The History, Scope and Prospects of Section 73 of the Constitution Act 1889 (WA)

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To the extent of their application, valid and binding manner and form provisions transform state constitutions from flexible to rigid documents. The scope and efficacy of such provisions is therefore critical to the prospects of effecting certain constitutional changes at the state level. Section 73 of the Constitution Act 1889 (WA), the primary manner and form provision in Western Australia, has been the subject of relatively extensive litigation in both Western Australia’s Supreme Court and the High Court of Australia. This article draws upon these cases to consider the scope and efficacy of s 73 by analysing the section’s impact on three areas of prospective constitutional change.

INTRODUCTION

Section 73 of the Constitution Act 1889 (WA) (‘s 73’) has been the subject of more judicial1 and academic2 exegesis than any other provision in the Constitution Act. The complexity and depth of the section’s history and judicial interpretation means an exhaustive review and analysis of s 73 jurisprudence cannot be

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1 Clydesdale v Hughes (1934) 51 CLR 518; Burt v R (1935) 37 WALR 68; Wilsmore v Western Australia (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980); Wilsmore v Western Australia [1981] WAR 159; Western Australia v Wilsmore (1982) 149 CLR 79; A-G (WA) ex rel Burke v Western Australia [1982] WAR 241; Burke v Western Australia [1982] WAR 248; Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211; S (A Child) v The Queen (1995) 12 WAR 392; McGinty v Western Australia (1996) 186 CLR 140; Judamia v Western Australia (Unreported, Full Court of the Supreme Court of Western Australia, 1 March 1996); Yougarla v Western Australia (1998) 146 FLR 128; Yougarla v Western Australia (1999) 21 WAR 488; Yougarla v Western Australia (2001) 207 CLR 344; Marquet, Clerk of Parliament (WA) v A-G (WA) (2002) 26 WAR 201; A-G (WA) v Marquet (2003) 217 CLR 545; Glew v Shire of Greenough [2006] WASCA 260 (1 December 2006); Glew v Governor of Western Australia (2009) 222 FLR 417.
undertaken within one article. This article instead incorporates aspects of this jurisprudence within a prospective analysis of s 73(2). Section 73’s history and structure are outlined to provide a necessary point of reference for this analysis. The article’s focus, however, is an examination of three relatively topical areas of constitutional reform to highlight the scope and limits of s 73(2). In particular, this paper considers whether the State Parliament must observe s 73(2)’s restrictive procedures when enacting laws:

1. Entrenching statutory provisions through new manner and form provisions;
2. Limiting the executive’s power to dissolve the Legislative Assembly; and
3. Altering the franchise for state elections

Two questions underlie the analysis of these potential laws. First, is such legislation inconsistent with constitutional provisions s 73(2) purportedly entrenches? Secondly, does a source of legal efficacy bind Western Australia’s Parliament to comply with s 73(2) when enacting such legislation? In Attorney-General (WA) v Marquet, Gleeson CJ, Gummow, Hayne and Heydon JJ held that s 6 of the Australia Acts leaves no room for the operation of some other principle binding State Parliaments to comply with manner and form provisions ‘at the very least in the field in which s 6 operates’. Although this does not definitively exclude other potentially binding sources, s 6 of the Australia Acts is now most likely the exclusive source of legal efficacy for manner and form provisions. Accordingly, this paper’s entrenchment analysis focuses on whether the prospective legislation being considered would engage s 6 as a law respecting Parliament’s ‘constitution, powers or procedure’. It is argued that many Bills falling within the three broad categories examined must be enacted in accordance with s 73(2). However, the limits of s 6 of the Australia Acts, s 73(2) and the provisions s 73(2) purportedly entrenches entail that State Parliament may enact at least some Bills entrenching new manner and form provisions or altering the State franchise through ordinary legislative procedures.

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3 See, for a comprehensive analysis of s 73 jurisprudence: Peter Johnston, Manner and Form Provisions in the Western Australian Constitution: Their Judicial Interpretation (SJD Thesis, University of Western Australia, 2005).


THE HISTORY AND STRUCTURE OF SECTION 73

The Constitution Act 1889 (WA) was enacted as a schedule to the Western Australia Constitution Act 1890 (Imp) (‘1890 Imperial Act’). Under s 5 of the 1890 Imperial Act, Western Australia’s legislature was empowered to alter or repeal any of the Constitution Act’s provisions through ordinary legislative procedures, ‘subject, however, to the conditions imposed by the [Constitution Act] 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’. Section 73 of the Constitution Act contains the ‘conditions’ referred to in s 5 of the 1890 Imperial Act. Its terms were ‘borrowed’ from similar provisions existing in other Australian colonial constitutions. As originally enacted, s 73 consisted of three parts: a grant of power and two provisos to that power. Section 73’s grant of constituent power obviated concerns that the plenary legislative power granted under s 2 of the Constitution Act may have been insufficient to permit the Colonial Legislature to amend the Constitution Act.

1  First Proviso

The first proviso requires bills effecting ‘any change in the Constitution of the Legislative Council or of the Legislative Assembly’ to obtain absolute majorities at the second and third readings in both houses before being presented for royal assent. This proviso was inserted in the Constitution Bill 1889 in accordance with instructions from the Secretary of State for the Colonies, Lord Knutsford. Knutsford also considered it unnecessary to retain a clause in an earlier draft requiring absolute majorities to alter the number or apportionment of representatives in either legislative chamber. The Legislative Council’s discussion of these alterations whilst debating the Constitution Bill 1889 indicates confusion regarding s 73’s scope. For example, the Colonial Secretary mistakenly referred to clause 73 as requiring absolute majorities in both Houses for ‘any measure affecting the Constitution itself’.

One alteration to the draft clauses that went uncommented upon was that s 73’s grant of power now referred to ‘this Act’. The draft clause sought to impose the requirement of special majorities more broadly. It is uncertain whether the reference to ‘this Act’ was purely for elegant expression or was a ‘sleight

9 Ibid 103 (Brennan J). See also, A-G (NSW) v Trethowan (1931) 44 CLR 394, 428 (Dixon J); McDonald v Cain [1953] VLR 411, 433 (O’Bryan J).
10 French, above n 2, 340-2.
11 Ibid, 340-1.
12 Anonymous, above n 2, 455-7.
13 Western Australia, Parliamentary Debates, Legislative Council, March 28 1889, 167.
14 French, above n 2, 342.
15 See, Johnston, ‘Freeing the Colonial Shackles’, above n 2, 313, 318.
of hand” on the Imperial Draftsman's part. Earlier colonial secretaries had, however, expressed frustration with the ‘great inconvenience’ caused by manner and form provisions. At any rate, this alteration would significantly limit the scope of s 73’s first proviso. In *Western Australia v Wilsmore*, the High Court’s held s 73’s first proviso was not a separate and independent provision, but merely a qualification on s 73’s grant of power. This conclusion was partially based on s 73’s reference to ‘this Act’ and limited the first proviso’s application to amendments to the *Constitution Act* itself. Accordingly, amendments to the *Constitution Acts Amendment Act 1899* (WA) (‘*CAAA 1899*’) and the *Electoral Act 1907* (WA) are not subject to s 73’s first proviso, even if they effect a change in the Assembly’s or Council’s ‘Constitution’.

2. **Second Proviso**

Section 73’s second proviso required the Governor to reserve bills interfering with certain nominated sections and schedules of the *Constitution Act*, including s 73 itself, for Her Majesty’s assent. The second proviso remains part of the *Constitution Act*’s text. However, its effect was reduced by the *Australian States Constitution Act 1907* (Imp) (‘1907 Imperial Act’) and eliminated by the *Australia Acts*.

Initially, this second proviso, in conjunction with Imperial legislation regulating the manner in which bills were to be reserved, caused difficulties for Western Australia’s Parliament. In particular, doubts existed whether the *Aborigines Act 1897* (WA) validly repealed s 70 of the *Constitution Act*, resulting in Parliament passing the *Aborigines Act 1905* (WA). Almost a century later, and following a number of actions and appeals in Western Australia’s Supreme Court, the High Court upheld the *Aborigines Act 1905*’s validity in *Yougarla v Western Australia*.

As *Yougarla* demonstrates, the law regarding reservation of colonial legislation at the start of the twentieth century was confused and confusing. The 1907 Imperial Act was enacted in response to this confusion and limited reservation requirements to the following three categories of bills:

1. Bills altering a State legislature’s or legislative chamber’s constitution;
2. Bills affecting the State Governor’s salary; and

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16 French, above n 2, 342.
19 But see, Johnston, ‘Method or Madness’, above n 2, 33 (discussing the broader interpretation of the phrase ‘this Act’ in the *Electoral Distribution Act 1947* (WA) in *A-G (WA) v Marquet* and its potential application to s 73(1)).
20 *Australian Constitutions Act 1842* (Imp), s 33; *Australian Constitutions Act (No 2) 1850* (Imp), s 32.
21 O’Connell and Riordan, above n 17, 53-5.
3. Bills required to be reserved under state legislation passed after 1907 or by Instructions given by His Majesty to a State Governor.

