

Manner and Form

*by Anne Twomey**

Introduction

Does anyone really understand manner and form? This was the question that George Williams put to me when asking me to give this paper. The answer has to be ‘very few people indeed’. Why? There appear to be two reasons. The first is that most lawyers have been brought up on a diet of the Commonwealth Constitution and assume, incorrectly, that State Constitutions function in the same manner. This is largely the consequence of Law Schools focusing almost exclusively on the Commonwealth Constitution and failing to teach ‘manner and form’. The second reason is that until recently, there were very few entrenched State constitutional provisions. Those that existed covered major issues of governance, such as the existence of a Legislative Council, which were not likely to involve issues relevant to the practice of the average lawyer.

This position has begun to change. The volume of entrenched State constitutional provisions has increased in recent years, particularly in Victoria where there is now an abundance of purportedly entrenched provisions covering subjects ranging from the delivery of water services¹ to access to government information.² Many of these provisions are likely to be ineffective, so it would be dangerous to take them at face value. A much keener analysis is required to determine their effect, if any.

The other change of importance is the increasing use of constitutional implications as a means of constraining legislative power. While the High Court has given some guidance as to the application of constitutional implications at the Commonwealth level,³ particularly with regard to the implied freedom of political communication, there is very little understanding of how (or even if) the same principles can be applied to State Constitutions.

Understanding manner and form is absolutely fundamental to understanding the operation of State Constitutions. Without that understanding, it is impossible to know which State laws are effective and which are not. In any particular case, this may be an issue of vital importance. Hence, while most lawyers do not understand manner and form, it is important that they do.

Given that most lawyers associate constitutional matters with their understanding of the Commonwealth constitution, this paper will illustrate the particular complexities of State manner and form issues by contrasting them with manner and form at the Commonwealth level.

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¹ *Constitution Act 1975* (Vic): s 18(2)(h) and Prt VII.

² *Constitution Act 1975* (Vic): s 18(1B)(o) and s 94H.

³ See, for example, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Validity of Laws

The provisions of the Commonwealth Constitution are, of course, entrenched by s 128, which provides that ‘this Constitution shall not be altered except in the following manner’. It then outlines manner and form requirements concerning absolute majorities in the Houses or House that passes the proposed law, and the approval of the proposed law by electors in a referendum, both nationally and in a majority of States.

The source of the power to entrench State laws used to be s 5 of the *Colonial Laws Validity Act* 1865, which applied to the States by paramount force, but is now s 6 of the *Australia Acts* 1986 (Cth) and (UK).⁴ It provides that a law made after the commencement of the *Australia Acts* by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament whether made before or after the commencement of the *Australia Acts*.

One of the most crucial differences to note there is that s 128 of the Commonwealth Constitution is directed at the validity of proposed laws – the legislative power to actually enact the law. In contrast, s 6 of the *Australia Acts* is not directed at the validity of proposed laws, but rather to the force and effect given to ‘laws’ that have been ‘made’ by the State Parliament.⁵ While the outcome may be the same, i.e. the law (proposed or made) will not come into effect, this difference potentially has important ramifications.

Constitutional implications

Take for example, the operation of constitutional implications. At the Commonwealth level, the Commonwealth Parliament has no power to enact a law which breaches an implication derived from the express terms of the Commonwealth Constitution.

At the State level, a constitutional implication is no constraint upon legislative power. First, a State constitutional implication which is derived from unentrenched constitutional provisions can be overridden by express State legislation, just as later State legislation will prevail over an earlier constitutional provision that is unentrenched, impliedly amending or repealing it.⁶ To have a significant effect,⁷ a State constitutional implication must be derived from entrenched constitutional provisions.⁸ Even then, however, it is not, strictly, a constraint on legislative power. The question is not whether

⁴ As noted below, the other possible sources of entrenchment of State provisions are s 106 of the Commonwealth Constitution and the *Ranasinghe* principle. For a discussion of them see: A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 293-8.

⁵ Cf s 9 of the *Australia Acts* 1986 which refers to ‘any Bill for an Act’.

⁶ *McCawley v The King* [1920] AC 691, which effectively overruled the earlier view of the High Court in *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304 that State Constitutions could not be impliedly amended or repealed.

⁷ Note that an implication may have an effect as an interpretative device even if it is unentrenched.

