

ERRATA

p 26 para 1, second sentence: "Bill of Rights" for "Bill of rights"

p 43 first sentence: "themselves" for "themselves"

p 51 footnote 103: "1971" for "197,1"

p 53 first sentence: "then" for "than"

p 54 footnote 114: "n 25" for "n 15"

p 95 footnote 277: "[190]" for "190"

p 95 footnote 278: "[67]" for "67"

p 100 footnote 294: space between "and" and "Form"

p 128 second sentence: "then" for "than"

p 148 footnote 419: "take" for "takes"

ADDENDUM

p 26 para 2, second sentence: delete "the doctrine of parliamentary sovereignty is not paramount and" and read "Under the US human rights protection model the US judiciary, headed by the Supreme Court ..."

p 40 footnote 73: delete text and replace with "*Attorney-General (WA) v Marquet* (2003) 217 CLR 545"

p 52 para 1, delete "Section 5 of the *Colonial Laws Validity Act* suggests that" and read "The context in which section 5 of the *Colonial Laws Validity Act* was enacted suggests that absolute and two-thirds majorities ..."

p 69 delete footnote 162

p 180 footnote 517: delete "as printed" and read "... *Some Models of Dialogue Between Judges and Legislatures*, in Huscroft ..."

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Effective Entrenchment of Human Rights in Victoria:

**a study of the law relating to
manner and form requirements**

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Abstract

Formulating the question

This thesis examines constitutional entrenchment of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) through the use of manner and form requirements. Manner and form requirements usually demand compliance with special procedures for the effective repeal or amendment of a protected law. Imposing such restrictions on Parliament's power to legislate inevitably gives rise to a persisting dilemma: whether human rights can be effectively protected while upholding parliamentary sovereignty? This thesis considers this dilemma and associated issues, and recommends methods by which the *Charter of Human Rights and Responsibilities* can be effectively entrenched.

Law relating to manner and form

In examining the law relating to manner and form requirements, this thesis presents new perspectives concerning the level of majority that may potentially constitute a valid manner and form requirement, and suggests that the validity of a two-thirds majority requirement should not be easily dismissed.

This thesis also addresses the dangers of promiscuous entrenchment and proposes amendments to the *Constitution Act 1975* (Vic) to mandate symmetric entrenchment. Mandating symmetric entrenchment would require Parliament, in enacting the entrenching law, to follow the same requirements it is proposing to introduce.

Entrenchment provisions in the Victorian Constitution

Discussion of the law relating to manner and form is contextualised by examining the entrenchments currently found in the *Constitution Act 1975* (Vic). Doubt is expressed in relation to the effectiveness of entrenchments of laws that do not respect the 'constitution, power or procedure' of Parliament, as these do not fall within the purview of section 6 of the Australia Acts. For these to be valid and binding,

authority outside of section 6 of Australia Acts should be sought, and this thesis contends that it is unlikely to be obtained.

Entrenching the Victorian Charter

The thesis recommends that the Victorian Charter be entrenched, in its entirety, with the use of an absolute majority requirement and an express declaration clause. Furthermore, it recommends that the *Charter of Human Rights and Responsibilities* form a separate part of the *Constitution Act 1975* (Vic). The thesis illustrates that it is possible to effectively entrench the Victorian Charter whilst retaining the key elements of the model, including institutional dialogue, the inability of the Courts to invalidate legislation deemed to be inconsistent with the Charter, and the ability of Parliament to override the operation of the Charter.

Candidate's Statement

I hereby declare that this thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution and affirm that to the best knowledge, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed by: 
Tomasz Roszkowski

Date:

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TR

Chapter 1

Introduction

In 2006 Victoria became the first state in Australia to enact a Bill of Rights, the *Charter of Human Rights and Responsibilities Act 2006*. The Charter was given the same legal status as ordinary legislation. It can be amended or even repealed by future Parliaments. This was done intentionally, for two reasons:¹

- first, to ensure that the Charter is adequately flexible to allow for modifications to adapt to the changing needs of society; and
- secondly, to dispel any fears of conferring too much power on the judiciary, ensuring that the final resolution of contested human rights issues remains with Parliament.

These reasons are legitimate and respond to concerns about the United States model of human rights protection, where decisions on human rights are left ultimately in the hands of the judiciary. These reservations are based on the belief that human rights issues should ultimately be decided by an elected, representative Parliament.²

There are, however, some risks in having human rights embedded in an ordinary Act of Parliament because this makes human rights vulnerable to the whims of everyday politics. Concerned with re-election, the elected arms of government may not adequately protect the rights of unpopular minority groups.³

This thesis suggests improvements to the protection of human rights in Victoria through entrenchment with the use of manner and form

¹ *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (December 2005) at 19-24 ('Human Rights Consultation Committee Report')

² This argument is made by Jeremy Waldron see Waldron J., *Law and Disagreement* (Clarendon Press, Oxford, 1999) ('Law and Disagreement')

³ For a broader discussion on reconciling human rights within a democratic framework see Debeljak J, *Human Rights as Judicial Politics or Parliamentary Judgments*, conference paper ('Judicial Politics or Parliamentary Judgments') available at www.law.monash.edu.au/castancentre/conference2001/papers/debeljak.html

requirements. Manner and form requirements usually demand compliance with special procedures for the effective repeal or amendment of a protected law. Common manner and form requirements include absolute majority, special majority and referendum requirements.

Such procedural restrictions on Parliament's power to legislate inevitably give rise to a persisting dilemma: how can human rights be effectively protected while upholding parliamentary sovereignty? This thesis identifies manner and form requirements that can effectively entrench the *Charter of Human Rights and Responsibilities Act 2006* (Vic), whilst preserving Parliament's power to be the final arbiter on human rights issues.

1.1 Evolution of the doctrine of parliamentary sovereignty

In any society it is important to agree on a system by which disagreements are resolved.⁴ Societies need institutions whose decisions are generally final and conclusive. It would otherwise be impossible to resolve disagreements, and this risks disorder, chaos and confusion.⁵

In medieval England the function of the final arbiter was assumed by the "King in Parliament", the highest court in the land, whose decisions were not subject to appeal to any other institution.⁶ This notion of parliamentary sovereignty has evolved over centuries to become a dominant characteristic of English political institutions and a keystone of English constitutional law.

A widely accepted definition of this doctrine as it evolved in England is Dicey's '*Parliament's right to make or unmake any law whatever*'.

⁴ Goldsworthy J., *The Sovereignty of Parliament: history and philosophy* (Oxford 1999) at 255 ('The Sovereignty of Parliament')

⁵ Ibid at 261

⁶ Dicey A.V., *Introduction to the Study of the Constitution* (MacMillan 1964) at 39-40 and 70

Dicey indicated that no person or body is recognized by the law of England as having a right to override or set aside legislation enacted by Parliament:⁷

The principle then of Parliamentary sovereignty may, looked at from its positive side, be thus described: Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts. The same principle, looked at from its negative side, may be thus stated: There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament.⁸

In other words, no person or body is recognized as having a right to override the legislation of Parliament.⁹ Thus, the doctrine of parliamentary sovereignty in England confers on Parliament an unfettered authority to enact or repeal any law.

There has been considerable debate as to whether Parliament can limit or control the exercise of its own sovereign powers. Two divergent views on the nature of parliamentary sovereignty have emerged: the 'continuing' and the 'self-embracing' view.

According to the 'continuing' view, a sovereign Parliament cannot validly or effectively enact requirements that restrict the supremacy of future Parliaments. If there is a law that prevents Parliament from enacting legislation in its usual manner and form, Parliament can simply ignore it. Paradoxically, however, sovereign legislative power is by its very nature diminished in that Parliaments are prevented

⁷ Ibid at 40

⁸ Ibid

⁹ Ibid

from effectively enacting provisions that limit the legislative powers of future Parliaments.¹⁰

This traditional view of 'continuing' parliamentary sovereignty, which has been widely accepted in the United Kingdom, has recently been challenged by British membership of the European Union and by the devolution of legislative authority to Scotland, Wales and Northern Ireland.¹¹

The other view of parliamentary sovereignty is the 'self-embracing' view. According to this view a sovereign Parliament can impose restrictions on future Parliaments. Parliamentary sovereignty is fully self-embracing when any type of restriction can be imposed on a future Parliament's law making power, whether substantive or procedural. Parliamentary sovereignty can also be partially self-embracing, when only procedural restrictions can be imposed on a future Parliament's law making power.

The view of the nature of parliamentary sovereignty that most clearly reflects constitutional law in the Australian States is the partial form of the 'self-embracing' view, where although Parliament's law making power can not be limited substantively, it can be limited procedurally through manner and form requirements. Parliaments remain sovereign, but their legislative competence is constrained when enacting specific legislation. Parliamentary sovereignty is 'self-embracing', but only procedurally, not substantively. Under no circumstances can Parliament's law making power be abdicated.

The analysis of parliamentary sovereignty and the theories of 'continuing' and 'self embracing' legislative authority are intertwined with the nature of the constitutional frameworks underpinning it. For instance, a Parliament enjoying a continuing law making power has an uncontrolled constitution: a constitution that can be amended or repealed in the same way as any other Act of Parliament. On the

¹⁰ Taylor G., *The Constitution of Victoria* (Federation Press, 2006) at 465 ('The Constitution of Victoria')

¹¹ Chander A., *Sovereignty, Referenda and the Entrenchment of a UK Bill of Rights* (1991) 101 *The Yale Law Journal* 457 at 467

other hand, a Parliament exercising self-embracing law making power has the power to make its constitution controlled, if it is not already controlled. Where the constitution is controlled, courts have the power to invalidate statutes if they are contrary to the constitution.

Some of these ideas were considered in the early 1900s in *McCawley* case, where discussion ensued about the constitutional foundations of an emerging, independent federation of self-governing states. The key question was whether the Queensland Parliament had the fundamental power to alter the Constitution of Queensland by simply legislating inconsistently with it. The Privy Council determined that it did, because for all intents and purposes it was in a position analogous to the Imperial Parliament itself and in the position of a sovereign legislature.¹²

Two constitutional theories dominated the deliberations in *McCawley* case. One side of the debate maintained the principle of the separation of powers, the independence of the judiciary and the status of the Constitution of Queensland as a fundamental, higher law. The other side of the debate was premised on the argument that the law ought to reflect social and economic progress, with the Queensland Parliament as a sovereign legislature affording the means for 'translating the public will into public law'.¹³

In delivering the opinion of the Privy Council, Lord Birkenhead LC explained that the British people had not:¹⁴

... in the framing of Constitutions felt it necessary, or thought it useful, to shackle the complete independence of their successors. They have shrunk from the assumption that a degree of wisdom and foresight has been conceded to their generation which will be, or may be, wanting to their successors, in spite of the fact that those successors will

¹² *McCawley v The King* (1920) 28 CLR 106 at 125-6

¹³ *McCawley v The King* (1918) 26 CLR 9, 44

¹⁴ *McCawley v The King* (1920) 28 CLR 106, 114-5

possess more experience of the circumstances and necessities amid which their lives are lived.

His Lordship concluded that the Queensland Parliament is, and should be, the 'master of its own household'.¹⁵ A commitment to majoritarian legislative supremacy appears to have been a fundamental influence behind this decision. This constitutional question about the nature and location of constituent power should be viewed together with the political question posed at the time of what it means to be a self-governing community. The decision in *McCawley's* case essentially worked through these fundamental politico-constitutional theories.¹⁶ In this context, Lord Birkenhead LC described the concept of 'controlled' and 'uncontrolled' constitutions as follows:¹⁷

It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision. Thus when one of the learned judges in the Court below said that, according to the appellant, the constitution could be ignored as if it were a Dog Act, he was in effect merely expressing his opinion that the constitution was, in fact, controlled. If it were uncontrolled, it would be an elementary commonplace that in the eye of the law the legislative document or documents which defined it occupied precisely the same position as a Dog Act or any other Act, however humble its subject matter.

This illustrates the difference between uncontrolled constitutions that facilitate social and economic reform, directed by a popularly elected legislature, and controlled constitutions through which

¹⁵ *Ibid* at 125

¹⁶ Aroney N., *Politics, Law and the Constitution in McCawley's Case* (2006) 30 Melbourne University Law Review 605 at 650

¹⁷ *McCawley v The King* [1920] A.C. 691 per Lord Birkenhead L.C. at 703

governmental and legislative power is restricted.¹⁸ The decision in *McCawley's* case essentially rested on Dicey's theory of parliamentary sovereignty. It is, however, important to note that the decision expressly recognised the possibility of procedural requirements in stating that a State Parliament is 'master of its own household, except insofar as its powers have in special cases been restricted'.¹⁹ The importance of the decision lies in its determination of the sovereign powers of state legislatures, and the effectiveness of manner and form provisions which restrict those powers.²⁰

The United Kingdom constitution is an unwritten constitution based on customary practice. It is 'uncontrolled' because it is susceptible to amendment by ordinary legislation. Despite this, the United Kingdom Parliament, as an Imperial Parliament, was able to authorise the imposition of procedural restrictions binding colonial legislatures.²¹ This distinction is significant because it means that some of the Privy Council's decisions relating to the actions of colonial legislatures would not apply to the actions of the Westminster Parliament. This gives authority for some colonial legislatures to introduce procedural restrictions, whereas arguably the United Kingdom Parliament would be unable to restrict itself in the same way.²²

1.2 Parliamentary Sovereignty as applied in Australia

The orthodox view of parliamentary sovereignty prevalent in the United Kingdom does not directly translate to the Australian

¹⁸ Aroney N., *Politics, Law and the Constitution in McCawley's Case* (2006) 30 Melbourne University Law Review 605 at 648

¹⁹ *McCawley v The King* (1920) 28 CLR 106 at 125

²⁰ Aroney N., *Politics, Law and the Constitution in McCawley's Case* (2006) 30 Melbourne University Law Review 605 at 655

²¹ Hood, Phillips, *Self-Limitation by the United Kingdom Parliament* (1975) 2 Hastings Constit L.Q. 443 at 455; Wade HWR., *The Basis of Legal Sovereignty* (1955) Cambridge L.J. 172 at 182

²² This distinction derives from the fact that the colonial legislatures were subordinate to the UK Parliament, which was fully sovereign. It was the *Colonial Laws Validity Act 1865* that gave colonial legislatures the power to entrench laws: see discussion in Chapter 2.

legislatures. Unlike the United Kingdom, Australia has a written federal Constitution which limits the legislative powers of all Australian Parliaments.

The Australian Constitution is controlled in that it can not be modified or repealed in the same way that other legislation may be amended or repealed, for instance by subsequent inconsistent legislation.²³ Amendment of the Australian Constitution will only be effective if it is passed by a majority of electors within Australia as well as a majority of electors in a majority of States, in accordance with the process outlined in section 128 of the Commonwealth Constitution.

There are also some constraints imposed on State Parliaments by their own constitutions. Until 2003, like most State constitutions, the Victorian Constitution was largely uncontrolled. Most of the provisions in the Victorian Constitution could have been modified or repealed in the same way as any other Act of Parliament.²⁴ In 2003 the Victorian Parliament introduced specific procedures for amending or repealing certain provisions in the Victorian Constitution. These included an absolute majority requirement, a three-fifth majority requirement and a referendum requirement. If these specific procedural requirements are effective, then the Victorian Constitution in relation to the entrenched provisions is now 'controlled', adopting the self-embracing view of parliamentary sovereignty.²⁵

Despite these significant distinctions in the way that the doctrine of parliamentary sovereignty has been adopted in the UK and in Australian jurisdictions, the traditional view of the doctrine of parliamentary sovereignty continues to exert a significant influence

²³ The Imperial Parliament enacted the Australian Constitution as part of the *Commonwealth of Australia Constitution Act* 1900, which came into force on 1 January 1901.

²⁴ There were absolute majority requirements relating to certain types of laws: see discussion in Chapter 2.

²⁵ Elkind J., *A new look at entrenchment* (1987) 50 *The Modern Law Review* 158 at 170-171

in the Australian legal system. For instance, as part of the Australian inheritance of the Westminster system, State Parliaments were given the same plenary power (within the limits imposed by the constitutional instruments) as that held by the Imperial Parliament.²⁶

The extent of the sovereignty of a State Parliament's power is defined by the authority granted to it in the constitutional instruments that define these powers.²⁷ Courts look to constitutional documents to determine the extent to which a State Parliament's legislative power is sovereign, and also the extent to which it is authorised to make enactments that impose restrictions on future Parliaments and the extent to which State constitutions are 'controlled'. The essentially flexible character of Australian State Constitutions was confirmed by the Privy Council in *McCawley v R*.²⁸ The Privy Council confirmed that Australian State Constitutions were uncontrolled in that:

what was given was completely, and unequivocally, in the belief fully justified by the event, that these young communities would successfully work out their own constitutional salvation.²⁹

Section 2(2) of *Australia Act 1986* (Imp & Cth)³⁰ confirmed the plenary power of the States found in their own constitutions and conferred additional power where it had previously been lacking because of the 'colonial' status of State legislatures. The same

²⁶ Hanks P., *Australian Constitutional Law: Materials and Commentary* (5th Edition, Butterworths 1994) at 125-6. The context for this conclusion includes the decision in *McCawley v The King* (1920) 28 CLR 106 as well as the significance of enacting section 5 of the *Colonial Laws Validity Act 1865* and section 6 of the *Australia Acts 1986*.

²⁷ Goldsworthy, *The Sovereignty of Parliament*, above n 4 at 1

²⁸ *McCawley v R*. [1920] AC 691

²⁹ *Ibid* at 706

³⁰ Section 2(2) of the *Australia Acts 1986* (Imp & Cth) will be abbreviated throughout the thesis to section 2 AA

principle is reflected in section 18(1) of the *Constitution Act 1975* (Vic) which states that:

subject to this section, the Parliament may by any Act repeal alter or vary all or any of the provisions of this Act and substitute others in lieu thereof.

If this was where the law stood, it could be concluded that the Victorian Parliament has no authority to introduce procedural restrictions as these would limit the supremacy of future Parliaments over the law.

There is, however, a provision that provides authority for State Parliaments to introduce procedural restrictions in relation to the enactment of certain laws. Section 6 of the *Australia Act 1986* (Imp & Cth)³¹ provides that

[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.

Most of the entrenchment provisions introduced into the *Constitution Act 1975* (Vic) in 2003 would have to rely on section 6 AA. There are genuine concerns about the validity of some of these entrenchments, as they may fall outside the scope of section 6 AA.

In examining the value of entrenchment, it is important to recognize the dangers of promiscuous entrenchment, particularly if a restrictive procedure for the amendment or repeal of certain laws is itself enacted through a simple majority. This creates a bias in favour of the post entrenchment status quo with respect to a particular subject matter. There is no guarantee that the capacity to entrench, to bind future Parliaments, will be exercised solely in the public interest. In

³¹ The *Australia Acts 1986* (Imp & Cth) will be abbreviated throughout the thesis to AA.

fact, this capacity to entrench may be abused by governments in promoting their factional or political interests. Future Parliaments might be unable to overcome the procedural restriction and the populace might be stuck with unwanted laws of earlier times. A solution to this problem is proposed as part of the discussion on symmetric entrenchment, which recommends that the *Constitution Act 1975* (Vic) be amended to mandate symmetric entrenchment. Mandating symmetric entrenchment would require that in enacting the entrenching law, Parliament follow the same requirements it is purporting to introduce. This thesis identifies the theoretical underpinnings for introducing mandatory symmetric entrenchment without resorting to Commonwealth legislation (such as the *Australia Acts*) and outlines how mandatory symmetric entrenchment could be introduced and applied in Victoria. This is a significant original contribution to the understanding of the law relating to manner and form and potentially of great value to policy makers and law reformers alike.

1.3 Modern interest in protecting human rights

Despite Australia remaining the only English speaking western country that does not have a national Bill of Rights of some sort, there is currently a degree of human rights protection afforded through the Australian Constitution, legislation, the common law and international law. The Australian Constitution protects some human rights, mostly against federal laws,³² and the High Court has found certain rights to be implied by the Australian Constitution.³³ Human rights are also protected through federal legislation³⁴ and the

³² For example, section 116 of the *Commonwealth Constitution* contains the right of freedom from religion.

³³ For example, in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, the High Court recognised freedom to discuss matters relating to the Australian government so that voters can participate effectively in elections.

³⁴ For example *Racial Discrimination Act 1975*; *Sex Discrimination Act 1984*; *Disability Discrimination Act 1992*; *Age Discrimination Act 2004*. Similarly, in addition to the *Charter of Human Rights and Responsibilities*, some Victorian legislation (preceding the Charter) also protects some human rights for example, the *Equal Opportunity Act 1995*, *Racial and Religious Tolerance Act 2001*, *Information Privacy Act 2000*.

common law, including the landmark ruling of *Mabo* where the High Court recognised Aboriginal native title.

Even with the limited application of the doctrine of parliamentary sovereignty in Australia, the courts are legally bound to apply laws that may happen to be in complete disregard of basic human rights, as long as the laws are within the authority conferred by constitutional instruments. With the recent enactment of statutory Bills of rights in the Australian Capital Territory and in Victoria, there is a growing interest in identifying how these rights may be most effectively protected, including consideration of models that do not resort to constitutional entrenchment placing rights beyond the reach of Parliament.

The United States' *Bill of Rights of 1791* is a well known example where human rights are protected as part of a constitutional framework. Under the US human rights protection model the doctrine of parliamentary sovereignty is not paramount and the US judiciary, headed by the Supreme Court, has ultimate authority on questions relating to human rights issues. The considerable power granted to these unelected courts, has the tendency to politicize the judiciary.³⁵

In recent years English-speaking common law jurisdictions have shown a preference for statutory models of human rights protection, including the United Kingdom's *Human Rights Act*, the Australian Capital Territory's *Human Rights Act* and most recently the Victorian *Charter of Human Rights and Responsibilities*. These models aim to preserve parliamentary sovereignty whilst maintaining a role for the judiciary, fostering an interaction between the two, recently described as an institutional dialogue.³⁶

³⁵ Joseph S., Castan M., *Federal Constitutional Law* (Lawbook Co 2001) at 3

³⁶ *Human Rights Consultation Committee Report*, above n 1 at 3; For an in depth discussion on an institutional dialogue see Debeljak J., *Human Rights and Institutional Dialogue: Lessons for Australia from Canada and the United Kingdom* PhD thesis 2005 (available from Monash University Library)

The problem with statutory Bills of rights, given that they can be amended or repealed by Parliament like any other legislation, is that a subsequent Act which is clearly inconsistent with human rights will prevail. In the United Kingdom, subsequent legislation may expressly or impliedly amend the model promulgated through the *Human Rights Act*. The situation could be somewhat different in Australia and in Victoria, as there may be an opportunity to protect the Victorian *Charter of Human Rights and Responsibilities* by introducing specific manner and form requirements for amending or repealing the dialogic model that is being promoted through the Charter. Different options of entrenchment for the *Charter of Human Rights and Responsibilities Act 2006* (Vic) are examined in this thesis.

This thesis recommends that the entire dialogic model of human rights protection embedded in the Victorian Charter be entrenched with a requirement of an absolute majority coupled with an express declaration clause. Furthermore, it is recommended that the *Charter of Human Rights and Responsibilities* form a separate part of the *Constitution Act 1975* (Vic). The thesis concludes that it is possible to effectively protect the Victorian Charter through a form of entrenchment where a self-embracing view of parliamentary sovereignty is preserved, the dialogic model effectively promoted and human rights elevated to a prominent place in the Victorian jurisdiction.