Except to that extent, it was not necessary to reserve bills passed by State legislatures. As Dwyer J held in *Burt v R*, the operation of s 73’s second proviso was significantly limited since pre-1907 provisions relating to reservation of bills passed by Australian State Legislatures largely ‘went by the board’.24 The 1907 Imperial Act was either impliedly repealed by the *Australia Acts* or expressly repealed by the *Statute Law (Repeals) Act 1989* (UK).25 The *Australia Acts* also abolished residual reservation requirements, rendering the second proviso in s 73 of ‘no force or effect’.26 However, this resulted in s 73’s second proviso being only ineffective, not invalid.27 Therefore, manner and form requirements may apply to a bill repealing s 73’s second proviso.28 This may explain why the reservation requirements in s 73 remain part of the *Constitution Act*’s text.

3. **1978 Amendments**

In 1978, absolute majorities in both Houses of Parliament passed the Acts Amendment (Constitution) Bill 1978.29 An earlier bill containing substantially similar provisions was defeated after failing to attain an absolute majority in the Legislative Council.30 Subsequent jurisprudence raises doubts whether such majorities were necessary. Prior to 1978, s 73 was not an ‘entrenched provision’. As Wilson J noted in *Western Australia v Wilsmore*, s 73’s requirement of absolute majorities in prescribed cases was subject to repeal by an Act passed by simple majorities in both Houses.31 Reservation was, however, necessary since s 73 imposed reservation requirements on bills ‘which … interfere with the operation

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26 *Australia Acts 1986* (Cth) & (UK), s 9.
28 Ibid. See also, *Constitution Act 1934* (SA), ss 8(b), 10A(2); *Constitution Act 1867* (Qld), s 53(4).
of … this section’.

Accordingly, the 1978 Bill was reserved for, and assented to by, Her Majesty.

The Acts Amendment (Constitution) Act 1978 (‘1978 Act’) significantly changed s 73 of the Constitution Act. First, the original s 73 was carried forward as s 73(1) of the Constitution Act and entrenched pursuant to s 73(2)(e). Section 73’s grant of power was altered to specify that it was ‘subject to the succeeding provisions of this section’. However, s 73’s two provisos were neither altered nor abolished.

Secondly, the 1978 Act inserted s 73(2) which established a new manner and form requirement applying to five categories of bills. Under s 73(2), the following bills must pass both Houses of Parliament by absolute majorities and obtain electoral approval at a referendum before being presented for royal assent:

- bills expressly or impliedly providing for:
  (a) the abolition of or alteration in the office of Governor;
  (b) the abolition of either House of Parliament;
  (c) either House of Parliament to be composed of members other than members chosen directly by the people;
  (d) a reduction in the number of the members of either House; and
- bills expressly or impliedly in any way affecting:
  (e) sections 2, 3, 4, 50, 51 or 73 of the Constitution Act.

The electorate for s 73(2) referendums consists of persons qualified to vote for Legislative Assembly elections. Under s 73(6), electors may bring proceedings in the Supreme Court to enforce s 73’s provisions either before or after a s 73(2) bill is presented for royal assent.

ENACTING NEW MANNER AND FORM PROVISIONS

In Western Australia v Wilsmore, Wilson J commented that:

it may be that the [Western Australian] legislature will devise a fresh manner and form requirement for inclusion in … new legislation; in that event, I see no reason why the observance of that requirement will not be a condition precedent to the validity of future amendments to that legislation.

However, s 73(2), which was mentioned in passing in Wilsmore, potentially conditions State Parliament’s power to devise such new manner and form provisions. Section 73(2)(e) purportedly applies to bills ‘expressly or impliedly in

35 Wilsmore v Western Australia [1981] WAR 159, 172 (Smith J).
any way affect[ing]' s 2 of the Constitution Act. The 1978 Act also amended s 2 of the Constitution Act by designating the former s 2 as subsection 2(1) and inserting two additional subsections, ss 2(2) and 2(3). Under s 2(3), every bill, after its passage through the Council and Assembly must, subject to s 73, be presented to the Governor for royal assent.

Professor Twomey has noted that s 2’s entrenchment in the Constitution Act may have had unintended consequences. Bills containing manner and form provisions may be inconsistent with s 2(3). For example, a manner and form provision may require bills altering entrenched provisions to observe additional procedural requirements after being passed by both Houses of Parliament before being presented for royal assent. Laws imposing manner and form provisions most likely engage s 6 of the Australia Acts as laws respecting Parliament’s ‘powers’ or ‘procedure’. The question then arises to what extent did s 2(3)’s entrenchment by s 73(2)(e) affect existing and prospective manner and form provisions outside of s 73 of the Constitution Act.

1. Past and Present Manner and Form Provisions Outside of Section 73

In 1978, when ss 2(3) and 73(2)(e) were inserted in the Constitution Act, s 13 of the Electoral Distribution Act 1947 (WA) (‘EDA’) was the only manner and form provision in Western Australian legislation outside of s 73 of the Constitution Act. Section 13 of the EDA required a bill amending the EDA to obtain absolute majorities on both its second and third readings in both houses of Parliament before being presented for royal assent.

In Marquet, Clerk of the Parliaments (WA) v Attorney-General (WA), the Western Australian Supreme Court considered s 13 of the EDA in relation to the Electoral Distribution Repeal Bill 2001 (WA) (‘Repeal Bill’). Clause 3 of the Repeal Bill, if validly enacted, would have repealed the EDA. Whilst the Repeal Bill obtained absolute majorities in the Assembly, the Council passed the Repeal Bill by simple, not absolute, majorities on its second and third readings. The question arose whether the Repeal Bill was required to be passed in accordance with s 13 of the EDA. Parliament’s Clerk sought a determination by the Supreme Court as to whether it was lawful for him to present the Repeal Bill and another bill, the Electoral Amendment Bill 2001, to the Governor for royal assent.

37 Anne Twomey, ‘The Effect of the Australia Acts on the Western Australian Constitution’ (2012) 36(2) University of Western Australia Law Review [271].
One argument the State of Western Australia submitted was that the insertion and entrenchment of s 2(3) of the Constitution Act by the 1978 Act impliedly repealed s 13 of the EDA. The word ‘passage’ in s 2(3), it was argued, meant a bill had received the support of not less than a simple majority of members then present and voting on the Bill. The Supreme Court unanimously rejected this argument.\textsuperscript{39} Steytler and Parker JJ held that ‘passage’ requires bills to have been passed by each House in a legally valid and binding manner.\textsuperscript{40} On appeal, the High Court also rejected the implied repeal argument.\textsuperscript{41} Gleeson CJ, Gummow, Hayne and Heydon JJ held that ‘passage through’ in s 2(3) means ‘due passage’ or ‘passage in accordance with applicable requirements’.\textsuperscript{42} Similarly, Kirby J interpreted ‘passage through’ as meaning passage ‘complying with any applicable requirements of law’.\textsuperscript{43} Consequently, s 2(3) did not imply repeal the absolute majority requirement in s 13 of the EDA.

The EDA was subsequently repealed by the Electoral Amendment and Repeal Act 2005 (WA) (‘EARA’) following the Labor government securing an absolute majority in the Legislative Council supporting the EDA’s repeal.\textsuperscript{44} In its place, the EARA amended the Electoral Act 1907 (WA) to establish an electoral distribution broadly in accordance with the principle of ‘one-vote, one-value’, subject to certain exceptions and allowing for a ±10% variation. The EARA also inserted s 16M of the Electoral Act which entrenches the ‘one-vote, one-value’ principle by requiring bills repealing or altering the provisions of the Electoral Act giving effect to that principle to be passed by absolute majorities in both Houses of Parliament.\textsuperscript{45} The interpretation of s 2(3) of the Constitution Act’s phrase ‘passage through [Parliament’s two houses]’ in Marquet suggests s 16M of the Electoral Act’s requirement of absolute majorities is not inconsistent with s 2(3).

2. Prospective Manner and Form Provisions

More broadly, it follows that Western Australia’s Parliament may, subject to compliance with pre-existing manner and form provisions, enact manner and form provisions requiring absolute majorities without observing s 73(2)’s restrictive procedures.\textsuperscript{46} ‘Passage’ in s 2(3) of the Constitution Act may also encompass

\begin{enumerate}
\item \textsuperscript{40} Ibid 255 [234].
\item \textsuperscript{41} A-G (WA) v Marquet (2003) 217 CLR 545, 568 [61] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 587 [123] (Kirby J), 634-5 [284]-[286] (Callinan J).
\item \textsuperscript{42} Ibid 568 [61].
\item \textsuperscript{43} Ibid 587 [123] (Kirby J).
\item \textsuperscript{45} Section 16M of the Electoral Act 1907 (WA) purportedly entrenches the provisions of Part 2 of the Electoral Act (‘Representation in Parliament’), other than Division 2, s 16G(3), (4), s 16L.
\item \textsuperscript{46} See eg, Western Australian Future Fund Bill 2012 (WA), cl 10. Of course, this does not mean that such manner and form provisions will bind future parliaments.
\end{enumerate}
special majority requirements of three-fifths or two-thirds of a chamber’s membership to amend entrenched constitutional provisions.\textsuperscript{47} Of course, at some point a special majority may constitute an impermissible substantive restraint on legislative power.\textsuperscript{48} Extra-parliamentary requirements are also generally substantive restraints on legislative power.\textsuperscript{49} The exception is requiring electoral approval at a referendum.\textsuperscript{50} Every Australian state, except Tasmania, purportedly entrenches specific constitutional provisions by requiring bills amending or repealing those provisions to first obtain the electorate’s approval at a referendum. It has been noted that the referendum manner and form provision in s 73(2) of the \textit{Constitution Act} may be replicated to entrench other constitutional principles and provisions in the future, including a bill of rights.\textsuperscript{51} However, the entrenchment of s 2(3) of the \textit{Constitution Act} raises an issue as to the manner and form required to validly enact a bill containing a referendum entrenchment provision.

