provision was truly a manner and form provision. The requirement of the approval of the electors at a referendum in *Trethowan* was, he said, easily seen to be a manner and form provision because it was confined to obtaining the direct approval of the people whom the 'representative legislature' represented. He then said:

> If, however, parliament purports to make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation, a serious question must arise as to whether the provision is truly a law prescribing the manner or form of legislation, or whether it is not rather a law as to substance, being a renunciation of the power to legislate on that topic unless the condition exists.[70]

In relation to the requirement for a special majority in the parliament, King CJ said:

> There must be a point at which a special majority provision would appear as an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise. This point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental constitution provision.[71]

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66 In pre-Australia Act days, one can point to s 5 of the *Colonial Laws Validity Act* 1865 which refers to "every Representative Legislature". It could be argued that the enactment of the 'manner and form' must not detract from this 'representative' feature. Thus in *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457, Barton J (with whom Gavan Duffy and Rich JJ agreed) said that the power [in s 5 of the *Colonial Laws Validity Act* 1865] did not extend "to authorise the elimination of the representative character of the legislature": at 468. Isaacs J also said that "[p]robably the 'representative' character of the legislature is a basic condition of the power relied on": at 474. Although s 6 of the *Australia Act* uses the expression "the Parliament of a State" (instead of "representative Legislature"), it would be unaccepable to construe it as meaning anything less than a fully representative institution. See note 24 *supra* at 424 n 16.

67 Note 25 *supra*.

68 *Ibid* at 239.

69 Note 54 *supra*.

70 *Ibid* at 397.

71 *Ibid*. See also W Friedmann "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 *ALJ* 103 at 105-6; Lumb note 35 *supra* pp 130-1 said: "[I]t would be within the power of a court, faced with a manner and form provision which rendered it virtually impossible to repeal an act on the statute book, as for example, by requiring that the repealing bill be approved by ninety per cent of electors voting at a referendum, to invalidate such legislation as fettering a State Parliament in the exercise of its powers of legislating for the peace, welfare, and good government of the State."

The requirement of an absolute majority in s 18 of the *Constitution Act* 1975 satisfies the indicia articulated in *Commonwealth Aluminium Corporation Pty Ltd v Attorney-General of Queensland* and *West Lakes Ltd v South Australia.* It clearly operates on the legislative process; it does not involve an extra-parliamentary body; it does not amount to a deprivation of the parliament's powers. The requirement constitutes a condition of law-making imposed by the *Constitution Act* 1975, ie by "the instrument which itself regulates its power to make law". The protection given to the jurisdiction of the Supreme Court of Victoria is set out in the *Constitution Act* 1975: therefore impinging upon that protection amounts to an amendment of the constitution - hence, a closer analogy to both *Ranasinghe* and *Harris.*

It might finally be argued that the absolute majority requirement in s 18 deprives the Victorian Parliament of power as the subject of the requirement is not a fundamental constitutional provision. The Legal and Constitutional Committee deliberated on this matter and gave support to "the moderate entrenchment of fundamental constitutional values".[72] The Committee then said:

> [I]t is a matter of crucial importance to determine whether the protection of s 85 of the Constitution Act by the imposition of an absolute majority requirement answers such a description.[73]

The Committee found that the "constitutional principle enshrined in s 85, however opaquely expressed, is that in Victoria, there is to be 'Rule of Law', enforced by a Court of Law". In arriving at this conclusion the Committee took heed of the words of the then Chief Justice of the Supreme Court of Victoria, who in evidence said:

> It is because the Supreme Court has been able to fulfil its function as a superior court of general jurisdiction that citizens of Victoria are able to say, with truth and pride, that they live under the rule of law. Any depletion of that jurisdiction must impair or gravely strain the Court's capacity to fulfil its function.[74]

Apart from the Rule of Law as a value underlying s 85, the Committee also perceived the entrenchment of that section as assisting in the maintenance of the doctrine of separation of powers within Victoria.

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72 *The Constitution Act Report* p 11.

73 *Ibid* p 13.

74 Mr KJ Thomson, MP, in his Minority Report disagreed with the entrenchment of s 85. He pointed out that there is no requirement in the Constitution Act of other States to obtain an absolute majority for the passage of legislation repealing, altering or varying the jurisdiction of their Supreme Courts. Subject to the exceptions prescribed by ss 73 and 75 of the Commonwealth Constitution, this is also true of the jurisdictions of the High Court and Federal Court. He also said that the British Parliament is able to alter the jurisdiction of the High Court of Justice in England and Wales without an absolute majority *ibid* at pp 58-9.

## VIII. CONCLUSION

The view which is preferred is that a genuine manner and form is valid and therefore binding even if it seeks to regulate the enactment of laws which do not relate to the constitution, powers or procedure of the Parliament of an Australian State. The Legal and Constitutional Committee and the Victorian Parliament were therefore justified in assuming the validity of the manner and form requirement imposed by s 18 in relation to any amendment to s 85 of the Constitution Act.