1.4 Outline of the thesis

- **Chapter 1** forms the introduction to the thesis, outlining different views on the nature of parliamentary sovereignty and examining the interface between human rights protection and parliamentary sovereignty.
- **Chapter 2** examines the legal grounds upon which 'manner and form' provisions are binding on State Parliaments and illustrates how symmetric entrenchment can be mandated in Victoria.
- **Chapter 3** outlines the entrenchment provisions introduced to the *Constitution Act 1975* (Vic) in 2003 and examines their validity, expressing concerns regarding the legal validity of some of these entrenchments.
- **Chapter 4** examines and compares the attributes of different human rights models, with a particular focus on the *Charter of*

Human Rights and Responsibilities Act 2006 (Vic). Options for entrenching the Victorian *Charter of Human Rights and Responsibilities* are discussed and recommendations for effective entrenchment of the Charter are made.

- **Chapter 5** contextualises the questions posed throughout the thesis, consolidates the conclusions formulated in previous chapters and provides specific recommendations for reform of the law relating to manner and form and the entrenchment of the model encapsulated in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Chapter 2

Legal Grounds upon which manner and form provisions are binding on State Parliaments

The entrenchment procedure is a two-edged sword. The beauty of the entrenchment procedure is the loud warning bell which echoes throughout the Parliament when a piece of legislation embarks on its passage through the Houses. There is much merit in a procedure which informs the Parliament of the seriousness of the task with which it is confronted. Conversely, its pitfall is that it may be used inappropriately on particular occasions and remove from the Supreme Court its ability to give citizens care, protection and justice, the very purpose for which it was established; its *raison d'être*.³⁷

A key function of Parliaments is enacting legislation. The usual law making procedure involves obtaining a simple majority in both houses of Parliament where one more than half the members that attend and vote must agree on the Bill for it to become law. In some cases, Parliaments wish to protect specific laws by making them more difficult to repeal or amend than ordinary legislation; they wish to entrench laws deemed of significant importance. Parliaments do so by making these laws subject to manner and form provisions which require special procedures to be followed for their repeal or amendment.³⁸ Some common manner and form requirements include:

- a requirement of an absolute majority where one more than half of the total number of members, no matter how many members attend and vote, need to pass a Bill through one or both houses of Parliament;³⁹

³⁷ *Discussion Paper No1 on the Operation of Section 85 of the Constitution Act 1975* Scrutiny of Acts and Regulations Committee Chapter 8 available at <http://www.parliament.vic.gov.au/SARC/Section85/> ('Operation of Section 85')

³⁸ The term 'manner and form' is defined broadly at this stage, referring to all special requirements for the amendment or repeal of laws. A more technical meaning of the term, relating more closely to the intended meaning in section 6 AA, will be clarified in later parts of the thesis, and distinguished from other requirements (i.e. pure procedures).

³⁹ E.g. section 18(2AA) of the *Constitution Act 1975* (Vic)

- a super majority requirement, where a specific proportion (ie 60%, 66% etc) of votes is needed to pass a Bill through one or both houses of Parliament;⁴⁰
- an express declaration clause, a requirement to expressly indicate an intention to amend or repeal, or to prevent an implied repeal;⁴¹ and
- a requirement for a referendum, where a Bill is required to be approved by the electors in a referendum before being submitted for Royal Assent.⁴²

Manner and form requirements can play a crucial role in protecting specific laws from amendment or repeal in state constitutional systems. Discussion of issues relating to the law of manner and form in this chapter is structured as follows:

- the chapter begins by examining what constitutes a genuine manner and form provision. This will identify some of the more widely used provisions and analyse whether or not they diminish or abdicate Parliament's law making power;
- this is followed by a discussion of the history and scope of the relevant provisions that provide the authority for enacting manner and form requirements, including sections 2 AA and 6 AA;
- other possible sources that may provide authority for the enactment of manner and form requirements are also examined, including the 'pure procedures' theory, the *Ranasinghe* principle and the concept of reconstitution; and
- the last section of the Chapter analyses the risks associated with the power to entrench, and examines how these risks may be mitigated. This thesis suggests mandatory symmetric entrenchment, where the legislature is required to follow the same conditions of law making it is introducing.

⁴⁰ E.g. section 18(1A) of the *Constitution Act 1975* (Vic)

⁴¹ E.g. section 85(5) of the *Constitution Act 1975* (Vic)

⁴² A widely known example of a referendum requirement is section 128 of the Commonwealth Constitution.

This chapter concludes that to be valid, manner and form provisions can not abdicate Parliament's law making powers. Purely procedural provisions need to find their authority in section 2 of the Australia Acts, in line with the 'pure procedures' theory.⁴³ Provisions that diminish Parliament's legislative power (albeit not substantively) need to find their authority in section 6 of the Australia Acts, particularly because the application of the *Ranasinghe* principle in Australia is doubtful and there is no other clear authority available to justify such manner and form requirements. This chapter also outlines a legally sound method by which symmetric entrenchment can be mandated in Victoria, minimising the potential for abuse of Parliament's power to entrench. Exploring how such a symmetric entrenchment provision might work makes an important contribution to the knowledge of the law relating to manner and form and may potentially be of use to policy makers and law reformers.

2.1 Genuine manner and form can not abdicate Parliament's power to make law

State Parliaments are given full power to make laws for the peace, order and good government of their State.⁴⁴ State Parliaments' wide legislative powers are confirmed by their respective Constitution Acts. The Victorian Parliament has the power to make laws in and for Victoria in all cases whatsoever.⁴⁵ This reflects the basic notion of the doctrine of parliamentary sovereignty and gives expression to the democratic principle that the people of one time are to be as free in their Parliament as the people of another time. As such, people in each State, acting through their Parliament, must possess the plenary legislative power as fully and freely as their predecessors.⁴⁶

⁴³ The 'pure procedures' theory was initially outlined in Goldsworthy J., *Manner and Form in the Australian States* (1987) 16 Melbourne University Law Review 403 ('Manner and Form')

⁴⁴ Section 2 of the *Australia Acts 1986* (Imp & Cth)

⁴⁵ Section 16 of the *Constitution Act 1975* (Vic)

⁴⁶ Goldsworthy, *Manner and Form*, above n 43 at 421

The term 'manner and form' refers to essentially procedural requirements which guide the future amendment or repeal of the protected law.⁴⁷ Manner and form requirements have for a long time been prescribed in Australian constitutional instruments.⁴⁸ As early as the 1920s, *McCawley v R*⁴⁹ suggested that manner and form provisions could be effective by stating that a State legislature can be viewed as:

... master of its own household, except in so far as its powers have in special cases been restricted.⁵⁰

Over the years, courts have attempted to define what may constitute a genuine manner and form requirement. It is a fundamental principle, established in many cases, that genuine manner and form requirements can not abdicate Parliament's power to legislate.⁵¹ This, however, does not necessarily mean that 'manner and form' refers to all requirements that do not abdicate Parliament's law making power.⁵²

Case law suggests that in addition to purely procedural provisions that have no impact on Parliament's law making power, there are also valid manner and form requirements that diminish Parliament's law making power. Case law, however, does not provide an exhaustive indication of what constitutes genuine manner and form requirements, and provides a limited (albeit useful) degree of insight into the way today's courts might decide questions on manner and form.

⁴⁷ Taylor, *The Constitution of Victoria*, above n 10 at 486

⁴⁸ For example two-thirds majority requirements in section XV of the Constitution of New South Wales 1855, 18 & 19 Vic. C.54; an absolute majority requirement in section LX of the *Victorian Constitution Act of 1855*

⁴⁹ *McCawley v R* [1920] AC 691

⁵⁰ *Ibid* at 714

⁵¹ *Reg v Burah* (1878) 3 App Cas 889, *Hodge v The Queen* (1883) 9 App Cas 117; and *Powell v Apollo Candle Co Ltd* (1885) 10 App Cas 282

⁵² Taylor, *The Constitution of Victoria*, above n 10 at 486-7

In *Attorney-General (NSW) v Trethowan*⁵³ Dixon J adopted a wide interpretation of the scope of manner and form requirements, including provisions that allow Parliaments to prescribe rules which have the force of law for their own conduct:⁵⁴

The more natural, the wider and the more generally accepted meaning includes within the proviso all the conditions which the Imperial Parliament or that of the self-governing State or Colony may see fit to prescribe as essential to the enactment of a valid law.⁵⁵

This wide interpretation of what may constitute a manner and form requirement as adopted by the majority in the *Trethowan* case is problematic because it includes provisions that may actually abdicate the legislature's constituent power, rather than simply regulate the legislature's exercise of that power.⁵⁶

In *re The Initiative and Referendum Act*,⁵⁷ the Privy Council held invalid *The Initiative and Referendum Act (Manitoba)* which established a new process of law-making outside of Parliament. Laws within this new process could be initiated by a percentage of electors and enacted into law by obtaining majority approval at a referendum. The process was held to deprive Parliament of its law making power by shifting it from Parliament directly into the hands of the electors.⁵⁸ However, in a more recent case, *Capital Duplicators Pty Ltd v*

⁵³ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394

⁵⁴ *Ibid* at 429-30

⁵⁵ *Ibid* at 432-33

⁵⁶ Goldsworthy J., *Trethowan's Case* in Winterton G., *State Constitutional Landmarks* (The Federation Press 2006) at 118-9 ('Trethowan's Case')

⁵⁷ [1919] AC 935

⁵⁸ See Carney G., *An Overview of Manner and Form in Australia* (1989) 5 Qld University of Technology Law Journal 69 at 83-4 ('Overview of Manner and Form in Australia')

Australian Capital Territory,⁵⁹ Mason CJ, Dawson and McHugh JJ in a joint judgment held that:

so long as Parliament retains the power to repeal or amend the authority which it confers upon another body to make laws ... it is not easy to see how the conferral of that authority amounts to an abdication of power.⁶⁰

In *Marquet*, Kirby J expressed a preference for a narrow interpretation of 'manner and form', highlighting the dangers of excessively onerous requirements. Kirby J dismissed the manner and form provision in question, section 13 of the *Electoral Distribution Act 1947* (WA), on the basis that it was a 'restriction on the law-making powers of later Parliaments'.⁶¹

What follows is a list of some procedural requirements used in Australian State jurisdictions, and an examination of whether they constitute genuine manner and form requirements.

2.1.1 Express declaration clause

An express declaration clause protects laws by requiring that the legislature expressly, and not merely by implication, state its intention to repeal or amend the protected law. Legislation to which this requirement applies can not be amended or repealed impliedly. The provision may require a specific formulation of the statement and may stipulate specific times when it is to be made (this, however, usually occurs at the time of the second reading). A deliberate and explicit amendment or repeal brings protected issues to the forefront of public and parliamentary debate.

One example of an express declaration clause is found in section 85 of the *Constitution Act 1975* (Vic). It provides that an Act of

⁵⁹ (1992) 177 CLR 248

⁶⁰ (1992) 177 CLR 248 at 265

⁶¹ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 197 also see Carney G., *The Constitutional System of the Australian States and Territories* (Cambridge University Press 2006) at 170

Parliament can not repeal, alter or vary the section dealing with the jurisdiction of the Supreme Court of Victoria unless it 'expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section'. The provision also indicates that an express declaration be made to the Council or Assembly during the second reading speech or at any time before the third reading.⁶²

In *South-Eastern Drainage Board v Savings Bank of South Australia*⁶³ the High Court had to consider section 6 of the *Real Property Act 1886* (SA), which required any law amending or repealing the Act to do so expressly, reciting 'notwithstanding the provision of the *Real Property Act 1886*'. It was argued that the formula of words stipulated had to be complied with for the amending law to be valid. The majority of the High Court dismissed the argument and held that the provision did not amount to a genuine manner and form requirement.⁶⁴ Evatt J, on the other hand, indicated that it did purport to lay down a rigid rule binding upon all future Parliaments, declaring that, however clearly the intention of such Parliaments may be expressed, that intention should not be effective unless it contains the required terminology. His Honour held such a command to be ineffective and inoperative. He held that the State legislature has 'plenary power to couch its enactment in such literary form as it may choose'. His Honour indicated that State Parliaments cannot be 'effectively commanded by a prior legislature to express [their] intention in a particular way'.⁶⁵

Evatt J's comments are surprising and unsatisfactory. The express declaration requirement in question did not appear to restrict in any substantive way, or to abdicate, Parliament's power to legislate.

⁶² Section 85(5) of the *Constitution Act 1975* (Vic)

⁶³ (1939) 62 CLR 603

⁶⁴ (1939) 62 CLR 603 per Latham at 618, Starke J at 623, Dixon J at 625 and McTiernan J at 636 Please note that the characterisation test whether the law is respecting the 'constitution, power or procedure' of the legislature was applied to the wrong act, the significance of this is discussed in other parts of this chapter.

⁶⁵ (1939) 62 CLR 603 at 633-4

Parliament was required simply to give clear expression of its intention to amend the *Real Property Act 1886* (SA). It would not have been inconsistent with the doctrine of parliamentary sovereignty for the legislature to incorporate the required phrase in enacting the *South-Eastern Drainage Amendment Act 1900* (SA). The requirement was not intended to restrict future Parliaments from amending or repealing the *Real Property Act 1886* (SA), but rather to ensure that Parliament give a clear indication that it intended to do so. The only power denied to Parliament was the power to repeal or amend by implication. This does not constitute a denial of Parliament's substantive law making power.

A growing number of academic opinions indicate support for the view that an express declaration clause constitutes a genuine manner and form requirement. There does not appear to be a valid rationale for holding that such a requirement can not bind. On the contrary, there are good reasons why Parliaments should expressly indicate their intention to alter or repeal laws deemed of significant importance.⁶⁶ There does not appear to be any legal justification for express declaration clauses not being legally valid. Justice Evatt's concerns expressed in *South-Eastern Drainage Board v Savings Bank of South Australia*⁶⁷ about the notions of parliamentary sovereignty appear to have little substance.

In a report released in 1990, the Victorian Legal and Constitutional Committee recommended that an express declaration clause be used to protect the jurisdiction of the Supreme Court of Victoria, as outlined in section 85 of the *Constitution Act 1975* (Vic). The aim of this requirement is to prevent legislation from impliedly conferring exclusive jurisdiction upon bodies other than the Supreme Court.⁶⁸ The recommendation was accepted by the Victorian Parliament and enacted in the *Constitution (Jurisdiction of Supreme Court) Act 1991* (Vic). The use of the express declaration clause continues to provide a

⁶⁶ Goldsworthy, *Manner and Form*, above n 43 at 419

⁶⁷ (1939) 62 CLR 603

⁶⁸ *Operation of Section 85*, above n 37, Chapter 6 at section 1

legally effective technique in protecting the jurisdiction of the Supreme Court from implied amendment or repeal.⁶⁹

2.1.2 Absolute Majority

An absolute majority requirement prescribes that one more than half the total number of members is required to pass a Bill. In practice this often means that all, or a large number of members of Parliament, are required to attend and vote to ensure that the Bill is validly enacted.

Section LX of the *Victorian Constitution Act of 1855* included an absolute majority requirement in relation to a provision governing the power to repeal and alter provisions of the *Victorian Constitution Act*. It read as follows:

LX. The Legislature of Victoria, as constituted by this Act, shall have full Power and Authority from Time to Time, by any Act or Acts, to repeal, alter, or vary all or any of the Provisions of this Act, and to substitute others in lieu thereof: Provided, that it shall not be lawful to present to the Governor of said Colony for Her Majesty's Assent any Bill by which an Alteration in the Constitution of the said Legislative Council, or Legislative Assembly [...] may be made, unless the Second and Third Readings of such Bill *shall have been passed with the Concurrence of an absolute Majority of the whole Number of the Members of the Legislative Council and of the Legislative Assembly respectively*: Provided also, that every Bill which shall be so passed shall be reserved for the Signification of Her Majesty's Pleasure thereon.⁷⁰ [emphasis added]

A Law Officer's opinion, preceding the enactment of section 5 of the *Colonial Laws Validity Act 1865*⁷¹ (the provision is discussed in greater

⁶⁹ Its initial use, however, was much more widespread than envisaged by the Committee. For more information on the operation of section 85 of the Victorian Constitution see Foley C., *Section 85 Victorian Constitution Act 1975: Constitutionally Entrenched Right ... or Wrong?* (1994) 20 Monash University Law Review 110

⁷⁰ Section LX of the *Victorian Constitution Act of 1855* (Imp)

⁷¹ Section 5 of the *Colonial Laws Validity Act 1865* (Imp) will be abbreviated throughout this thesis to section 5 CLVA

detail below) suggests that non compliance with a specified majority requirement would render the law invalid. The opinion stated that:

When the power of legislation, with regard to a particular subject, is given, not to a simple majority, but to certain specified majorities in one or both branches of the Legislature, it is evident that such majorities are a *conditio sine qua non* to its exercise, and consequently that the judges are not at liberty to treat any law on that subject as valid, if it appears, either on the face of the law itself, or by other proper evidence that it was not, in fact, passed by the required majorities.⁷²

It is therefore likely that through the enactment of section 5 of the *Colonial Laws Validity Act 1865* the Imperial Parliament intended special majorities that were already in colonial constitutions at the time to be valid. This would include the absolute majority requirement found in the *Victorian Constitution Act of 1855* and possibly some other special majority requirements that were employed at the time (i.e. the two-thirds majority requirement found in the Queensland Constitution, discussed below). The validity of absolute majority requirements has been confirmed by the enactment of section 6 AA as well as a number of judicial determinations.

The *Marquet* case concerned an absolute majority requirement found in section 13 of the *Electoral Distribution Act 1947* which aimed to protect legislation governing the State electoral system. The Western Australian Supreme Court and the High Court of Australia held that an absolute majority requirement is a valid manner and form requirement, and therefore the WA government's electoral reform Bills of 2001 were invalid because they were not passed in

⁷² Reproduced in O'Connell D.P., and Riordan A., *Opinions on Imperial Constitutional Law* Melbourne: Law Book Company 197,1 Opinion No 275 of 28 September 1864, 671 paragraph 4

accordance with the absolute majority required under section 13 of the *Electoral Distribution Act 1947* (WA).⁷³

The Victorian Parliament's Legal and Constitutional Committee found that an absolute majority does not substantively diminish Parliament's legislative power stating that 'it is difficult to envisage a less onerous degree of entrenchment than that comprised in an absolute majority requirement'. The Committee was of the opinion that an absolute majority requirement performs a 'comparatively humble cautionary task' and that it provides an effective warning light to the legislature saying 'Stop! Think before you proceed'.⁷⁴

Requirements of an absolute majority do not appear to substantively diminish or impose too strenuous demands on Parliament's law making power. An absolute majority requirement appears to constitute a purely procedural requirement, protecting and fostering democracy by ensuring that a large number of members of Parliament attend and vote on legislative proposals deemed of significant importance. There is little doubt, if any, that an absolute majority requirement constitutes a genuine manner and form provision. There are a number of provisions in the *Victorian Constitution Act 1975* (Vic) which are currently protected with an absolute majority requirement.⁷⁵

⁷³ Gardner A., *Musing on Marquet* (The Samuel Griffith Society: Volume 16: Chapter Nine) at 4 and 6 of 13 available at <http://www.samuelgriffith.org.au/papers/html/volume16/v16chap9.html> ('Musing on Marquet')

⁷⁴ Victorian Parliamentary Papers (1988-91 vol XXI, pl 5 at 11) reprinted in Taylor, *The Constitution of Victoria*, above n 10 at 484

⁷⁵ For example see Section 18 (2AA) and (2A) of the *Constitution Act 1975* (Vic)

2.1.3 Other special majorities⁷⁶

Majority requirements other than absolute majorities have also been, and still are, used by Parliaments to entrench specific provisions. These usually prescribe a particular proportion of votes that is required to pass a Bill amending or repealing a protected provision.

There was interest in special majorities as early as the 1850s. Initial drafts of the constitution of the New South Wales colony contained a provision allowing the legislature of New South Wales to alter the electoral divisions and the apportionment of representatives, with the concurrence of a majority of the members for the time being of the Legislative Council and two-thirds of the members for the time being of the Legislative Assembly.⁷⁷

This provision, from a political perspective, was quite controversial at the time. It was included out of fear inspired in the property owning Legislative Council by the increasingly growing and influential immigrant population. The two-thirds majority requirement was aimed at protecting the allocation of representation in the Legislative Assembly and the form of the Legislative Council. By doing this it tried to preserve the assumption of political power by privilege and

⁷⁶ Special majority requirements are often referred to as super majority requirements. To ensure consistency with the terminology used in the *Constitution Act 1975* (Vic) I will use the term 'special majority' throughout this thesis to refer to majority requirements other than simple or absolute majority requirements.

⁷⁷ ACV Melbourne, *Early Constitutional Development in Australia* (UQP, Brisbane, 1963) at 402. The New South Wales Constitution Act of 1855 was given assent by Queen Victoria after the Constitution Statute 1855 came into force. The provision with the two-thirds majority requirement (section XV, 18 & 19 Vic. C.54, New South Wales Government, 16 July 1855) appeared in the Act as follows:

[...] Provided always, that it shall not be lawful to present to the Governor of the Colony, for Her Majesty's Assent, any Bill by which the Number or Appointment of Representatives in the Legislative Assembly may be altered, unless the Second and Third Readings of such Bill in the Legislative Council and the Legislative Assembly respectively shall have been passed with the Concurrence of a Majority of the Members for the Time being of the said Legislative Council and of Two Thirds of the Members for the Time being of the said Legislative Assembly and the Assent of Her Majesty shall not be given to any such Bill unless an Address shall have been presented by the Legislative Assembly to the Governor stating that such Bill has been so passed.

class.⁷⁸ Some members of the Legislative Council were very critical of this entrenchment, rightly arguing that it was designed by and for the colonial land holders to maintain a monopoly of legislative and executive influence.⁷⁹ These criticisms, however, appear to have been politically motivated, focusing on the subject matter being entrenched rather than the legality of the entrenchment itself.

In relation to this two-thirds majority entrenchment, the Crown Law Officers observed that in certain cases, two-thirds majorities were required, but there was nothing preventing the repeal of these requirements by simple majorities.⁸⁰ The two-thirds majority requirement itself was not safeguarded (it was not doubly entrenched) and therefore could be repealed with the use of a simple majority. This is consistent with the general provision for the amendment of the New South Wales Constitution's terms, as outlined in section 4 of the *Constitution Statute* of 1855:

4. Power to repeal and alter the provisions of the reserved Bill.

It shall be lawful for the Legislature of New South Wales to make laws altering and repealing all or any of the provisions of the said reserved Bill, in the same manner as any other laws for the good government of the said colony, *subject, however, to the conditions imposed by the said reserved Bill on the alteration of the provisions thereof in certain particulars, until and unless the said conditions shall be repealed or altered by the authority of the said Legislature* [emphasis added].⁸¹

Section 4 made it lawful for the New South Wales legislature to alter or repeal all or any of the provisions of the reserved Bill by a simple majority, in the same manner as any other laws for the good government of the said Colony. The second part of section 4, however, seems to hint that there may be conditions imposed on the alteration of the provisions in certain instances. It appears that

⁷⁸ Ibid at 414-6

⁷⁹ Ibid at 420-1 (objections by Robert Lowe)

⁸⁰ Ibid at 420; also see discussion in Twomey A., *The Constitution of New South Wales* (The Federation Press 2004) at 269-70

⁸¹ Section 4, *Constitution Statute 1855* (Imp) 18 & 19 Vic, c54 (1855) (Imp)

section 4 confirms the validity of the two-third majorities that were in force at the time by specifically referring to the possibility of specific conditions being imposed for altering provisions, and furthermore provides that these conditions apply unless and until they themselves are repealed or altered by the legislature. This is consistent with the way the law stands on the matter today; unless the entrenchment is itself protected, there is nothing preventing the legislature from repealing it with the use of a simple majority.⁸²

The two-third majority requirements proposed in the drafts of the Constitution remained in sections 15 and 36 of the *Constitution Act 1855*. The validity of these two-thirds majority requirements was recognised by Keith, who observed that

New South Wales demanded two-thirds majorities on second and third readings for alterations in the constitution of the Upper House, and a two-thirds majority in the Assembly for change in it, but having omitted to safeguard the clauses enacting the rules, they were repealed without the majorities in 1857.⁸³

The two-thirds majority requirements in the New South Wales Constitution were repealed with the use of a simple majority in 1857.⁸⁴ McTiernan J in the *Trethowan* case recognised that the two-thirds majority requirement found in the New South Wales Constitution was validly repealed with the use of a simple majority because:

⁸² A current example of a two-thirds majority requirement not being doubly entrenched, and therefore able to be repealed by a Bill passed by an ordinary majority, is section 41A of the *Constitution Act 1934* (Tas).