Manner and form provisions requiring a successful referendum before a bill may receive royal assent affect s 2(3)’s requirement that every bill, subject to s 73, must be presented for royal assent following its ‘passage through the Legislative Council and the Legislative Assembly’. Such provisions introduce additional procedures between a bill’s passage and its assent. Additionally, bills defeated at a referendum are not presented for assent. The phrase ‘passage through’ may also be contrasted with the reference in s 5 of the \textit{Colonial Laws Validity Act 1865} (\textit{CLVA}) to ‘passed in such manner and form’. In \textit{Attorney-General (NSW) v Trethowan}, the appellant argued the term ‘passed’ restricted manner and form requirements to conditions relating to a bill’s passage through a colonial legislature’s house(s). Rich J, with whom the Privy Council agreed on this point, rejected the appellant’s argument, holding that ‘passed’ was equivalent to ‘enacted’ and related to the entire process of turning a bill into a legislative enactment.\textsuperscript{52} The extra-parliamentary requirement that a bill be submitted to and approved by the electorate at a referendum fell within s 5 of the \textit{CLVA}. \textit{Trethowan} is distinguishable as s 2(3) of the \textit{Constitution Act} refers specifically to passage through Parliament’s

\textsuperscript{47} See eg, \textit{Constitution Act 1975} (Vic), s 18(2); \textit{Constitution Act 1934} (Tas), s 41A. Section 41A of the \textit{Constitution Act 1934} (Tas) is of doubtful efficacy since it is not doubly entrenched: Peter Hanks, Patrick Keyzer and Jennifer Clarke, \textit{Australian Constitutional Law: Materials and Commentary} (LexisNexis, 7\textsuperscript{th} ed, 2004) 316.


\textsuperscript{49} \textit{Commonwealth Aluminium Corporation Ltd v A-G (Qld)} [1976] Qd R 231, 236-7 (Wanstall SP); \textit{West Lakes Ltd v South Australia} (1980) 25 SASR 389, 396-8 (King CJ).

\textsuperscript{50} A-G (NSW) v \textit{Trethowan} (1931) 44 CLR 394, 418 (Rich J), 431-2 (Dixon J); \textit{West Lakes Ltd v South Australia} (1980) 25 SASR 389, 397 (King CJ). Cf A-G (NSW) v \textit{Trethowan} (1931) 44 CLR 394, 413-4 (Gavan Duffy CJ), 443 (McTiernan J).

\textsuperscript{51} See, French, above n 2, 346.

\textsuperscript{52} A-G (NSW) v \textit{Trethowan} (1931) 44 CLR 394, 418-9 (Rich J), afd [1932] AC 526, 541. See also, (1931) 44 CLR 394, 432-3 (Dixon J), \textit{Contra}. (1931) 44 CLR 394, 414 (Gavan Duffy CJ), 444-5 (McTiernan J). Section 6 of the \textit{Australia Acts} forestalls this argument by using the phrase ‘\textit{made} in such manner and form’.
two houses and not to a bill’s passage more generally. Therefore, a manner and form provision requiring a referendum after a bill’s passage through both houses of Parliament most likely affects s 2(3). Section 73(2)(e) requires bills containing such provisions to first be approved at a referendum themselves.

Paradoxically, this reasoning draws on traditional views of manner and form provisions to effectively limit the traditional position regarding the enactment of manner and form provisions. Under orthodox analysis Parliament may enact manner and form provisions through ordinary legislative procedures, subject to compliance with pre-existing valid and binding manner and form provisions. Conversely, Gummow J in McGinty v Western Australia considered legitimate manner and form provisions must be ‘made with observance of that manner and form which is thereafter to apply’. As a practical matter, s 73(2)(e)’s entrenchment of s 2(3) establishes a requirement of symmetric entrenchment in respect of referendum requirements. Prospective manner and form provisions purportedly requiring electoral approval at a referendum as a condition precedent to amending entrenched provisions must themselves be approved at a referendum.

Restricted by s 73(2) in this respect, by what other methods may State Parliament entrench legislation through ordinary legislative procedures? One possibility may be for an entrenching provision to provide that the Governor must not proclaim legislation amending or repealing entrenched provisions unless an electoral majority approves that legislation at a referendum. Proclamation is often made contingent upon a particular event occurring. For example, s 6 of the Daylight Savings Act 2006 (WA) was to commence the day after the gazetting of a referendum writ on daylight savings if a majority of electors voted ‘yes’ to daylight savings at the referendum. An entrenching provision drafted as follows might circumvent s 2(3)’s entrenchment by s 73(2)(e) of the Constitution Act 1889 (WA):

(1) For the purposes of this section –

‘Amending or Repealing Act’ means, any Act which amends or repeals the provisions of this Act, including this section.

‘Amending or Repealing Bill’ means, any Bill which, if enacted, would amend or repeal the provisions of this Act, including this section.

(2) An Amending or Repealing Bill must not be presented to the Governor for Her Majesty’s assent unless the second and third readings of the

53 McCawley v The King [1920] AC 691, 704 (Lord Birkenhead); Clayton v Hefron (1960) 105 CLR 214, 249 (Dixon CJ, McTiernan, Taylor and Windeyer J); Carney, above n 38, 194.


55 Daylight Savings Act 2006 (WA), s 2(2). I am indebted to Mr Greg Calcutt SC for informing me of this provision. See also, Australia Acts (Request) Act 1999 (WA).
Amending or Repealing Bill have been passed by absolute majorities in both the Legislative Assembly and Legislative Council.

(3) After an Amending or Repealing Bill passed pursuant to (2) receives Royal Assent, a referendum must be held in relation to the Amending or Repealing Act.

(4) A referendum held for the purposes of (3) must be held in the same manner, and is subject to the same rules, as a referendum held under section 73(2) of the Constitution Act 1889 (WA).

(5) If a majority of the electors at a referendum held pursuant to (3) approve the Amending or Repealing Act then the Governor must proclaim the Amending or Repealing Act to commence from the date of the referendum.

(6) The Governor must not proclaim an Amending or Repealing Act except in accordance with (5).

(7) An Amending or Repealing Act has no force or authority until proclaimed in accordance with this section.

Such a provision would arguably not affect s 2(3) of the Constitution Act, and thereby engage s 73(2), since assent is a distinct gubernatorial act to proclamation. Legislation may be assented to without being proclaimed. However, a provision requiring a referendum as a condition precedent to proclaiming an Act arguably may not constitute a manner and form provision for the purposes of s 6 of the Australia Acts. In Trethowan, Dixon J held that manner and form provisions include all the conditions Parliament prescribes ‘as essential to the enactment of a valid law’.\textsuperscript{56} Conditions precedent to an Act’s proclamation are not essential condition in relation to that Act’s enactment. Bills become Acts upon receiving Royal Assent.\textsuperscript{57} Proclamation merely affects an Act’s commencement.\textsuperscript{58} However, His Honour also noted that provisions governing the reservation of Bills were ‘matters prominently in view when s 5 [of the CLVA] was framed’.\textsuperscript{59} One such example, s 33 of the Australian Constitutions Act (No 1) 1842 (Imp), provided that no Bill reserved for the signification of Her Majesty’s pleasure:

[S]hall have any force or authority … until the Governor … shall signify, either by speech or message to the Legislative Council, or by proclamation, as aforesaid, that such Bill has been laid before Her Majesty in Council, and that Her Majesty has been pleased to assent to the same.

In Yougarla, both the High Court and Western Australia’s Supreme Court characterised s 33’s proclamation requirement as a manner and form provision.\textsuperscript{60}

\textsuperscript{56} (1931) 44 CLR 394, 432-3.
\textsuperscript{57} Anne Twomey, ‘The Refusal or Deferral of Royal Assent’ [2006] Public Law 580, 585.
\textsuperscript{58} Ibid.
\textsuperscript{59} (1931) 44 CLR 394, 432.
\textsuperscript{60} Yougarla v Western Australia (1999) 21 WAR 488, 506 [60] (Lpp ), 513-6 [96], [98], [102].
On this basis, requirements following royal assent, including requirements as to an Act’s proclamation, may be ‘manner and form’ provisions falling within s 6 of the Australia Acts. Such a manner and form provision does not in any way affect s 2(3) and may be enacted without observing s 73.

LIMITING THE EXECUTIVE’S POWER TO DISSOLVE THE LEGISLATIVE ASSEMBLY

Section 3 of the Constitution Act provides: ‘It shall be lawful for the Governor ... to dissolve the Legislative Assembly by Proclamation or otherwise whenever he shall think fit’. The phrase ‘it shall be lawful’ denotes a gubernatorial discretion, reflecting the dissolution power’s status as a reserve power. Constitutional systems of Westminster heritage have, however, increasingly placed limits on the Crown’s dissolution power. Other Australian states have, to some extent, limited their respective State Governors’ power to dissolve Parliament prior to a fixed date. In Western Australia, legislation similar to that existing in those states must be enacted in accordance with s 73(2). Such legislation would engage s 73(2) by altering the Governor’s Office, and, or, affecting s 3 of the Constitution Act.

