

SOVEREIGNTY UNDER THE AUSTRALIAN CONSTITUTION: WHY IS SECTION 6 OF THE AUSTRALIA ACTS BINDING ON STATE PARLIAMENTS?

JONATHAN CROWE*

Section 6 of the Australia Acts 1986 provides that, when a State law concerns the ‘constitution, powers and procedure’ of the State Parliament, it must abide by any relevant ‘manner and form’ requirements in previous legislation. This provision is generally accepted as imposing a binding limitation on the sovereignty of State Parliaments. However, the reason why this section is binding on State Parliaments is disputed. This article begins by discussing the concept of sovereignty in philosophical terms, before turning to the history of sovereignty in Australia. It explores the role of the Australia Acts in the constitutional system, focusing on their implications for constitutive power in the States, then looks specifically at s 6 and its capacity to bind State Parliaments. I argue that attempts to explain the authority of s 6 by appealing to the United Kingdom or Commonwealth Australia Acts fail. The only satisfactory explanation appeals to the idea that the Australian Parliaments acting together have a special form of sovereignty that allows them to make certain kinds of constitutional changes. This conclusion has important implications for how constitutive power is understood in Australia today.

I INTRODUCTION

The *Australia Acts* 1986 are a truly extraordinary package of legislation. They consist of two *Australia Acts* passed by the Commonwealth and United Kingdom Parliaments, respectively, preceded by six *Australia Acts (Request) Acts* enacted by the State Parliaments. The legislation made important changes to Australia’s constitutional system, particularly regarding Australia’s relationship to the United Kingdom, but also concerning the powers of State Parliaments. The unique way that the *Australia Acts* were enacted was intended to harness the combined sovereignty of the eight distinct Parliaments involved. Nonetheless, questions still arise about the source of the legislation’s authority to change Australia’s

* Head of School and Dean, School of Law and Justice, University of Southern Queensland; External Fellow, Centre for Public, International and Comparative Law, The University of Queensland. This article draws on material previously published in Jonathan Crowe, *Australian Constitutional Law: Principles in Movement* (Oxford University Press, 2022) ch 12.

constitutional arrangements. This issue holds the potential to illuminate the notion of sovereignty in Australia, including both its historical development and its current status.

Section 6 of the *Australia Acts* provides that when a State law concerns the ‘constitution, powers and procedure’ of the State Parliament, it must be passed in accordance with any relevant ‘manner and form’ requirements. This provision is generally accepted as imposing a binding limitation on the sovereignty of State Parliaments. However, the reason why this section is binding on State Parliaments is disputed. No satisfactory explanation for this conclusion has been provided, including by the High Court. This article begins by discussing the concept of sovereignty in philosophical terms, before turning to the history of sovereignty in Australia. It explores the role of the *Australia Acts* in the constitutional system, focusing on their implications for constitutive power in the States, then looks specifically at s 6 and the source of its ability to bind State Parliaments to manner and form requirements.

Why, then, does s 6 of the *Australia Acts* bind the States? Explanations based on the authority of the United Kingdom or Commonwealth versions of the *Australia Acts* are unconvincing. I argue that the only satisfactory explanation appeals to the idea that the Australian Parliaments acting together have a special form of sovereignty that allows them to make certain kinds of constitutional changes. This explanation derives from the distinctive process used to enact the *Australia Acts* themselves. The proposal might seem undemocratic when compared with the referendum process under s 128 of the *Constitution*. However, it is consistent with the role played by parliamentary bodies in the Australian system — not only as organs of representative democracy, but also as repositories of constituent power.

II THE CONCEPT OF SOVEREIGNTY

The formal amendment process in s 128 of the *Constitution* tells us who may alter the text of the constitutional document. The answer it gives to this question is that the power rests with the Commonwealth Parliament acting together with the Australian voters. This reflects the democratic character of the Australian system of government. It is the Australian people, acting through and with the Parliament, who are ultimately sovereign. The nature of sovereignty in the Australian constitutional system, however, has a complicated history. The United Kingdom (or Imperial) Parliament originally enacted the *Constitution* and, for many years, retained residual power to legislate for both the Commonwealth and the States.

It is easy to forget today that the *Australian Constitution* is contained within a statute of the Imperial Parliament. The text of the *Constitution* appears within s 9 of the *Commonwealth of Australia Constitution Act 1900* (Imp). The fact that the *Constitution* was enacted in this manner, albeit following a vote of the Australian

Colonies, shows that the United Kingdom Parliament was accepted at that point as possessing sovereignty over Australia. It seems absurd, however, to regard the United Kingdom Parliament as retaining sovereignty over Australia today. This shows that sovereignty, like other aspects of the *Constitution*, changes over time. We might speak here of the *sovereign movement* of the *Australian Constitution*. This movement can only be understood by examining its history.

Sovereignty is ultimate power within a jurisdiction. On the traditional view of sovereignty, expounded by the English jurists John Austin and A V Dicey, the sovereign has three attributes.¹ First, all persons within the jurisdiction are subject to the sovereign's authority. Second, the sovereign is not bound by any other authority. Third, the sovereign is not bound by its own authority. The sovereign, in other words, is the ultimate source of legal authority within the jurisdiction. Austin's conception of sovereignty was modelled on the role of the United Kingdom Parliament, as he understood it. The formal power of the United Kingdom Parliament within the Westminster system was traditionally conceived as unlimited, including by the principles of the unwritten constitution (although the current legal position on this issue is much more complicated).²

It is questionable, however, whether sovereignty is ever truly unlimited. The concept of sovereignty seems to include at least three inherent limitations. First, as Austin and Dicey acknowledge, it is subject to *jurisdictional* limits: a sovereign body cannot legislate outside its jurisdiction, whether defined geographically or in some other way. Second, sovereignty is subject to *practical* limits: a sovereign body cannot impose a law it lacks the power to enforce. An example of the practical limits of sovereignty is provided by the following hypothetical legislation:

Eldest Child Act: The legislature passes an enactment that requires all parents to immediately kill their eldest child or pay a nominal fine.³

Most parents would be extremely reluctant to do as this legislation requires. A nominal fine would not convince them to do so. It therefore seems to be outside the practical limits of sovereignty to enact such a law.

Third, sovereignty is arguably subject to *moral* limits: a sovereign body cannot validly pass a law that is repugnant to fundamental moral values. The *Eldest Child Act* also serves to illustrate this category. Ordering a parent to sacrifice their first born child is something that nobody has authority to do, because it is so morally repugnant. No sovereign, no matter how powerful, can dispense with moral duties. Sometimes, we need to weigh our ordinary moral duties against the

¹ John Austin, *Lectures on Jurisprudence* (John Murray, 5th ed, 1885) 221; A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) lect 2.

² See, eg, the High Court's discussion of this issue in its unanimous joint judgment in *Union Steamship Co of Australia v King* (1988) 166 CLR 1, 10.