⁸³ A.B. Keith, *Responsible Government in the Dominions* (Clarendon Press, Oxford 1928) at 353

⁸⁴ 20 Vic No 10, Reserved Bill, Jan, 20 1857. Furthermore, Twomey appears to recognize the validity of this requirement for special two-thirds majorities by recognising that they were validly repealed by ordinary majorities because they were not doubly entrenched; see Twomey A., *Implied limitations on legislative power in the United Kingdom*, Legal Studies Research Paper No 07/59, The University of Sydney August 2007 at 6 fn 26. Paper can be downloaded from <http://ssrn.com/abstract=1007343>

There was no provision in the reserved Bill that it should not be lawful to present to the Governor for the royal assent a Bill to repeal the proviso in sec. 36 relating to special majorities unless the Bill had obtained the majorities therein mentioned.⁸⁵

On 6 June 1859 Letters Patent were issued establishing Queensland as a separate colony and an Imperial Order-in-Council was made, affording Queensland with a constitution based on the original New South Wales Constitution. A two-thirds majority clause, the same as appeared in the original New South Wales Constitution, was replicated in the Order-in-Council of 6 June 1859 and incorporated in the new Constitution of Queensland. At the time, the two-third majority clauses in the Constitution of New South Wales had been removed, having been repealed in 1857. The constitution which was given to Queensland in 1859 was based on the original Constitution of New South Wales that received the royal assent in 1855 and therefore included the two-third majority clauses. This was confirmed in 1862 by the Crown Law Officers, who made it clear that:

... the 8th section of the Order-in-Council of the 6 June 1859 incorporated by reference into the Constitution of the Legislative Council and Legislative Assembly of Queensland all of the provisions of the New South Wales Constitution Act 17th Vic. No 41 and not the New South Wales Act, 20th Victoria No. 10.⁸⁶

Subsequently, therefore, the two-thirds majority requirements found their way into the Constitution of Queensland of 1867.

In 1871, with the use of a simple majority in both houses, the Queensland legislature expressly repealed the two-thirds majority clause relating to the Legislative Assembly. Until that time, the two-thirds majority requirement operated on a number of occasions to

⁸⁵ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per McTiernan J at 435-6

⁸⁶ *Early Constitutional Development in Australia* above n 77 at 457-8

prevent many measures of reform. By 1908, the two-thirds provision relating to the Legislative Council was also repealed, also with the use of a simple majority in both houses.⁸⁷ This ended a comparatively long survival of the two-thirds majority clause in Queensland.

The significance of Palmer and Collier's report

The Crown Law Officers' opinion by Palmer and Collier was instigated by a number of issues that came to a head in South Australia when Boothby J of the Supreme Court of Australia held a number of laws invalid for reasons of repugnancy with both British statutes and the common law.⁸⁸ These issues were referred to Sir Roundell Palmer and Sir RP Collier, for advice. The resulting advice was presented in a report issued on 28 September 1864 which recommended the enactment of Imperial legislation to the effect that no colonial law shall be deemed invalid unless it is repugnant to an Imperial Act which extends to the colony. That report specifically indicated that when the power of legislation is given to certain specified majorities for legislation to be valid it needs to be passed by the required majorities. The report also recommended the passage of an Imperial Act for the purpose of empowering the Legislature of that colony to alter its own Constitution'.⁸⁹ Sections of the report that specifically relate to certain specified majorities are reproduced below:

If an Act which, under some Act of Parliament or local statute, ought to have been reserved for the signification of Her Majesty's pleasure, has not been reserved, or if an Act, containing provisions which could only be passed by certain majorities, has not been passed by such majorities, we think it is void *in toto*, and not merely as to those particular

⁸⁷ *Early Constitutional Development in Australia* above n 77 at 459-60; also see A.B. Keith, *Responsible Government in the Dominions* (Clarendon Press, Oxford 1928) at 353 where Keith recognizes the validity of the two-thirds majority requirements in question and observes that because these provisions have not been safeguarded (i.e. doubly entrenched) they could be repealed with the use of a simple majority.

⁸⁸ This historical context is provided in part 2.3.1 of this thesis.

⁸⁹ R., Palmer, R.P. Collier, Opinion No 275 of 28 September 1864

provisions which may have rendered its reservation or its passage by certain majorities necessary. [...] In the cases now under consideration the matter is wholly *intra vires*; but it is subject, as to certain parts of one Legislative Act, to special conditions, without the observance of which the legislative power will not have been duly exercised; and we think that an Act which might have been wholly valid if the proper forms had been observed cannot be bad in part for the non observance of those forms, and at the same time good as to other provisions, as to which (if they had stood alone) legislation, with different forms, might have been competent.

When the power of legislation with regard to a particular subject is given, not to a simple majority, but to certain specified majorities in one or both branches of the Legislature, it is evident that such majorities are a *conditio sine qua non* to its exercise; and, consequently, that the Judges are not at liberty to treat any law on that subject as valid if it appears, either on the face of the law itself or by other proper evidence, that it was not, in fact, passed by the required majorities. We do not, however, think that it is absolutely necessary that it should appear on the face of the law itself that it was passed by the requisite majorities (if that fact can be otherwise proved) in order to authorise the Judges to act upon such legislation as valid and effectual, and we incline to think (although this point may perhaps admit of some doubt) that the Judges ought to presume, until the contrary is proved, that every Act which has passed the Legislature, and which is authenticated as an Act of the Legislature in the ordinary way, was passed by such a majority as would be necessary, according to law, to give it effect.⁹⁰

This opinion directly influenced the enactment of the *Colonial Laws Validity Act 1864* (Imp), including section 5, which provided that every representative legislature had full power to make laws respecting the constitution, powers, and procedure of the legislature,

⁹⁰ R. Palmer, R.P. Collier, Opinion No 275 of 28 September 1864, paragraphs 3 and 4

provided that such laws were passed in such manner and form as were from time to time required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the Colony.⁹¹ The interpretation of the *Colonial Laws Validity Act* in the second half of the 19th century relied heavily on Palmer and Collier's report. In reviewing the Act, Blackmore stated that 'their report deals with the most important points of the Constitutional law of the colonies, and is the foundation upon which the Act under review was based'.⁹² Citing Blackmore, counsel in argument in the *Trethowan's* case referred to the Palmer and Collier report, pointing out that 'this letter treats the two things, majorities and non-reservation, in the same category as forms necessary in the making of the law'.⁹³ McTiernan J recognised that the report formed the basis of the *Colonial Laws Validity Act*:

The basis of the Colonial Laws Validity Act is the report of the Imperial law officers, which was made in 1864. The report referred (inter alia) to the doubts and difficulties that had arisen because Bills had been assented to by Governors, which under the provisions of an Act should have been reserved for the royal assent, and Bills which should have obtained special majorities had found their way to the Statute Book, though such majorities had not been obtained. The law officers reported, that, in their opinion, failure to observe such requirements was fatal.⁹⁴

Section 5 of the *Colonial Laws Validity Act 1864* (Imp), in effect, created a distinction between the Imperial Parliament and a Dominion Parliament regarding its constituent powers. An Imperial Act could make any change to the constitution, but Parliament could

⁹¹ 28 & 29 Vic, c 63

⁹² E., Blackmore, *The Law of the Constitution of South Australia* (Government printer, Adelaide, 1894) at 64, 67-8

⁹³ (1931) 44 CLR 394 at 409; another reference to the 'letter of the law officers to the Secretary of State to the Colonies [that] describes the matters that gave rise to the *Colonial Laws Validity Act*' is at 407

⁹⁴ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per McTiernan J at 444

undo it through a simple procedure because an Imperial Parliament can not curb its own sovereignty. With the enactment of the *Colonial Laws Validity Act*, a colonial legislature could successfully fetter its successor, by laying down manner and form requirements to be followed in law making. This interpretation of section 5 CLVA, and the opinion that it encompassed two-thirds majority requirements, was well summarised by Keith:

The fundamental difference between an Imperial Act altering the Imperial constitution and a Dominion Act is shown in the proviso; an Imperial Act cannot bind any succeeding Parliament; an enactment that a two-thirds majority would be necessary for the repeal of, say, a housing Act would be valueless; any subsequent Act passed without a majority of the kind would bind the Courts, and the earlier Act would be extinguished by reason of its divergence from the later and more authentic Act. It is not so with the Dominions; any rule laid down by any of the means specified is binding, and any Act passed without due regard to the conditions specified is *ultra vires*.⁹⁵

It follows that at the time when the Crown Law Officers, Palmer and Collier, formulated their opinion preceding the enactment of section 5 of the *Colonial Laws Validity Act* 1865,⁹⁶ there was a valid two-thirds majority clause operating in the Queensland Constitution. This two-thirds majority requirement appears to have been relatively effective given that it remained part of the Queensland Constitution for almost fifty years, even though it could have been repealed with the use of a simple majority as it was not doubly entrenched.

This thesis suggests that by enacting section 5 of the *Colonial Laws Validity Act* 1865 (Imp), the Imperial Parliament intended special majorities that were already in colonial constitutions at the time,

⁹⁵ A.B. Keith, *Responsible Government in the Dominions* (Clarendon Press, Oxford 1928) at 350-1

⁹⁶ Reproduced in O'Connell D.P., and Riordan A., *Opinions on Imperial Constitutional Law* Melbourne: Law Book Company 1971 Opinion No 275 of 28 September 1864, 671 paragraph 4

including the two-thirds majority requirement found in Queensland, to be valid. This finding opens up new perspectives in assessing the level of majority that may potentially constitute a valid manner and form requirement. This consideration has not been taken into account in any of the publications discussing special majority requirements that I have come across. It provides a significant new insight into the question of the degree of special majority that constitutes a valid manner and form provision, and may open up new opportunities to entrench with the use of special majority requirements.⁹⁷

Historically it was a common practice for Dominion parliaments to seek advice from the Crown Law Officers in relation to questions of law or legislative proposals. For example, in 1862 an opinion of the Crown Law Officers was sought as to which version of the New South Wales Act was in force in the colony of Queensland, and the Queensland Parliament accepted the Crown Law Officers' advice that it was the original constitution of New South Wales, and not one with subsequent amendments.⁹⁸ Even well after the enactment of the CLVA, colonial governments sought Crown Law Officers' advice regarding CLVA's application. For example, in 1933 advice was sought from the Crown Law Officers regarding the manner and form provision found in instruments other than colonial statutes, and once again the advice received was accepted and adopted by the Colonial Government.⁹⁹

It is safe to conclude that the advice produced by the Crown Law Officers was relatively influential, generally accepted and adopted by Governments, making a significant contribution in resolving questions of law, shaping new legislative proposals or clarifying the operation of existing legislative provisions.

⁹⁷ I am grateful to Prof Goldsworthy who, in light of the Law Officer's opinion, suggested that I research any special majority requirements that were found in Imperial legislation enacted before section 5 of the *Colonial Laws Validity Act* 1865.

⁹⁸ *Early Constitutional Development in Australia* above n 77 at 457-8

⁹⁹ Memorandum from Sir E Harding to the Crown Law Officers, 16 June 1933: PRO: DO 11156/100; and the subsequent Legal Advice by TWH Inskip and FB Merriman, 17 June 1933: PRO: DO 11156/103

Was the advice referring only to absolute majorities, or also other special majorities?

The key question regarding the Crown Law Officers' advice issued on 28 September 1864 is whether it was referring to special majorities or whether it was exclusively referring to absolute majorities. If the advice was referring to special majorities, the subsequent question is whether it was referring to two-thirds majorities or to any other degree of special majorities.

In 1855, when the two-thirds majority requirement was initially proposed in the original draft bill of the New South Wales Constitution, the Crown Law Officers observed that in certain cases two-thirds majorities were required but that there was nothing preventing the repeal of these clauses by simple majorities.¹⁰⁰ The two-thirds majority provision was, from a political perspective, quite controversial at the time and was subject to numerous public debates. Despite the New South Wales provision being repealed in 1857, it was included in the Queensland Constitution in 1859. This was confirmed by the advice procured from the Crown Law Officers in 1862. No doubt there was a lot of discussion regarding the two-thirds majority requirements when the Palmer and Collier report was drafted in 1864 and when section 5 of the *Colonial Laws Validity Act* was framed in 1865. In *Trethowan's* case Dixon J referred to the requirements that existed in 1865 and indicated that these were:

... matters prominently in view when section 5 was framed. It is evident that these matters are included within the proviso, and that, if and in so far as the law for the time being in force purported to make them imperative, a law could not be said to have passed unless they were fulfilled.¹⁰¹

McTiernan J in the *Trethowan's* case also referred to the Palmer and Collier report of 1864 and the pre existing requirements at the time, including special majorities, as provisions that would have been

¹⁰⁰ *Early Constitutional Development in Australia* above n 77 at 420

¹⁰¹ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per Dixon J at 433

within the 'contemplation of [the Imperial] Parliament' when section 5 of the *Colonial Laws Validity Act* was being framed.¹⁰²

The specific wording of the report clearly distinguishes between a simple majority and other 'certain specified majorities'¹⁰³. As demonstrated above, there were only absolute majority and two-thirds majority requirements in force at the time the advice was formulated and the *Colonial Laws Validity Act* was enacted. Both would have been included in the reference to 'certain specified majorities' in the advice, and subsequently in the *Colonial Laws Validity Act*. Had Palmer and Collier intended to refer to an absolute majority only, they would have done so expressly and would have phrased the advice to leave little doubt as to their intentions. The fact that the advice clearly refers to 'certain specified majorities' that were in force in the colonies at the time has been reflected in the wording of section 5 of the *Colonial Laws Validity Act 1865* which specifically refers to '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*' [emphasis added].¹⁰⁴

What is the relevance of this finding today?

As a result of the advice provided by the Crown Law Officers, Palmer and Collier, the *Colonial Laws Validity Act 1865* (Imp.) was enacted, with section 5 clarifying the plenary nature of the colonial legislative power, indicating that every representative legislature in the colony has full power to make laws respecting its own constitution, powers and procedure, and that this full power to make laws is subject to a

¹⁰² *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per McTiernan J at 445

¹⁰³ Reproduced in O'Connell D.P., and Riordan A., *Opinions on Imperial Constitutional Law* Melbourne: Law Book Company 197,1 Opinion No 275 of 28 September 1864, 671 paragraph 4

¹⁰⁴ This interpretation of the *Colonial Laws Validity Act 1865* (Imp.) has been supported by A.B. Keith who in *Responsible Government in the Dominions* (Clarendon Press, Oxford 1928) at 350-1 uses a two-thirds majority requirement as an example of a special majority that is encompassed by section 5

condition that laws must have been passed in such manner and form as may 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'.¹⁰⁵

Section 5 of the *Colonial Laws Validity Act* suggests that absolute and two-third majorities, which were in force at the time in the said colony, amount to valid and enforceable restrictions on the legislative power of the legislature.

It is well documented that the enactment of section 6 of *Australia Acts* in 1986 reflects a desire to retain the authority for manner and form requirements which was granted by section 5 of the *Colonial Laws Validity Act*.¹⁰⁶ There is nothing to suggest that section 6 AA limits the types of manner and form requirements that were authorised by section 5 CLVA. To the contrary, re-enactment of section 5 CLVA in section 6 AA provides authority for some requirements that may actually diminish Parliament's law making power. Given the decision in *Trethowan*, section 6 AA most certainly includes a referendum requirement, and if section 5 CLVA intended to encompass a two-thirds majority, such would also have been encompassed by section 6 AA which to this day provides the authority regarding manner and form requirements in Australia.

In the end, it is up to the Courts to determine the relevance of the report produced by the Crown Law Officers Palmer and Collier, the intention of the Imperial Parliament in enacting the *Colonial Laws Validity Act*, and how this informs the modern interpretation of the *Australia Acts*.

The author hopes that this finding presents a new perspective in discussing the level of majority that may potentially constitute a valid manner and form requirement, whether in future judicial deliberations or academic debates. If a conclusion is reached that a

¹⁰⁵ Section 5 of the *Colonial Laws Validity Act 1865* (Imp.)

¹⁰⁶ Discussion on the way section 5 CLVA was translated into section 6AA is in section 2.3.3 of this thesis

two-thirds majority requirement does constitute a valid manner and form requirement, than the majority requirements of a lesser degree (such as three-fifths) would also constitute a valid manner and form requirement. The issue, however, remains speculative until it is judicially resolved by the High Court of Australia. It is, however, promising to note that Lord Steyn from the House of Lords in the United Kingdom recently made judicial pronouncements giving express support to the possibility of a two-thirds majority requirement:

[...] apart from the traditional method of law making, 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.¹⁰⁷

In 2003, amendments were introduced to section 18 of the *Constitution Act 1975* (Vic) requiring 60 per cent of the whole number of members of the Assembly and the Council to agree when enacting laws amending or repealing a number of protected provisions.¹⁰⁸ Some commentators have expressed doubt regarding the validity of the three-fifth majority requirement that was introduced into the *Constitution Act 1975* (Vic) in 2003.¹⁰⁹ The validity of this three-fifth majority requirement, however, can not be so easily dismissed.

A three-fifths majority requirement is less demanding than a two-thirds majority requirement originally found in the New South Wales and the Queensland Constitutions, which was considered valid and effective at the time (albeit not doubly entrenched), and the validity of which was arguably confirmed by the enactment of section 5 CLVA

¹⁰⁷ *Jackson v Attorney General* [2005] UKHL 56 at 81

¹⁰⁸ Section 18 (1A) of the *Constitution Act 1975* (Vic)

¹⁰⁹ See Evans C., *Entrenching Constitutional Reform in Victoria* (2003) 14 PLR 133 at 134 ('Entrenching Constitutional Reform in Victoria') and Taylor, *The Constitution of Victoria*, above n 10 at 487

and subsequently section 6 AA. This adds an important new consideration when discussing the degree at which special majority requirements can constitute genuine and valid manner and form provisions, and the effectiveness of the three-fifths majority requirement found in the Victorian Constitution, even if they do not extend beyond the authority of section 6 AA.

From a political perspective, some special majority requirements (such as those requiring two-thirds or three-fifths majority) may be useful in ensuring that changes to laws deemed of significant importance can only be achieved with a measure of bipartisan support.¹¹⁰ There have been two cases relating to a two-thirds majority requirement: *Harris v Donges*¹¹¹ and *Bribery Commissioner v Pedrick Ranasinghe*.¹¹² Both cases are from jurisdictions outside Australia.

*Harris v Donges (Harris v Minister of the Interior)*¹¹³ involved an attempt to repeal a provision of the South African Constitution (the *South Africa Act* 1909) which had been protected by a two-thirds majority requirement. The South African Appeal Court enforced the manner and form and held that Parliament was bound to pass the amending legislation by a two-thirds majority at a joint sitting of both houses, as stipulated by the requirement. In deciding this case the Court accepted the possibility of *divisible sovereignty*; indicating that Parliament could be differently constituted for different purposes.¹¹⁴

*Bribery Commissioner v Pedrick Ranasinghe*¹¹⁵ was a decision relating to a requirement that any Bill repealing or amending the provision in

¹¹⁰ Goldsworthy, *Manner and Form*, above n 43 at 422

¹¹¹ [1952] 1 T.L.R. 1245

¹¹² [1965] AC 172

¹¹³ [1952] 1 T.L.R. 1245

¹¹⁴ For an in depth discussion of this case see Carney, *Overview of Manner and Form*, above n 45 at 88; and Elkind, above n 15 at 162

¹¹⁵ [1965] AC 172

question is required to be passed by a two-thirds majority of the House of Representatives and have attached to it the Speaker's Certificate verifying that it had been so passed before being presented for royal assent. The Privy Council held that the requirement was binding, from which the so-called *Ranasinghe* principle arose (which is discussed further below). The Privy Council held that the need to obtain a two-thirds majority vote in the House of Representatives did not limit the sovereign powers of Parliament itself on the basis that Parliament can always pass the amendment with the requisite majority.¹¹⁶

In the end the validity of a special majority requirement depends on how large a majority is required before Parliament's law making power is deemed to be abdicated. King CJ in the *West Lakes* observed that there is a point where a special majority provision becomes so restrictive that it deprives Parliament of its law making power. At that point it ceases to be a genuine manner and form requirement. King CJ also observed that 'this point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental constitutional provision'.¹¹⁷ His Honour did not indicate, however, how to distinguish between those special majority requirements that constitute a valid manner and form, and those that do not.

On the assumption that an absolute majority is a valid manner and form provision, it can be inferred that at some point between 51 per cent and 100 per cent a special majority requirement becomes an attempt to deprive Parliament of its law making power. The author submits that this point is anything more than a two-thirds majority.

¹¹⁶ *The Bribery Commissioner v Pedrick Ranasinghe* [1965] AC 172 at 197-200

¹¹⁷ (1980) 25 S.A.S.R. 389, 397 further discussed in Carney, *Overview of Manner and Form*, above n 58 at 85

2.1.4 Transfer of the law-making function to an extra-parliamentary body

Situations may arise where Parliaments attempt to protect specific laws by subjecting the exercise of their legislative power to the consent of an outside body, be it an individual, a company or any other entity not forming part of the legislative structure.

There is a fundamental distinction between a provision that transfers the law making function and one that merely directs the exercise of the executive power. The former restricts, and potentially abdicates, Parliament's law making power. The latter does not diminish Parliament's law making power because the final say in relation to the law remains with Parliament. This distinction is illustrated by comparing the *West Lakes* and *Comalco* cases.¹¹⁸

*West Lakes Ltd v The State of South Australia*¹¹⁹ involved an agreement between West Lakes Ltd and the South Australian government, for the development of a residential estate, which had arguably been incorporated into a statute. A statutory provision prevented any variation of the agreement without the consent of West Lakes Ltd. The Full Court of South Australia interpreted the provision as not intended to deprive Parliament of its power of variation, but merely to restrict the capacity of the executive to vary the agreement unilaterally.¹²⁰ In the course of his judgment, King CJ expressed objections in relation to a requirement of assent to legislation by an extra-parliamentary body on the basis that this

¹¹⁸ Carney, above n 61 at 177-8

¹¹⁹ (1980) 25 SASR 389

¹²⁰ (1980) 25 SASR 389 also see Carney, above n 61 at 178

would unquestionably be a renunciation of legislative power.¹²¹ King CJ indicated that if Parliament purports to:

make the validity of legislation on a particular topic conditional upon the concurrence of an extra-parliamentary individual, group of individuals, organisation or corporation, a serious question must arise as to whether the provision is truly a law prescribing the manner and form of legislation, or whether it is not rather a law as to substance, being a renunciation of the power to legislate on that topic.¹²²

*Commonwealth Aluminium Corporation v Attorney-General*¹²³ (*Comalco*) related to a requirement that any variation to the agreement in the schedule to the legislation in question, in addition to the consent of the Minister, also required the consent of Comalco. The majority judgment recognized that the requirement related to the exercise of the law making function, but held that the requirement imposed did not constitute a genuine manner and form. Winstall SPJ indicated that any provision directed at preventing Parliament from legislating on a subject is a purported abdication of power and can not constitute a genuine manner and form requirement.¹²⁴

This case provides strong authority indicating that a provision requiring the consent to legislation of an entity outside the legislature does not amount to a genuine manner and form provision because it is a renunciation of Parliament's power to legislate. Parliaments can, however, delegate their power to subordinates, such as the Executive, as long as this power can easily be withdrawn or altered by the Parliament as initially constituted.