Laws limiting the Governor’s exercise of the dissolution power engage s 6 of the Australia Acts as laws respecting Parliament’s ‘constitution’ and ‘powers’. In this latter respect, Dixon J in Trethowan held that laws imposing, removing or diminishing constitutional checks, safeguards or restraints on the Legislature were laws respecting a legislature’s ‘powers’ under s 5 of the CLVA. The Governor’s dissolution power is one such constitutional check on Parliament’s power. Restricted by s 73(2) in that respect, this article examines what, if any, limitations may be imposed on the dissolution power in Western Australia without holding a s 73(2) referendum. Two distinct types of limitations are considered. First, legislation restricting when the Premier or Executive Council may advise the Governor to exercise the dissolution power. Secondly, limiting independent gubernatorial discretion by either amending the Letters Patent or enacting...
legislation relying upon the principle of parliamentary supremacy and s 73(2)’s limitations. It is argued that these alternatives are unlikely to circumvent s 73(2)’s procedures.

1. Restricting the Premier’s and Executive Council’s Advisory Powers

In 1972, BS Markesinis opined that contemporary constitutional lawyers:

need not bother with [limiting the Crown’s reserve powers] but instead should try to formulate new principles regulating the prime-ministerial powers [to advise dissolution].

The Premier’s power to advise the Governor to dissolve the Assembly confers significant political advantages on incumbent executives. Dissolution may be advised so that the resulting election occurs at a politically opportune time. Additionally, the dissolution power enables the executive to exert political influence over the Assembly by vesting it with the power to shorten parliamentarians’ tenure. Accordingly, one potential constitutional change is to enact legislation prohibiting the Premier or Executive Council advising the Governor to dissolve the Assembly, except in limited circumstances, such as when the Premier loses the Assembly’s confidence. As a matter of statutory interpretation, specific and explicit language is necessary to restrict the Premier’s or Executive Council’s power to advise the Governor. Whether such legislation would be required to observe s 73(2) depends on whether restricting the Premier’s advisory role affects the Governor’s dissolution power under s 3 of the Constitution Act or alters the Governor’s Office itself under s 50.

Constitutional developments in comparative jurisdictions provide some assistance in answering this question. In New South Wales, recent constitutional amendments restrict when the Premier or Executive Council may advise the Governor to prorogue Parliament, but expressly preserve the Governor’s reserve powers to prorogue Parliament. However, New South Wales’ Governor’s prorogation power was not specifically protected by manner and form provisions. Canada is perhaps a better example since, similar to Western Australia, special legislative procedures must be followed to amend Canada’s Governor-General’s Office or power to dissolve Canada’s House of Commons. In 2007, amendments to Canadian legislation fixed election dates, subject to the Governor-General’s dissolution power. In Conacher v Canada (Prime Minister), these amendments

67 See, Constitution Act 1902 (NSW), s 10A inserted by Constitution Amendment (Prorogation of Parliament) Act 2011 (NSW), s 3.
68 Canada Act 1982 (UK) c 11, sch B (’Constitution Act 1982’), part V.
69 Constitution Act 1982, s 41(a).
70 Constitution Act 1867 (Imp), 30 & 31 Vict, c 3, s 50.
71 Canada Elections Act S.C. 2000, c 9, s 56 inserted by 2007, c 10, s 1.
72 [2008] FC 1119; [2009] FC 920, [49], [53]; [2010] FCA 131, [5]. See also, Edward McWhinney, ‘Fixed Election Dates and the Governor-General’s Power to Grant Dissolution’
were held to be constitutional, leaving the Governor-General’s discretion unamended. The Conacher Court noted the possibility of legislation restricting the Prime Minister’s power to advise the Governor-General to dissolve the House of Commons, but expressly declined to comment on such legislation’s constitutionality.

Does the posited legislation alter the Governor’s Office or affect the Governor’s dissolution power? On one view, such legislation expands the Governor’s power to refuse dissolution. If the Governor may refuse to act on ‘transparently’ unlawful advice, the legislation provides an additional basis for the Governor refusing to dissolve the Assembly. In Arena v Nader, legislation expanding New South Wales’ Legislative Council’s powers was held not to alter the Council’s powers under s 7A of the Constitution Act 1902 (NSW). ‘Altered’ was interpreted in light of s 7A’s purpose of preventing the Council’s abolition or dissolution except in accordance with s 7A. Accordingly, s 7A was confined to ‘alteration[s] of powers by their diminution or limitation’. Similarly, ss 50 and 73(2) of the Constitution Act’s purposes included protecting the Governor’s Office. Expanding the Governor’s powers would not constitute an alteration for those purposes.

Restricting the Premier’s or Executive Council’s advisory powers may, however, affect the Governor’s dissolution power under s 3 of the Constitution Act. In Marquet, Wheeler J noted that the phrase ‘expressly or impliedly in any way affects’ gives s 73(2)(e) ‘a very broad reach’. Section 73(2)(e) therefore imposes a very significant restraint upon legislation ‘dealing with’ or making changes in general to the particular sections to which it applies. As Peter Johnston notes, ‘interpreted broadly, s 73(2) potentially applies to indirect, as well as direct, changes to the nominated topics, or to changes to the operation of those enumerated provisions’. The Conacher Court noted the Governor-General’s and Prime Minister’s constitutional relationship may entail that protection of the

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75 (1997) 42 NSWLR 427, 436 (Priestley, Handley and Meagher JJA).

76 Ibid.

77 Ibid.

78 Western Australia, Parliamentary Debates, Legislative Assembly, 22 March 1978, 308-9 (Charles Court – Premier).

79 (2002) 26 WAR 201, 281 [344].

80 Ibid.


82 Conacher v Canada (Prime Minister) [2010] FCA 131, [5].
Governor-General’s powers extend to the Prime Minister’s advice-giving role. Similarly, the Governor-in-Council can exercise the Governor’s powers. In *Wrathall v Fleming*, Morris CJ held that the Governor may exercise powers vested in the ‘Governor … not the Governor acting with the advice of the Executive Council’, with the Executive Council’s advice. If the Governor is *obliged* to refuse a dissolution contrary to law, such legislation may limit the Governor’s power to grant dissolution. Additionally, such legislation potentially restricts who the Governor may consult when dissolving the Assembly. Accordingly, restricting the Premier’s advisory power may affect the Governor’s dissolution power.

2. Limiting Independent Gubernatorial Discretion

Following the 1975 dismissal, many Australian constitutional scholars have repudiated Markesinis and focused on limiting independent gubernatorial discretion in exercising the reserve powers. At the Commonwealth level, it has been suggested that this may be achieved via ordinary legislation or even by amending the *Letters Patent*. This section examines these arguments and considers whether they can be applied to Western Australia to limit the Governor’s exercise of the dissolution power without holding a s 73(2) referendum.

(i) Amending the Letters Patent

Section 73(2) of the *Constitution Act* applies to ‘Bills’, not prerogative instruments such as *Letters Patent*. Under s 7(2) of the *Australia Acts*, Governors may exercise Her Majesty’s power respecting a State to issue, amend or revoke *Letters Patent*. May the Governor, acting on ministerial advice, amend the *Letters Patent* to limit or fetter independent gubernatorial discretion? Clause XXII of Western Australia’s *Letters Patent* provides the ‘[p]ower to revoke, alter or amend these our Letters Patent is reserved’. On one view, these revised *Letters Patent* limit the Governor’s exercise of the powers under s 7(2) of the *Australia Acts*. However, it is arguable that this instrument may itself be revoked, altered or amended pursuant to an exercise of the royal prerogative. At any rate, the Queen

83 Williams v A-G (NSW) (1913) 16 CLR 404, 465 (Higgins J); *Wrathall v Fleming* [1945] Tas SR 61, 63 (Morris CJ).
84 [1945] Tas SR 61, 63.
90 George Winterton, ‘The Role of the Governor’ in Clement Macintyre and John Williams (eds) *Peace, Order and Good Government: State Constitutional and Parliamentary Reform*
may amend the *Letters Patent* while present in Western Australia and acting on the Premier’s advice.\(^\text{91}\)

Amending the *Letters Patent* has been considered a means of abrogating Governors’ reserve powers.\(^\text{92}\) Indeed, some commentators suggest Victoria’s previous *Letters Patent* did just that.\(^\text{93}\) Does this provide a precedent Western Australia may follow? Clause III of Victoria’s former *Letters Patent* provided ‘The Premier … shall tender advice to the Governor in relation to the exercise of the … [Governor’s] powers and functions’.\(^\text{94}\) Hanks originally considered Clause III ‘impos[ed] a legal constraint on the [G]overnor, recognised by the courts, to follow the course advised by the current government’.\(^\text{95}\) No judicial decisions recognising this constraint were cited and Clause III’s enforceability may be doubted.\(^\text{96}\) Moreover, Clause III was ‘equivocal’,\(^\text{97}\) merely identifying the Premier as the Governor’s advisor. It did not state that the Governor must follow the Premier’s advice.\(^\text{98}\) At any rate, amending Western Australia’s *Letters Patent* would not legally constrain the Governor’s exercise of the dissolution power. The *Letters Patent* are prerogative instruments. Section 3 of the *Constitution Act* excludes the prerogative operating in this context.\(^\text{99}\)


\(^\text{93}\) *Victoria, Letters Patent Relating to the Office of Governor of Victoria*, No. 30, 30 April 1986, 1117. These Letters Patent were revoked by the *Constitution (Amendment) Act 1994* (Vic), s 7(1).