³ It is arguable that an enactment of this kind is no law at all, because it cannot play law's function of setting the boundaries of social conduct. See Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge University Press, 2019) 173–7.

broader moral duty to follow the law of our community.⁴ However, there are some actions that are so deeply wrong that we should never perform them, even if the law purports to require it. The *Eldest Child Act* is incapable of giving a parent an obligation to kill their eldest child, because they have a very strong moral obligation not to do so.

The United Kingdom Parliament was once sovereign over Australia's constitutional system. However, Australia has since gained its independence. Could the United Kingdom revoke Australia's independence and reassert its sovereignty, perhaps by amending the *Constitution Act* or the *Constitution* itself? Austin and Dicey thought that the sovereign is not bound by its own authority, implying that it can take back its past decisions, including decisions to grant independence. However, this overlooks the practical limitations on the concept of sovereignty. Australia, as a practical matter, no longer recognises the constitutive authority of the United Kingdom Parliament.⁵ This implies that once independence is established, it cannot be taken back, because there is no longer any practical ability to do so.

III SOVEREIGNTY IN AUSTRALIA

Any history of sovereignty in Australia must begin by recognising the original sovereignty of Indigenous Peoples. Aboriginal and Torres Strait Islander Peoples lived in Australia for at least 60,000 years before Europeans arrived.⁶ They had well-developed bodies of customary law that continue to be observed in many Indigenous communities today.⁷ The High Court has consistently declined to recognise Indigenous sovereignty over Australia,⁸ but this reflects the fact that the High Court itself derives its authority from the *Australian Constitution* and is therefore obliged to accept the *Constitution* as legitimate.⁹ Indigenous sovereignty over Australia was never relinquished and is maintained by Aboriginal and Torres Strait Islander Peoples to the present day. It constitutes a parallel form of sovereignty that the *Constitution* ignores, but is incapable of erasing entirely.

The United Kingdom, upon colonising Australia in 1788, asserted sovereignty over it, ignoring the prior claims of the Indigenous inhabitants. The first

⁴ For discussion, see Crowe (n 3) ch 10.

⁵ Cf *Sue v Hill* (1999) 199 CLR 462, 492 [64] (Gleeson, Gummow and Hayne JJ).

⁶ Chris Clarkson et al, 'Human Occupation of Northern Australia by 65,000 Years Ago' (2017) 547(7663) *Nature* 306.

⁷ See generally Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) chs 2–3.

⁸ See, eg, *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 31–2, 57–60, 63, 69 (Brennan J; Mason CJ and McHugh J agreeing), 78–9 (Deane and Gaudron JJ), 122 (Dawson J), 179–80 (Toohey J) ('*Mabo*'); *Love v Commonwealth* (2020) 270 CLR 152, 176–7 [25] (Kiefel CJ), 200–1 [102] (Gageler J), 227 [202] (Keane J), 249–52 [264]–[268] (Nettle J), 273 [337] (Gordon J) ('*Love*').

⁹ Cf *Mabo* (n 8) 78–9 (Deane and Gaudron JJ); *Love* (n 8) 273 [337] (Gordon J).

Australian Colony, New South Wales, was under the executive authority of the Governor. The Governor, in turn, was responsible to the King and the Imperial Parliament. A Legislative Council was established for New South Wales in 1823,¹⁰ and for Van Diemen's Land (as Tasmania was then known) in 1825.¹¹ The role of the Legislative Council was to advise the Governor on the exercise of legislative authority. The *Australian Courts Act 1828* (Imp) made English law applicable in the Australian Colonies as it existed on 25 July 1828. It empowered the Governors and Legislative Assemblies to determine which United Kingdom laws passed after that date should apply in their jurisdiction. The statute also established the Supreme Courts of New South Wales and Van Diemen's Land as courts of record with broad jurisdiction (s 3).

The *Australian Constitutions Act 1850* (Imp) empowered the Governor and Legislative Council of New South Wales to establish, with the approval of the United Kingdom Parliament, a bicameral legislature with expanded legislative powers. This occurred with the passage of the *New South Wales Constitution Act 1855* (Imp). The other Australian Colonies received their own *Constitution Acts* in ensuing decades, establishing bicameral elected legislatures.¹² The application of Imperial statutes to the Colonies was clarified by the *Colonial Laws Validity Act 1865* (Imp). Section 1 provides that United Kingdom statutes only apply to the Colonies if extended by express words or necessary implication. Section 2 states that Colonial laws that conflict with applicable Imperial Acts are void and inoperative. This section reiterated the repugnancy doctrine that limited the legislative powers of Colonies and dominions by making them subject to override by the Imperial Parliament.

Section 5 of the *Colonial Laws Validity Act* further states that the Colonial legislatures have power to make laws with respect to the courts and the constitution, powers and procedure of the legislature. This provision had the effect of granting the Colonial legislatures power to alter their constitutional arrangements, subject to the paramount force of Imperial legislation. The Commonwealth of Australia subsumed the Colonies on 1 January 1901 following the passage of the *Commonwealth of Australia Constitution Act 1900* (Imp). However, even following the creation of the Australian Commonwealth, the United Kingdom Parliament retained the capacity to make laws for the Commonwealth and the States by exercising paramount force. The continuing ability of the United Kingdom Parliament to override Australian legislation after Federation is illustrated by the case of *Union Steamship Co of New Zealand v Commonwealth*.¹³ The High Court held in that case that provisions of the *Navigation*

¹⁰ *New South Wales Act 1823* (Imp).

¹¹ This was done by proclamation of Sir Ralph Darling, Governor of New South Wales.

¹² The Upper House of the Queensland Parliament was subsequently abolished by the *Constitution Act Amendment Act 1921* (Qld).

¹³ (1925) 36 CLR 130.

Act 1912 (Cth), enacted under the trade and commerce power in s 51(i) of the *Constitution*, were void for repugnancy to the *Merchant Shipping Act 1894* (Imp).

This authority continued unaltered until the passage of the *Statute of Westminster 1931* (Imp) and its subsequent adoption into Australian law in 1942.¹⁴ Section 2 of the *Statute of Westminster* states that the *Colonial Laws Validity Act* no longer applies to the dominions (including the Commonwealth of Australia). This section abolished the repugnancy doctrine in respect of Commonwealth legislation. However, the doctrine continued to apply to State laws. Section 4 of the *Statute of Westminster* further provides that no United Kingdom statute applies to a dominion unless the dominion has requested and consented to its application. The request and consent procedure in the *Statute of Westminster* therefore replaced the paramount force doctrine in the *Colonial Laws Validity Act* as far as the Commonwealth was concerned. This was a further step in the gradual relinquishment of United Kingdom sovereignty over the Australian legal system. Nonetheless, it was still possible following the *Statute of Westminster* for the United Kingdom Parliament to legislate for the Australian Commonwealth with the latter's request and consent. Furthermore, the request and consent procedure in the *Statute of Westminster* was not extended to the States, who were still covered by the doctrine of paramount force (s 9).