¹²¹ *West Lakes Ltd v The State of South Australia* (1980) 25 SASR 389 at 397; Goldsworthy, *Manner and Form*, above n 43 at 419; Taylor, *The Constitution of Victoria*, above n 10 at 472

¹²² *West Lakes Ltd v The State of South Australia* (1980) 25 SASR 389 at 397 per King CJ

¹²³ [1976] Qd R 231

¹²⁴ [1976] Qd R 231 Winstall SPJ at 237

2.1.5 Referendum

As illustrated above, a provision requiring an entity other than the legislature to consent to legislation is not a provision relating to the manner and form in which the law is to be passed because it deprives Parliament of its law making power. It therefore follows that a provision requiring the electorate to consent to legislation deprives Parliament of its law making power because Parliament alone can not change the protected statute.

A referendum requirement therefore appears to be incompatible with section 2(2) of the *Australia Acts*, which supplies the Parliament of each State (not the electorate) with continuing constituent power. A referendum requirement also appears to be inconsistent with the basic notion of parliamentary sovereignty. On face value, a referendum requirement does not appear to be a genuine manner and form by which certain legislation is to be passed.

Despite this, the majority of the Australian High Court in *Attorney-General (NSW) v Trethowan*,¹²⁵ a landmark decision on the law relating to manner and form provisions, decided that a referendum requirement constitutes a valid manner and form requirement. The Court considered whether the Parliament of New South Wales had to comply with section 7A of the *Constitution Act 1902* (N.S.W.). Section 7A provided that the Legislative Council could only be abolished with the approval of electors at a referendum, and the relevant provisions read as follows:

(1) The Legislative Council shall not be abolished nor ... shall its constitution or powers be altered except in the manner provided in this section.

(2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.

(6) The provisions of this section shall extend to any Bill for the repeal or amendment of this section ...

¹²⁵ (1931) 44 CLR 394; [1932] A.C. 526

The majority of the High Court decided that section 7A was binding and that a referendum requirement was a valid 'manner and form' provision. Rich J applied a wide interpretation to the definition of a manner and form, including 'compliance with every requirement which existing legislation imposed upon the process of law making', including a requirement for the electorate to vote in a referendum.¹²⁶ The Judicial Committee of the Privy Council upheld the High Court decision.

The electorate, therefore, appears to be the only extra-parliamentary body to which the legislature can be validly subjected. This requirement is confined to obtaining the direct approval of the people whom the representative legislature represents.¹²⁷ Despite substantively diminishing Parliament's law making power, a requirement to have the consent of the electorate voting at a referendum can provide good protection against possible abuses of transient parliamentary majorities. It can also promote basic principles of democratic inclusion.

Referendum requirements are widely accepted in a number of constitutional instruments across Australian jurisdictions: section 53 of the *Constitution Act 1867* (Qld), section 7A in the *Constitution Act 1902* (NSW), and section 18(1B) of the *Constitution Act 1975* (Vic).¹²⁸ The Australian people, governments and the legal community feel

¹²⁶ (1931) 44 CLR 394 per Rich J at 419; also note McTiernan J's dissent on the point at 443:

I do not construe the proviso to sec. 5 of the *Colonial Laws Validity Act* as conferring power on a colonial legislature to enact a law prescribing a manner and form, which in effect destroys the plenary powers given by the section to the said legislature in its capacity as a representative legislature. ... Sec. 5 of the *Colonial Laws Validity Act* is an overriding charter which keeps the legislature continuously supplied with plenary power to make laws respecting its own constitution, powers and procedure, and no Act of the legislature can destroy or permanently diminish the authority which it derives from the charter.

¹²⁷ *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 397 see related discussion in Goldsworthy J., *The 'Principle in Ranasinghe' – a reply to H.P. Lee* (1992) 15(2) *University of New South Wales Law Journal* 540 at 544 ('The Principle in Ranasinghe')

¹²⁸ Twomey A., *The Constitution of NSW* (The Federation Press 2004) at 312

comfortable with referendum requirements. As a consequence it has become a widely accepted method of restricting Parliament's law making power.¹²⁹

The decision in *Trethowan* was based on section 5 CLVA. Re-enactment of section 5 CLVA in section 6 AA confirms this decision and therefore reinforces *Trethowan's* authority that a referendum requirement is a valid manner and form provision. As such, one source of authority for a referendum requirement could be section 6 AA. Both section 5 CLVA and section 6 AA will be discussed in greater detail below.

2.2 Mandatory, directory and discretionary provisions

Most requirements traditionally thought of as manner and form are 'mandatory' in the sense that there is no room for anything less than strict compliance. In some instances, however, strict compliance is not necessary and the resulting law may be valid as long as the requirement has been complied with in substance. These are known as 'directory' requirements. Requirements that do not require compliance at all are generally known as 'discretionary'. In examining manner and form requirements, a question that arises is whether or not a provision needs to be adhered to strictly or substantially, or not at all.¹³⁰ Whether a requirement is discretionary, directory or mandatory is not always obvious.¹³¹

¹²⁹ Taylor, *The Constitution of Victoria*, above n 10 at 473; Carney, above n 61 at 177

¹³⁰ Pearce D.C., Geddes R.S., *Statutory Interpretation in Australia* (6th Edition, Butterworths Sydney 2006) at 331 and 343

¹³¹ Carney, *Overview of Manner and Form*, above n 58 at 79 and Carney, above n 61 at 170 see a footnote indicating that although the High Court in *Project Blue Sky v ABA* (1998) 194 CLR 353 per Brennan CJ at 374-5 and per McHugh, Gummow, Kirby and Hayne JJ at 390 disapproved of the 'elusive distinction between mandatory and directory requirements' (quoting Gummow J from *Australian Capital Television Pty Ltd v Minister for Transport and Communications* (1989) 86 ALR 119 at 146), it is submitted that these terms remain useful descriptions of

When determining whether a provision imposes a duty or whether it is merely facultative or discretionary, the purpose of the provision and the consequences that flow from requiring strict compliance with a requirement need to be examined. For example, if great injustice might follow from requiring strict compliance, it is unlikely that the requirement will be held to be mandatory.¹³²

This issue was considered in *Clayton v Heffron*¹³³ where the plaintiffs argued that an Act should be held to be invalid for non compliance with a requirement to hold a ‘free conference’ between managers appointed by the two Houses of Parliament. The requirement formed part of the dispute resolution procedure encapsulated in section 5B of the *New South Wales Constitution Act*. The plaintiff argued that a free conference was an essential condition of the ultimate validity of any statute enacted under section 5B, in the same way as manner and form requirements.

The High Court held that the Act in question was valid despite non-compliance with the requirement to hold a ‘free conference’. In response to the argument put forward by the plaintiffs, the majority of the High Court said:¹³⁴

Would it be possible for the Court to investigate the legislative process and hold the enactment void because there had not been a conference of managers? There is no doubt that the words “after a free conference between managers” contain an implied direction that such a conference shall take place. In the same way the words relating to the joint sitting of members of the Houses import an intention that the Governor shall then exercise the authority to convene a joint sitting of members. But it is an

requirements which respectively are intended to be complied with for validity and those which are not so intended.

¹³² Pearce, Geddes, above n 130 at 332, 338 and 343

¹³³ *Clayton v Heffron* (1960) 105 CLR 214

¹³⁴ Ibid at 244-8

entirely different thing to find in a direction an intention that a departure from the procedure shall spell invalidity in the statute when it is passed, approved and assented to. In this case there are two matters with which we are dealing: the legislative power and the procedure for its exercise. The principle of the common law distinguished sharply between invalid attempts to exercise a legislative power and departures from the prescribed course for its exercise which may not or do not bring invalidity as a necessary consequence. In the end the distinction must be governed by the intention expressed by the legislature conferring the power and prescribing the steps to be taken in the course of its exercise. But commonly no express declaration is to be found in a statutory power as to the effect on validity of departures from the procedure laid down. The question is then determined by reference to the nature of the power conferred, the consequences which flow from its exercise, the character and purpose of the procedure prescribed.

The High Court found the requirement for a free conference not to be mandatory but discretionary because the conference could easily have been cancelled. In this case the Act in question was held to be valid despite non-compliance with that requirement. The case highlights the importance of distinguishing between mandatory requirements and non-mandatory requirements and confirms that strict compliance with requirements is not always necessary for validity.¹³⁵

Compliance with such discretionary requirements is not binding and non-compliance has no impact on the validity of the law; therefore, they do not restrict or abdicate Parliament's law making power in any way. The dispute resolution procedure outlined in the Victorian Constitution, where the choice whether to proceed with the

¹³⁵ The case related to an alternative procedure for the enactment of ordinary legislation. There could be no limitation on Parliament's power to enact the law as it could always do so through ordinary procedure. See section 2.4.1 of this thesis and related discussion in Carney, *Overview of Manner and Form*, above n 58 at 80

stipulated procedure rests with the Premier, is an example of a discretionary requirement.¹³⁶

2.3 Authority for manner and form provisions within the Australia Acts

2.3.1 Section 5 of the Colonial Laws Validity Act

The provision providing authority for manner and form requirements was enacted in section 5 of the *Colonial Laws Validity Act 1865* (Imp.)¹³⁷ as a result of doubts expressed by Justice Boothby in relation to the scope of the colonial legislative power to enact laws inconsistent with Imperial law.¹³⁸

The Law Officers' opinion, sought in response to Boothby J's pronouncements, indicated that a colonial manner and form provision was capable of binding future Parliaments. The opinion indicated that the legislature had at most obtained 'conditional power, and such power can only ... be properly exercised on compliance with the conditions'.¹³⁹ As a consequence, section 5 was enacted to ensure absolute clarity regarding the plenary nature of the colonial legislative power. Section 5 of the *Colonial Laws Validity Act 1865* (Imp.) stated that:

... 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

¹³⁶ See section 2.4.1 of this thesis

¹³⁷ Abbreviated throughout the thesis to section 5 CLVA

¹³⁸ Carney, above n 61 at 166-7

¹³⁹ Ibid at 168

any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.¹⁴⁰

The front end of section 5 CLVA provided the authority for Australian State Parliaments to exercise their plenary legislative power. The second part provided authority for manner and form provisions to be effectively binding in certain situations. Had it not been for the second part of section 5, the plenary nature of the State's legislative power would probably have overridden any manner and form restrictions.¹⁴¹

The historical context behind the enactment of section 5 suggests that the reference to laws respecting the 'constitution, powers and procedure' of the legislature confirms Parliament's constituent power, and reflects the fact that until the enactment of section 5 CLVA, all imperially prescribed manner and form requirements related to the legislative process. The new colonial constitutions at the time made little reference to the executive and judicial branches; section 5 reflects a position which considered only imperially prescribed manner and form requirements.¹⁴²

2.3.2 Section 2 of Australia Acts

Section 5 CLVA was re-enacted in two sections of the *Australia Acts (Imp & Cwth)* 1986: section 2 and section 6.¹⁴³ Section 2 AA replaced the front end of section 5 CLVA, which granted States their constituent legislative power. Section 2 AA states that:

(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace,

¹⁴⁰ Section 5 of the *Colonial Laws Validity Act 1865* (Imp.)

¹⁴¹ Twomey A., *A Manner and Form limitations on the power to amend State Constitutions* (2004) 15(3) Public Law Review 182 at 182 ('Manner and Form Limitations')

¹⁴² Carney, above n 61 at 181

¹⁴³ Taylor, *The Constitution of Victoria*, above n 10 at 480

order and good government of that State that have extra-territorial operation.

(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a state any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.¹⁴⁴

Section 2 AA can be interpreted as giving expression to the basic notion of parliamentary sovereignty, that Parliaments possess plenary law making power as fully as their predecessors. If a provision abdicates Parliament's constituent power to legislate, that provision becomes inconsistent with section 2 AA.¹⁴⁵

2.3.3 Section 6 of Australia Acts

If the law stopped at section 2 AA, it would have conferred full power on the Parliament of a State to make laws regardless of any prior restrictions. State Parliaments would probably have enjoyed unrestricted plenary legislative powers. This, however, is not the case. An exception to the unrestricted plenary law making power is found in section 6 AA.¹⁴⁶ Section 6 of the *Australia Acts* provides the following:

Notwithstanding section 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State *respecting the constitution, powers or procedure of the Parliament of the State* shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.¹⁴⁷

¹⁴⁴ Section 2 of the *Australia Acts 1986* (Imp & Cwth)

¹⁴⁵ Carney, above n 61 at 177

¹⁴⁶ Taylor, *The Constitution of Victoria*, above n 10 at 470-1

¹⁴⁷ Section 6 of the *Australia Acts 1986* (Imp & Cwth) Note that the Northern Territory and Norfolk Island legislatures have very limited capacity to entrench. Section 6 is confined to the States and does not extend to the Australian Territories.

Section 6 AA states that Parliament's plenary legislative power can be restricted by manner and form requirements. The prerequisites for binding manner and form requirements under section 6 are:¹⁴⁸

- The manner and form requirement can be contained in any Act of the Parliament of a State;
- The requirement must relate to future laws respecting the constitution, power or procedure of Parliament;
- Manner and form requirements must relate to the legislative process; and
- Under no circumstances may Parliament's power to legislate be abdicated.

The enactment of section 6 AA reflects a desire to retain the authority for enacting manner and form provisions which was previously present in section 5 CLVA.¹⁴⁹ Re-enactment of section 5 CLVA in section 6 AA, confirms the majority judgment in *Trethowan*. It sets out the foundations for the law relating to manner and form requirements in Australia by expressly qualifying the plenary legislative power conferred by section 2 AA.¹⁵⁰ The enactment of section 6 AA confirms that manner and form provisions can not abdicate Parliament's law making power.¹⁵¹

Section 6 AA does, however, authorise some requirements that diminish Parliament's law making power. Given the decision in *Trethowan*, section 6 AA most certainly includes a referendum

Only ACT is empowered by the *Australian Capital Territory (Self-Government) Act 1988* (Cth) to entrench and its power to entrench is not confined to laws relating to the constitution, powers or procedure of the legislature. Commonwealth conferred constitutions are found in *Northern Territory (Self-Government) Act 1978* (Cth) and the *Norfolk Island Act 1979* (Cth); see Carney, above n 61 at 151

¹⁴⁸ Carney, above n 61 at 162

¹⁴⁹ Carney, *Overview of Manner and Form in Australia*, above n 58 at 70

¹⁵⁰ Carney, above n 61 at 182

¹⁵¹ Goldsworthy J., *Manner and Form Revisited: Reflections on Marquet's Case* in Groves M., *Law and Government in Australia: Essays in Honour of Enid Campbell* (The Federation Press 2005) at 34-5 ('Reflections on Marquet's Case')

requirement, and may also include other requirements that diminish Parliament's law making power such as certain special majorities.

There are a number of differences between section 5 CLVA and section 6 AA, although these probably don't change the substance of what section 6 AA is aiming to achieve.¹⁵² Section 5 CLVA referred to a 'representative legislature' and to the 'constitution, powers *and* procedure' of the legislature, whereas section 6 AA refers to a 'Parliament of a State' and the 'constitution, powers *or* procedure' of the Parliament. Section 5 CLVA applied to laws '*passed* in such manner and form', whereas section 6 AA refers to laws '*made* in such manner and form'. The 'making of laws' referred to in section 6 AA was probably inserted to confirm that it authorised referendum requirements, because under section 5 CLVA it was possible to argue that a referendum requirement was inconsistent as the laws had to be 'passed' rather than 'made' by Parliament.¹⁵³

Section 5 CLVA authorised manner and form to be contained in any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony. The only binding manner and form provisions under section 6 AA must be found in a 'law made by the State Parliament'. Section 5 CLVA implied that a law made in non-compliance with the stipulated manner and form would be invalid, whereas section 6 AA declares that a law made in non-compliance with the stipulated manner and form 'shall be of no force or effect'. As such, section 6 AA does not in effect prevent enactment; it only renders the law made by the Parliament of no force or effect.¹⁵⁴ In referring to a 'law' having to comply with manner and form, both section 5 CLVA and section 6 AA target only those provisions that are subject to manner and form requirements.

¹⁵² Carney, above n 61 at 160-1

¹⁵³ Carney, *Overview of Manner and Form*, above n 58 at 82

¹⁵⁴ Carney, above n 61 at 161

Non-compliance with manner and form requirement would not result in the entire act becoming invalid.¹⁵⁵

Amendment of any section in the *Australia Acts*, including section 6 AA, is controlled by section 15 of the *Australia Acts*. It stipulates that a provision in the *Australia Acts* can only be amended by the Federal Parliament at the request or with the concurrence of all state Parliaments.¹⁵⁶

2.3.4 Laws respecting the ‘constitution, power or procedure’ of Parliament

According to section 6 AA, laws to which manner and form requirements apply, need to be laws respecting the ‘constitution, powers or procedure of Parliament’. In section 5 CLVA this term was set in the context of an enabling provision and was used to confirm the scope of the power to make laws. The application of the phrase was used in the granting of the power, rather than imposing limitations on it.¹⁵⁷ This helps to explain some of the ambiguity encountered by the courts attempting to define the term. Previous judgments provide some guidance in understanding what may be encompassed by the term, however, there is a great deal of uncertainty around its exact scope and application of section 6 AA.

In *Taylor v Attorney-General*¹⁵⁸ the term ‘constitution of Parliament’ was interpreted to include the composition, form or nature of the Houses of Parliament.¹⁵⁹ In *Trethowan’s* case, Dixon J indicated that the power to make laws respecting its own constitution enables the

¹⁵⁵ Carney, above n 61 at 195; This interpretation is consistent with the approach adopted in the Acts Interpretation laws, such as section 7 of the *Interpretation of Legislation Act* 1984 (Vic)

¹⁵⁶ Section 15 of the *Australia Acts* 1984 (Cth)

¹⁵⁷ Taylor, *The Constitution of Victoria*, above n 10 at 471 and 476

¹⁵⁸ (Qld) (1917) 23 CLR 457

¹⁵⁹ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457, per Barton J at 469, Duffy J and Rich J at 477

legislature to deal with its own nature and composition.¹⁶⁰ This was confirmed by the majority decision in the *Marquet* case,¹⁶¹¹⁶² where it was also recognised that there is a relationship between the 'constitution' and features which give Parliament a representative character. At least to some extent, the 'constitution' of the Parliament extends to features which give it, and its Houses, a representative character; therefore, section 6 may be engaged in cases in which legislation deals with matters that are encompassed by the general description 'representative'.¹⁶³ *Marquet* also confirmed that provisions relating to the system of voting, changing from single electorates to multi-member electorates or changing electoral distributions, are laws which relate to the 'constitution' of Parliament.¹⁶⁴

Today manner and form provisions can probably apply to laws dealing with the following issues:¹⁶⁵

- altering the relationship between the two houses of Parliament;¹⁶⁶
- abolishing one of the houses of Parliament, or adding a new one;¹⁶⁷

¹⁶⁰ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per Dixon J; [1932] AC 526. Similar definitions of "constitution" are in *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457, 468, 477. See Taylor, *The Constitution of Victoria*, above n 10 at 473

¹⁶¹ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 75

¹⁶² *Attorney-General (WA) v Marquet* (2003) 217 CLR 545

¹⁶³ Ibid per Gleeson CJ, Gummow, Hayne and Heydon JJ at 76; see also *Manner and Form Limitations* above n 141 at 169 and Twomey above n 127 at 310

¹⁶⁴ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 70 see also *Manner and Form Limitations* above n 141 at 184

¹⁶⁵ Twomey, *Manner and Form Limitations*, above n 141 at 183 also Taylor, *The Constitution of Victoria*, above n 10 at 473

¹⁶⁶ *McDonald v Cain* [1953] VLR 411, 429; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 76

¹⁶⁷ *Attorney-General (NSW) v Trethowan* [1932] AC 526

- changing the system of voting including altering electoral districts, altering the number of seats, altering the system adopted for elections;¹⁶⁸
- affecting royal assent or removing the Queen or her representative as a constituent element of Parliament;¹⁶⁹ and
- altering the general nature of Parliaments as representative bodies.