\(^\text{94}\) Peter Hanks, ‘Victoria’s Liberals have a Problem’ (1991) 10(3) *Australian Society* 5, 6 (emphasis added).

\(^\text{95}\) See, O’Brien, above n 87, 349.


(ii) Parliamentary Supremacy as a Basis for Legislation Regulating Executive Powers Conferred and Entrenched under the Constitution Act

(a) Professor Winterton’s Parliamentary Supremacy Thesis

In the wake of the dismissal, Professor Winterton posited that the Commonwealth Parliament may enact legislation regulating the Governor-General’s exercise of dissolution powers conferred under ss 5 and 57 of the Commonwealth Constitution. Winterton considered ss 5 and 57 to merely specify the formal repository of power, not those powers’ substantive content. Legislation might provide that the Governor-General must exercise dissolution powers upon advice received from ministers enjoying the House of Representative’s confidence. Winterton argued s 51(xxxix) of the Commonwealth Constitution, principles of parliamentary supremacy and the obiter dictum of Jacobs J in the AAP Case would support such legislation. Two Acts are cited as examples supporting Winterton’s thesis. First, the High Court of Australia Act 1979 (Cth) establishes conditions precedent to judicial appointments, notwithstanding the Commonwealth Constitution providing the Governor-General in Council shall appoint High Court Justices. Secondly, the Defence Act 1903 (Cth) vests the Defence Minister with general control of the Defence Force, notwithstanding the Governor-General’s constitutional position as Commander-in-Chief.

Others doubt or deny the Commonwealth Parliament’s power to regulate the Governor-General’s dissolution powers. First, such laws may not be within s 51(xxxix) if gubernatorial discretion is fundamental to the dissolution powers.

101 Victoria v Commonwealth (‘AAP Case’) (1975) 134 CLR 338, 406 (Jacobs J): ‘It does not follow that any subject matter of the exercise of the prerogative which is properly exercisable through the Governor General on the advice of the Executive Council cannot be the subject of legislation of the Parliament which may deny or limit or replace the prerogative by legislative provision. The same is true of any executive power expressly conferred by the Constitution, though of course the exercise of either executive or legislative power is subject to the provisions of the Constitution.’
102 See, Winterton, Parliament, the Executive and the Governor-General, above n 100, 98-100; Leslie Zines, The High Court and the Constitution (Federation Press, 5th ed, 2008) 373-4.
103 Commonwealth Constitution, s 72(i); High Court of Australia Act 1979 (Cth) ss 5-10.
107 See, for doubts: O’Brien, above n 106, 55.
Secondly, even if the cited laws are valid, s 5 of the Commonwealth Constitution uses the term ‘may’, ‘vividly contrasting’ with a mandatory ‘shall’ in s 72(i). Therefore, s 5 may grant the Governor-General a discretion, whereas s 72(i) merely outlines the formal repository of power. Thirdly, a strict separation of legislative and executive powers may undermine implications of parliamentary supremacy.

(b) Applying Professor Winterton’s Parliamentary Supremacy Thesis to Western Australia

Is there a basis for extending Winterton’s thesis to Western Australia? The necessary conditions exist. State legislative power is plenary within limits and parliamentary supremacy is recognised at the State level. Additionally, State Constitutions do not establish an independent separation of powers doctrine. However, State Parliament’s power and supremacy are subject to, amongst other things, valid and binding manner and form provisions. In Trethowan, Dixon J held manner and form issues are ‘not … determined by … direct[ly] appl[y]ing … the doctrine of parliamentary sovereignty’. Section 6 of the Australia Acts does not extend to state executive power. Accordingly, manner and form provisions purportedly entrenching gubernatorial executive powers may not bind Parliament unless legislation regulating such powers otherwise engages s 6 or another source of legal efficacy exists. If not, State Parliament may enact such legislation through ordinary procedures. However, suggesting principles of parliamentary supremacy operate over and above valid and binding manner and form provisions involves overturning Trethowan. In Glew v Governor of Western Australia, Hasluck J held that s 73(2) does not apply to laws consistent with ‘substantive realities

109 Winterton, Parliament, the Executive and the Governor-General, above n 100, 100. However, Winterton considers this ‘too tenuous a ground on which to resist the implications of the fundamental constitutional concept of parliamentary supremacy’.
111 A-G (NSW) v Trethowan (1931) 44 CLR 394, 425 (Dixon J); Grace Bible Church Inc v Reedman (1984) 36 SASR 376, 390 (Millhouse J); Kable v DPP (NSW) (1996) 189 CLR 51, 66 (Brennan CJ). See also, Dixon above n 38, 50.
114 (2009) 222 FLR 417, 428 [74], 430 [90].
underlying the Constitution [Act].\textsuperscript{115} If the concept of ‘substantive constitutional reality’ posited in Glew encompasses the principle of parliamentary supremacy, laws consistent with that principle may not fall within s 73(2) of the Constitution Act. However, Glew may be more properly limited to its facts.\textsuperscript{116}

**SECTION 73 AND THE STATE FRANCHISE**

High Court majorities in Roach v Electoral Commissioner and Rowe v Electoral Commissioner held that ss 7 and 24 of the Commonwealth Constitution establish an implied freedom of universal adult-citizen suffrage limiting Commonwealth legislative power.\textsuperscript{117} Different views exist regarding Roach and Rowe’s implications for the state franchise.\textsuperscript{118} Significantly, Western Australia’s Attorney-General intervened in both cases in support of the impugned Commonwealth legislation. Roach and Rowe may have added significance for Western Australia given s 73(2)(c) of the Constitution Act.\textsuperscript{119} Section 73(2)(c) entrenches the requirement that Parliament’s two Houses be composed of members ‘chosen directly by the people’. In Stephens v West Australian Newspapers Ltd, s 73(2)(c) was held to entrench representative democracy in Western Australia and provide a basis for an implied freedom of political communication in this state.\textsuperscript{120} The phrase ‘chosen directly by the people’ is a permutation of ss 7 and 24’s reference to ‘directly chosen by the people’ which underlies the implied freedom of universal adult-citizen suffrage established in Roach. This section considers whether, in light of Roach and Rowe, Western Australia’s Parliament must observe s 73’s restrictive procedures when enacting laws altering the State franchise. Consistent with Stephens, s 73(2)(c) may provide a basis for a freedom of universal adult-

\textsuperscript{115} Hasluck J’s reference to ‘substantive constitutional reality’ in Glew v Governor of Western Australia (2009) 222 FLR 417 related to changes in legislation’s terminology from ‘Queen’ and ‘Governor’ to ‘State of Western Australia’. See also, Legal, Constitutional and Administrative Review Committee, Parliament of Queensland, Consolidation of the Queensland Constitution: Final Report (1999) 12: Queensland’s Crown Solicitor advised the Committee that for a subsequent Act to ‘affect’ provisions entrenched by a provision similar to s 73(2) in the Constitution Act 1867 (Qld) that Act would have to change its meaning in some way. Accordingly, substituting the word ‘State’ for ‘colony’ would not affect the entrenched sections.


\textsuperscript{117} Compare, Anthony Gray, ‘The Guaranteed Right to Vote in Australia’ (2007) 7(2) University of Queensland 178, 194-7; Wait, above n 6, 259.


\textsuperscript{119} (1994) 182 CLR 211, 233-4 (Mason CJ, Toohey and Gaudron JJ), 236 (Brennan J).

\textsuperscript{120} (1982) 149 CLR 79.
citizen suffrage in Western Australia. However, this is unlikely to provide as extensive protection of the franchise as ss 7 and 24 of the *Commonwealth Constitution* due to s 73(2)(c)’s context and the limits of s 6 of the *Australia Acts*.

1. **Roach v Electoral Commissioner and Section 73(2)(c)**

*Wilsmore* was the last challenge to the constitutionality of Western Australian laws altering the state franchise.\(^{121}\) However, the prospect of a challenge seemingly precipitated Western Australia’s intervention in, and legislative response to, *Roach*. In *Roach*, the plaintiff challenged the constitutionality of amendments in 2006 to the *Commonwealth Electoral Act 1918* (Cth) disenfranchising all persons serving a sentence of imprisonment.\(^ {122}\) The plaintiff submitted that these amendments infringed a requirement under ss 7 and 24 of the *Commonwealth Constitution* that the Commonwealth Parliament’s two houses be ‘directly chosen by the people’. Western Australia’s Attorney-General intervened in support of the validity of the Commonwealth legislation.\(^ {123}\) When Kirby J inquired why Western Australia’s Attorney-General intervened, Mr RM Mitchell noted the similarities between s 73 of the *Constitution Act 1889* (WA) and ss 7 and 24 of the *Commonwealth Constitution*.\(^ {124}\) Amendments to the *Electoral Act 1907* (WA) disenfranchised all prisoners in line with the impugned federal provisions in *Roach*.\(^ {125}\) Consequently, invalidation of the federal provisions may have resulted in a challenge to Western Australia’s legislation. Ultimately, Gleeson CJ, Gummow, Kirby and Crennan JJ held that the 2006 amendments to the *Commonwealth Electoral Act 1918* (Cth) were unconstitutional.\(^ {126}\) Western Australia’s Parliament subsequently substituted the blanket disenfranchisement of prisoners for a disenfranchisement of persons serving a sentence of imprisonment of one year or longer.\(^ {127}\) This amendment to the *Electoral Act* was based on the Government’s acceptance that *Roach* entailed that a blanket disenfranchisement of prisoners was unconstitutional.\(^ {128}\)

2. **The Scope of Protection under Section 73(2)**

In *Burke v Western Australia*, Burt CJ held that ‘for the purposes of s 73(2)(c) of the Constitution and in the context of a universal adult franchise “the people” means … the persons enrolled and entitled to vote: s 17 of the *Electoral Act*.\(^ {129}\) Of

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\(^{121}\) *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth).