⁸ *McGinty v Western Australia* (1996) 186 CLR 140, per Toohey J at 212.

there was power to enact the law, but rather whether there has been a breach of the manner and form requirements given effect by s 6 of the *Australia Acts*, in which case the law may be of no force or effect. This different question requires a different mode of analysis and gives rise to different considerations.

Let me illustrate the point in relation to the implied freedom of political communication. It was identified as arising out of the Commonwealth Constitution because of provisions which required Members of Parliament to be directly chosen by the people.⁹ In order to be a true choice, it must be an informed choice, so people must have access to information about political matters.¹⁰

A State based implication is much harder to identify. To have any effect, it must be derived from entrenched provisions. Let me give an example. Suppose it was argued that a prohibition on advertising by lawyers breached the constitutional right to freedom of political communication implied by a State Constitution.¹¹ In Tasmania, this argument would not even get off the ground because there are no effectively entrenched constitutional provisions in the Tasmanian *Constitution Act 1934* (Tas). Accordingly, Tasmanian legislation cannot be affected by an implied right of freedom of political communication derived from the Tasmanian Constitution.¹²

The position is more difficult in New South Wales where there are some entrenched provisions, but not one which requires Members to be directly chosen by the people.¹³ Instead, the incidental references in entrenched provisions to Members of Parliament being 'elected' and representing electoral districts and the references to voters and the voting system, must be cobbled together in an attempt to support an implication of representative democracy which requires freedom of political communication. Even that, however, is not enough. Section 7A of the *Constitution Act 1902* (NSW) provides that a Bill for the purpose of expressly or impliedly repealing or amending certain listed constitutional provisions shall not be presented for assent until it has been approved by the electors in a referendum. One must therefore be able to argue that the law concerning advertising by lawyers breached the requirements of s 7A because it was enacted for the

⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

¹⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, per the Court at 560.

¹¹ This scenario is derived from *APLA Ltd v Legal Services Commissioner of New South Wales* (reserved by the High Court 7 December 2004), although that case was argued on the basis of a Commonwealth based constitutional implication, rather than a State constitutional implication.

¹² Note that the implication derived from the Commonwealth Constitution may still affect State legislative power to the extent that the implication is necessary to support the system of representative government established by the Commonwealth Constitution: *Muldowney v South Australia* (1996) 186 CLR 352, per Brennan CJ at 365-6; Toohey J at 374; and Dawson J at 370; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, per the Court at 561; and A Twomey, *The Constitution of New South Wales* (Federation Press, Sydney, 2004) pp 198-200.

¹³ Cf the position in Western Australia where there is a requirement that Members be 'chosen directly by the people' and thus the High Court has held that there is also an implied freedom of political communication: *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, per Mason CJ, Toohey and Gaudron JJ at 233-4 and per Brennan J at 236.

purpose of impliedly repealing or amending these entrenched provisions that refer to voters and elections. As you can see, it is a harder task to argue.

Application of manner and form provisions

At the Commonwealth level, the manner and form requirements of s 128 apply to the alteration of any provisions of the Commonwealth Constitution, be they express terms or implications derived from them. The manner and form requirements of s 128 do not apply to other Commonwealth legislation and attempts to place conditions upon Commonwealth power to amend the *Flags Act* or the rate of the GST are ineffective.¹⁴

At the State level, s 6 of the *Australia Acts* gives effect to manner and form requirements that affect the provisions in any law, not just the *Constitution Act*, as long as it is a law respecting the ‘constitution, powers or procedure’ of the Parliament.

The first point to make here is that the ‘constitution, powers or procedure’ test does not apply to the entrenching provision (i.e. the provisions that imposes the manner and form requirements). Nor does it apply to the ‘entrenched provision’ (i.e. the provision that the manner and form requirements protect from ordinary amendment or repeal). The test is whether the law that purports to amend or repeal the entrenched provision is one respecting the constitution, powers or proceedings of the Parliament. Applying the test to the wrong law is an easy trap to fall into. The High Court fell into it in *South-Eastern Drainage Board v Savings Bank of South Australia* in 1939,¹⁵ and Justice Kirby did so again more recently in the *Marquet* case. He applied the test to the entrenching provision rather than the Bills that were intended to amend or repeal the entrenched provisions.¹⁶ In most cases the result will be the same, because if the entrenched provision is one respecting the constitution of the Parliament, a law which amends or repeals it is also likely to be such a law. But this is not always the case.