Laws in relation to the qualification and disqualification of members of Parliament,¹⁷⁰ their salaries,¹⁷¹ or the numbers who can sit in Parliament,¹⁷² however, would not be regarded as part of the 'constitution' of a legislature.¹⁷³ Section 6 AA would only encompass the Crown within the 'constitution' of Parliament as far as the Crown is exercising its legislative, not executive, powers. Laws relating to the executive power and the judicial power fall outside the scope of section 6 AA.¹⁷⁴

Kirby J in his dissenting judgment in the *Marquet* case interpreted the term 'constitution' to relate to the fundamental provisions affecting the design and institutional composition of the legislature, including its framework and basic structure, but indicated that it is not

¹⁶⁸ *McDonald v Cain* [1953] VLR 411, 441, *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 79

¹⁶⁹ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457 at 473

¹⁷⁰ *Clydesdale v Hughes* (1934) 51 CLR 518, 528; *WA v Wilsmore* (1982) 149 CLR 79; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 77

¹⁷¹ *McDonald v Cain* [1953] VLR 411, 422, 431

¹⁷² *A-G (WA) (ex rel Burke) v WA* [1982] WAR 241; *Miragliotta* (2003) 31 UWALR 154, 161-3

¹⁷³ *Clydesdale v Hughes*, *WA v Wilsmore* per Wilson J, dissenting judgment of Wallace J in *McCawley v R*, Burt CJ in *A-G for WA (Ex rel Burke) v State of WA* as discussed in Carney, above n 61 at 168; *A-G (WA) (ex rel Burke) v Western Australia*, *Miragliotta* as discussed in Taylor, *The Constitution of Victoria*, above n 10 at 473

¹⁷⁴ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 429

concerned with matters of detail such as individual membership of a parliamentary chamber or elections.¹⁷⁵

Ultimately, what constitutes a law relating to the 'constitution' of Parliament will evolve together with judicial views of the law's relevance to the make up of Parliament. This leaves a great deal of uncertainty and makes it difficult to predict the interpretation of the term adopted by future courts, including judicial views on issues such as the qualifications of voters, compulsory voting, the length of parliamentary terms and other issues.¹⁷⁶

There have been very few cases providing guidance on the definition of the term 'power or procedure' of Parliament.¹⁷⁷ Dixon J in the *Trethowan* case interpreted the term as follows:

The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its own conduct.¹⁷⁸

The word 'power' encompasses provisions preventing a Bill from becoming a law, including laws regarding manner and form requirements,¹⁷⁹ while the word 'procedure' encompasses rules for Parliament's own conduct and standing orders. This could include provisions dealing with parliamentary privilege,¹⁸⁰ joint sittings to fill

¹⁷⁵ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 197 This was not necessary to Kirby J's decision where he found that section 13 did not prevent repeal of the 1947 Act. See also discussion in Carney, above n 61 at 170

¹⁷⁶ Twomey, above n 128 at 279-80

¹⁷⁷ Taylor, *The Constitution of Victoria*, above n 10 at 475

¹⁷⁸ *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 per Dixon J; upheld on appeal [1932] AC 526 see Taylor, *The Constitution of Victoria*, above n 10 at 473

¹⁷⁹ *Taylor v Attorney-General (Qld)* (1917) 23 CLR 457 Barton J at 469 see Twomey, above n 128 at 280

¹⁸⁰ *Arena v Nader* (1997) 42 NSWLR 427 at 437

in vacancies, standing orders, quorums, the office of the speaker and the like.¹⁸¹

In *Commonwealth Aluminium Corporation Limited v Attorney-General*¹⁸² Hoare J argued that a law repealing or modifying another law that deals with the powers or procedure of Parliament is also a law respecting the powers or procedure of Parliament:

[B]ecause [the 1974 Act] enacts provisions which conflict with the 1957 Act it necessarily follows that it is an Act respecting the powers and procedure of the legislature of Queensland ... It is I think an over simplification to say that the 1974 Act is an Act relating to mining royalties and inferentially that therefore it is not an Act 'respecting the constitution, powers and procedure' of the legislature. To determine what an Act of Parliament does, it is necessary to consider the operation of the Act (*Kariapper v Wijesinha* [1968] AC 717 at 743-4). It seems to me clear enough that an Act may be categorised under more than one heading.¹⁸³

Hoare J argued that a law, by the very nature of being passed contrary to a prescribed restrictive procedure, had to be respecting the 'constitution, powers or procedure' of Parliament.¹⁸⁴ This argument, however, appears to be weak. If a law that fails to comply with a manner and form provision can be characterised as a law respecting the powers and procedure of Parliament, then every law that fails to comply with a manner and form provision would be within the scope of section 6 AA. The characterisation test would have no significance. This can not be the intention behind section 6 AA and casts strong doubts on the validity of Hoare J's argument. Such an interpretation would in fact expand the opportunity for

¹⁸¹ See discussion at Twomey, above n 128 at 281 and Taylor, *The Constitution of Victoria*, above n 10 at 476

¹⁸² [1976] Qd.R. 231

¹⁸³ Ibid at 248

¹⁸⁴ Goldsworthy, *Manner and Form*, above n 43 at 415

entrenchment, whereas section 6 AA is actually trying to curtail it.¹⁸⁵ As such, a law on a topic that is subject to the requirements of a manner and form is not necessarily a law respecting the 'powers or procedure' of Parliament.¹⁸⁶

2.3.5 Location of manner and form

Another consideration is whether manner and form must be located in a formal 'constitution' or whether it can be located in an ordinary act of Parliament. In *Victoria v The Commonwealth and Connor*, Gibbs J., in acknowledging that in many cases manner and form requirements relate to amendments of the Constitution, said that the principle which has evolved is not limited to constitutional amendments.¹⁸⁷

As the situation now stands in Australia, a manner and form requirement can be effectively located in an ordinary act of Parliament. Furthermore, manner and form requirements are not confined in their application to amendments of Constitution Acts but can also apply to ordinary legislation, provided that the legislation relates to the 'constitution, power or procedure' of Parliament, as required by section 6 AA.¹⁸⁸

2.3.6 Application of section 6

According to section 6 AA, manner and form provisions bind only future laws respecting the 'constitution, powers or procedure' of Parliament. It is the subsequent law purporting to amend or repeal the protected provision that needs to fulfil this characterisation, or

¹⁸⁵ Carney, *Overview of Manner and Form*, above n 58 at 79

¹⁸⁶ *Ibid* at 78-79

¹⁸⁷ (1975) 134 CLR 81

¹⁸⁸ Lee H.P., *Manner and Form: An imbroglio in Victoria* (1992) 15 U.NSW.L.J. 516 at 536

the manner and form requirement is ineffective and can be amended either expressly or impliedly by a simple majority in both houses.¹⁸⁹

In other words, if Law 1 is the law introducing the manner and form provision protecting a specific subject matter, and Law 2 is the law that is subject to the manner and form provision because it is attempting to amend what Law 1 is protecting, then for section 6 AA to apply, Law 2 needs to be a law respecting the 'constitution, power or procedure' of Parliament.

A common mistake is to focus the analysis on Law 1, the law introducing the manner and form requirement, and incorrectly make Law 1 (rather than Law 2) subject to the section 6 AA characterisation test. This error has been made in a number of judicial interpretations of section 5 CLVA and section 6 AA. In *South-Eastern Drainage Board v Savings Bank of South Australia*¹⁹⁰ the High Court mistakenly approached the question by asking whether section 6 of the *Real Property Act 1886* (Law 1) could be characterised as a law respecting the constitution, powers or procedure of the legislature. The Court found that section 6 of the *Real Property Act 1886* (Law 1) was not such a law.¹⁹¹ Instead, analysis should have focused on the subsequent *South Eastern Drainage Acts 1931 and 1933* (Law 2) to determine whether they were laws respecting the 'constitution, powers and procedure' of the legislature as then required under section 5 CLVA, as confirmed in the *West Lakes Limited v The State of South Australia*.¹⁹²

Kirby J was similarly mistaken in *Attorney-General (WA) v Marquet*, incorrectly applying the characterisation test to the *Distribution Act 1947* (Law 1) rather than the *Electoral Distribution Repeal Bill 2001*

¹⁸⁹ Carney, *Overview of Manner and Form*, above n 58 at 75; Twomey, above n 128 at 283

¹⁹⁰ (1939) 62 CLR 603

¹⁹¹ *South-Eastern Drainage Board v Savings Bank of South Australia* (1939) 62 CLR 603 at 625

¹⁹² (1980) 25 SASR 389

(WA) and the *Electoral Amendment Bill 2001* (WA) (Laws 2). Because of this error, his Honour applied the *Colonial Laws Validity Act* rather than the *Australia Acts*.¹⁹³ The majority judgment in the *Marquet* case correctly applied section 6 AA to the 2001 repeal and amendment Bills (Laws 2), concluding that the *Electoral Distribution Repeal Bill 2001* (WA) and the *Electoral Amendment Bill 2001* (WA) were laws respecting the 'constitution, powers or procedure' of Parliament.¹⁹⁴

2.3.7 Validity of Australia Acts

Kirby J in *Marquet*¹⁹⁵ expressed concern about the validity of the *Australia Acts*. His Honour was of the opinion that there was a shift in the accepted foundation of sovereignty over Australia's constitutional law before 1986, leaving the UK Parliament with no authority to change the law of Australia through the enactment of the *Australia Act 1986* (UK). Furthermore, his Honour expressed doubt about the Australian Parliament's enactment of the *Australia Act 1986* (Cth) on the basis that the power under section 51(38) of the Commonwealth Constitution is insufficient to alter state constitutions because they are protected by section 106 of the Commonwealth Constitution, to which section 51(38) is expressly made subject.¹⁹⁶

None of the parties in *Marquet* challenged the validity of the *Australia Acts*, no other judge has pursued this line of argument and the proposition that the *Australia Acts* are invalid has been widely discredited in academic circles.¹⁹⁷ All other judges in the *Marquet*

¹⁹³ (2003) 78 ALJR 105 per at 197

¹⁹⁴ Ibid at 171

¹⁹⁵ (2003) 202 ALR 233, 282f

¹⁹⁶ [2003] HCA 67 at para 69; 78 ALJR 105 at 117

¹⁹⁷ Goldsworthy notes that even according to the best modern philosophical analyses, the foundations of a legal system consist at least partly of a consensus among its senior legal officials. In quoting H.L.A. Hart's *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994), Goldsworthy states that it is implausible to suggest that the attitudes of senior legal officials are irrelevant to the foundations of

case stated that the enactment of the *Australia Act 1986* (Cth) is within the power of section 51(38) of the Commonwealth Constitution, which provides authority for the Commonwealth Parliament, with the request and consent of the Parliaments of the States directly concerned, to make a law that could at the establishment of the Commonwealth be made only by the UK Parliament.¹⁹⁸ In addition, the enactment of the *Australia Acts 1986* (UK) was requested by the Australian Parliament to ensure that the validity of the *Australia Act 1986* (Cth) was beyond doubt in case it was questioned.¹⁹⁹ Despite Kirby J's concerns, it can be safely assumed that both of the *Australia Acts* are valid. This assumption is made throughout the thesis.

2.4 Authority for manner and form provisions outside of Australia Acts

As discussed above, under section 6 AA, manner and form requirements can only apply to laws relating to the 'constitution, powers or procedure' of Parliament, and there is a degree of uncertainty as to the scope and nature of this characterisation. A number of entrenched provisions, including some in section 18 of the *Constitution Act 1975* (Vic), can not be characterised as laws relating to the 'constitution, powers or procedure' of Parliament. These include provisions relating to the Governor, local government, the independence of statutory officers and arguably the judiciary.²⁰⁰ For

legal systems. Goldsworthy also believes it to be unwise to reject the validity of a statute of fundamental constitutional importance, on the basis of nothing more solid than very dubious philosophical speculation. Goldsworthy believes that Kirby J's position rests on a highly suspect empirical hypothesis as well as dubious philosophical speculation. See Goldsworthy, *Reflections on Marquet's Case*, above n 151 at 42-3

¹⁹⁸ Gardner, *Musing on Marquet*, above n 73 at 6 of 13

¹⁹⁹ Goldsworthy, *Reflections on Marquet's Case*, above n 151 at 43

²⁰⁰ Twomey, *Manner and Form Limitations*, above n 141 at 185

these to be valid and enforceable, their entrenchment needs to find authority outside of section 6 AA.²⁰¹

The following four possible legal grounds for entrenchment outside of section 6 AA are examined in this section:

- pure procedures
- the *Ranasinghe* principle
- reconstitution
- section 106 of the Commonwealth Constitution

2.4.1 Pure procedures

Requirements traditionally thought of as manner and form, including special majority and referendum requirements, restrict Parliament's substantive law making power (without abdicating it). As described earlier, the source of authority for these restrictive procedures may be derived from section 2(2) AA together with section 6 AA. These sections are limited in their scope of operation to future laws respecting the 'constitution, power and procedure' of Parliament.

There are also requirements that resemble manner and form requirements, but which do not diminish Parliament's law making power. These are usually purely procedural requirements. They include (but are not limited to) provisions in relation to the quorums of the houses of Parliament; the need for appropriation of Bills to be preceded by a message from the Governor; express declaration clauses and possibly absolute majority requirements.²⁰²

The source of authority for these purely procedural requirements stems from section 2(2) AA independently of section 6 AA because they do not diminish Parliament's law making power. Pure procedures are therefore distinctly different from manner and form requirements, and are not limited in application to laws relating to

²⁰¹ Discussion of the entrenchment provisions found in the *Constitution Act 1975* (Vic) is found in Chapter 3 of the thesis

²⁰² Goldsworthy, *Manner and Form*, above n 43 at 403

the 'constitution, powers and procedure' of Parliament as required by section 6 AA.

The 'pure procedure' theory was initially articulated by Goldsworthy who defined the concept as follows:

... procedural requirements – 'pure' because necessarily they affect neither the legislature's constitution (otherwise reconstitution would be the issue not its substantive powers) nor its substantive powers (otherwise they would invalidly restrict Parliament's continuing constituent power). It follows that pure procedures must not be excessively demanding and difficult to comply with.²⁰³

As for pure procedure ... the legislature is not even partially deprived of that power by having to comply with a procedure ... in exercising it, provided that compliance is not excessively difficult, costly or time-consuming.²⁰⁴

Goldsworthy provided two reasons for justifying such undemanding requirements under current constitutional arrangements:²⁰⁵

- Firstly, by virtue of section 2(2) AA, independently of section 6 AA, State Parliaments have a plenary legislative power that includes power to prescribe procedures of their own functioning (such requirements, however, must relate purely to the

²⁰³ Goldsworthy, *Manner and Form*, above n 43 at 408

²⁰⁴ Ibid at 409

²⁰⁵ Goldsworthy, *Reflections on Marquet's Case*, above n 151 at 29. Lee H.P., *Manner and Form: An imbroglio in Victoria* (1992) 15 U.NSW.L.J. 516 at 532 questions the basis on which Goldsworthy justifies the 'pure procedures' theory. H.P. Lee argues that all requirements that do not abdicate Parliament's law making power are binding, and therefore the pure procedures theory can be subsumed into the *Ranasinghe* principle. Goldsworthy in Goldsworthy, *The Principle in Ranasinghe*, above n 127 at 540-545 at 543 defends his position by distinguishing requirements binding in accordance with section 6 of the *Australia Act*, and the purely procedural requirements which are binding independently of section 6 of the *Australia Act*. The purely procedural requirements find their authority within the continuing, constituent legislative power in section 2 of the *Australia Act*.

- procedure or form of enactment and must not be excessively demanding), and
- Secondly, section 2 AA confers no legal restrictions on Parliament’s power to legislate if Parliament’s continued possession of the plenary power is not diminished.

If the requirement diminishes Parliament’s substantive law making power it can not be justified under section 2(2) AA and can not be classified as a purely procedural requirement.²⁰⁶ Procedures for resolving deadlocks between Victoria’s two houses of Parliament are examined below to ascertain whether they are pure procedures or manner and form requirements.

Key differences between purely procedural requirements and manner and form requirements

	Pure procedures (purely procedural requirement)	Manner and form (restrictive requirement)
Impact on Parliament’s power	Parliament’s law making power not diminished.	Parliament’s law making power diminished
Source of authority	Section 2 AA	Section 2 AA and Section 6 AA
Scope of application	Applies to laws in all cases whatsoever	Applies only to future laws respecting the constitution, power and procedure of Parliament
Examples	Express declaration clauses Absolute majority requirements	Referendum requirements Special majority requirements (possibly)

Procedures for resolving deadlocks between the two houses of Parliament

The nature of bicameral Parliaments gives rise to a potential for conflict between the two houses, as they often represent different electorates and may reflect different political values. Such conflicts

²⁰⁶ Taylor, *The Constitution of Victoria*, above n 10 at 482-3

most commonly arise when the upper house either rejects or fails to pass Bills that have been passed by the lower house.²⁰⁷ A number of states have established formal legislative procedures (with varied requirements) for resolving deadlocks between the two houses of Parliament. These procedures vary between the jurisdictions in the degree of burden imposed on Parliaments.

In New South Wales a procedural requirement to resolve deadlocks between the two houses is found in section 5B of the *Constitution Act 1902* (NSW). Section 5B provides that after two failed attempts to pass a Bill through both houses of Parliament, the Governor may convene a joint sitting of both houses to deliberate upon the Bill. With any additional amendments agreed at the joint sitting, the Bill is then submitted by way of a referendum to the electors. If the majority of the electors voting approve the Bill, it is submitted for Royal Assent.²⁰⁸

In Victoria, a new dispute resolution process was introduced in 2003 and is outlined in section 65A-65G, Division 9A of the *Constitution Act 1975* (Vic). A disputed Bill is defined as one which

has passed the Assembly and having been transmitted to and received by the Council not less than 2 months before the end of the session has not been passed by the Council within 2 months after the Bill is so transmitted, either without amendment or with such amendments only as may be agreed to by both the Assembly and the Council.²⁰⁹

A disputed Bill is initially referred to the Dispute Resolution Committee, comprising of seven members from the Assembly and five members from the Council.²¹⁰ The Dispute Resolution Committee reaches a Dispute Resolution on the Bill in question, providing

²⁰⁷ Hanks, above n 26 at 100-101

²⁰⁸ Section 5B(3) of the *Constitution Act 1902* (NSW)

²⁰⁹ Section 65A of the *Constitution Act 1975* (Vic)

²¹⁰ Section 65B of the *Constitution Act 1975* (Vic)

recommendations that the disputed Bill be either passed without amendments, passed with amendments, or not passed at all. The Dispute Resolution is then considered by the Assembly and the Council.²¹¹ If the Assembly or the Council fails to give effect to the Dispute Resolution, the Premier may advise the Governor that the Assembly be dissolved as a result of a deadlocked Bill.²¹² If the reintroduced deadlocked Bill again becomes a disputed Bill after an election for the Assembly, the Premier may then advise the Governor in writing to convene a joint sitting of the Assembly and the Council.²¹³ At the joint sitting the Bills are decided by the majority of the votes cast by the members present, unless the Bills relate to laws which are entrenched in the constitution. In that case the Bill is required to obtain an absolute or special majority or be submitted by way of a referendum to the electors, as the case may be.²¹⁴

It appears that the dispute resolution procedure outlined in Division 9A of the *Constitution Act 1975* (Vic) is a purely procedural requirement because it does not diminish Parliament's substantive law making power. The procedure is only used when the usual law making process fails. Parliament is always initially presented with an opportunity to legislate through the usual law making processes, which means that its sovereign law making power is left unfettered. In fact, the procedure for resolving deadlocks enhances Parliament's legislative power because it provides an alternative procedure to facilitate the enactment of legislation in situations where the usual procedure fails.

This view is supported by Twomey, who, in reference to setting up additional legislative procedures for the resolution of disagreements between the two Houses in the New South Wales Parliament, states:

²¹¹ Sections 65C and 65D of the *Constitution Act 1975* (Vic)

²¹² Section 65E of the *Constitution Act 1975* (Vic)

²¹³ Section 65F of the *Constitution Act 1975* (Vic)

²¹⁴ Section 65G of the *Constitution Act 1975* (Vic)

It does not involve the imposition of manner and form restrictions on any kind of legislation. It does not limit the power to enact legislation by the ordinary means of majorities in both Houses and the assent of the Governor. It merely provides an additional means by which legislation can be enacted.²¹⁵

In addition, the deadlock resolution procedure in Victoria appears to be discretionary in nature. In illustrating how the deadlock resolution procedure is a discretionary requirement, it is useful to break down the chronology for resolving disputes in Victoria:²¹⁶

- First, a Dispute Resolution Committee must be appointed at the start of each new Parliament against the possibility that a dispute may arise;
- Then a Bill must become a 'disputed Bill' as a result of disagreements between the Houses;
- Next, the Dispute Resolution Committee must attempt to resolve the dispute;
- If that fails, the Bill becomes a deadlocked Bill and the Premier decides whether or not to recommend a dissolution of the Legislative Assembly;
- Finally, there is the joint sitting that may be held after the next election (whether it results from a dissolution or not).

It is therefore evident that the dispute resolution procedure outlined in the Victorian Constitution is discretionary in nature because the choice to proceed rests with the Premier. That the deadlock resolution procedure outlined in section 65 of the *Constitution Act 1975* (Vic) is a discretionary requirement further confirms that it does not constitute a binding manner and form requirement.

Taylor suggests that the Victorian dispute resolution requirement is also, in part, a directory provision because strict compliance with the procedure is not required. He observes that strict compliance with

²¹⁵ Twomey, above n 128 at 292 footnote 127

²¹⁶ Taylor, *The Constitution of Victoria*, above n 10 at 333

some of the provisions of the Victorian dispute resolution procedure is not necessary to result in a valid statute:

[I]t is certainly possible that accidental non-compliance with some of the provisions of the dispute resolution procedure (for example, a failure to appoint the correct number of members of the Dispute Resolution Committee) would not invalidate a statute that resulted.²¹⁷

It can therefore be safely assumed that the procedure for resolving deadlocks between the two houses of Parliament as outlined in Division 9A of the *Constitution Act 1975* (Vic) does not diminish Parliament's substantive law making power because it does not limit the power of Parliament to enact legislation by ordinary means. Also, the procedure does not appear to be mandatory, and consists of some directory and some discretionary requirements. It is therefore likely that the procedure for resolving deadlocks between the two houses of Parliament in Victoria constitutes a pure procedure. The authority for purely procedural requirements stems from section 2 AA, independently of section 6 AA, effectively applying to all laws and not only those relating to the 'constitution, powers and procedure' of Parliament.

2.4.2 The *Ranasinghe* principle

*Bribery Commissioner v Pedrick Ranasinghe*²¹⁸ was a decision regarding a special majority requirement found in section 29(4) of the *Ceylon Constitution*. The *Ceylon Constitution* was contained in an Imperial Order-in-Council of 1946. Section 29(4) required that any Bill repealing or amending this Order had to be passed by a special majority of two-thirds of the House of Representatives and have attached to it the Speaker's Certificate verifying that it had been so passed before being presented for Royal Assent. The Ceylon Parliament was no longer subject to any superior legislature therefore section 5 CLVA no longer applied to Ceylon.

²¹⁷ Taylor, *The Constitution of Victoria*, above n 10 at 340, footnote 216

²¹⁸ [1965] AC 172

The Privy Council indicated that section 29(4) was binding and held that the *Bribery Amendment Act (1958)* was inconsistent with the Constitution because it failed to comply with the requirement set out in section 29(4), and was therefore invalid. From this decision the *Ranasinghe* principle emerged, which states the following:

... 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 laws.²¹⁹

The prohibition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.²²⁰

The Privy Council indicated that the need to obtain a two-thirds majority vote in the House of Representatives did not limit the sovereign powers of the Parliament because Parliament can always pass the amendment with the requisite majority.²²¹ Lord Pearce indicated that:²²²

The legislative power of the Ceylon Parliament is derived from section 18 and section 29 of its Constitution. [...] Therefore in the case of amendment and repeal of the Constitution the Speaker's certificate is a necessary part of the legislative process and any Bill which does not comply with the condition precedent of the proviso, is and remains, even though it receives Royal Assent, invalid and ultra vires.²²³

²¹⁹ *The Bribery Commissioner v Pedrick Ranasinghe* [1965] AC 172 at 197

²²⁰ *Ibid* at 198

²²¹ *Ibid* at 197-200

²²² *Ibid* at 199

²²³ *Ibid* at 199-200

The *Ranasinghe* principle states that restrictive manner and form requirements may be valid independently of section 6 AA. This is significant because it means that the scope of the *Ranasinghe* principle is not limited in operation to laws respecting the 'constitution, powers or procedure' of Parliament as required under section 6 AA. Under the *Ranasinghe* principle restrictive manner and form requirements may be imposed on laws relating to almost any subject matter.²²⁴

The form of law making under the *Ranasinghe* principle, however, is potentially inconsistent with the basic notions of parliamentary sovereignty as applicable in the Australian States. The *Ranasinghe* principle appears to be inconsistent with section 2(2) AA and section 6 AA.²²⁵ Gummow J in *McGinty v Western Australia* said that:

whilst section 2(2) of the *Australia Acts* declares and enacts that State Parliaments have plenary legislative power, it is further provided in section 6 that, notwithstanding this provision, manner and form requirements must be satisfied [and] this express treatment of the subject must leave no room for any greater operation which a principle derived from *Ranasinghe* might otherwise have had for any Parliament of an Australian State.²²⁶

Goldsworthy, in dismissing the Privy Council's assertion in *Ranasinghe* that 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' argues that:

this can not be taken literally because it is both too broad and too narrow. It is too broad because the Privy Council itself did not think that every condition of law-making must be

²²⁴ Carney, *Overview of Manner and Form*, above n 58 at 91

²²⁵ Goldsworthy, *The Principle in Ranasinghe*, above n 127 at 542. Also discussed in Carney G., *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press 2006) at 189

²²⁶ (1996) 186 CLR 140 at 297

complied with. [I]t is ... too narrow because it is unjustifiably limited to conditions of law-making imposed "by the instrument which itself regulates its power to make law".²²⁷

Despite these concerns, the *Ranasinghe* principle has received some judicial support in lower courts in Australia. In *Commonwealth Aluminium Corporation Ltd v Attorney-General (Qld)*²²⁸ (the *Comalco* case), Hoare J of the Supreme Court of Queensland indicated that notwithstanding section 5 CLVA, if there is an express legislative provision concerning the manner and form of subsequent legislation, then it must be observed.²²⁹ Hoare J referred to the *Ranasinghe* principle as the basis for the enforcement of manner and form requirements outside section 5 CLVA, but did not rely on it as the basis for his decision.²³⁰ The principle has also received some support from Matheson and Zelling JJ²³¹ in the *West Lakes* case²³² and Barwick CJ in *Cormack v Cope*.²³³

In *Victoria v The Commonwealth and Connor*²³⁴ Gibbs J indicated in obiter dicta that:

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

²²⁷ Goldsworthy, *The Principle in Ranasinghe*, above n 127 at 542

²²⁸ *Commonwealth Aluminium Corporation Ltd v Attorney General (Qld)* [1976] Qd R 231

²²⁹ *Commonwealth Aluminium Corporation Ltd v Attorney General (Qld)* [1976] Qd.R. 231, 247 per Hoare J., dissenting

²³⁰ [1976] Qd R 231 at 247

²³¹ (1980) 25 SASR 389 at 413 and 421 as discussed in Carney, above n 61 at 186-8

²³² (1980) 25 SASR 389

²³³ (1974) 131 CLR 432, 452f

²³⁴ (1975) 134 CLR 81, 163f also in Carney, *Overview of Manner and Form*, above n 58 at 91

resulting product.²³⁵

It should however be noted that this case dealt with alternative procedures for situations when the usual means for law making fail. Alternative law making procedures, technically, do not constitute manner and form requirements.²³⁶ In addition, in this case the alternative procedures were laid down by the federal Constitution and not a State legislature by and for itself.²³⁷

*City of Collingwood v Victoria (No 1)*²³⁸ and *BHP v Dagi*²³⁹ are decisions of the Victorian Supreme Court that upheld a manner and form requirement protecting the jurisdiction of the Supreme Court (section 85 of the *Constitution Act 1975* (Vic)) without referring to section 6 AA. Harper J²⁴⁰ in the original proceedings accepted the binding force of section 85 of the Victorian Constitution without any explanation or reference to section 6 AA. In *Collingwood v Victoria [No2]*²⁴¹ Brooking J described the *Constitution Act 1975* (Vic) as 'controlled' in many respects, without citing any legal authority for entrenchment.²⁴²

The majority judgment of the High Court in the *Marquet*²⁴³ case expressed doubts as to the applicability of the *Ranasinghe* principle in Australia based on reasons similar to those expressed by Gummow

²³⁵ *Victoria v The Commonwealth and Connor* (1975) 134 CLR 81 per Gibbs J at 163-4

²³⁶ Taylor, *The Constitution of Victoria*, above n 10 at 478 and discussion relating to deadlock resolutions in section 2.4.1 of this thesis

²³⁷ *Ibid* at 479

²³⁸ [1993] 2 VR 66; (No2) [1994] 1 VR 652

²³⁹ [1996] 2 VR 117

²⁴⁰ *Collingwood v Victoria* [1993] 2 VR 66 at 73 and 78

²⁴¹ [1994] 1 VR 652

²⁴² *Ibid* at 669-70

²⁴³ [2003] HCA 67

J in *McGinty v Western Australia*.²⁴⁴ Gleeson CJ, Gummow, Hayne and Heydon JJ in *obiter dicta* rejected the *Ranasinghe* principle on the basis that the operation of section 6 AA makes it 'unnecessary to decide whether, separately from and in addition to the provision of that section, there is some other source' authorising manner and form requirements. Two reasons were provided: firstly, the continuance of the Constitution of a State (pursuant to section 106 of the Commonwealth Constitution) is subject to the Australia Act; and secondly, the express provisions of section 6 AA 'can leave no room for the operation of some other principle, at the very least in the field in which section 6 operates'.²⁴⁵

Since the *obiter dicta* comments by the High Court in the *Marquet* case, it is unlikely that the *Ranasinghe* principle has any application with respect to the Australian States and Territories. The form of law-making where state Parliaments could introduce conditions by and for themselves in the future is inconsistent with the concept of a State Parliament's continuing constituent power granted in section 2(2) AA and the only exception to it is outlined in section 6 AA. This is not to say that the principle should be dismissed outright; it could possibly have some weight in other jurisdictions such as the United Kingdom where there does not appear to be a Constitutional impediment to the invocation of the principle.

2.4.3 Reconstitution

'Reconstitution' refers to a situation where the structure of Parliament is reconstituted for the purposes of enacting certain laws. The power to enact these laws lies with the reconstituted legislature, not with the original legislature.²⁴⁶ The 'reconstitution' of Parliament is based on the premise that the definition and composition of

²⁴⁴ (1996) 186 CLR 140; (2003) 78 ALJR 105, per Gleeson CJ, Gummow, Hayne and Heydon JJ as outlined in Twomey, *Manner and Form Limitations*, above n 141 at 185

²⁴⁵ [2003] HCA 67 at 80; 78 ALJR 105 at 118-119

²⁴⁶ Carney, *Overview of Manner and Form*, above n 58 at 86

Parliament is not static and can be changed with relative ease.²⁴⁷ For example, a Parliament may be a body consisting of the Crown and two Houses, as is the case in most states, but it may also consist of the Crown and only one House as is the case in Queensland. In some instances Parliament may be reconstituted whereby members from both houses vote together in a joint sitting, which is a common practice in resolving disputes between the two Houses of Parliament.²⁴⁸ It could also be argued that when a referendum is called, Parliament is reconstituted to include the electors in addition to the Houses of Parliament and the Crown. There may also be other circumstances in which Parliament could be validly reconstituted.

The significance of the 'reconstitution' option is that it is not the same as a manner and form requirement and therefore there is no need for it to be confined to laws respecting the 'constitution, power or procedure' of Parliament in accordance with section 6 AA.²⁴⁹

Authority for 'reconstitution' is found in the *Australia Act* where State Parliaments are authorised to alter their own constitutions as part of the plenary legislative power granted in section 2(2) AA.²⁵⁰ This authority is further supported by section 16(1) of the *Australia Acts*²⁵¹ which recognises that State Parliaments may consist of different elements in legislating on different subjects.

References to State Parliaments in sub section 2(2) AA relate to 'Parliament' as defined in State Constitutions.²⁵² When reconstituting

²⁴⁷ Lee H.P., above n 205 at 526

²⁴⁸ *Harris v Donges (Harris v Minister of the Interior)* [1952] 1 T.L.R. 1245

²⁴⁹ Lee H.P., above n 205 at 527

²⁵⁰ Carney, *Overview of Manner and Form*, above n 58 at 90

²⁵¹ "[A] reference in this Act to the Parliament of a State includes, in relation to the State of New South Wales, a reference to the legislature of that State, whether or not, in relation to any particular legislative act, the consent of the Legislative Council of that State is necessary."

²⁵² Goldsworthy, *Manner and Form*, above n 43 at 413

Parliament it should therefore be made clear that it is the 'Parliament', as defined in the State Constitution, that is being reconstituted for a specific purpose.²⁵³ This may be difficult in practice because the definition of 'Parliament' is often entrenched.²⁵⁴ Section 15 of the *Constitution Act 1975* (Vic), which provides that 'the legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria', is protected by a requirement of a three-fifths special majority.²⁵⁵ To effectively reconstitute the Parliament of Victoria, an amendment of section 15 of the *Constitution Act 1975* (Vic) is required.

Even though some commentators have rejected the view that Parliament can bind future Parliaments by simply reconstituting itself,²⁵⁶ there has been ample support expressed for the concept of reconstitution.²⁵⁷

In *Trethowan*²⁵⁸ it was suggested that a referendum requirement could be justified as a change in the composition of Parliament to include the electors voting in a referendum.²⁵⁹ Dixon J indicated that

²⁵³ Carney, above n 61 at 186

²⁵⁴ This, however, may in itself involve a restrictive procedure. Section 18 of the *Constitution Act 1975* (Vic) requires that any Bill 'by which an alteration in the constitution of the Parliament, the Council or the Assembly may be made' must be passed by absolute majorities in both Houses before presentation for the Royal Assent.

²⁵⁵ Assuming that a three-fifths majority requirement constitutes a valid manner and form requirement.

²⁵⁶ Sawyer G., *Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence* (1944) 60 *Law Quarterly Review* 83; Winterton G., *The British Grundnorm: Parliamentary Supremacy Re-examined* (1976) 92 *Law Quarterly Review* 591; see Carney, above n 61 at 184

²⁵⁷ See Goldsworthy, *Manner and Form*, above n 43; Taylor, *The Constitution of Victoria*, above n 10; Twomey, above n 128

²⁵⁸ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394

²⁵⁹ For further analysis of the *Trethowan's* case regarding this issue see Goldsworthy, *Trethowan's Case*, above n 43 at 112-3

reconstitution was possible because Parliament's 'power to make laws respecting its own constitution enables the legislature to deal with its own nature and composition', and that 'laws which relate to Parliament's own constitution must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws'.²⁶⁰

Rich J held that 'the constitution of the legislative body may be altered; that is to say, the power of legislation may be reposed in an authority differently constituted'. Referring to Parliament's continuing plenary power, his Honour conceded that a Parliament 'was competent to ... establish a third chamber whose assent would be required to complete any legislative act'. This third chamber might consist of electors voting on a specific subject in a referendum.²⁶¹ His Honour then indicated that:

if the legislative body consists of different elements for the purpose of legislating on different subjects, the natural method of applying the definition would be to consider what was the subject upon which the particular exercise of power was proposed, and ... conferring upon that body authority to deal with that subject matter.²⁶²

According to Rich J's judgment, some restrictive procedures can be either manner and form requirements or a reconstitution of Parliament.²⁶³

In his dissenting judgment, McTiernan J accepted the principle of reconstitution, but only in situations where the legislature is reconstituted for all purposes, not just for passing selected legislation. His Honour concluded that section 7A of the *Constitution*

²⁶⁰ (1931) 44 CLR 394 at 430

²⁶¹ *Ibid* at 418

²⁶² *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394 Rich J at 419-420. In *Clayton v Heffron* (1960) 105 CLR 214 at 251 joint judgment adopts the same approach in relation to section 5 of the *Constitution Act 1902* (NSW).

²⁶³ Goldsworthy, *Manner and Form*, above n 43 at 408

Act 1902 (NSW) did not give effect to reconstitution and rejected the proposition that the electorate could be a constituent element of Parliament only for the purposes outlined in section 7A of the *Constitution Act 1902* (NSW).²⁶⁴

*Harris v Donges (Harris and Others v Minister of the Interior)*²⁶⁵ involved an attempt to repeal the provision of the South African Constitution (the *South Africa Act 1909*) which had been created by the Imperial Parliament and entrenched by the following procedure:

no repeal or alteration of the provisions contained in this section ... or in sections 35 and 137 ... shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by no less than two-thirds of the total number of members of both Houses.²⁶⁶

By that time the *Colonial Laws Validity Act* no longer applied to South Africa. The Court held that the South African Parliament was bound by the requirement to pass the *Separate Representation of Votes Act 1951* by a two-thirds majority at a joint sitting of both houses. The Court declared the amendments invalid because the authority to enact those amendments was vested solely in the Parliament as initially constituted (per section 152 of the *South Africa Act*). The Court accepted *divisible sovereignty*, indicating that Parliament could be differently constituted for different purposes, and held that the repealing legislation (the *Separate Representation of Voters Act*) was not a valid Act, because the body that passed it was not 'Parliament' as required in the entrenchment.²⁶⁷

²⁶⁴ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394 at 445-8

²⁶⁵ [1952] 2 SA 428; [1952] 1 T.L.R. 1245

²⁶⁶ Section 152 *South African Act* (1909)

²⁶⁷ *Harris and Others v Minister of the Interior* [1952] 2 SA 428; [1952] 1 T.L.R. 1245. See discussion at Carney, *Overview of Manner and Form*, above n 58 at 88.

There are, however, a number of limitations on what may constitute a 'Parliament' and what constitutes a valid and effective reconstitution. First, as discussed earlier, under no circumstances can Parliament's law making power be abdicated. Secondly, the Crown must remain part of the legislature of a State Parliament to grant royal assent, as illustrated in *In re Initiative and Referendum Act* and *Taylor v Attorney General of Queensland*. Thirdly, a 'Parliament' by definition and for the purposes of the *Australia Act* must include an element of democratic accountability.²⁶⁸ Even though there are no entrenched requirements guaranteeing democracy, it is likely that courts, in defining 'Parliament' in light of section 2(2) AA, would exclude partly or wholly unrepresentative bodies.²⁶⁹

In summary, 'reconstitution' refers to a situation where the structure of Parliament is changed for the purposes of enacting certain laws. Reconstitution is different from manner and form requirements as it finds its authority in section 2(2) AA, independently of section 6 AA. This is significant as it means that reconstitution is not confined to laws relating to the 'constitution, power and procedure of Parliament'. Notwithstanding this, to be valid, reconstitution can not subject the exercise of legislative power to an outside body, the Crown must always remain part of the legislature and the reconstituted Parliament should always include an element of democratic accountability.

2.4.4 Section 106 Commonwealth Constitution

Section 106 of the Commonwealth Constitution states that:

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

²⁶⁸ Goldsworthy, *Manner and Form*, above n 43 at 413

²⁶⁹ Ibid at 413-4

Reliance on section 106 of the Commonwealth Constitution to justify manner and form requirements has been influenced by comments made *obiter dicta* in *The State of WA and Others v Wilsmore*.²⁷⁰ The phrase 'until altered in accordance with the Constitution of the State' in section 106 of the Commonwealth Constitution was interpreted to require that State Parliaments observe manner and form requirements in State Constitutions.²⁷¹ Burt CJ said that:

... section 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.²⁷²

On face value, Burt C.J.'s comments may be taken to mean that section 106 provides authority for holding restrictive procedures to be binding independently of section 6 AA. Goldsworthy, however, argues that what his Honour might have meant is that when a restrictive procedure is already binding for other reasons, section 106 by its own force and for its own purposes also makes it binding.²⁷³ Goldsworthy maintains that 'in accordance with' in the final phrase of section 106 means 'not in violation of' and therefore, the binding nature of any manner and form requirement is left to be determined under the general law and derives no independent force from section 106 itself. The words 'until altered in accordance with the Constitution of the State' in section 106 should be construed as 'until altered in accordance with the valid restrictive procedures in the Constitution of the State'.²⁷⁴ Under this proposition the purpose of

²⁷⁰ (1981) 33 ALR 13

²⁷¹ *State of Western Australia v Wilsmore* (1981-1982) WAR 179

²⁷² *State of Western Australia v Wilsmore* (1981) 33 ALR 13 at 18 per Burt CJ, (1981-1982) WAR 179 at 18

²⁷³ Goldsworthy, *Manner and Form*, above n 43 at 426-8

²⁷⁴ See discussion in Lee H.P., above n 205 at 531 in footnote 43

section 106 is to maintain State Constitutions as they are, and make them subject to the Commonwealth Constitution.²⁷⁵

This proposition has been adopted by Gummow J in *McGinty v Western Australia* where the phrase 'until altered in accordance with the Constitution of the State' was interpreted to mean 'until so altered as not to contravene any otherwise binding requirement' of the Constitution of the State. Manner and form requirements have to be justified by an authority other than section 106 of the Commonwealth Constitution.²⁷⁶

The same approach was reflected in Kirby J's judgment in the *Marquet* case, where he indicated that section 106 alone could not supply a basis for entrenchment.²⁷⁷ The majority in *Marquet* emphasised that section 106 is subject to laws enacted under section 51(38) of the Commonwealth Constitution, including section 6 AA. It was further recognized that section 6 AA was intended to cover the field in relation to manner and form requirements and therefore section 106 has no role in independently providing authority for manner and form requirements.²⁷⁸

In summary, two different views have been expressed as to the effect of section 106 on manner and form provisions. One interpretation derived from Burt J's obiter dicta in *Wilsmore*, is that it provides a constitutional guarantee that any manner and form requirement prescribed by a State Constitution for its own amendment, must be observed whether or not any other legal basis exists for its enforcement. Another interpretation is that section 106 merely contemplates the amendment of State Constitutions after 1901, ensuring that section 106 has a continuing effect in maintaining State Constitutions as they exist from time to time and subjecting them to

²⁷⁵ Carney, above n 61 at 190

²⁷⁶ *McGinty v Western Australia* (1996) 186 CLR 140, per Gummow J at 296-7

²⁷⁷ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 per Kirby J at 190

²⁷⁸ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 67

the Commonwealth Constitution. The latter interpretation was adopted in the *McGinty* and *Marquet* cases and has been widely accepted in academic circles. It is therefore unlikely that section 106 of the Commonwealth Constitution would be held to provide any additional authority for manner and form requirements independently of section 6 AA.²⁷⁹

2.4.5 New developments in the UK

In *Thoburn v Sunderland City Council*²⁸⁰, Laws LJ in the English Divisional Court took the view that parliamentary sovereignty might be altered by the common law. Laws LJ stated that a hierarchy of Acts of Parliament should be recognised. In addition to 'ordinary statutes' which are subject to the doctrine of implied repeal, Laws LJ identified a special category of 'constitutional statutes' which could not be repealed by a later statute unless that statute expressly stated its intention to do so.²⁸¹ 'Constitutional statutes' were found to include those relating to the legal relationship between citizens and State in some general overarching manner, or those that enlarge or diminish the scope of what are now regarded as fundamental constitutional rights. As such, a Bill of Rights under English law could potentially be classified as a 'constitutional statute'.²⁸²

This is a new (and somewhat controversial) principle emerging in the UK jurisdiction, which at this stage is largely undeveloped. It is unlikely that this principle would have any weight in Australia or Victoria. Acceptance of such a principle in Australia would be

²⁷⁹ For discussion of what constitutes a Constitution see Gilbert C.D., *Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts* (1978) 9 Federal Law Review 348 at 350-7

²⁸⁰ [2002] 3 WLR 247

²⁸¹ See discussion in Evans C., Evans S., Brookes A., *Attachment D: Constitutional Entrenchment of a Bill of Rights in Victoria to the Submission to the Victorian Human Rights Consultation Committee* Centre for Comparative Constitutional Studies at 5 ('Attachment D') available at <http://cccs.law.unimelb.edu.au/download.cfm?DownloadFile=BEB2C642-1422-207C-BAAC46B2A2643AF7>

²⁸² [2002] 3 WLR 247 at 62

inconsistent with the doctrine of parliamentary sovereignty as it applies in the Australian context, and therefore section 6 AA.²⁸³ To gain recognition it would be necessary for the Australian courts to unilaterally and fundamentally change the constitutional arrangements currently in place. As such, there is so far no basis for Australian courts to rely on the 'constitutional statutes' principle as authority for manner and form requirements in Australian states.²⁸⁴ It is useful to consider how the doctrine of parliamentary sovereignty is developing in relevant jurisdictions compared to Australia in order to appreciate different (yet relevant) perspectives on the doctrine.

Another relevant development in the UK relates to the English Court of Appeal and the House of Lords judgments on the validity of the *Hunting Act 2004* (UK) which banned fox hunting. The validity of the legislation was upheld, but the specific judicial exhortations on the issue have challenged the traditional judicial perceptions on the nature and relevance of the doctrine of parliamentary sovereignty as applied in the UK.²⁸⁵

The *Hunting Act 2004* (UK) was enacted without the consent of the House of Lords, pursuant to section 2 of the *Parliament Act 1911* (UK) which permitted a Bill to be presented to the monarch for royal assent if it had been both passed by the House of Commons and rejected by the House of Lords in three successive sessions.²⁸⁶ This, in effect, conferred a power to legislate subject to compliance with certain conditions. The supporters of fox-hunting challenged the validity of the *Hunting Act 2004* on the ground that the procedure used to enact the Act was invalid.

²⁸³ Evans, *Attachment D*, above n 281 at 6

²⁸⁴ For more information on *Thoburn* see Evans S., *Why is the Constitution Binding? Authority, Obligation and the Role of the People* (2004) 25 *Adelaide Law Review* 103

²⁸⁵ *Jackson v Attorney General* [2005] QB 579; *Jackson v Attorney General* [2005] UKHL 56

²⁸⁶ This was amended by the *Parliament Act 1949* so that the procedure only required the passage and rejection of a Bill in two successive sessions instead of three.

It is significant that both the English Court of Appeal and the House of Lords accepted that the validity of the *Hunting Act 2004* (UK) was a justiciable matter. Members of both the Court of Appeal and the House of Lords upheld the validity of the *Hunting Act 2004* (UK) but, principally Lord Steyn, appeared to presuppose implied limitations on the power to legislate under the *Parliament Act 1911* (UK), particularly if the proposed laws are undemocratic or remove the express limitations imposed by the 1911 Act on the exercise of powers under that Act. It is unusual in the UK for judges to indicate that the courts may ultimately determine the scope of parliamentary supremacy and reject laws which are, for instance, undemocratic. Such judicial determinations tend to be more consistent with constitutional developments in Australia.

Lord Steyn indicated that the UK does not have an uncontrolled constitution, and that there are limitations deriving from recent political and legislative developments including membership of the European Union and incorporation of the European Convention on Human Rights into domestic law. He then indicated that:

In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.²⁸⁷

In discussing what constitutes Parliament, he indicated that:

The word Parliament involves both static and dynamic concepts. The static concept refers to the constituent elements which make up Parliament: the House of Commons, the House of Lords, and the Monarch. The dynamic concept involves the constituent elements functioning together as a law making body. The inquiry is: has Parliament spoken? The law and custom of Parliament regulates what the constituent elements must do to legislate: all three must signify consent

²⁸⁷ *Jackson v Attorney General* [2005] UKHL 56 at 102

to the measure. But, apart from the traditional method of law making, 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.²⁸⁸

Lord Steyn appears to suggest that Parliament could, for specific purposes, provide for a two-thirds majority requirement. A similar suggestion is made in this thesis above in section 2.1.3, albeit for different reasons. Some of the issues regarding parliamentary sovereignty considered in the *Jackson's* case may further inform future deliberations (whether judicial or not) on related issues in Australia.

It is also noteworthy that the Court of Appeal in its consideration of the case identified a possible distinction between the power to make fundamental constitutional changes and more modest changes in amending the *Parliament Act 1911* (UK), and stated that fundamental changes can only be made by the traditionally constituted sovereign Parliament, whereas more modest changes could be made by the Parliament Act's procedure.²⁸⁹ The Court of Appeal indicated that it is 'obvious that, on our approach, the greater the scale of the constitutional change proposed by any amendment, the more likely it is that it will fall outside the powers contained in the 1911 Act'.²⁹⁰ The House of Lords rejected this proposed distinction.²⁹¹

²⁸⁸ Ibid at 81

²⁸⁹ *Jackson v Attorney General* [2005] QB 579 at 48

²⁹⁰ Ibid at 100

²⁹¹ *Jackson v Attorney General* [2005] UKHL 31, 56, 131 and 158

2.5 Forms of entrenchment

2.5.1 Single entrenchment and double entrenchment

If a manner and form requirement is not effectively protected, it can be easily repealed either expressly or impliedly. Unprotected manner and form requirements are often referred to as singly entrenched. Under single entrenchment, manner and form requirements can be amended or repealed by ordinary legislation, paving the way for amendment or repeal of the legislation they purport to protect.²⁹² Singly entrenched manner and form provisions are ineffective in protecting specific laws. The enactment of legislation inconsistent with manner and form requirements can impliedly repeal a manner and form provision. To be effectively binding, manner and form provisions themselves need to be protected, the need to be doubly entrenched.²⁹³

Double entrenchment refers to a situation where amendment or repeal of manner and form provisions is itself subject to a specific manner and form requirement. Unlike single entrenchment, it ensures that the manner and form provision itself can not be repealed or amended, either impliedly or expressly, by a simple majority.²⁹⁴ The requirement protecting the manner and form provision could be one that the provision itself prescribes, or it could be a different requirement.²⁹⁵ An example in which another requirement to the one prescribed is used to protect a manner and form provision is section 85 of the *Constitution Act 1975* (Vic). Section 85 requires that Bills altering the jurisdiction of the Supreme Court be explained to the House by the Member introducing the Bill.