\(^{122}\) (2007) 233 CLR 162, 163, 170, 184 [34].


\(^{124}\) *Electoral Legislation Amendment Act 2006* (WA), s 18.


\(^{126}\) *Electoral Amendment (Miscellaneous) Act 2009* (WA), s 7.


course, this leaves open for debate the nature and extent of exceptions to universal suffrage.\textsuperscript{130} What constitutes universal adult suffrage is contentious and has changed throughout history. In \textit{Attorney-General (Cth) ex rel McKinlay v Commonwealth}, McTiernan and Jacobs JJ considered the words ‘chosen by the people’ in ss 7 and 24 of the \textit{Commonwealth Constitution} fall to be applied to different circumstances at different times.\textsuperscript{131} Their Honours held that whether a parliamentarian is ‘chosen by the people’ partially depends upon the \textit{common understanding of the time} on those who must be eligible to vote.\textsuperscript{132} Gleeson CJ in \textit{Roach} agreed with McTiernan and Jacobs JJ’s interpretation of the words ‘chosen by the people’. His Honour held that by 2007 changing historical circumstances, including legislative history, meant ss 7 and 24 limited the Commonwealth Parliament’s power to alter the franchise.\textsuperscript{133} A majority in \textit{Rowe} also interpreted ‘chosen by the people’ in light of ‘common understandings’ of the time.\textsuperscript{134} Indeed, Heydon J colourfully noted that the Commonwealth Solicitor-General’s ‘originalist’ submission regarding the 1900 meaning of ‘chosen by the people’ stimulated ‘as much approbation as the man who asked for a double whisky in the Grand Pump Room at Bath’.\textsuperscript{135} Does this ‘common understanding’ jurisprudence translate to the interpretation of the phrase ‘chosen directly by the people’ in s 73(2)(c)?

Wickham J in \textit{Burke} left open the question whether the term ‘the people’ in s 73(2) (c) ‘has a changing connotation (sic - denotation) according to changing political and social values’.\textsuperscript{136} An affirmative answer underlies Toohey J’s reasoning in \textit{McGinty}. His Honour held that an implication of representative democracy in Western Australia’s Constitution, derived partially from s 73(2), was responsive to the time and circumstances in which it falls for consideration.\textsuperscript{137} However, majorities in both \textit{Burke} and \textit{McGinty} interpreted s 73(2)(c) in light of Western Australia’s electoral legislation in 1978 when s 73(2) was enacted.\textsuperscript{138} In both cases, the plaintiff argued electoral distribution laws resulted in Western Australia’s Parliament not being ‘chosen directly by the people’ contrary to s 73(2)(c). The \textit{Burke} and \textit{McGinty} majorities rejected this argument. One consideration in both decisions was that the challenged electoral distribution laws respectively permitted a similar and lesser degree of malapportionment than legislation in 1978 permitted. Accepting the plaintiffs’ argument would entail that the 1978

\begin{itemize}
\item \textsuperscript{130} (1975) 135 CLR 1, 36.
\item \textsuperscript{131} Ibid.
\item \textsuperscript{134} (2010) 243 CLR 1, 97 [293] (Heydon J).
\item \textsuperscript{135} [1982] WAR 248, 256.
\item \textsuperscript{136} (1996) 186 CLR 140, 216.
\item \textsuperscript{137} [1982] WAR 248, 253 (Burt CJ), 256 (Smith J agreeing); (1996) 186 CLR 140, 178 (Brennan CJ), 189 (Dawson J), 253 (McHugh J). See also, (1996) 186 CLR 140, 299-300 (Gummow J).
\item \textsuperscript{138} This assumes that the phrase ‘chosen directly by the people’ has a relatively fixed content which is based on historical circumstances in 1978.
\end{itemize}
Parliament was not itself ‘chosen directly by the people’. Applying a similar approach to laws altering the franchise raises doubts whether s 73(2)(c) protects post-1978 expansions of the franchise. One such expansion is the enfranchisement of expatriates under s 17A of the *Electoral Act*. Whilst s 73(2)(c) may apply only to laws disenfranchising classes of voters enfranchised in 1978, it is unlikely to apply to all such laws. In 1978 the status of ‘British subject’ was a necessary qualification to vote under the *Electoral Act*’s provisions. Amendments to the *Electoral Act* in 1983 replaced the qualification of ‘British subject’ with ‘Australian citizen’ but inserted a grandfather clause preserving voting rights of British subjects enrolled prior to January 26 1984. *Bennett v Commonwealth* suggests Parliament may now repeal this grandfather clause through ordinary procedures without infringing s 73(2)(c). The High Court held that nothing in the *Commonwealth Constitution* prohibits discrimination in conferring or withholding electoral rights based on Australian citizenship. Presumably this includes ss 7 and 24 which are somewhat analogous to s 73(2)(c).

There are limits, however, to the analogy. In *Rowe*, French CJ held that the validity of laws denying the franchise to a class of persons is not determined by whether an election conducted under its provisions results in members of Parliament being ‘directly chosen by the people’. Conversely, s 73(2)(c) purportedly applies to bills expressly or impliedly providing that either house of Parliament ‘be composed of members other than members chosen directly by the people’. Hayne J’s approach in *Roach* and *Rowe* of asking whether the impugned provisions yield Houses of Parliament chosen by the people is apposite in relation to s 73(2)(c).

### 3. ‘The Electors’ and ‘The People’ under Section 73

In *Burke*, Burt CJ rejected the plaintiff’s submission drawing a distinction between ‘the electors’ and ‘the people’ under s 73 of the *Constitution Act*. Similarly, upon introducing the Acts Amendment (Constitution) Bill 1978, Premier Charles Court stated the Bill proposed to protect ‘the right of the electors at large to

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139 *Electoral Legislation Amendment Act 2006 (WA).*
140 *Electoral Amendment Act 1983 (WA).*
142 (2010) 243 CLR 1, 20-1 [25].
143 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 206 [112]; *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 64 [182]. See also, Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 March 1978, 308 (Charles Court – Premier). Premier Charles Court stated the Amendment (Constitution) Bill 1978 proposed to protect ‘the right of the electors at large to elect the members of either house’.
select the members of either house’. However, as a textual matter, s 73(2)(g), (3), (4) and (5) refer to ‘the electors’ in contrast to s 73(2)(c)’s reference to ‘the people’. Under s 73(3) and (4), bills to which s 73(2) applies are to be submitted to the electors at a referendum. The electors are those persons qualified to vote for Legislative Assembly elections under the Electoral Act 1907. Such a bill is to be submitted to the Governor for assent if a majority of the electors voting at the referendum approve the bill. Section 73(6) provides that a person entitled to vote at Legislative Assembly elections (an elector) is entitled to bring proceedings in the Supreme Court to enforce s 73(2). Section 73(2)(e) entrenches s 73 itself.

As Steytler J noted in S (A Child) v The Queen, bills expressly or impliedly affecting the right conferred upon the persons mentioned in s 73(6) to bring Supreme Court proceedings to enforce s 73(2) must meet s 73(2)’s requirements. However, does s 73(2) also apply to bills altering electors’ qualifications and thereby affecting which persons are ‘electors’ and may bring proceedings under s 73(6)? Alterations to electoral qualifications and disqualifications also change the electorate for s 73(2) referendums and, potentially, even the results of a s 73(2) referendum. In Wilsmore, Wilson J drew a distinction between a rule and the subject matter upon which the rule operates. His Honour rejected the conclusion reached by Wickham J in the Supreme Court that amendments to the Electoral Act touching electors’ qualifications indirectly altered sections of the CAAA 1899 requiring parliamentarians to be, or be qualified to become, an elector entitled to vote. The rule prescribed by the CAAA’s sections remained the same. Amendments to the Electoral Act merely meant that some persons who had formerly satisfied the description of an elector no longer did so. However, s 73(2)(e) purportedly applies to legislation ‘expressly or impliedly in any way affect[ing]’ s 73 which is seemingly wider than whether legislation alters protected provisions. Although this phrase gives s 73(2)(e) a very broad reach, it is unlikely to entail that amendments to electoral qualifications and disqualifications affect ss 73(3)–(6). Under s 16 of the Interpretation Act 1984 references in written laws to other written laws include any amendments from time to time to the latter written law. References in s 73(3) of the Constitution Act to the electors qualified to vote under the Electoral Act, therefore, encompass alterations to the franchise.

147 Cf Commonwealth Constitution, ss 7, 8, 24, 30, 41, 128.
148 Constitution Act 1889 (WA), s 73(5).
149 (1995) 12 WAR 392, 400. However, Western Australia’s Parliament would only be required to comply with s 73(2) if it was bound by a source of legal efficacy when enacting such a bill.
153 Johnston, Manner and Form Provisions in the Western Australian Constitution, above n 3, 209.
4. **Entrenchment Issues: The Franchise and Parliament’s Constitution**

Accepting though that *some* laws altering the franchise fall within s 73(2)(c), must such legislation be approved at a referendum? This raises another question: is a law altering electors’ qualifications or disqualifications respecting Parliament’s ‘constitution, powers or procedure’? Parliament’s ‘constitution’ is the most relevant term for present purposes and was the focus of the majority’s analysis in *Marquet*. In *Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ held that for the purposes of s 6 of the *Australia Acts* a State Parliament’s ‘constitution’ extends, at least to some extent, to ‘features which go to give it, and its Houses, a representative character’. Accordingly, legislation dealing with matters encompassed by the general description ‘representative’ and which give that word its application in a particular case may engage s 6.