For example, if a law amended the vote counting procedures in the Sixth Schedule to the *Constitution Act* 1902 (NSW) to accommodate electronic voting, without affecting the outcome of the count, the question would not be whether s 7A which entrenches the Sixth Schedule is a law respecting the constitution, powers or procedure of the Parliament, nor whether the Sixth Schedule itself is such a law. The question would be whether a law making technical changes to the Schedule, which did not affect the outcome of the election, could be described as a law respecting the constitution, powers or procedure of the Parliament. It is doubtful that it could so be described. Accordingly, just because a provision is expressly entrenched in a State Constitution, and even when that provision is itself one respecting the constitution, powers or procedure of the Parliament, this does not necessarily mean that all amendments to the provision will have to meet manner and form requirements. Each amendment has to be assessed individually.

¹⁴ *Flags Act* 1953 (Cth): s 3; and *A New Tax System (Commonwealth-State Financial Arrangements) Act* 1999 (Cth): s 11.

¹⁵ *South-Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603.

¹⁶ *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, per Kirby J at [197], [201] and [212].

Constitution, powers or procedure ‘of the Parliament’

What does ‘constitution, powers or procedure of the Parliament’ mean? The answer is not completely clear, but there are some obvious points to make. First the law must concern the Parliament. Thus purportedly entrenched laws concerning the judiciary (such as Part 9 of the NSW Constitution) or local government (such as Part IIA of the Victorian Constitution and s 64A of the South Australian Constitution) or the appointment of public servants (as previously included in s 14 of the Queensland Constitution) clearly do not fall within that category. Whether or not other sources, such as s 106 of the Commonwealth Constitution or the *Ranasinghe* principle, support their entrenchment is debateable. While there was some early *dicta* in the High Court suggesting that this may be the case,¹⁷ recent *dicta* in *McGinty* and *Marquet* suggest that s 6 of the *Australia Acts* may be the exclusive source of the power to entrench State constitutional provisions.¹⁸

Interestingly, this was the view taken by the Queensland Parliament in 1996 when it repealed s 14(1) of its *Constitution Act 1867* (Qld) without holding the referendum that was expressly required by s 53 of that Act. The view was taken that as s 14(1) was a provision concerning the appointment of public servants, a law for its repeal would not be a law with respect to the constitution, powers or procedure of the Parliament and there was no other valid source of power for such entrenchment. This view was supported by the advice of the Solicitor-General, Crown Solicitor, Professor Finnis and the Electoral and Administrative Review Commission.¹⁹ To the best of my knowledge, the validity of the legislation has not been challenged, so the issue has not been determined by a court.

‘Constitution, powers or procedure’

Assuming, however, that a law has some relationship with the Parliament, what is meant by ‘constitution, powers or procedure’? Until *Marquet*, court decisions suggested that ‘constitution’ included the composition of the Parliament (for example by abolishing or adding a House)²⁰ and the composition of the Houses (for example, requirements that Members be directly or indirectly elected),²¹ but did not include the qualification or

¹⁷ *Victoria v The Commonwealth* (1975) 134 CLR 81, per Gibbs J at 164; *West Lakes v South Australia* (1980) 25 SASR 389, per Zelling J at 413; and *Wilsmore v Western Australia* [1981] WAR 159, per Smith J at 175.

¹⁸ *McGinty v Western Australia* (1996) 186 CLR 140, per Gummow J at 296-7; and *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, per Gleeson CJ, Gummow, Hayne and Heydon JJ at [70] and [80]. See also Kirby J at [206] and [214] – [215].

¹⁹ See: Electoral and Administrative Review Commission, *Report on the Review of the Elections Act 1983-1991 and Related Matters*, December 1991, Vol 2, Appendix D (Opinion of the Crown Solicitor); and Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution*, August 1993, paras 4.7. 4.26, 4.27, and 6.196.

²⁰ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457, per Barton J at 470; *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, per Rich J at 418; *Attorney-General (NSW) v Trethowan* [1932] AC 526, per Lord Sankey LC at 540; *Clayton v Heffron* (1960) 77 WN (NSW) 767, per Herron J at 799; and *Yougarla v Western Australia* (1999) 21 WAR 488, per Ipp J at 505; per Anderson J at 521 and per White J at 539.