The United Kingdom Parliament, by enacting the *Statute of Westminster*, voluntarily limited its own power to legislate with respect to the Commonwealth of Australia. However, we saw previously that, according to Austin and Dicey, a sovereign body is not bound by its own edicts. Could the United Kingdom Parliament therefore simply repeal s 4 of the *Statute of Westminster* and proceed to legislate for Australia without its request and consent? The answer depends, as we saw before, on the practical limits of sovereignty. The question becomes whether the Australian courts and other legal officials would recognise such an action as valid and binding. They may have done so if it had been carried out shortly after the *Statute of Westminster* was originally enacted, but it is improbable that they would do so today. Sometime between those dates, sovereignty in Australia shifted irrevocably away from the United Kingdom and towards the Australian Parliaments and people.

IV THE AUSTRALIA ACTS

Sovereignty can sometimes shift abruptly, as in the case of a revolution. However, in Australia, the evolution of sovereignty was more gradual, as we saw in the previous section. It is difficult to pinpoint the exact time when Australian sovereignty ceased to recognise a role for the United Kingdom Parliament and shifted irreversibly to domestic sources. The First and Second World Wars are

¹⁴ *Statute of Westminster Adoption Act 1942* (Cth).

often cited as contributing to a growing sense of Australian national identity, but they also reiterated Australia's continuing status as part of the British Commonwealth (particularly since Australia automatically became a party to those conflicts when war was declared by the United Kingdom). It was not until the passage of the *Australia Acts 1986* that the remaining constitutional links between Australia and the United Kingdom were severed (except for the monarchy). This legislation was therefore an important step in confirming Australia's independent sovereignty, although it is best viewed as the culmination of a gradual trend extending back to Federation.

The *Australia Acts*, as mentioned at the commencement of this article, comprise two almost identical *Australia Acts* passed by the Commonwealth and United Kingdom Parliaments, preceded by six *Australia Acts (Request) Acts* passed by the State Parliaments, incorporating the *Australia Act* in a schedule.¹⁵ The Commonwealth had also earlier passed the *Australia (Request and Consent) Act 1985* (Cth) requesting the United Kingdom to enact its legislation. The State *Australia Acts (Request) Acts* were necessary for the Commonwealth to pass its *Australia Act*. This is because the Commonwealth Parliament relied upon s 51(xxxviii) of the *Constitution*, which allows for the exercise, with the request and consent of the affected States, of powers which at Federation belonged only to the United Kingdom Parliament.¹⁶ Similarly, the Commonwealth *Australia (Request and Consent) Act* was needed for the United Kingdom Parliament to pass its *Australia Act*, due to the request and consent process in s 4 of the *Statute of Westminster*.

Section 1 of the *Australia Acts* provides that no United Kingdom legislation can henceforth apply by paramount force in Australia. The consent and request procedure in the *Statute of Westminster* is repealed (s 12). Sections 2 and 3 confirm that the States have full legislative power to override United Kingdom laws and that the *Colonial Laws Validity Act* no longer applies to them. State Governors also have full executive powers as representatives of the Queen (s 7) and the Queen may not personally overrule State laws (s 8). The State Governors may not be required by any United Kingdom law or instrument to withhold assent to State laws (s 9). The United Kingdom government no longer has any responsibility for the government of the Australian States (s 10). Section 11 abolishes appeals to the Privy Council from Australian courts, making the High Court the ultimate court of appeal for the nation.

Section 15 of the *Australia Acts* is a remarkable provision. It sets out a special amendment process applicable to both the *Australia Acts* themselves and the *Statute of Westminster* (insofar as they form part of the law of Australia), disallowing amendment by other methods. Section 15(1) provides:

¹⁵ *Australia Act 1986* (Cth); *Australia Act 1986* (UK); *Australia Acts (Request) Act 1985* (NSW); *Australia Acts (Request) Act 1985* (Vic); *Australia Acts (Request) Act 1985* (Qld); *Australia Acts (Request) Act 1985* (WA); *Australia Acts (Request) Act 1985* (SA); *Australia Acts (Request) Act 1985* (Tas).

¹⁶ For further discussion, see Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) ch 5.

This Act or the *Statute of Westminster 1931*, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

Subsection (3) makes it clear that this process does not alter the existing procedure for constitutional change under s 128. Nonetheless, s 15 supplements s 128 in an interesting and significant way. It makes it possible for the Commonwealth and State legislatures, acting together, to change Australia's constitutional arrangements, at least insofar as these depend upon the terms of the *Australia Acts* and the *Statute of Westminster*. At the same time, the provision purports to limit the powers of the Australian legislatures to amend their various *Australia Acts* without cooperation between them. Even more exceptionally, it strips the United Kingdom Parliament of any power to amend its own *Australia Act*, while handing that power over to the Commonwealth and State Parliaments.

The United Kingdom Parliament, in enacting the *Australia Act 1986* (UK), seems to voluntarily relinquish its last vestiges of potential authority over Australia. Could the United Kingdom Parliament nonetheless repeal its version of the *Australia Act*, ignoring s 15, and then proceed to change Australian law? It seems unlikely that such a step would be recognised as valid by the Australian courts, as it would go against the spirit and the letter of the *Australia Acts*, as well as running counter to the progressive devolution of sovereignty since Federation. The ultimate constituent authority in Australia, at least since 1986 (and arguably before), is no longer the United Kingdom Parliament. This raises the question of whether it was necessary to enact the *Australia Act 1986* (UK) at all. If the Australian legislatures had simply passed their own *Australia Acts*, without involving the United Kingdom, would the effect have been any different? The inclusion of the United Kingdom was arguably more symbolic and political, than practically necessary.¹⁷

V CONSTITUTIVE POWER IN THE STATES

The legislative power of the State Parliaments, unlike that of the Commonwealth Parliament, is not confined to specific subjects. This can be seen by comparing s 51 of the *Constitution*, which gives the Commonwealth enumerated powers, with s 107, which reserves to the States the powers of the Colonies, except as modified by the *Constitution*. The *Constitution Acts* granted the Colonial Parliaments wide power to 'make laws for the peace, welfare and good government' of the Colony. Section 2 of the *Constitution Act 1867* (Qld) provides an example:

¹⁷ Cf *Attorney General (WA) v Marquet* (2003) 217 CLR 545, 612–13 [203]–[204] (Kirby J) ('Marquet').

Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

The *Colonial Laws Validity Act*, as we saw before, provided that Colonial laws must not be repugnant to Imperial legislation extended to the Colonies by express words or necessary implication (ss 1–2). However, this limitation on State legislative power, which had largely fallen into disuse, was removed by the *Australia Acts* (s 1). The *Australia Acts* also confirmed that State legislatures have plenary power ‘to make laws for the peace, order and good government of the State’ (s 2(1)) and that a State law will no longer be void for inconsistency with a United Kingdom statute (s 3). State laws shall also not be disallowed by the Queen or reserved for her approval (ss 8–9).

The plenary jurisdiction of the Colonial and State Parliaments traditionally extended to modifying their own constitutions, giving them both legislative and constitutive powers. Section 5 of the *Colonial Laws Validity Act* confirmed this position, while making it subject to an important limitation:

Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, order in council, or colonial law for the time being in force in the said colony.