The franchise is critical to, and at the core of, representative democracy. On this basis, laws altering the franchise seemingly fall squarely within the *Marquet* majority’s representativeness test and engage s 6 of the *Australia Acts* as laws respecting Parliament’s constitution. However, the *Marquet* majority subsequently held, citing *Clydesdale v Hughes*, that not every matter touching parliamentarians’ election affects Parliament’s constitution. Their Honours noted that *Clydesdale* established that changes to the grounds disqualifying sitting members from a legislative chamber’s membership do not change the chamber’s ‘Constitution’ under s 73 of the *Constitution Act*. Yet, as Ipp J noted in *Yougarla*, Parliament’s membership qualifications and disqualifications are ‘a question of the utmost importance in the life of any democratic state’. Qualifications for, and disqualifications from, such membership are central to Parliament’s representativeness.

The coherence of the *Marquet* majority’s representativeness test is questionable if the apparent acceptance of *Clydesdale* as a limitation on the test entails that parliamentarians’ qualifications constitute an exception to the test. This is especially so since *Clydesdale* has traditionally formed the reference point along a scale of importance in determining what forms part of Parliament’s constitution, with matters less ‘important’ than parliamentarians’ qualifications

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156 Ibid, 573 [76].
157 Ibid.
161 *Yougarla v Western Australia* (1999) 21 WAR 488, 503 [45].
162 *Cleatle v The Queen* (1993) 177 CLR 541, 560-1.
excluded from Parliament’s constitution. For example, in Wilsmore, Brinsden J concluded that as laws altering parliamentarians’ qualifications did not affect Parliament’s Constitution under s 73 nor did laws varying provisions merely relating to electors’ disqualifications. Indeed, as Stawell CJ opined in Kenny v Chapman, ‘what would be an altering of the constitution, if altering the qualifications of members [is] not?’ In Marquet, enacting a single State-wide electorate using proportional representation was advanced as an example falling within the representativeness test. Proportional representation advances a ‘microcosmic conception’ of representation. It generally increases minor parties’ parliamentary representation and facilitates political parties nominating candidates from broader demographics. However, would not legislation directly determining whether candidates are eligible for parliamentary membership be more closely connected to Parliament’s representativeness than laws merely indirectly facilitating higher parliamentary representation of those candidates? A close analysis of both Clydesdale and Marquet is therefore necessary to determine the coherence of the representativeness test and its application to laws altering the franchise.

(i) Clydesdale v Hughes

Clydesdale was the first occasion on which s 73 of the Constitution Act was subject to judicial interpretation and application. Previously, it was seemingly accepted that laws altering the qualifications and disqualifications for parliamentary membership were respecting Parliament’s ‘constitution’. Similarly, voters’ qualifications were held to form part of Parliament’s constitution in Ex parte Drifield and Auld v Murray. During parliamentary debate on the Constitution

164 Wilsmore v Western Australia (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 23.
165 (1861) W & W 93, 100. See also, McDonald v Cain [1953] VLR 411, 441, 444 (O’Brien J); Wilsmore v State of Western Australia [1981] WAR 159, 164 (Wickham J).
167 Iain MacLean, ‘Forms of Representation and Systems of Voting’ in David Held (ed), Political Theory Today (Polity Press, 1991) 172, 173-4. The microcosmic conception posits that Parliament should be an exact portrait, in miniature, of society. That is, it should contain members drawn from all groups and sections of society, in proportion to their size in society.
169 McGinty v Western Australia (1996) 186 CLR 140, 249-50 (McHugh J); Pendal, Black and Phillips, above n 169, 149.
170 See, Johnston, ‘Freeing the Colonial Shackles’ above n 2, 318.
173 Western Australia, Parliamentary Debates, Legislative Council, March 28 1889, 169
Bill 1889, the Attorney-General, the Hon Charles Warton, stated:

So far as constitutional matters were concerned – that was to say, what kind of an Upper House they should have, what the franchise should be, or what the qualification should be, the only restriction as regards future legislation affecting the bill was that such legislation should be passed with the concurrence of an absolute majority of both Houses.174

Both Houses of Parliament passed the *Parliament (Qualification of Women) Act 1920* by absolute majorities which were considered necessary to comply with s 73 of the *Constitution Act*.175 Other legislation’s passage also indicates Parliament operated under this assumption.176 Questions regarding s 73 arose in *Clydesdale* as the Legislative Assembly assented to the Legislative Council’s amendments to the *Constitution Acts Amendment Act 1933* (‘*CAAA 1933*’) by less than an absolute majority.

Western Australia’s Parliament enacted the *CAAA 1933* whilst an action was pending between two Western Australian parliamentarians: Alexander Clydesdale MLC and Thomas Hughes MLA.177 Clydesdale accepted an appointment as a member of Western Australia’s Lottery Commission under the *Lotteries (Control) Act 1932*. Hughes commenced proceedings in Western Australia’s Supreme Court claiming, amongst other things, that Clydesdale’s membership of the Lottery Commission constituted an office of profit under the Crown. On this basis, Hughes claimed Clydesdale was disqualified from sitting or voting as a parliamentarian under s 38 of the *CAAA 1899*. Section 2 of the *CAAA 1933* provided that s 38 of the *CAAA 1899* did not apply to members of the Lottery Commission appointed pursuant to the *Lotteries (Control) Act 1932*.

At first instance, and on appeal to the Full Supreme Court, s 2 of the *CAAA 1933* was held not to confer immunity upon Clydesdale.178 Clydesdale appealed to the High Court and Hughes submitted that the *CAAA 1933* had not been passed in accordance with s 73 of the *Constitution Act 1889*. As noted above, the Legislative Council’s amendments to the *CAAA 1933* were assented to by less than an absolute majority of the Legislative Assembly. Rich, Dixon and McTiernan JJ, however, considered the *CAAA 1933* to have been passed in accordance with s 73. Section 73 was interpreted as recognising the ‘possibility of substantial amendment in the other House after the passage of the Bill by the requisite majorities through the House where it originates’.179 At any rate, their Honours rejected Hughes’


176 However, Thomas Hughes was not a member of Parliament at the time.

177 *Hughes v Clydesdale* (1934) 36 WALR 73; *Clydesdale v Hughes* (1934) 36 WALR 78.

178 (1934) 51 CLR 518, 528-9.

179 Ibid 528.
argument that passage in accordance with s 73 was necessary since the CAAA 1933 altered or changed the Constitution of the Legislative Council. Rich, Dixon and McTiernan JJ simply stated ‘we do not agree that it effected a change in the constitution of the Legislative Council’. Unfortunately, this statement is of little assistance in determining their Honours’ reasoning as it does not explain why they disagreed with the proposition that the CAAA 1933 effected a change in the Legislative Council’s Constitution for the purposes of s 73.

A number of different interpretations of Clydesdale have been posited to explain their Honours’ decision. Narrow readings of Clydesdale suggest it does not establish that electors’ and parliamentarians’ qualifications are not part of a legislative chamber’s ‘constitution’. In McDonald v Cain, O’Bryan J considered Clydesdale was decided on the basis that the CAAA 1933 was a declaratory Act and did not alter the law as to parliamentarians’ qualifications. His Honour held that the CAAA 1933 simply removed doubts as to the disqualifications by validating Clydesdale’s position. Rich, Dixon and McTiernan JJ did state in Clydesdale that the object of the CAAA 1933 was ‘by declaratory enactment to settle a dispute in question, not to make a mere prospective enactment’. A majority of the Supreme Court in Wilsmore v Western Australia also interpreted Clydesdale narrowly. Wickham J, with whom Smith J agreed, had ‘no doubt that in general, a change in qualification or disqualification for electors or for membership of either House is a change affecting the constitution of the House(s). Clydesdale was explicable on the basis that the CAAA 1933 was ‘ad hoc’ and ‘temporary’.

A broader interpretation of Clydesdale is that the Court reached its conclusion on the CAAA 1933 and s 73 of the Constitution Act based on the view that laws altering parliamentarians’ qualifications do not effect a change in either legislative chamber’s constitution for the purposes of s 73. Brinsden J adopted this interpretation of Clydesdale at first instance in Wilsmore. His Honour rejected O’Bryan J’s interpretation of Clydesdale in McDonald, noting that whilst the Clydesdale Court referred to the CAAA 1933 as a ‘declaratory enactment ... not a mere prospective enactment’, it was necessary to interpret this in light of the lower courts viewing the CAAA as operating only prospectively. On appeal to

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180 One possibility is that ‘Constitution’ in s 73 of the Constitution Act 1889 (WA) was interpreted in light of s 1(2)(d) of the 1907 Imperial Act. Their Honours held that the CAAA 1933 was not required to be reserved under the 1907 Imperial Act immediately after addressing s 73 of the Constitution Act.