²⁹² Carney, above n 61 at 192 also see Carney, *Overview of Manner and Form in Australia*, above n 58 at 70

²⁹³ Goldsworthy, *Manner and Form*, above n 43 at 419

²⁹⁴ Winterton G., *Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?* (1980) 11 (2) *Federal Law Review* 167 at 172

²⁹⁵ Carney, *Overview of Manner and Form in Australia*, above n 58 at 93

However, amendment or repeal of section 85 can only be effected if it is passed by an absolute majority of each House of Parliament.²⁹⁶ A doubly entrenched manner and form requirement is a prerequisite for an effective entrenchment.

2.5.2 Symmetric entrenchment

Introducing manner and form requirements through a simple majority raises questions about fairness and potential abuse of the power to entrench as it allows today's Parliaments, with relative ease, to restrict the legislative power of future Parliaments.²⁹⁷

Authority for such enactments was confirmed in the *Trethowan*²⁹⁸ case where the referendum requirement contained in section 7A of the *Constitution Act 1902* (NSW) was held to be valid and binding despite being enacted by a simple majority. Section 73(2) of the *Western Australian Constitution* is another example where an absolute majority and a referendum requirement were enacted by absolute majorities.²⁹⁹ A further example is section 53 of the *Constitution Act 1867* (Qld), which prescribes a referendum for legislative change, but was entrenched without a referendum being held.³⁰⁰ There are also a number of manner and form provisions embedded in the *Constitution Act 1975* (Vic) that were enacted by a procedure less onerous than the ones imposed.

In *Marquet*, Kirby J expressed his concerns about the power to entrench which is currently available to state Parliaments.³⁰¹

²⁹⁶ Section 18(2A) of the *Constitution Act 1975* (Vic) as discussed in Carney, above n 61 at 192

²⁹⁷ Twomey, above n 128 at 313

²⁹⁸ (1931) 44 CLR 394

²⁹⁹ Gardner, *Musing on Marquet*, above n 73 at 7 (of 13 A4 page print out)

³⁰⁰ Carney, above n 61 at 151

³⁰¹ Section 13 of the *Electoral Distribution Act* which was subject of judicial deliberations in the *Marquet* case, was itself enacted by absolute majorities.

[T]he absurdity of the postulate that would permit one Parliament, by vote of a simple majority, to require that no change to its constituent powers might occur without a two-thirds, 80% or 90% or 99% majority to be effective, shows the limits to which the undemocratic potential of section 5 of the Colonial Laws Validity Act, so constructed, could be pushed, at least in legal theory.

The supposed power of entrenchment must be tested by other possibilities of extreme and undesirable impositions upon a representative legislature of a state of Australia. Whilst not denying the possibility of entrenchment as such, the wisdom of restricting the effective imposition of such outcomes to laws of a very limited class is borne out ... by the general postulate of democratic accountability that underpins all Australia's constitutional arrangements.³⁰²

As observed by Kirby J, there is no guarantee that Parliaments' capacity to bind future Parliaments will be exercised solely in the public interest. The power of entrenchment may be easily abused by majority governments promoting their factional or political interests.³⁰³

Also, Gummow J in *McGinty v Western Australia* found a conceptual difficulty with the legitimacy of a requirement being enacted otherwise than by the very procedure it purports to prescribe.³⁰⁴ There appears to be a recognition of the need to address this legal conundrum.

One way of addressing this potential problem is by mandating symmetric entrenchment. Symmetric entrenchment is a practice where the same rule governs both the enactment and the repeal of legislation. Mandatory symmetric entrenchment would require the

³⁰² (2003) 202 ALR 233 at 281 and 285; see Goldsworthy, *Reflections on Marquet's Case*, above n 151 at 20-1

³⁰³ Carney, above n 61 at 159

³⁰⁴ (1996) 186 CLR 140, per Gummow J at 299

introduction of entrenchments to follow the same procedure that constitutes the entrenchment.³⁰⁵

In recent times there has been growing political support for symmetric entrenchment. The Queensland Constitutional Review Commission recommended that provisions requiring a referendum should only be enacted if they themselves are approved by a referendum.³⁰⁶ In New South Wales, it has been suggested by some Members of Parliament that the *Constitution Act* be amended with the support of the people in a referendum, to provide that future manner and form requirements be inserted by the same manner and form as they impose. To date, however, these proposals have not been implemented.³⁰⁷

A provision which is similar to a mandatory symmetric entrenchment requirement is found in section 26 of the *Australian Capital Territory (Self-Government) Act 1988*. It states that any law attempting to prescribe 'restrictions on the manner and form' of making particular enactments has to be submitted to a referendum. Once the majority of voters voting in a referendum approve the provision, Parliament is required to pass the entrenching law by the same special majority it is purporting to require for other legislation.³⁰⁸ Section 26 reads as follows:

- (1) The Assembly may pass a law (in this section called the entrenching law) prescribing restrictions on the manner and form of making particular enactments (which may include enactments amending or repealing the entrenching law).
- (2) The entrenching law shall be submitted to a referendum of the electors of the Territory as provided by enactment.

³⁰⁵ Carney, above n 61 at 159

³⁰⁶ Queensland Constitutional Review Commission *Report on the Possible Reform and Changes to the Acts and Laws that relate to the Queensland Constitution* February 2000 at 76

³⁰⁷ NSW Parliamentary Debates, Legislative Assembly, 11 April 1979, per Mr Mason at 4061, and per Mr Punch at 4068; 25 September 1985, per Mr Dowd at 7054; 12 November 1986, per Mr Dowd at 6228 see Twomey, above n 128 at 313

³⁰⁸ Section 26 of the *Australian Capital Territory (Self-Government) Act 1988 (Cth)*

- (3) If a majority of the electors approve the entrenching law, it takes effect as provided by section 25.
- (4) While the entrenching law is in force, an enactment to which it applies has no effect unless made in accordance with the entrenching law.
- (5) If an entrenching law includes the requirement (however expressed) that an enactment or enactments be passed by a specified majority of the members (in this subsection called a special majority), the same requirement shall be taken to apply to the entrenching law so that it must be passed by:
 - a. that special majority; or
 - b. if it specifies different special majorities for different enactments – the highest of those special majorities.
- (6) If an entrenching law passed by the Assembly:
 - a. includes the requirement (however expressed) that an enactment or enactments be submitted to a referendum of the electors of the Territory; and
 - b. includes provision (however expressed) that, to have effect, the referendum is to be passed by a specified majority of the electors (in this subsection called a special majority);

the same requirement shall be taken to apply to the entrenching law, so that the reference in subsection (3) to a majority of the electors shall be taken to be a reference to:

- c. that special majority; or
- d. if the entrenching law specifies different special majorities for different enactments – the highest of those special majorities.

2.5.3 Risks inherent with symmetric entrenchment

Unqualified symmetric entrenchment can not necessarily resolve all the problems associated with Parliament's power to entrench. There are risks associated with symmetric entrenchment as it alone can not guarantee that Parliament's capacity to entrench will be exercised solely in the public interest. The power to entrench may still be abused by majority governments in promoting their factional or political interests. For example, a government with a slim majority of, say, 54% might see this as an opportunity to symmetrically entrench its agenda with a special majority of 54%. Another party with a majority of 57% might entrench its agenda with a 57% special majority. This illustrates how an unqualified presumption of symmetry may result in a large and diverse number of possible entrenchments, making it difficult to monitor the requirements used

for different laws, undermining the fundamental distinction between ordinary legislation and higher law.³⁰⁹

For these reasons, symmetric entrenchment must be conditional.³¹⁰ To effectively mitigate the risks inherent in Parliament's power to entrench, symmetric entrenchment needs to affirm democracy and prevent Parliaments from opportunistic exploitation of large swings in the political majority.³¹¹ There are two possible measures that may mitigate the potential misuse of symmetric entrenchment by Parliaments:

- asymmetric entrenchment; and
- fixed (as opposed to variable) entrenchment.

Asymmetric entrenchment requires that legislation introducing an entrenchment be enacted through a specific procedure, but not necessarily the same procedure it is purporting to introduce. For example, there may be a generic requirement that any Bill attempting to introduce an entrenchment is required to be approved by a majority of voters voting in a referendum, as is the case in the Australian Capital Territory.³¹²

Fixed entrenchment relates to a situation where symmetric entrenchment can be limited to the use of only a few (two or three) predetermined procedures. For example, where entrenchment is only possible, and can only be introduced, with the use of an absolute majority, a specific special majority or a referendum

³⁰⁹ McGinnis J., Rappaport M., *Symmetric Entrenchment: A Constitutional and Normative Theory* (2003) 89(2) *Virginia Law Review* 385 at 439

³¹⁰ Gardner, *Musing on Marquet*, above n 73 at 7 (of 13); Carney, above n 61 at 193; This principle was supported by Winterton's submission to the Western Australian Government, Commission on Government, Report 5 August 1996 at 86

³¹¹ For example a requirement of a majority of the whole membership of a chamber for a vote on an important issues should not be seen as undemocratic; Gardner, *Musing on Marquet*, above n 73 at 7 (of 13)

³¹² McGinnis, Rappaport, above n 309 at 411-2

requirement.³¹³ This, however, risks excluding the use of some other useful entrenchments. Asymmetric entrenchments and fixed entrenchments aim to ensure that temporary variations in parliamentary compositions do not result in opportunistic entrenchments, preserving some of the benefits of entrenchment without the peculiar dangers associated with unconditional power of entrenchment.³¹⁴

2.5.4 Mandating symmetric entrenchment³¹⁵

There is currently no legal requirement in Victoria for Parliament to follow the same manner and form procedure that it is purporting to introduce. Potential risks associated with Parliament's unqualified power to entrench are therefore quite real.

An obvious method of introducing mandatory symmetric entrenchment is to amend section 6 AA to expressly indicate that any entrenchment provision needs to be enacted by the same procedure it is purporting to introduce. Amendment of section 6 AA would need to follow the procedure set out in section 15(1) of the *Australia Acts*, which requires amendment by the Federal Parliament at the request or with the concurrence of all state Parliaments.

A less obvious but possibly equally effective method of mandating symmetric entrenchment in Victoria is to insert a new provision into the Victorian Constitution requiring parliaments to adhere to symmetric entrenchment when exercising their power to entrench. The way such a provision could be effectively introduced into the Victorian legal framework will now be outlined, providing an important contribution to the understanding and applicability of the law relating to manner and form in Victoria, and in formulating detailed recommendations for reform in this area.

³¹³ Ibid at 437

³¹⁴ Ibid at 439

³¹⁵ Introducing mandatory symmetric entrenchment as part of the *Constitution Act 1975* (Vic) was initially suggested by Prof Goldsworthy, with the concept and methodology subsequently evolving through our regular discussions.

2.5.5 Introducing mandatory symmetric entrenchment in Victoria

Section 2(2) of the *Australia Acts* states that the Parliament of each state has full power to make laws for the peace, order and good government of that state. Section 16 of the *Constitution Act 1975* (Vic) states that the Victorian Parliament has the power to make laws in and for Victoria in all cases whatsoever. These two provisions provide authority enabling the Victorian Parliament itself to introduce mandatory symmetric entrenchment in Victoria.

Building on the example in section 2.3.6 of this chapter, using Law 1 and Law 2, the provision mandating symmetric entrenchment can be referred to as 'Law 0' as it precedes both Law 1 and Law 2. It would be prudent to entrench a provision mandating symmetric entrenchment to ensure that it is effectively binding on future Parliaments. If Law 0 is validly entrenched, it can effectively restrict the entrenchments available to Parliaments, in the same way that it can effectively mandate symmetric entrenchment, as long as it does not abdicate Parliament's law making power. The requirement doubly entrenching this provision may be a restrictive manner and form in accordance with section 6 AA. The provision entrenching Law 0 would almost certainly be within the scope of section 6 of the *Australia Acts* because any law attempting to enact a manner and form provision, by its very nature, would be a law relating to the 'constitution, power or procedure' of Parliament. If Law 0 is itself not entrenched, a future law purporting to introduce a manner and form provision would not be required to adhere to the requirement.

Even though it is not legally required, consistency demands that the enactment of Law 0 itself comply with symmetric entrenchment. For example, Law 0 should be enacted by an absolute majority if its amendment or repeal is made subject to an absolute majority requirement.

Enactment of any subsequent law (Law 1) would need to follow the manner and form requirement it is purporting to introduce. For example, if a law were being enacted introducing a referendum requirement, there would be a legal requirement for that law itself to be submitted to the voters in a referendum. Law 0 would therefore ensure that symmetric entrenchment is a legally binding requirement in Victoria.

If, subsequently, a law were introduced in the future (Law 2) attempting to amend or repeal the entrenched law (Law 1), it would have to fall within the scope of section 6 AA for the manner and form requirement to be binding. If Law 2 relates to the 'constitution, powers or procedure of Parliament' then it would have to be introduced in accordance with the manner and form requirement stipulated in Law 1.

INTRODUCING SYMMETRIC ENTRENCHMENT

- Law 0** Law 0 mandates symmetric entrenchment: it requires any future law introducing a manner and form procedure to be passed by the same procedure.
- Law 1** Law 1 is the subsequent law introducing a manner and form requirement entrenching "X". Law 1 itself is required by Law 0 to be passed by the procedure it is purporting to introduce. Any Law 1, because it is attempting to enact a manner and form provision, relates to the 'constitution, power and procedure of Parliament' in accordance with section 6 of the *Australia Acts*.
- Law 2** Law 2 is a future law attempting to amend or repeal "X". Law 2 would need to be a law with respect to the 'constitution, powers or procedure of Parliament' for the manner and form requirement protecting "X" to be binding.

2.5.6 Suggested provisions for the *Constitution Act 1975 (Vic)*

This section suggests provisions which may be introduced into the Victorian legal framework, possibly as part of section 16 of the *Constitution Act 1975 (Vic)* to mandate symmetric entrenchment. The suggested provisions are modelled on section 26 of the *Australian Capital Territory (Self-Government) Act 1988*.

- symmetric entrenchment

A provision that mandates symmetric entrenchment requires that entrenchments are passed in accordance with the same procedure that they purport to introduce. The following draft provisions could be inserted into section 16 of the *Constitution Act 1975 (Vic)* to mandate symmetric entrenchment:

Section 16 AA: Requirement for symmetric entrenchment

- (1) If Parliament passes a law (in this section called the entrenching law) prescribing a specific manner and form requirement for making particular enactments, the entrenching law must itself be enacted in accordance with the same manner and form requirement that it prescribes for other enactments.
- (2) A law, including the entrenching law, will be of no force or effect unless made in accordance with the prescribed manner and form requirement.

These provisions confirm that Parliament has the power to prescribe manner and form requirements, in line with sections 2 and 6 of the *Australia Acts*, and section 16 of the *Constitution Act 1975* (Vic). The provisions mandate symmetric entrenchment by expressly specifying that Parliament is required to follow the procedure it is purporting to introduce in the entrenching law, making symmetric entrenchment mandatory in Victoria when a manner and form requirement is being introduced. To ensure that the provision is effectively binding, it itself needs to be effectively entrenched by some specific manner and form requirement.

- asymmetric entrenchment

Asymmetric entrenchment requires that legislation introducing an entrenchment be enacted through a specific procedure, but not necessarily the same procedure it is purporting to introduce. This may mitigate some of the risks associated with Parliament's power to entrench that are not addressed by symmetric entrenchment. In section 26 of the *Australian Capital Territory (Self Government Act) 1988*, for instance, there is a generic requirement that any bill attempting to introduce an entrenchment is required to be approved by a majority of voters voting in a referendum. Below is an example of a similar provision that could be inserted into section 16 of the *Constitution Act 1975* (Vic):

Section 16 AA: Requirement for asymmetric entrenchment

- (1) If Parliament passes a law (in this section called the entrenching law) prescribing a specific manner and form requirement for making particular enactments, the entrenching law must be approved by a majority of electors voting at a referendum conducted in accordance with Part 9A of the **Electoral Act 2002**.
- (2) If the entrenching law is binding and while it is in force, an enactment to which it applies has no effect unless it is passed in accordance with the manner and form requirement prescribed by the entrenching law.

These provisions confirm that Parliament has the power to prescribe manner and form requirements and indicates that any Bill intending to introduce entrenchments needs to be approved by a majority of the voters voting at a referendum. This effectively mandates asymmetric entrenchment. Once again, to ensure that the provision is effectively binding, it itself needs to be effectively entrenched.

2.6 Conclusions

2.6.1 Manner and form can not abdicate Parliament's law making power.

Understanding manner and form is of fundamental importance to the understanding of the operation of State constitutions. In some instances, Parliaments may wish to protect specific laws by making them more difficult to amend or repeal than ordinary legislation. They achieve this by imposing manner and form requirements when amending or repealing these laws. There are currently a number of manner and form requirements entrenching a significant number of provisions in the *Constitution Act 1975* (Vic).

For manner and form requirements to be valid and binding, they can not abdicate Parliament's law making power. The people in each state, acting through their Parliaments, must possess plenary legislative power as fully and freely as their predecessors. Any requirement that abdicates Parliament's law making power is contrary to the basic notion of parliamentary sovereignty, and more significantly, contrary to section 2(2) AA, and therefore invalid. It is not always clear, however, whether a requirement constitutes a genuine manner and form or abdicates Parliament's law making power.

This chapter entertains the possibility that by enacting section 5 of the *Colonial Laws Validity Act 1865* (Imp), the Imperial Parliament intended special majorities that were already in colonial constitutions at the time to be valid, including the two-thirds majority requirement found in the Queensland constitution. The author hopes that this will provide new perspectives in discussing the levels of majority that may potentially constitute a valid manner and form requirement. If a conclusion is reached that a two-thirds majority requirement does constitute a valid manner and form requirement, then majority requirements of a lesser degree (such as three-fifths) would also

constitute valid manner and form requirements. The issue, however, remains speculative until it is judicially resolved by the High Court of Australia.

2.6.2 Pure procedures and restrictive procedures

Requirements that are purely procedural do not affect Parliament's substantive law making powers. For example, provisions relating to the quorums of the houses of Parliament, express declaration clauses and possibly absolute majority requirements are not excessively demanding or too difficult for Parliaments to deal with. The source of authority for such requirements being section 2(2) AA, they are not limited in their operation to future laws respecting the 'constitution, power and procedure' of Parliament.

Restrictive requirements (i.e. special majority requirements) limit but do not necessarily abdicate Parliament's substantive law making powers. The source of authority for these restrictive procedures is not only section 2(2) AA but also section 6 AA. The qualification in section 6 AA means that these restrictive procedures are limited in their operation to future laws respecting the 'constitution, power and procedure' of Parliament.

2.6.3 Authority for manner and form requirements outside of section 6 AA

In addition to the pure procedures theory, there are three possible grounds outside of section 6 of the *Australia Acts* that may potentially be used to justify manner and form requirements: reconstitution of the legislature when enacting certain laws; the *Ranasinghe* principle; and section 106 of the Commonwealth Constitution.

Since the *obiter dicta* by the High Court in *Marquet*, it is unlikely that the *Ranasinghe* principle would have any application with respect to the Australian States and Territories. Section 106 of the Commonwealth Constitution, whilst complementary to section 6 of the *Australia Acts*, also does not appear to provide any additional authority for manner and form requirements. Reconstitution of Parliament, on the other hand, provides a valid form of authority for requirements that on face value look like manner and form requirements.

2.6.4 Mandating symmetric entrenchment in Victoria

Under current law, a simple majority can be used to introduce manner and form requirements, as has been the case with most of the manner and form provisions operating in Victoria. This thesis makes an important contribution to the understanding and applicability of the law relating to manner and form in Victoria by recommending mandatory symmetric entrenchment. Mandatory symmetric entrenchment requires introduction of entrenchments to follow the same procedure that constitutes the entrenchment.

This thesis outlines a legally sound method for introducing provisions into the Victorian legal framework that could mandate symmetric entrenchment, and to that effect recommends draft provisions that can be inserted into the *Constitution Act 1975* (Vic). The thesis further recommends that any such provision should be doubly entrenched, to ensure that it is effectively binding on future Parliaments.

Chapter 3

Validity of the entrenchment provisions introduced through the *Constitution* *(Parliamentary Reform) Act* *2003*

3.1 Introduction

Chapter 2 provided a theoretical analysis of the law relating to manner and form requirements and identified how effective entrenchment may be achieved in Australian state jurisdictions. This chapter contextualises the law on manner and form by examining entrenchments introduced through the *Constitution (Jurisdiction of Supreme Court) Act 1991* (Vic) and the *Constitution (Parliamentary Reform) Act 2003* (Vic). The entrenchment provisions introduced into the Victorian Constitution in 2003 raise a number of legal and practical issues. This chapter discusses these issues and provides conclusions on the validity of the manner and form provisions in the Victorian Constitution.

3.2 ‘Manner and form’ provisions in the Constitution Act 1975 (Vic) – pre 2003

The first entrenchment in Victoria was an absolute majority requirement found in the *Victorian Constitution Act of 1855* (Imp), protecting the power of the legislature to alter the Constitution Act.

Absolute majority requirements survived into the *Constitution Act 1975* (Vic), most prominently protecting the jurisdiction of the Victorian Supreme Court.³¹⁶ In addition, an absolute majority requirement was also used to protect provisions dealing with the constitution of the Parliament, the Legislative Council, the Legislative Assembly, some aspects of local government and financial arrangements.³¹⁷ Until the 2003 reforms, the rest of the *Constitution Act 1975* (Vic) was flexible in nature, able to be changed through a simple majority affirmative vote in both houses of Parliament.

³¹⁶ Previously section 18(2) of the *Constitution Act 1975* (Vic); currently section 18(2AA) of the *Constitution Act 1975* (Vic)

³¹⁷ Section 18 of the *Constitution Act 1975* (Vic)

3.2.1 Entrenchment of the Supreme Court's jurisdiction

Questions about the entrenchment of the jurisdiction of the Supreme Court were subject to significant consideration in the late 1980s and early 1990s. The issue of entrenchment of the Supreme Court's jurisdiction was initially considered extra-judicially by Justice Tadgell of the Supreme Court of Victoria in 1988. Mr Justice Tadgell delivered a paper in which he raised questions about the operation of sections 18 and 85 of the *Constitution Act 1975* (Vic).³¹⁸ Sub-section 2 and sub-section 3 of section 18, as they appeared in the *Constitution Act 1975* at the time, provided that:

(2) it shall not be lawful to present to the Governor of Her Majesty's assent any Bill

(b) by which ... Part III ... may be repealed altered or varied –

unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.

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

Section 85 in Part III of the *Constitution Act 1975* and subject to the operation of section 18 read as follows:

(1) Subject to this Act the Court shall have jurisdiction in or in relation to Victoria its dependencies and the areas adjacent thereto in all cases whatsoever and shall be the superior Court of Victoria with unlimited jurisdiction.

³¹⁸ Supreme Court Judges' Conference in Brisbane, 1988; Justice Tadgell's concerns were expressed in the context of the *Retail Tenancies Act 1986* which conferred exclusive jurisdiction upon a body other than a Supreme Court. Justice Tadgell suggested that this Act, in the absence of passage by an absolute majority as required by section 18, might be invalid.

(3) The Court has and may exercise such jurisdiction (whether original or appellate) and such powers and authorities as it had immediately before the commencement of the *Supreme Court Act 1986*.

(4) This Act does not limit or affect the power of the Parliament to confer additional jurisdiction or powers on the Court.

As such, any Bill with a provision which in any way sought to change the jurisdiction of the Supreme Court, was required to be passed by an absolute majority of the whole number of members in the Legislative Council and the Legislative Assembly respectively. Any Bill subject to, but not passed in compliance with the requirement, became void in its entirety.