This section confirms that Colonial Parliaments had power to change their constitutions by an ordinary statute. The same power was inherited by State Parliaments after Federation by virtue of s 107 of the *Constitution*. This was reiterated in *McCawley v The King*, where the Privy Council ruled that State Parliaments may make laws that are inconsistent with their constitutions without passing a formal amendment.¹⁸ That case concerned an attempt by the Queensland Parliament to create a Court of Industrial Arbitration. The Court was designated as a branch of the Supreme Court of Queensland and judges were appointed with seven-year terms. The Supreme Court held this was invalid, as it was contrary to the *Constitution Act 1867* (Qld).¹⁹ A majority of the High Court agreed.²⁰ However, the Privy Council overruled the High Court, holding that a Queensland statute that contradicts the *Constitution Act* should be construed as an implied constitutional amendment.

¹⁸ *McCawley v The King* [1920] AC 691.

¹⁹ *Re McCawley* [1918] QSR 62.

²⁰ *Re McCawley* (1918) 26 CLR 9.

VI MANNER AND FORM REQUIREMENTS

Section 5 of the *Colonial Laws Validity Act* also stipulates that, when a State law concerns the ‘constitution, powers and procedure’ of the Parliament, any relevant ‘manner and form’ requirements must be followed. This section has now been superseded by s 6 of the *Australia Acts*, which reads as follows:

[A] law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of 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 ...

This provision effectively allows the State Parliaments to prescribe special procedures that must be followed for future constitutional changes. Later State Parliaments can then not simply amend those parts of the constitution by an ordinary statute, but must follow the process in the earlier law.

Normally, a statute imposing a special process for enacting legislation would not bind future Parliaments. The general principle, as discussed previously, is that a sovereign Parliament has power to repeal or override any previous laws, so it could simply repeal the procedural limitation (either expressly or by implication). However, s 6 of the *Australia Acts*, like s 5 of the *Colonial Laws Validity Act* before it, suggests that Parliaments may bind their successors to follow special procedures in the circumstances set out in the provision. It is generally accepted that the section gives paramount force to State manner and form requirements that fall within its scope and therefore constitutes an exception to the plenary powers of the State legislatures.²¹ This raises the following question: how exactly does s 6 of the *Australia Acts* override the usual powers of State legislatures?

We will return later in this article to the question whether s 6 of the *Australia Acts* is properly considered binding on State Parliaments and, if so, why. The question raises profound issues about the nature of sovereignty in Australia today. However, it is useful to begin by considering the scope of s 6 itself. The section is subject to two limitations. First, it only applies to laws concerning ‘the constitution, powers or procedure of the Parliament’. Second, it raises the question of what procedures count as valid ‘manner and form’ requirements.

A ‘Constitution, Powers and Procedure’

Manner and form requirements under s 6 of the *Australia Acts* can only be imposed on laws relating to the ‘constitution, powers and procedure’ of a State Parliament. For example, the Parliament could not impose a special process for future amendments to criminal law, as that is not a matter concerning the ‘constitution,

²¹ This was the view taken by a majority of the High Court in *Marquet* (n 17) 570–1 [67]–[70] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

powers and procedure of the Parliament'. 'Constitution' here means the 'nature and composition' of the Parliament.²² It does not extend to all the matters dealt with in the constitution of the State. Changes to the powers of the executive branch, for example, do not concern the 'constitution, powers and procedure' of the Parliament and therefore cannot be made subject to a valid manner and form procedure.²³ A similar analysis would apply to legislative changes concerning the judiciary.

Gleeson CJ, Gummow, Hayne and Heydon JJ said in *Attorney-General (WA) v Marquet* ('*Marquet*') that the term 'constitution' in s 6 relates to 'features which go to give [the Parliament], and its Houses, a representative character'.²⁴ A change in the method of voting would therefore affect the constitution of the Parliament and could be subject to a manner and form procedure. However, their Honours seemed to accept, following the earlier authority of *Clydesdale v Hughes* ('*Clydesdale*'),²⁵ that a change to the qualifications of Members of Parliament does not fall into this category, without explaining their reasoning.²⁶ Clydesdale was a member of the Western Australian Legislative Council who subsequently became a member of the Lotteries Commission. It was alleged that this rendered him ineligible to sit in Parliament, as it was an office of profit under the Crown.

The Parliament passed a constitutional amendment while the case was pending providing that no Member of Parliament shall be disqualified for being a member of the Lotteries Commission. The High Court held that this amendment did not have to comply with s 73 of the *Constitution Act 1889* (WA), which required absolute majorities in both Houses for any change to the constitution of the Legislative Council. The judgment in *Clydesdale* is very short and its reasoning is cursory. It seems to rest on a narrow reading of the term 'constitution' in s 5 of the *Colonial Laws Validity Act*. Restrictions on who can run for the Parliament would seem to have a direct effect on its composition. It is therefore unclear why those restrictions do not relate to Parliament's 'constitution'. However, the view in *Clydesdale* was affirmed *obiter* by Wilson J in *Western Australia v Wilsmore*,²⁷ as well as by the majority in *Marquet*.

The majority judges in *Marquet* declined to comprehensively define the terms 'powers' and 'procedure' in s 6.²⁸ However, it is clear that 'powers' includes the Parliament's legislative power;²⁹ it would also seem to encompass Parliament's other inherent capacities, such as the power to punish for contempt, seek

²² *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 429 (Dixon J) ('*Trethowan's Case*'); *Marquet* (n 17) 572–3 [75] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

²³ *Trethowan's Case* (n 22) 429, 431–2 (Dixon J).

²⁴ *Marquet* (n 17) 573 [76].

²⁵ (1934) 51 CLR 518.

²⁶ *Marquet* (n 17) 573 [77].

²⁷ (1981) 149 CLR 79, 102.

²⁸ *Marquet* (n 17) 572 [74].

²⁹ *Trethowan's Case* (n 22) 430 (Dixon J).

information from Ministers or suspend its Members.³⁰ Any change to the scope of the Parliament's legislative power will affect its 'constitution, powers and procedure'. This means it is possible for Parliament to provide that any future imposition of a manner and form requirement must itself go through a special process, because imposing a manner and form requirement limits the Parliament's usual legislative powers. 'Procedure', meanwhile, would seem to refer to the procedural rules governing Parliament's legislative functions. It is unclear whether it extends to the rules governing subsidiary bodies, such as parliamentary committees.

B *'Made in Such Manner and Form'*

If a State statute relates to 'the constitution, powers and procedure of the Parliament', then it is necessary to ask whether its passage is constrained by a valid manner and form requirement. The Australian courts have placed various constraints on what content a manner and form requirement may have. A type of manner and form requirement adopted by some States is that future changes to fundamental aspects of the State constitution be subject to a referendum.³¹ Both the High Court³² and the Privy Council in *Attorney-General (NSW) v Trethowan* ('*Trethowan's Case*')³³ upheld the validity of this requirement, rejecting the contention that a referendum is not sufficiently related to the legislative process. *Trethowan's Case* concerned s 7A of the *Constitution Act 1902* (NSW), which provides that the Legislative Council could not be abolished or its powers altered without the approval of the State's electors. The High Court and the Privy Council found that this provision was binding on the Parliament.