181 (1934) 51 CLR 518, 528.
183 Ibid 163-4.
184 Ibid 22.
185 Wilsmore v Western Australia (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 23.
186 Ibid 22.
the High Court, Wilson J, Gibbs CJ and Mason J agreeing in this respect, held that:

_Clydesdale v Hughes_ is clear authority, unless and until it is reversed or departed from by this Court, for the proposition that a law which merely changes the qualifications of members of the Legislative Council does not effect a change in the constitution of that body within the meaning of s 73 of the 1889 Act. When such an authority has guided the law-making procedures of the Parliament for almost fifty years then any departure from it would require very serious consideration.

**(ii) Marquet, the Qualification, the Franchise and Parliament’s Constitution**

The High Court _Marquet_ majority referred to _Clydesdale_ and _Wilsmore_ specifically in relation to s 73 of the _Constitution Act_, not s 6 of the _Australia Acts_. Ultimately, the representativeness test’s coherence depends on whether this indicates equivocalness to _Clydesdale_ or acceptance of _Clydesdale_ as a limitation on the representativeness test. Adopting the latter view requires reassessment of the exception or the test itself. In _Marquet v Attorney-General (WA)_ Malcolm CJ, Steytler and Parker JJ noted _Clydesdale_’s scope may need reassessment. Like the High Court majority, Steytler and Parker JJ applied representativeness as a determinant of Parliament’s constitution whilst simultaneously accepting _Clydesdale_ as a limit on constitution’s meaning in s 6 of the _Australia Acts_. Their Honours also accepted Wilson J’s analysis in _Wilsmore_ and rejected O’Bryan J’s interpretation of _Clydesdale_ in _McDonald_. However, their Honours noted that the change to qualifications in _Clydesdale_ was extremely confined in scope and duration. Would some types and degrees of change be so significant as to alter Parliament’s constitution? For example, would gender-based legislative disqualifications from voting or standing for Parliament be respecting Parliament’s constitution? Such disqualifications would obviously affect Parliament’s representativeness. However, in _Attorney-General (WA) ex rel_
Burke v Western Australia, Burt CJ, citing Wilson J in Wilsmore, considered it irrelevant the change effected in Clydesdale was temporary and narrow.\(^{196}\) His Honour considered Parliament’s ‘Constitution’ in s 73 of the Constitution Act to mean no more than Parliament’s size and the number of electoral districts.\(^{197}\) This analysis was seemingly predicated on the marginal notes to ss 11 and 45 of the Constitution Act.\(^{198}\) In Wilsmore, Brinsden J considered these marginal notes of little assistance in ascertaining ‘Constitution’s’ meaning in s 73.\(^{199}\) At any rate, Burt CJ’s reasoning does not limit the meaning of Parliament’s ‘constitution’ in s 6 of the Australia Acts which is wider than s 73 of the Constitution Act in this respect.\(^{200}\)

Accepting then that Clydesdale’s scope is potentially open to reassessment, what legislative alterations to the franchise would change Parliament’s ‘constitution’ under s 6 of the Australia Acts? Since the Marquet majority cited Wilson J’s application of Clydesdale in Wilsmore, changes such as those to prisoners’ voting qualifications considered in Wilsmore would seemingly not fall within s 6.\(^{201}\) Wilson J also addressed the reduction in the age for voting and standing for Parliament from 18 to 21 years of age. Yet, the Marquet majority indicated that ‘section 6 is not to be read as confined to laws which … altogether take away [Parliament’s] “representative” character’.\(^{202}\) Intuitively, s 6 of the Australia Acts would catch amendments to the Electoral Act re-establishing gender or racial disqualifications from the franchise or making voting rights dependent on educational or property qualifications.\(^{203}\) Whether it also applies to more probable alterations such as to laws altering the voting rights of permanent residents and expatriates is less clear.

CONCLUSION

From its enactment in 1889 until its amendment in 1978, s 73 proved to be a ‘paper tiger’.\(^{204}\) As Gibbs CJ surmised in Wilsmore, s 73 was a curiously weak and ineffectual provision which was not intended to be a great constitutional

\(^{196}\) [1982] WAR 241, 244.

\(^{197}\) The marginal notes to ss 11 and 45 of the Constitution Act 1889 (WA) were respectively ‘Constitution of Legislative Assembly’ and ‘Legislative Council to be elected.’

\(^{198}\) Wilsmore v Western Australia (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980) 26. See also, McDonald v Cain [1953] VR 411, 423 (Gavan Duffy J).


\(^{200}\) (2003) 217 CLR 545, 573 [77].

\(^{201}\) Ibid.


\(^{203}\) Johnston, ‘Freeing the Colonial Shackles’ above n 2, 325.

Conversely, the 1978 amendments reflected a clear legislative intention to impose very significant restraints upon certain changes to Western Australia’s constitutional system. Section 73(2) imposes a stringent referendum requirement upon bills to which it applies in addition to requiring absolute majorities in both houses. Additionally, s 73(2) is not, unlike s 73(1), limited to amendments to the Constitution Act itself. Section 73(2)(e) is especially difficult to avoid, purportedly applying to bills ‘expressly or impliedly in any way affecting’ ss 2, 3, 4, 50, 51 or 73 of the Constitution Act. This may extend s 73(2)(e) beyond textual alterations to laws affecting the legal operation of the protected sections. For example, s 73(2)(e)’s entrenchment of the Governor’s dissolution power under s 3 of the Constitution Act may entail that the Premier’s power to advise dissolution is also entrenched. Indeed, the scope of entrenchment may be even broader than that intended by Parliament. Section 2(3)’s entrenchment entails that traditional referendum manner and form provisions must also be approved at a referendum then.

Conceivably, changes to the constitutional powers, functions and nature of the Executive Council and Supreme Court may also fall within s 73(2) as laws ‘expressly or impliedly in any way affecting’ ss 73(3) and (6) respectively. In light of Marquet, however, it is highly doubtful that an alternative source of legal efficacy requires Parliament to comply with s 73(2) when enacting laws falling outside of Parliament’s ‘constitution, powers or procedure’.

The orthodox view is that legislation merely relating to the Supreme Court, its jurisdiction or powers does not answer the description of a law respecting Parliament’s ‘constitution, powers or procedure’. HP Lee, “Manner and Form”: An Imbroglio in Victoria” (1992) 15 University of New South Wales Law Journal 516, 526. However, in Trethowan, Dixon J held that laws respecting a Legislature’s ‘powers’ under s 5 of the CLVA included laws imposing, removing or diminishing restraints, in the form of constitutional checks or safeguards, on the Legislature’s own authority: (1929) 44 CLR 394, 429-30. The Supreme Court’s power under s 73(6) of the Constitution Act to determine legislation’s validity and enforce Parliament’s compliance with s 73 of the Constitution Act is a check on Parliament’s authority. A law removing this power from the Supreme Court arguably removes a constitutional restraint on Parliament’s authority. Similarly, laws interfering with the Supreme Court’s independence may also diminish the Court’s capacity to check Parliament’s power under s 73(6). If so, then such laws may be respecting Parliament’s ‘powers’ under s 6 of the Australia Acts. Dixon J held that Parliament’s ‘constitution, powers and procedure’ did not extend to the executive power in the Constitution, but did not expressly address judicial power. However, it is also arguable that Dixon J’s reference to ‘constitutional checks or safeguards on a legislature’s authority’ should not be understood as referring to judicial checks. His Honour was addressing s 5 of the CLVA which conferred full power on colonial legislatures to establish, alter, abolish and reconstitute Courts of Judicature within their jurisdiction.
element to constitution’s meaning in s 6 of the *Australia Acts*. Section 73(2), in conjunction with the *Marquet* representativeness test, may therefore significantly restrain prospective changes to Western Australia’s Constitution notwithstanding the limits imposed by the *Clydesdale* exception. Legislation relating to the Legislative Council’s powers, resolution mechanisms for parliamentary deadlocks, the prorogation of Parliament and changes to the Governor’s powers and appointment process may also be required to observe s 73(2).

It is, however, important to note s 73(2)’s limits. No challenge to legislation based on non-compliance with s 73 has ultimately been successful. Parliament may also rely upon limits within both entrenched provisions and s 73(2) itself to enact constitutional amendments whilst avoiding s 73(2)’s restrictive procedures. For example, the words ‘passage’ and ‘assent’ in s 2(3) entail that Parliament may, through ordinary legislation, entrench provisions by requiring amendments to obtain special parliamentary majorities or approval at a referendum to be proclaimed. Thus, even though s 73(2)(e) applies to bills enacting traditional referendum manner and form provisions, a similar result may be achieved through legislation enacted by ordinary legislative procedures.

Of course, it is trite to note s 73(2)’s scope depends on how the section is interpreted. For example, a purposive interpretation of the term ‘alters’ in ss 50 and 73(2)(a) may limit those sections to laws diminishing gubernatorial powers. Similarly, s 73(2)(c)’s phrase ‘chosen directly by the people’ was interpreted in both *Burke* and *McGinty* in light of Western Australia’s historical context and legislation existing in 1978. If this approach is applied to laws altering the franchise then fewer such laws fall within s 73(2)(c). More radical approaches, such as limiting s 73(2) and its entrenched provisions’ scope by directly applying the principle of parliamentary supremacy, are unlikely to gain judicial acceptance. However, in *Glew*, s 73(2)’s scope was limited by reference to ‘substantive constitutional reality’. What exactly constitutes ‘substantive constitutional reality’ is unclear, but, at any rate, this reasoning may not extend beyond *Glew*’s narrow facts.