²¹ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457, per Barton J at 468; and per Gavan Duffy and Rich JJ at 477; and *McDonald v Cain* [1953] VLR 411, per Martin J at 429.

disqualification of Members,²² or their privileges or immunities.²³ This led to questions as to whether laws concerning the conduct of elections, electoral redistributions, the issue of writs or compulsory voting fell within the category of the ‘constitution’ of the Parliament. In *Marquet* a majority of the Court, in determining whether a law concerned the ‘constitution’ of the Parliament looked to the ‘features which go to give [the Parliament] and its Houses, a representative character’.²⁴ So laws concerning voting systems and redistributions are now likely to be considered laws respecting the ‘constitution’ of the Parliament, but it remains unclear whether laws such as those concerning compulsory voting would fall into that category.

An equally difficult question is whether laws entrenching the office of the Governor would fall within that category, at least in States where the Queen, rather than the Governor, is a constituent part of the Parliament.²⁵ There is still a debate, for example, as to whether the Governor in giving assent to a Bill is performing a legislative act or an executive act. The answer may be relevant to determining whether an amendment to the Constitution which removed the Governor’s role in relation to royal assent would amount to a law respecting the ‘powers’ of the Parliament.²⁶ Certainly, the Queensland Government took the view that its amendment to the *Constitution Act* which removed the Governor’s power to make public service appointments was not one respecting the ‘constitution, powers or procedure’ of the Parliament, but the situation may be different in relation to the Governor’s powers to give royal assent or even to approve appropriations.

‘Powers and procedure’

Perhaps the most difficult question concerns the meaning of the ‘powers and procedure’ of the Parliament. Arguably every manner and form provision is one affecting the ‘powers’ of the Parliament or dealing with its procedure in enacting laws.²⁷ The consequence would be that every law that expressly or impliedly amended or repealed a manner and form provision is also one respecting the powers of the Parliament. The

²² *Clydesdale v Hughes* (1934) CLR 518, per Rich, Dixon and McTiernan JJ at 528; *Western Australia v Wilsmore* (1982) 149 CLR 79, per Wilson J at 102; and *Attorney-General (WA) (ex rel Burke) v Western Australia* [1982] WAR 241, per Burt CJ at 244-5.

²³ *Chenard and Co v Arissol* [1949] AC 127, at 133.

²⁴ *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, per Gleeson CJ, Gummow, Hayne and Heydon JJ at [76]. Note that their Honours appeared to continue support for *Clydesdale v Hughes* at [77] by excluding the qualification of Members from this category.

²⁵ The Queen is a constituent part of the Parliaments of New South Wales, Queensland, Victoria and Western Australia: *Constitution Act* 1902 (NSW): s 3; *Constitution Act* 1867 (Qld): s 2A; *Constitution Act* 1975 (Vic): s 15; and *Constitution Act* 1889 (WA): s 2(2). The Governor is the constituent part of the Tasmanian Parliament while the South Australian Parliament is defined as the two Houses only: *Constitution Act* 1934 (Tas): s 10; and *Constitution Act* 1934 (SA): s 4.

²⁶ See the discussion of this issue in: Anne Twomey, *The Constitution of New South Wales* (Federation Press, Sydney, 2004), pp 223 and 772.

²⁷ *Smith v The Queen* (1994) 181 CLR 338, per Deane J at 352-3; and *Marquet v Attorney-General (WA)* (2002) 36 WAR 201, per Anderson J at [95].

High Court in *Marquet* recognized the argument but expressly declined to address it.²⁸ If such an analysis were correct, then laws on any subject at all could be entrenched, be they provisions of the *Wild Dog Destruction Act* or the *Greyhound Racing Act* because subsequent attempts to repeal or amend them without complying with manner and form requirements would be laws respecting the powers or procedure of the Parliament to the extent that they expressly or impliedly purported to amend or repeal the manner and form provision. This clearly was not the intention behind the enactment of s 5 of the *Colonial Laws Validity Act* 1865 or s 6 of the *Australia Acts* 1986 which were confined to matters respecting the Parliament.

The preferable approach is to characterize a law according to its substance. If, in substance, it is not one with respect to the constitution, powers or procedure of the Parliament, then its incidental application in impliedly amending or repealing a purported manner and form requirement, should not result in it being characterized as a law respecting the powers of the Parliament.