The Queensland Supreme Court, by contrast, held in *Commonwealth Aluminium Corporation Limited v Attorney-General (Qld)* (the '*Comalco Case*') that a manner and form requirement is not binding if it requires future changes to be approved by a body outside the legislature (other than the voters at a referendum).³⁴ The *Comalco Case* concerned a requirement that any amendments to an agreement between the Queensland government and Comalco (a mining company) be approved by Comalco. The majority judges held this was not a valid manner and form provision, as it was not legislative in nature.³⁵ This principle was endorsed by King CJ of the South Australian Supreme Court in *West Lakes v South Australia* ('*West Lakes*').³⁶ Similarly to the *Comalco Case*, that case concerned

³⁰ For discussion of the inherent powers of the New South Wales Legislative Council, see *Egan v Willis* (1998) 195 CLR 424.

³¹ See, eg, *Constitution Act 1902* (NSW) s 7A; *Constitution Act 1867* (Qld) s 53.

³² *Trethowan's Case* (n 22).

³³ *Attorney-General (NSW) v Trethowan* [1932] AC 526.

³⁴ [1976] Qd R 231.

³⁵ *Ibid* 236–7 (Wanstell SPJ), 260 (Dunn J).

³⁶ [1980] 25 SASR 389, 398 (King CJ).

legislation requiring the South Australian government to consult West Lakes (a property developer) before altering an agreement between them. The Supreme Court unanimously declined to enforce the requirement.

King CJ observed in *West Lakes* that a manner and form requirement is not valid if it is so onerous as to amount to an abdication of power.³⁷ A requirement of that sort would be 'an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise'.³⁸ The question of whether a requirement is a limitation or an abdication of power will depend on both the nature of the procedure imposed and the subject matter of the law. Manner and form requirements relating to fundamental aspects of the State constitution may legitimately be more onerous than those concerning less important matters.³⁹

A distinction was drawn by the High Court in *Clayton v Heffron* ('*Clayton*') between mandatory and directory manner and form requirements.⁴⁰ A mandatory manner and form requirement must be observed, otherwise the amending law will be invalid. However, a directory requirement will not invalidate the legislation if it is not followed. *Clayton*, like *Trethowan's Case* before it, concerned an attempt to abolish the New South Wales Legislative Council. The Bill to abolish the Legislative Council was twice passed by the Legislative Assembly and rejected by the Council itself. The government then sought to proceed to a referendum, relying on s 5B of the *Constitution Act 1902* (NSW), which allowed for the breaking of deadlocks between the Houses. However, it was alleged that the process in s 5B had not been followed, because it involved a 'free conference' of the House managers. This conference had been called, but the Legislative Council did not participate. The majority judges held that the 'free conference' process in s 5B was merely directory, since if the procedure were construed as mandatory it could be aborted unilaterally by any one party.⁴¹

C *Double Entrenchment*

It may be significant in assessing the effectiveness of a manner and form requirement to ask whether the provision prevents future changes to the requirement itself. Consider the following hypothetical provision:

³⁷ Ibid 397 (King CJ).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ (1960) 105 CLR 214, 244–8 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 268 (Kitto J), 276–7 (Menzies J) ('*Clayton*').

⁴¹ Ibid 244–8 (Dixon CJ, McTiernan, Taylor and Windeyer JJ), 268 (Kitto J), 276–7 (Menzies J).

- (1) The Legislative Council shall consist of 50 members.
- (2) Subsection 1 above shall not be repealed or amended except with the approval of the people at a referendum.

Subsection (2) seems to prevent the Parliament from amending subsection (1) without a referendum. However, what stops the Parliament from repealing subsection (2)? There is nothing in the provision that prevents this from being done. This would be an indirect method of attacking subsection (1), which could then also be changed without a referendum. It is commonly accepted that manner and form requirements should be ‘doubly entrenched’ in order to avoid this kind of indirect attack. This would involve rewording the provision as follows:

- (1) The Legislative Council shall consist of 50 members.
- (2) Subsection 1 above *or this subsection* (2) shall not be repealed or amended except with the approval of the people at a referendum.

The issue of double entrenchment received extensive discussion in *Trethowan’s Case*. The bulk of the argument in that case revolved around the validity of s 7A(6) of the *Constitution Act 1902* (NSW), which purported to doubly entrench the referendum requirement in s 7A. It was contended that this provision was ineffective, as it purported to fetter the plenary power of the New South Wales Parliament, granted in s 5 of the *Colonial Laws Validity Act*. However, a majority of the High Court held that a doubly entrenched referendum requirement was a valid manner and form provision for the purposes of s 5, thereby confirming the ability of State Parliaments to permanently limit their own legislative capacities.⁴² The Privy Council agreed.⁴³ It appeared to be assumed in argument before the High Court that s 7A could have been amended or removed were it not for the double entrenchment provision, although the issue was not directly addressed in the judgments.

It is arguable, however, that double entrenchment is not necessary for a manner and form provision to be effective.⁴⁴ This is because the force of a manner and form requirement within s 6 of the *Australia Acts* comes not from the statute in which it is contained, but from s 6 itself.⁴⁵ Much of the discussion in *Trethowan’s Case* revolved around whether a sovereign legislature can bind itself. However, if s 6 of the *Australia Acts* represents a higher source of sovereignty than a State legislature, then the fact that a manner and form provision falls within s 6 means the State Parliament is bound by it. This would be so, regardless of whether the provision is doubly entrenched. A singly entrenched provision covered by s 6

⁴² *Trethowan’s Case* (n 22).

⁴³ *Attorney-General (NSW) v Trethowan* [1932] AC 526.

⁴⁴ Gerard Carney seems to endorse this suggestion, although his discussion of the point is a little unclear: Gerard Carney, ‘An Overview of Manner and Form in Australia’ (1989) 5 *Queensland University of Technology Law Journal* 69, 93.

⁴⁵ A similar point can be made about s 5 of the *Colonial Laws Validity Act*.

would therefore still be binding and potentially enforceable by the courts. However, to avoid doubt, it is prudent for manner and form provisions to include double entrenchment.

D Manner and Form in Queensland

The *Constitution Act 1867* (Qld) contains a unique provision (s 53) on manner and form issues. (The *Constitution of Queensland 2001* (Qld), which consolidates many aspects of Queensland's constitutional arrangements, leaves these parts of the earlier constitution intact.) Section 53 of the *Constitution Act* provides that any changes to the office of Governor or ss 1, 2, 2A, 11A, 11B or 53 of the Act require a referendum. The sections concern the composition and powers of the legislature and the executive. Section 53 itself is also doubly entrenched. Section 53 is a wide-ranging manner and form provision covering many fundamental aspects of Queensland's constitution. However, it is questionable whether the provision is valid in its application to the office or powers of the Governor, given Dixon J's observation in *Trethowan's Case* that changes affecting the executive branch of government do not concern the 'constitution, powers and procedure' of the Parliament.⁴⁶

Section 2 of the *Constitution Act*, which is among the provisions entrenched by s 53, reads as follows:

2 Legislative Assembly constituted

Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.

Section 53's application to s 2 effectively means that the Queensland Parliament cannot impose any additional manner and form requirements without holding a referendum, since doing so would limit the powers of the legislature. This appears to be an unintended consequence of s 53.

Another notable and unique feature of s 53 is the way it deals with standing. Section 53(5) gives all Queensland voters standing to enforce the manner and form requirements in the section. Normally, only those individuals directly and personally affected by a law have standing to challenge it on constitutional grounds; this can lead to serious difficulties in enforcing constitutional requirements. Section 53(5) removes this practical difficulty, thereby increasing the effectiveness of the provision. Section 53(5) further empowers the Supreme Court to grant injunctions to prevent manner and form requirements being ignored. The Supreme Court may therefore potentially grant an injunction to restrain the Parliament from voting on a Bill that violates s 53 or referring such a

⁴⁶ *Trethowan's Case* (n 22) 429, 432 (Dixon J). For a contrary view, see Carney (n 44) 78.

Bill to the Governor for signing. It is unclear whether this would be possible in other States that lack an equivalent provision. The New South Wales Supreme Court in *Trethowan's Case* was willing to grant an injunction, but this decision has been questioned in later cases.⁴⁷

VII MANNER AND FORM BEYOND THE *AUSTRALIA ACTS*

Could a State Parliament (or, for that matter, the Commonwealth Parliament) bind itself to observe manner and form requirements for topics falling outside s 6 of the *Australia Acts*? Could, for example, a State statute validly require a referendum for future amendments to criminal law? An actual example raising this issue might be s 53 of the *Constitution Act 1867* (Qld), insofar as it applies to the Governor. This is really a question about the nature of sovereignty and, in particular, the ability of a sovereign to bind itself. There are essentially two possible views on this issue. The first view, suggested by Austin and Dicey's conception of sovereignty, would be that the sovereign can freely repeal its past acts, ignoring any limits it has previously placed on itself. The second view would be that a sovereign can do anything within its jurisdiction, including reconstituting itself or irrevocably limiting its own future powers. There has long been a debate about this issue throughout the British Commonwealth. The first view expressed above is the traditional position on the issue, although the second view has gained supporters in recent decades.⁴⁸

The High Court in *Trethowan's Case* considered two possible rationales for the contention that State Parliaments may use manner and form provisions to limit their own future powers. The first rationale, which was endorsed by all three members of the majority (Rich, Starke and Dixon JJ), was that State Parliaments are bound by manner and form provisions falling within s 5 of the *Colonial Laws Validity Act*.⁴⁹ The reference to manner and form in s 5 imposed an explicit limitation on the plenary powers of Colonial legislatures conferred in the same section. The force of manner and form requirements, on this view, does not derive from a source internal to the sovereignty of the State Parliament itself. Rather, it derives from the authority of the *Colonial Laws Validity Act*, as a statute of the Imperial Parliament. It is because the powers of State Parliaments were originally granted by the Imperial Parliament that they can be limited through reference to this higher source of authority. The majority view in *Trethowan's Case* therefore

⁴⁷ See, eg, *Hughes and Vale v Gair* (1954) 90 CLR 203, 204 (Dixon CJ); *Clayton* (n 40) 234 (Dixon CJ, McTiernan, Taylor and Windeyer JJ).

⁴⁸ For a useful (albeit dated) survey, see George Winterton, 'Can the Commonwealth Enact "Manner and Form" Legislation?' (1980) 11(2) *Federal Law Review* 167. See also Jeffrey D Goldsworthy, 'Manner and Form in the Australian States' (1987) 16(2) *Melbourne University Law Review* 403.

⁴⁹ *Trethowan's Case* (n 22) 423–4 (Starke J), 431–2 (Dixon J).

does not contradict the traditional view of sovereignty, according to which a sovereign body cannot bind itself.

The second rationale for the binding force of manner and form requirements discussed in *Trethowan's Case* was based on the idea that a sovereign legislature may permanently reconstitute itself for particular purposes, thereby preventing later legislatures from reasserting powers contrary to the reconstitution. Rich J was the only judge to accept this principle.⁵⁰ A similar doctrine was subsequently endorsed by the Privy Council in the case of *Bribery Commissioner v Ranasinghe* ('*Ranasinghe*').⁵¹ The Privy Council held in *Ranasinghe* that the Ceylon Parliament was bound to follow a previously imposed requirement for a two-thirds majority vote to pass certain kinds of legislation, because 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law'.⁵² However, the reasoning given in support of this principle is brief and cursory.

More recently, the reconstitution theory was endorsed by Lord Steyn and Baroness Hale in *R (Jackson) v Attorney General* (the '*Fox Hunting Case*').⁵³ That case concerned a challenge to the use of the *Parliament Act 1949* (UK) to bypass the House of Lords and secure the passage of legislation banning fox hunting. Lord Steyn observed:

But, apart from the traditional method of law making, Parliament acting as ordinarily constituted may functionally redistribute legislative power in different ways. For example, Parliament could for specific purposes provide for a two-thirds majority in the House of Commons and the House of Lords. This would involve a redefinition of Parliament for a specific purpose. Such redefinition could not be disregarded.⁵⁴

Baroness Hale agreed, saying that, '[i]f Parliament can do anything, there is no reason why Parliament should not decide to re-design itself, either in general or for a particular purpose'.⁵⁵ However, if Parliament can do anything, it can also arguably override any previously imposed limits on its powers.

Trethowan's Case does not settle the question of whether manner and form requirements outside s 6 of the *Australia Acts* (which replaced s 5 of the *Colonial Laws Validity Act*) would be considered binding in Australia. The issue would ultimately depend on the willingness of the courts to enforce them. The absence of any clear Australian authority on the issue, as well as the lack of a well-accepted theoretical foundation, makes this appear unlikely. Five judges of the High Court in *Marquet* held that the Australian courts will yield to legislative actions, including decisions to override previous statutes, unless some higher

⁵⁰ Ibid 420.

⁵¹ [1965] AC 172.

⁵² Ibid 197 (Lord Pearce).

⁵³ [2006] 1 AC 262.

⁵⁴ Ibid 296 [81].

⁵⁵ Ibid 318 [160].

source of authority such as the *Colonial Laws Validity Act* or the *Australia Acts* can be identified.⁵⁶ This view is consistent with the traditional analysis of sovereignty.

The question of manner and form outside s 6 also raises public policy issues. If Parliament can impose a manner and form requirement on any law, this could lead to the destruction of parliamentary democracy. Each party would potentially seek to entrench its own policies (as, indeed, occurred in *Trethowan's Case*). On the other hand, it makes more sense to entrench fundamental features of the State constitution, such as the powers of the Governor or judicial independence, even if they do not strictly concern the 'constitution, powers and procedure' of the Parliament.⁵⁷ Manner and form restrictions on these kinds of provisions could potentially be justified on democratic or rule of law grounds. However, that does not mean Australian courts would be willing to enforce them against the Parliament.