Timing issues

While s 128 of the Commonwealth Constitution applies to all subsequent express or implied amendments of the Commonwealth Constitution, State manner and form provisions give rise to special timing issues. Section 6 of the *Australia Acts* applies to laws made after the commencement of the *Australia Acts* on 3 March 1986 regardless of when the entrenching provision was enacted. Manner and form provisions concerning laws enacted prior to 3 March 1986 continue to be made effective by the *Colonial Laws Validity Act*.

This position is complicated by State attempts to give retrospective effect to the application of the *Australia Acts*. Each State has enacted a provision to the effect that provisions of laws enacted before the commencement of the *Australia Acts* have the same effect and validity as they would have had if the *Australia Acts* had been in operation at the time of their enactment.²⁹ In *Yougarla v Western Australia* it was argued that the consequence was that the *Aborigines Acts* of 1897 and 1905 only had to comply with the requirements of the *Australia Acts* 1986, which had been given retrospective effect, and not Imperial manner and form constraints imposed by the *Colonial Laws Validity Act*. While the argument appears to have been accepted at first instance,³⁰ it was dismissed by the Full Court of the Supreme Court of Western Australia on the ground that the law was not one with respect to the ‘constitution, powers or procedure’ of the Parliament and that

²⁸ *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, per Gleeson CJ, Gummow, Hayne and Heydon JJ at [74]. See also *Marquet v Attorney-General (WA)* (2002) 36 WAR 201, per Steytler and Parker JJ at [277].

²⁹ *Interpretation Act* 1987 (NSW), s 34A; *Acts Interpretation Act* 1954 (Qld), s 9A; *Acts Interpretation Act* 1915 (SA), s 22B; *Acts Interpretation Act* 1931 (Tas), s 46C; *Interpretation of Legislation Act* 1984 (Vic), s 58; and *Interpretation Act* 1984 (WA), s 76A.

³⁰ *Yougarla v Western Australia* (1998) 146 FLR 128, per Murray J at 146.

s 6 would therefore not have applied in any case, regardless of whether it could be applied retrospectively.³¹

It is doubtful whether the States could give retrospective effect to the *Australia Acts*. Such provisions are likely to be considered inconsistent with s 6 of the *Australia Acts* which expressly applies with prospective effect only.³²

The nature of ‘manner and form’ requirements

Section 128 of the Commonwealth Constitution sets out the two manner and form requirements of special majorities and referenda. It is doubly entrenched, so that s 128 cannot itself be amended without going through the same procedure. Nor can new provisions or subject matters be entrenched without being inserted in the Commonwealth Constitution pursuant to the same manner and form requirements.

Again, the position is different with the States. Section 6 of the *Australia Acts* does not specify the type of ‘manner and form’ requirements that will satisfy its terms. In practice, the most commonly used are referenda and special majorities, although there may be other special procedural requirements such as tabling or the inclusion of special statements. An important distinction must be drawn between whether a provision prescribes the ‘manner and form’ of enacting a law or whether it amounts to the purported abdication of power. Many cases where ‘manner and form’ questions arise in reality concern invalid attempts to abdicate legislative power.

A Parliament cannot abdicate its legislative function where this is conferred by a higher law.³³ State legislative power is not only granted by State *Constitution Acts* but is also derived from s 107 of the Commonwealth Constitution and s 2 of the *Australia Acts* 1986.³⁴ It cannot be removed by the State Parliament. Thus an attempt to limit legislative power by providing that legislation may only be introduced in the Parliament if approved by a specified body,³⁵ or that a law altering a contract may not be enacted without the approval of all the parties to the contract,³⁶ is ineffective. Such provisions are not ‘manner and form’ provisions because they do not operate upon the legislative

³¹ *Yougarla v Western Australia* (1999) 21 WAR 488, per Ipp J at 505, per Anderson J at 521 and per White J at 539. The High Court did not address the issue on appeal.

³² See the more detailed discussion in A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), at 288-91.

³³ *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, per Barwick CJ at 373.

³⁴ See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, per Brennan CJ at 65-6; and J Goldsworthy, ‘Manner and Form in the Australian States’ (1987) 16 MULR 403, at 411.