VIII WHY IS SECTION 6 OF THE *AUSTRALIA ACTS* BINDING?

The preceding discussion about sovereignty raises a further issue: why exactly is s 6 of the *Australia Acts* binding on State legislatures? The High Court's reasoning in *Trethowan's Case*, as discussed above, was premised on the authority of the *Colonial Laws Validity Act* as an enactment of the United Kingdom Parliament. That reasoning made sense in 1931, but is less compelling today. Any suggestion that State Parliaments are bound by s 6 of the *Australia Act* (UK) due to the authority of the United Kingdom Parliament would be premised on the idea that the United Kingdom Parliament retains sovereign power in Australia. That is doubtful, for reasons discussed previously. Furthermore, any attempt to trace the continuing force of s 6 to the sovereignty of the United Kingdom Parliament would contradict the spirit (if not the letter) of the *Australia Acts*, which were intended to sever all remaining constitutional ties between the United Kingdom and Australia.

The continuing authority of s 6 of the *Australia Acts*, then, cannot plausibly be traced to the *Australia Act* (UK). Can it be traced instead to the *Australia Act* (Cth)? This was the view taken by the High Court majority in *Marquet*, although it was not supported by detailed reasoning.⁵⁸ This proposal encounters two main difficulties. First, ss 106–7 of the *Australian Constitution* clearly give the States power over their own constitutional arrangements. Section 106 is made 'subject to this Constitution', but that clause applies to the continuance of the State constitutions, not the States' exclusive power to alter them. The use of s 51(xxxviii) to not only amend State constitutional frameworks, but also preclude

⁵⁶ *Marquet* (n 17) 568–70 [63]–[65] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 616–17 [214]–[215] (Kirby J). For a classic exposition and defence of this approach, see HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *Cambridge Law Journal* 172.

⁵⁷ Cf *West Lakes v South Australia* [1980] 25 SASR 389, 397 (King CJ).

⁵⁸ *Marquet* (n 17) 571 [70].

the States themselves from making further alterations, is therefore arguably contrary to s 106,⁵⁹ particularly when read alongside s 107, which preserves the power of State legislatures unless exclusively vested in the Commonwealth or otherwise withdrawn by the *Constitution*.

Second, the Commonwealth's power under s 51(xxxviii), as discussed previously, relies upon the request and consent of the States. The concept of sovereignty, as elucidated by Austin and Dicey, suggests that a Parliament that can confer power in this way can also withdraw it, subject to practical limitations. It is unclear whether referrals of power under s 51(xxxviii) may later be withdrawn, although the High Court has held that referrals of State power to the Commonwealth under the more commonly used s 51(xxxvii) may be subject to open-ended time limits.⁶⁰ The logic of sovereignty led Latham CJ to comment that:

[A] State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec. 51(xxxvii) of the Constitution.⁶¹

Anne Twomey and Andrew Lynch both opine that 'it appears likely that a State could validly revoke its reference' under s 51(xxxvii).⁶²

A further question is whether a State could impliedly withdraw a referral of power under s 51(xxxviii) by legislating inconsistently with it. Ordinarily, sovereign Parliaments can override a previous law either expressly or by implication.⁶³ Furthermore, if the provision of a later law is inconsistent with a prior law in its application to a specific case, 'then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act'.⁶⁴ This raises the prospect that a State could override its referral of power to the Commonwealth, and therefore exclude the *Australia Act* (Cth), by passing contradictory legislation. There are evidently some parts of the *Australia Act* that could not practically be overridden by a single State, such as those involving the jurisdiction of the United Kingdom Parliament. However, the possibility has important implications for the

⁵⁹ Kirby J held in *Marquet* that the *Australia Act* (Cth) was unconstitutional for this reason, although he was alone in this finding: *ibid* 613–14 [205]–[207].

⁶⁰ *The Queen v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways* (1964) 113 CLR 207.

⁶¹ *South Australia v Commonwealth* (1942) 65 CLR 373, 416.

⁶² Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 810. See also Andrew Lynch, 'After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32(3) *Sydney Law Review* 363, 381–4.

⁶³ Lynch suggests that a State Parliament could impliedly revoke a referral of power to the Commonwealth under s 51(xxxvii), provided that the intention to do so is clear, although he sees this possibility as remote: Lynch (n 62) 384.

⁶⁴ *Goodwin v Phillips* (1908) 7 CLR 1, 7 (Griffith CJ).

effectiveness of s 6 of the *Australia Acts*, which purports to limit the legislative power of State Parliaments.

Any State law that contradicts a manner and form provision falling within s 6 of the *Australia Acts* could therefore be construed as an implied amendment to the State's previous request and consent legislation. This, in turn, would deprive the Commonwealth of the power needed to support the *Australia Act* (Cth), meaning it would not apply. A Commonwealth law, once enacted, does not ordinarily survive a withdrawal of the constitutional power that supports it. This can be seen by analogy with the case law on the defence power in s 51(vi).⁶⁵ The High Court has been willing to strike down Commonwealth laws enacted under the wartime defence power following the transition to peacetime, because this change in the factual circumstances removes the power that supported them.⁶⁶

If the capacity of s 6 of the *Australia Acts* to bind the States does not come from either the *Australia Act* (UK) or the *Australia Act* (Cth), then what explains it? There is one further possibility. This is the idea that the Commonwealth and State Parliaments, acting together, possess a special form of sovereignty, which none of them possesses alone. Section 15 of the *Australia Acts*, as discussed previously, purports to allow the Australian Parliaments to collectively amend both the *Australia Acts* and the *Statute of Westminster*. This provision, if effective, might be viewed as conferring those bodies with a special form of collective sovereignty that extends to altering Australia's constitutional framework insofar as it affects their respective jurisdictions. If so, then that sovereignty would potentially extend not only to the powers in s 15, but also to providing s 6 with the force it needs to bind the State legislatures. However, this possibility has more radical implications.

IX AN ALTERNATIVE AMENDMENT PROCESS?

Christopher Gilbert has argued that s 15 of the *Australia Act* 1986 (UK) creates an alternative way of amending the *Australian Constitution*.⁶⁷ He proposes a two-step process whereby the provision can be used as an alternative to a referendum under s 128. The first step is for the Commonwealth and State Parliaments to amend s 15 of the *Australia Act* (UK) to allow amendment of the *Constitution* by the process set out in the section. This would involve inserting a reference to the *Commonwealth of Australia Constitution Act* into s 15 so it reads as follows:

⁶⁵ Lynch (n 62) 384.

⁶⁶ *R v Foster; Ex parte Rural Bank of New South Wales* (1949) 79 CLR 43.

⁶⁷ Christopher Gilbert, 'Section 15 of the *Australia Acts*: Constitutional Change by the Back Door' (1989) 5 *Queensland University of Technology Law Journal* 55. This possibility had previously been raised (and dismissed) in GJ Lindell, 'Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29, 40–2.

This Act or the *Statute of Westminster 1931* or the *Commonwealth of Australia Constitution Act 1900*, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.

The second step would be for all the Australian Parliaments to pass statutes amending the *Constitution*. This would be authorised by the amended s 15, as the *Constitution* forms part of the *Constitution Act*.