³⁵ See, for example, the *Parliamentary Contributory Superannuation Act* 1971 (NSW), s 4. See also s 45C of the *Constitution Act* 1934 (Tas) which provides that any division of Tasmania into municipal areas must not be altered without the recommendation of the Local Government Board. For a lesser example, where the Member introducing the Bill must, if practicable, arrange for a summary of it to be given to a body, see *Constitution of Queensland* 2001, s 77.

³⁶ *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, per Wanstall SPJ at 236-7.

process but rather purport to prevent Parliament from exercising its power to legislate in particular circumstances.³⁷

It has been argued in the past that a requirement of a referendum is an abdication of legislative power, because it requires the approval of people external to the Parliament.³⁸ However, the view has been taken that the electors, in voting in a referendum, form part of the legislature, rather than being external to it. Some have considered the electors to be a ‘third House’ of a reconstituted Parliament for the purposes of enacting certain types of laws. This, however, gives rise to its own problems in relation to Queensland where s 3 of the *Constitution Act Amendment Act 1934* (Qld) provides that a Bill may not be presented to the Queensland Governor for assent if it were to establish another House or legislative body, unless it is itself approved by the people in a referendum. It has been argued that subsequent entrenching provisions in Queensland, such as those enacted in 1977, are ineffective because they purported to establish a new legislative body but were not themselves enacted pursuant to a referendum.³⁹

Double entrenchment

To be effective, a manner and form provision must not only entrench the relevant sections or subject-matters that are sought to be protected from ordinary repeal or amendment, but must also entrench itself so that it cannot be amended or repealed without meeting the same manner and form requirements.⁴⁰ Unless the entrenching provision is itself entrenched, it can be repealed by ordinary legislation, allowing the entrenched provision also to be repealed or amended by ordinary legislation. While most State manner and form provisions are doubly entrenched, some are not.

For example, s 41A of the *Constitution Act 1934* (Tas) provides that the House of Assembly may not pass a Bill to amend s 23 (which deals with the term of the Assembly) unless two thirds of its Members vote for it. However, there is no limitation on s 41A being amended expressly or impliedly by ordinary legislation. The consequence is that the Tasmanian Parliament could enact a law extending the term of the House of Assembly without having to comply with the special two-thirds majority requirement, if it so chose.⁴¹

³⁷ *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, per Wanstall SPJ at 237; and *West Lakes v South Australia* (1980) 25 SASR 389, per King CJ at 397.

³⁸ This view was accepted in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, per McTiernan J at in his dissenting judgment at 442, but rejected by the rest of the Court.

³⁹ Electoral and Administrative Review Commission, *Report on the Review of the Elections Act 1983-1991 and Related Matters*, December 1991, Appendix D, Opinion of the Crown Solicitor, p D7.

⁴⁰ *West Lakes v South Australia* (1980) 25 SASR 389, per Zelling J at 414.

⁴¹ Note also that the original manner and form provisions in ss 15 and 36 of the *Constitution Act 1855* (NSW) were repealed by ordinary legislation as they were not doubly entrenched.

The procedure for entrenching a provision

To entrench a provision at the Commonwealth level, one must insert it in the Commonwealth Constitution. This means that one must use the procedure in s 128 as the means of entrenching it, as well as the means of subsequently amending or repealing it.

The position is again different in the States. Ordinary legislation can be used to entrench provisions so that they cannot be amended or repealed without meeting the special manner and form requirements, such as a referendum. This means that one Parliament can impose serious restrictions on the power of a future Parliament to amend or repeal a law. This has been the subject of some criticism. Gummow J in *McGinty v Western Australia* commented on the ‘conceptual difficulty ... with the legitimacy of a manner and form requirement which is inserted in a written constitution otherwise than by a law made with observance of that manner and form which is thereafter to apply, or by a law having paramount force’.⁴²

In the Australian Capital Territory, entrenching laws must comply with the entrenching procedure that they propose in order to be validly enacted.⁴³ The Queensland Constitutional Review Commission has also recommended that provisions requiring a referendum for their amendment or repeal should only be enacted if they themselves are approved by a referendum.⁴⁴

In New South Wales, although there is no requirement to do so, it has been the practice to collect all entrenchment requirements in ss 7A and 7B. The consequence is that any proposal to entrench new laws involves an amendment of s 7A or s 7B and therefore requires a referendum to be held. Thus, for example, Part 9 of the *Constitution Act* 1902 (NSW) was itself entrenched pursuant to a referendum.⁴⁵ The preferable approach, however, would be to include in State Constitutions a requirement that future manner and form requirements be only enacted by the same manner and form procedure that they impose.

The terms of State manner and form provisions

The terminology used in the diverse State manner and form provisions can itself raise further legal difficulties. In New South Wales, for example, s 7A applies to Bills for any ‘purpose’ within sub-section (1). One must then ascertain whether a Bill is for the ‘purpose’ of expressly or impliedly amending certain specified provisions. This may not be easy. Take for example a Bill to implement a republic in New South Wales. While the *Constitution Act* does not entrench the role of the monarch, there are incidental references to royal assent in some entrenched provisions. Could such a Bill be regarded

⁴² (1996) 186 CLR 140, per Gummow J at 297. See also *Attorney-General (WA) v Marquet* (2003) 78 ALJR 105, per Kirby J at [216].

⁴³ *Australian Capital Territory (Self-Government) Act* 1988 (Cth): s 26.

⁴⁴ Queensland Constitutional Review Commission, *Report on the Possible Reform and Changes to the Acts and Laws that relate to the Queensland Constitution*, February 2000, p 76.

⁴⁵ Note, however, that the effectiveness of this entrenchment is doubtful because it is not a law with respect to the constitution, powers or procedure of the Parliament.

as being for the ‘purpose’ of expressly or impliedly amending these entrenched provisions? Would it be a law respecting the constitution, powers or procedure of the Parliament? This might depend upon whether assent to Bills is regarded as a legislative or an executive act. Other provisions in such a Bill, such as a provision to amend the definition of the Legislature in s 3 to remove the Queen as a constituent part of the legislature, would amount to laws respecting the constitution, powers or procedure of the Parliament, but s 3 is not entrenched. It would appear, however, that one could use such a provision to characterize the Bill as one respecting the constitution, powers or procedure of the Parliament, and that this would trigger the application of the manner and form provisions in relation to a separate provision in the same Bill dealing with incidental references to royal assent in entrenched provisions, even if the latter were not a provision respecting the constitution, powers or procedure of the Parliament.

An even more difficult problem is that the terms of most State manner and form provisions are directed at preventing a Bill from being presented to the Governor for assent until manner and form requirements are met. The intention is to prevent the Bill from becoming a law. While this was appropriate prior to 1986, when the *Colonial Laws Validity Act* affected the ‘power’ to make a law in breach of manner and form requirements, it causes difficulty in relation to s 6 of the *Australia Acts*.

Section 6 applies to laws that have already been ‘made’. It does not have any application in relation to Bills nor would it result in them being held invalid if they received assent. Section 6 operates upon valid laws by rendering them of no force or effect once they have received assent. It is difficult to see how s 6 could be used as grounds to prevent a proposed law from being presented to the Governor for assent or to argue that it is not ‘lawful’ to present the law for assent.⁴⁶

Consequences of breach

A further difference arises in the consequences of a breach of manner and form requirements. At the Commonwealth level, the consequence of a breach is the invalidity of the provisions that purported to ‘alter’ the Commonwealth Constitution. In most cases these may be severed from other provisions in the Bill which do not purport to have that effect. At the State level, however, s 6 of the *Australia Acts* renders ineffective any ‘law’ that breaches the manner and form requirement, regardless of the fact that only one of its provisions attracted those manner and form requirements.⁴⁷

The consequence is that many years after a law has been enacted, a court may find that it is ineffective in its entirety because one of its provisions attracted manner and form requirements which had not been met.

⁴⁶ While this issue would have been relevant to the *Marquet* litigation, it does not appear to have been addressed.

⁴⁷ This follows from the opinion of the Imperial Law Officers in their report that gave rise to the enactment of the *Colonial Laws Validity Act*. See Report of the Imperial Law Officers, Sir R Palmer and Sir R Collier, 28 September 1864, reprinted in E Blackmore, *The Law of the Constitution of South Australia* (Government Printer, Adelaide, 1894) p 67, para 3. See also the manner and form provisions of State Constitutions that are intended to prevent entire Bills from being presented to the Governor for assent.

Conclusion

Manner and form is a very technical and difficult area. There are many pitfalls and the consequences can be quite serious, especially if an entire law is held ineffective. However, as the number and range of purportedly entrenched provisions increase, it is an area with which lawyers will have to start becoming familiar. While few may understand manner and form, hopefully that number has just increased.