Does Gilbert's proposal work? The main problem with his argument is that it effectively involves the Australian Parliaments harnessing the power of the United Kingdom Parliament (by way of s 15 of the *Australia Act*) and then using that power to amend the *Australian Constitution*. The proposal relies on the fact that the *Constitution Act* is a statute of the United Kingdom Parliament; as such, by harnessing the power of the United Kingdom Parliament, the Australian Parliaments can amend it. However, this would only work if the United Kingdom Parliament still has the power to amend the *Australian Constitution*. This is unlikely, as discussed previously. The United Kingdom Parliament no longer possesses sovereignty over Australia; as such, harnessing the power of the United Kingdom version of the *Australia Act* does not enable the Australian Parliaments to amend the *Constitution*.

However, Gilbert's proposal points the way to a deeper question: could the *Australia Acts* themselves be viewed as creating a new source of constituent power? The enactment of the *Australia Acts* is premised on the idea that the Commonwealth and State Parliaments, acting together, can accomplish something that none of them could do alone. We have seen that the Commonwealth Parliament relied upon s 51(xxxviii) of the *Constitution* to enact its version of the *Australia Act*, implying that it could not have validly done so without the assistance of the States. This was required partly because of the impact of the *Australia Acts* on the State constitutions, over which the Commonwealth has no power. Each of the State Parliaments, on the other hand, would be incompetent to enact the *Australia Act* insofar as it impacts on the constitutional arrangements of the Commonwealth and the other States (not to mention the legislative power of the United Kingdom Parliament). It is nonetheless widely accepted that the *Australia Acts* are valid and effective. Their practical legitimacy seems to be due to the collaborative way in which they were passed.

Does this mean that the Commonwealth and State Parliaments, acting together, possess a special form of sovereignty in the Australian legal system? And, if so, could this be harnessed to provide an alternative method of constitutional amendment? This idea is different from Gilbert's proposal, because it does not involve utilising s 15 of the *Australia Act* (UK). Rather, it raises the possibility that the *Constitution* could be amended by all the Australian

Parliaments agreeing to do so, without first altering s 15 as Gilbert proposes. The question then becomes whether, if this occurred, the Australian courts would regard such an amendment as effective. This is a practical question about sovereignty, rather than a strictly legal one. It is a matter in which, as HWR Wade put it, the courts ‘have a perfectly free choice, for legally the question is ultimate’.⁶⁸ However, the courts themselves are constrained by what other legal officials and the general public would accept as legitimate.

It seems doubtful that the Australian courts would uphold an attempt to amend the express text of the *Australian Constitution* through this process. Any such amendment would lack practical legitimacy, because it would bypass the referendum procedure in s 128. The legitimacy of that process, in the eyes of the public, lies in its democratic character. On the other hand, it seems more likely that the courts might be willing to accept a change in Australia’s constitutional framework carried out by this method that falls short of amending the text of the *Constitution*, particularly one that does not abridge basic constitutional values. Indeed, this is arguably what happened with the *Australia Acts* themselves. The cursory reasoning of the majority judges in *Marquet* indicates that they accepted the *Australia Acts* as legitimate, despite the serious constitutional issues raised by their method of enactment.⁶⁹ Kirby J, the sole dissenter in *Marquet*, tacitly recognised the primacy of practical considerations in questions about sovereignty, commenting that:

Convenience may ultimately overwhelm these legal and logical difficulties. The ‘march of history’ may pass by my concerns. The passage of time may accord constitutional legitimacy and respectability to what has happened.⁷⁰

This seems intended as a lament, but it is just the way sovereignty works. The *Constitution*, for all its internal technicalities, cannot isolate itself from practical considerations. The ultimate test of constitutional validity, in the end, is what legal officials and the public will accept as valid.

X CONCLUSION

Sovereignty in Australia has a complicated history. It begins with the long-term sovereignty of Aboriginal and Torres Strait Islander Peoples, which was unsettled by European invasion, but never ceded. This created two parallel forms of sovereignty — Indigenous and non-Indigenous — which continue today. The colonisation of Australia by the United Kingdom created a form of government under the sovereignty of the Crown and the Imperial Parliament. The role of the Imperial Parliament persisted even after Federation, but was progressively

⁶⁸ Wade (n 56) 192.

⁶⁹ *Marquet* (n 17) 570–1 [67]–[70] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁷⁰ *Ibid* 614 [208].

limited by statutes such as the *Colonial Laws Validity Act* and the *Statute of Westminster*, as well as being subject at the Commonwealth level to the *Australian Constitution*. This lengthy transition culminated in the *Australia Acts* in 1986.

The most obvious source of sovereignty in Australia today is found in s 128 of the *Constitution*, which gives constitutive power to the Commonwealth Parliament acting together with the people. However, sovereignty at the State level yields a more complex picture. Historically, the State Parliaments had plenary powers, including the ability to amend their own constitutions. State laws may be overridden by Commonwealth laws under s 109, but only within areas of exclusive or concurrent Commonwealth power. There are some areas of power reserved to the States under ss 106 and 107. These areas of power are still subject to the ultimate sovereignty of the Commonwealth Parliament and the people under s 128, since the *Constitution* (including ss 106 and 107) could be amended by this process. However, on a day-to-day basis, they are controlled by the State Parliaments.

The role of manner and form requirements in State constitutional law was traditionally attributed to the sovereignty of the United Kingdom, as expressed in s 5 of the *Colonial Laws Validity Act*. However, that explanation no longer suffices. The binding force of s 6 of the *Australia Acts* is widely accepted, but difficult to explain adequately. It cannot plausibly be traced to the *Australia Act* (UK); relying on the *Australia Act* (Cth) also has serious problems. This leaves us with two practical choices. We can deny, like Kirby J in *Marquet*,⁷¹ that s 6 of the *Australia Acts* is binding on the States. Alternatively, we can embrace the idea canvassed in this article that the Australian Parliaments acting together have a special form of sovereignty that enables them to accomplish things none of them could do alone, including making certain kinds of changes to Australia's constitutional arrangements.

The idea that the Australian Parliaments collectively enjoy a limited form of constitutive power might seem undemocratic when compared with the referendum process under s 128. However, Australia is, after all, a parliamentary democracy. Sovereignty at the State level, as we have seen, traditionally rests with the legislature — and, even at the Commonwealth level, the Parliament retains an integral role in the s 128 procedure. The democratic movement of the *Constitution* might logically seem to culminate in unfettered popular sovereignty at both Commonwealth and State levels, just as it has led the High Court to recognise a conditional guarantee of universal franchise.⁷² That may, indeed, be where we are ultimately headed, as evidenced by the inclusion of referendum processes in various State constitutions.⁷³ However, whether we are there yet is a different question.

⁷¹ Ibid 613–14 [205]–[207].

⁷² *Roach v Electoral Commissioner* (2007) 233 CLR 162.

⁷³ See, eg, *Constitution Act 1902* (NSW) ss 5B, 7A, 7B; *Constitution Act 1867* (Qld) s 53.