The entrenchment provision in section 18 was not subject to any debate in the Legislative Assembly or the Legislative Council when it was enacted. No reasons were given for the insertion of an absolute majority requirement to protect the jurisdiction of the Supreme Court. The only comment it attracted was from the Hon. J.W. Galbally, who noted the importance of the status of the Supreme Court and its independence.³¹⁹

Justice Tadgell said that the operation of sections 18 and 85 posed a number of complex problems, the main one being that it was often difficult to distinguish which Bills affected the jurisdiction of the Supreme Court. The *Constitution Act 1975* (Vic) did not define the class of Bills which would have the effect of 'repealing, altering or varying' section 85. It became a difficult task determining whether or not a Bill was in relation to the jurisdiction of the Supreme Court, and therefore whether it had to be passed by an absolute majority. The issue that arose was that some Bills which inadvertently 'repealed, altered or varied' section 85, had been passed with the use of a simple majority, resulting in the entire Bill being void.³²⁰ A number of enactments indirectly detracted from the jurisdiction of the Supreme Court by granting exclusive jurisdiction to other bodies in respect of

³¹⁹ *Operation of Section 85*, above n 37, Chapter 1 at section 1.7

³²⁰ *Ibid* at section 1.8-1.9

certain matters, being passed by a simple majority and not by an absolute majority as required by the entrenchment.³²¹

Following Justice Tadgell's extra-judicial remarks, litigation was initiated in the Supreme Court, aiming to test the validity of a number of Acts on the basis that they related to the jurisdiction of the Supreme Court but had not been passed in compliance with the absolute majority requirement.³²² These cases raised serious legal questions regarding a wide range of Bills, but none resulted in pronouncements of the exact scope of section 18 in relation to section 85.³²³

In response to the issues identified by Justice Tadgell and the consequent litigation, as a 'quick fix' measure, Parliament enacted the *Constitution (Supreme Court) Bill 1989*. When the Bill received Royal Assent on 2 June 1989, it removed the possibility of Acts passed between December 1975 and June 1989 being invalid. The *Constitution (Supreme Court) Act 1989* (Vic), however, did not fully resolve the problems raised by the prospective operation of sections 18 and 85. These were referred to the Victorian Legal and Constitutional Committee in September 1989. Following careful consideration of the issues at hand, the Committee proposed that:³²⁴

- the responsible Minister be required to state the reasons for altering the jurisdiction of the Supreme Court;
- an express declaration clause be enacted;
- Parliamentary Counsel advise the relevant Minister of any provisions in a Bill that may raise a potential issue in relation to the jurisdiction of the Supreme Court;
- there should be a Scrutiny of Bills Committee required to report to the Parliament in respect of any section 85 provisions in any Bills;

³²¹ For example section 21(4) of the *Retail Tenancies Act 1986* (Vic) or section 39(3) of the *Planning and Environment Act 1987* (Vic)

³²² For example *Mowra Pty Ltd v Roper* (Unreported, 14 March 1989) and *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd* (Unreported, 25 October, 1988)

³²³ *Operation of Section 85*, above n 37 at section 1.9

³²⁴ *Ibid* at section 1.15

- if any Bill contained a section 85 provision and was passed in breach of an absolute majority requirement, only the provision operating upon section 85 (rather than the entire Bill) should be void;
- an amendment be introduced to make it clear that compliance with the requirement for an express declaration clause does not relieve of the necessity to comply with an absolute majority procedure;
- where a Bill is passed by an absolute majority, it becomes subject to a Ministerial statement and an express declaration, and have a certificate to that effect from the Presiding Officer;
- an additional provision be inserted into the *Constitution Act 1975* to the effect that whenever jurisdiction is conferred on a body, concurrent jurisdiction is also conferred on the Supreme Court.

These recommendations aimed at resolving issues identified in Justice Tadgell's paper and were mostly adopted in the enactment of the *Constitution (Jurisdiction of Supreme Court) Act 1991* (Vic) which introduced section 85(5) and (6) into the *Constitution Act 1975* (Vic).³²⁵ Section 85(5) and (6) read as follows:

(5) A provision of an Act, other than a provision which directly repeals or directly amends any part of this section, is not to be taken to repeal, alter or vary this section unless –

- (a) the Act expressly refers to this section in, or in relation to, that provision and expressly, and not merely by implication, states an intention to repeal, alter or vary this section; and
- (b) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying this section; and
- (c) the statement is so made –
 - i. during the member's second reading speech; or
 - ii. after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - iii. with the leave of the Council of the Assembly, as the case requires, at any time before the third reading of the Bill.

³²⁵ Ibid at Chapter 2

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

The express declaration requirement and the requirement for the Minister to provide a statement of reasons was in addition to an absolute majority requirement, with the new provision, section 18(2A), reading as follows:

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

This ensured that only the offending provision, rather than the entire enactment, becomes void if the absolute majority requirement is not fulfilled. It also eliminated the requirement that the Bill be passed by an absolute majority at both the second and third readings.

It is useful to examine the debates and issues regarding the entrenchment of the jurisdiction of the Supreme Court when considering effective entrenchment in the *Constitution Act 1975* (Vic). It provides an example of an entrenchment, which was thoroughly analysed and refined, to ensure it is effective. There are important lessons from this historical and legal analysis that could inform similar future entrenchments, with the key question addressed elsewhere in this thesis being whether a similar entrenchment could be effectively adopted to protect the Victorian *Charter of Human Rights and Responsibilities*.

3.3 'Manner and form' provisions in the Constitution Act 1975 (Vic) – post 2003

3.3.1 Constitution Commission of Victoria – March 2001

In March 2001 the Constitution Commission of Victoria was established by the Bracks Labor government to research, investigate, consult and make recommendations on a number of issues relating

to the governance of Victoria. In particular, the Commission was asked to report on the power, composition, responsiveness, responsibility and accountability of the Upper House.³²⁶ In December 2001 the Commission released a Consultation Paper which focused on a number of issues, including the resolution of deadlocks between the Houses of Parliament and the use of referenda to entrench provisions in the *Constitution Act 1975* (Vic).³²⁷ The Commission's consultations found that people across Victoria were surprised to learn that the Victorian Constitution could be changed as easily as through a simple or an absolute majority vote in both Houses of the Parliament. The consultations also identified a strong view that the fundamental elements of the Victorian Constitution should be entrenched by a referendum, particularly if the Constitution were to provide more extensively for the protection of fundamental individual rights.³²⁸

The Commission's final report '*A House for Our Future*', released in 2002, recommended entrenchment of the fundamental provisions in the Constitution and recognition of human rights as guiding principles as part of the Victorian Constitution.³²⁹ The report recommended entrenchment through a referendum requirement on

³²⁶ *A House for our Future: A Report*, Terms of Reference, Constitution Commission Victoria (2002) at 5 ('A House for Our Future')

³²⁷ *A House of Review – The Role of the Victorian Legislative Council – Issues and Options for the Victorian Community: A Consultation Paper* (2001) ('A House of Review'). Some of the other issues raised as part of the consultation included: Resolving the issue of blocking of supply/ deadlock resolutions; Role of government mandate; Use of committees by a House of Review; term of election/ re-election of Ministers in the Legislative Council; Term for Parliament; Voting system for the upper house; and The use of referenda to entrench provisions in the Constitution.

³²⁸ Ibid at 16

³²⁹ *A House for our Future*, above n 326 at 6-7. Other recommendations included: A different method of election of members of the Upper House, that is by proportional representation; Division of the State into multi-member electorates designed to broaden the pool of candidates and ensure fair representation for all Victorians; Senate style voting, extended to optional preferences; Fixed four year terms for members of both houses; Strengthening of the Committee system to enhance accountability and enable greater community input; Establishment of a deadlock resolution mechanism; Consideration of the removal of Ministers from the Legislative Council over time.

the basis that it promotes the principle of public participation in decision making and is fundamental in fostering democracy.³³⁰ The report expressed criticism that there was no Bill of Rights in Victoria and recommended that the Constitution deal expressly with human rights.³³¹

3.3.2 Constitution (Parliamentary Reform) Act 2003

Some of the Commission's recommendations relating to the entrenchment of certain provisions in the Victorian Constitution were enacted through the *Constitution (Parliamentary Reform) Act 2003* (Vic). During the second reading speech for the *Constitution (Parliamentary Reform) Bill 2003*, Premier Bracks indicated that the reforms being introduced would ensure a more open and accountable government, giving Victorian people greater confidence in their elected representatives and ensuring that the Victorian Parliament has the strongest possible democratic safeguards.³³²

A number of key reforms were introduced through the Act, including new entrenchment provisions affording protection to a significant number of provisions in the *Constitution Act 1975*.³³³ The types of entrenchments introduced include a referendum requirement, three-fifths majority requirement, and an absolute majority requirement. These reforms were passed by a simple majority and failed to obtain bi-partisan support.³³⁴ Entrenching provisions in the *Constitution Act 1975* (Vic) were justified by the government on the basis that they

³³⁰ Ibid at 14

³³¹ Ibid at 69

³³² *Hansard* 27 February 2003 per Mr Bracks at 160

³³³ Other reforms introduced include: Setting a fixed date for elections every four years; Introducing fixed four year terms of Parliament for both the Legislative Assembly and the Legislative Council; Reforming the Legislative Council; Changing the way members are elected to the Legislative Council; Removing the Council's power to block a supply Bill; Establishing a new procedure to settle disputed about proposed legislation between the two Houses of Parliament; Entrenching some provisions with a referendum requirement.

³³⁴ Victoria, Legislative Assembly, Parliamentary Debates (18 March 2003) Robert Doyle, Leader of the Opposition at 265

protect democratic institutions and procedures that support Parliament.³³⁵ There was surprisingly little discussion about the legal validity of these requirements, either by the Constitution Commission of Victoria, Parliament or the government.

3.4 Overview of section 18 of the Constitution Act 1975 (Vic)

The entrenchments introduced by the *Constitution (Parliamentary Reform) Act 2003* were inserted into section 18 of the *Constitution Act 1975* (Vic). These entrenchments significantly altered the constitutional landscape in Victoria from one that was largely uncontrolled and amenable to alteration in the same way as any other Act of Parliament, to a controlled constitution with most parts subject to specific manner and form requirements. Parts of the Victorian Constitution that are subject to the entrenching provisions will now be outlined.

3.4.1 Referendum requirement – section 18(1B)

Provisions requiring the approval of the majority of Victorian electors voting at a referendum are included in section 18(1B) of the *Constitution Act 1975* (Vic) and deal with the following:

- the requirement to hold a referendum, doubly entrenching the provision;³³⁶
- provisions relating to the regions, number of members and quorum of the Council and the president;³³⁷
- provisions relating to the districts, duration of, quorum of and number of members of the Assembly and to the Speaker;³³⁸

³³⁵ *Hansard* 27 February 2003 per Mr Bracks at 162

³³⁶ Sections 18(1A), 18(1B), 18(1BA), 18(1C), 18(3) of the *Constitution Act 1975* (Vic)

³³⁷ Provinces and members are covered in sections 26-30 of the *Constitution Act 1975* (Vic), proceedings of the Council in sections 31-32 of the *Constitution Act 1975* (Vic)

³³⁸ District of members are covered in sections 34-37 of the *Constitution Act 1975* (Vic), duration of the assembly in sections 38-38A of the *Constitution Act 1975*

- the requirement that there be a session of Parliament each year;³³⁹
 - the provision relating to appropriation Bills and the inability of the Council to block passage of such Bills;³⁴⁰
 - the provision establishing a process for dispute resolution;³⁴¹
 - provisions that recognize local government as a distinct and essential tier of government and the ability of Parliament to legislate in respect of local governments;³⁴²
 - the provision ensuring the continuance of the Supreme Court;³⁴³
 - provisions establishing the offices of the Director of Public Prosecutions and Auditor-General and matters relating to those offices;³⁴⁴
 - provisions establishing the executive arm of government and relating to matters of the Executive Council and the tendering of advice to the Governor;³⁴⁵
 - provisions making the Electoral Commissioner and the Ombudsman independent officers of Parliament.³⁴⁶
-

(Vic), proceedings of the assembly in sections 39-40 of the *Constitution Act 1975* (Vic)

³³⁹ Sessions of Council and Assembly are covered in section 41 of the *Constitution Act 1975* (Vic)

³⁴⁰ Provisions relating to appropriation Bills are in sections 62-65 of the *Constitution Act 1975* (Vic)

³⁴¹ Provisions relating to disputes concerning Bills are in sections 65A-65G *Constitution Act 1975* (Vic)

³⁴² Sections 74A-74B of the *Constitution Act 1975* (Vic)

³⁴³ Section 75(1) of the *Constitution Act 1975* (Vic)

³⁴⁴ Provisions relating to the Director of Public Prosecutions are in sections 87AA-87AF of the *Constitution Act 1975* (Vic), the Auditor General in sections 94A-94C of the *Constitution Act 1975* (Vic)

³⁴⁵ Provisions relating to the Executive are in sections 87A-88A of the *Constitution Act 1975* (Vic)

³⁴⁶ These offices are responsible to the Parliament rather than the government, and can only be dismissed by Parliament as outlined in sections 94E and 94F of the *Constitution Act 1975* (Vic)

3.4.2 Special majority requirement – section 18(2)

Provisions that require a three-fifths majority approval of the whole number of the members of the Assembly and the Council respectively are found in section 18(2) of the *Constitution Act 1975* (Vic) and cover the following subject matters:

- the requirement for a special majority, doubly entrenching the provision;³⁴⁷
- arrangements in relation to the delivery of water services; including the structure, composition or membership of a public authority that has responsibility for ensuring the delivery of water services;³⁴⁸
- the Crown and the Governor;³⁴⁹
- provisions establishing the constitution and powers of Parliament;³⁵⁰
- provisions which deal with the membership of the houses and qualifications of voters;³⁵¹
- a provision that enables a house to relieve a member of the consequences of alleged defaults.³⁵²

3.4.3 Absolute majority requirement – section 18(2 AA)

Provisions entrenched by an absolute majority requirement are encapsulated in sections 18(2 AA) and 18(2A), and doubly entrenched in section 18(5) of the *Constitution Act 1975* (Vic). Provisions protected by an absolute majority are those dealing with the

³⁴⁷ Sections 18(2) and 18(4) of the *Constitution Act 1975* (Vic)

³⁴⁸ Sections 96-97 of the *Constitution Act 1975* (Vic)

³⁴⁹ Sections 6-14 of the *Constitution Act 1975* (Vic)

³⁵⁰ Sections 15-17 of the *Constitution Act 1975* (Vic)

³⁵¹ Provisions relating to the membership of the Council and the Assembly are in sections 44-47 of the *Constitution Act 1975* (Vic), qualifications of Electors for the Council and the Assembly section 48 of the *Constitution Act 1975* (Vic)

³⁵² Section 61A of the *Constitution Act 1975* (Vic)

jurisdiction and membership of the Supreme Court, and matters relating to judges and masters of that court.³⁵³

3.4.4 Express declaration requirement – section 18(1BA) and section 85

Provisions protecting local governments through a requirement of a referendum are further protected by an express declaration clause, as set out in section 18(1BA). The requirement indicates that the repealing Bill must expressly state the intention to repeal, alter or vary provisions relating to local governments.³⁵⁴ Also, the requirement of an express declaration clause in section 85 of the *Constitution Act 1975* (Vic) protecting the jurisdiction of the Supreme Court has been retained.³⁵⁵

3.4.5 Double Entrenchment

The *Constitution (Parliamentary Reform) Act 2003* (Vic) doubly entrenched the requirements it introduced so that changes to the referendum provisions are required to be made by a referendum, and changes to the special or absolute majorities are required to be passed by special or absolute majorities, as the case may be.³⁵⁶ The enactment of the *Constitution (Parliamentary Reform) Act 2003* (Vic) itself, however, did not adhere to the notions of symmetric entrenchment. It was enacted through a simple majority in both houses of Parliament and without bi-partisan support.³⁵⁷

³⁵³ Such as encapsulated in sections 75-87 (other than ss.75(1) and 85) of the *Constitution Act 1975* (Vic)

³⁵⁴ Section 18(1BA) of the *Constitution Act 1975* (Vic)

³⁵⁵ Section 85(5) of the *Constitution Act 1975* (Vic)

³⁵⁶ Sections 18(2)(1B)(a) and 18(2)(1C)(c) of the *Constitution Act 1975* (Vic)

³⁵⁷ Victoria, Legislative Assembly, Parliamentary Debates (18 March 2003) Robert Doyle, Leader of the Opposition at 265

3.5 Validity of the requirements in section 18

Discussion of the law relating to manner and form in the preceding chapter concluded that to be a genuine manner and form, the requirement cannot abdicate Parliament's law making power. Once the entrenchment is established as a genuine manner and form requirement, to be valid, it must be supported by section 6 AA or an authority for manner and form found outside of section 6 AA, such as the pure procedures theory, the *Ranasinghe* principle or reconstitution.³⁵⁸

3.5.1 Genuine manner and form or an abdication of Parliament's law making power?

- express declaration requirements

Despite Evatt J's judgment in *South-Eastern Drainage Board v Savings bank of South Australia*, the requirement of an express declaration such as the one in section 18(1BA) and section 85 of the *Constitution Act 1975* (Vic), does not appear to abdicate or even diminish Parliament's law making power.³⁵⁹ An express declaration requirement merely requires that the intent to amend or repeal a provision relating to a specific subject matter be declared expressly. It can therefore be safely assumed that an express declaration requirement constitutes a genuine manner and form provision.³⁶⁰

- absolute majority requirements

An absolute majority requirement also appears to constitute a genuine manner and form provision on the basis that, at most, it requires that a large number of members of Parliament attend and vote on the proposed laws. This is not an overly burdensome

³⁵⁸ See parts 2.3 and 2.4, Chapter 2

³⁵⁹ Sections 18(1BA) and 85 of the *Constitution Act 1975* (Vic)

³⁶⁰ See part 2.1.1, Chapter 2

requirement, and can be easily justified for laws deemed of significant importance.³⁶¹

As discussed in Chapter 2, by enacting section 5 of the *Colonial Laws Validity Act 1865*, the Imperial Parliament probably intended special majorities that were already in colonial constitutions at the time, to be valid. This includes the absolute majority requirement found in the 1855 Victorian Constitution. The enactment of section 5 CLVA confirmed that an absolute majority requirement constitutes a valid manner and form provision. The validity of absolute majority requirements has been further confirmed by the enactment of section 6 AA.

- three-fifths majority requirements

There is a point at which the degree of restriction imposed by a special majority requirement abdicates Parliament's law making power and ceases to be a genuine manner and form provision. Diverse views have been expressed on the degree of the majority required before Parliament's law making power is substantively diminished, with little certainty around these assertions. Taylor believes that a requirement of a three-fifths majority is not an acceptable manner and form. This view is also shared by Evans and Twomey. Doubts around the validity of a three-fifth majority requirement are based on the premise that it is overly burdensome and may potentially prohibit a party with less than 60% of the seats from legislating without the consent of its opponents.³⁶² The validity of these entrenchments, however, should not be easily dismissed.

As shown in the previous chapter, the enactment of section 5 of the *Colonial Laws Validity Act 1865* (Imp) may have intended to confirm the validity of special majority requirements present at the time, which in addition to absolute majority requirements also included a two-thirds majority requirement found in the Queensland

³⁶¹ See part 2.1.2, Chapter 2 Same view held by Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 134

³⁶² Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 134 and Taylor, *The Constitution of Victoria*, above n 10 at 487-8

Constitution. As noted in the previous chapter, this finding presents new perspectives in discussing the levels of majority that may potentially constitute a valid manner and form requirement. If a conclusion is reached that a two-third majority requirement constitutes a valid manner and form restriction, then a three-fifths majority requirement would also constitute a valid manner and form provision as it is less demanding than a two-thirds majority requirement.

If it is ascertained that a three-fifth majority requirement does in fact constitute a genuine manner and form provision, then the subsequent question is whether or not these entrenchments are authorised by section 6 AA or find their authority outside of the Australia Acts.³⁶³

If it is decided that a three-fifth majority requirement does not constitute a genuine manner and form provision, then without the need for any further examination, it can be concluded that provisions in the Victorian Constitution relating to the delivery of water services, the Crown and the Governor, provisions establishing the constitution and powers of Parliament, and those that deal with the membership of the houses and qualification of voters, are not effectively entrenched. Certainty regarding the validity of a two-thirds or a three-fifth majority requirements can only be ascertained through judicial pronouncements on the issue by the High Court of Australia.

- referendum requirement

It could be argued that a requirement to hold a referendum shifts the law making power from Parliament to the electorate, abdicating Parliament's power to make law and therefore failing to constitute a genuine manner and form requirement. It is unlikely, however, that this argument would be accepted by Australian courts. Re-enactment of the 'manner and form' provisions in section 6 AA confirms previous judicial interpretation of that provision. A referendum requirement has been previously accepted by the High Court of

³⁶³ See part 2.3 and 2.4, Chapter 2

Australia in the *Trethowan*³⁶⁴ case, and this interpretation stands under section 6 AA, as confirmed in the *Marquet*³⁶⁵ case. Australian people, governments and the legal community feel comfortable with a referendum requirement, which is widely accepted as a valid method in restricting Parliament's law making power.³⁶⁶ It is therefore likely that it would be accepted by the Courts as a valid manner and form requirement.

3.5.2 Sourcing authority from section 6 Australia Acts

On the assumption that the entrenchments introduced as part of the *Constitution Act 1975* (Vic) in 2003 do not abdicate Parliament's power to legislate and therefore constitute genuine manner and form requirements,³⁶⁷ the next question is whether these entrenchments are authorised by section 6 of the Australia Acts. This depends on whether the subject matter being protected relates to the 'constitution, power or procedure' of Parliament.

- features giving Parliament a representative character

The majority judgment in the *Marquet*³⁶⁸ case drew a relationship between the 'constitution' and features which give Parliament a representative character, indicating that at least to some extent the 'constitution' of Parliament extends to features which go to give it, and its Houses, a representative character. Therefore, section 6 AA may be engaged in cases in which the Bill amending the protected

³⁶⁴ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394

³⁶⁵ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545

³⁶⁶ Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 134; Taylor, *The Constitution of Victoria*, above n 10 at 473; *A House of Review*, above n 327 at 16

³⁶⁷ As discussed, whether a three-fifth majority constitutes a valid manner and form can only be conclusively resolved through a judicial determination by the High Court of Australia.

³⁶⁸ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545

legislation deals with matters that are generally characterised as being of a 'representative' character.³⁶⁹

The *Marquet* case confirmed that provisions relating to the system of voting, changing from single electorates to multi-member electorates or changing electoral distributions, are laws which relate to the 'constitution' of Parliament.³⁷⁰ It follows that provisions relating to regions, districts, duration, quorum and number of members of the Assembly, as well as to the Speaker, can also be seen as provisions relating to the 'constitution' but are also likely to be relating to the 'procedures' of Parliament.³⁷¹

An argument could be mounted that provisions relating to the dates of elections preserve the representative character of the houses of Parliament and can be construed as respecting the 'constitution' of Parliament.³⁷² Perhaps any provision that contributes in any meaningful way to the representative character of Parliament could be said to relate to the 'constitution' of Parliament, including provisions dealing with electoral distributions,³⁷³ the conduct of elections and possibly compulsory voting.³⁷⁴ Provisions relating to the number of members and quorum of the Houses of Parliament also relate to the 'constitution' of Parliament.³⁷⁵

³⁶⁹ Ibid per Gleeson CJ, Gummow, Hayne and Heydon JJ at 76 see also Twomey, *Manner and Form Limitations*, above n 141 and Twomey, above n 128 at 310

³⁷⁰ Ibid at 70 see also Twomey, *Manner and Form Limitations*, above n 141 at 184

³⁷¹ This includes sections 35(1), 38 and 94G of the *Constitution Act 1975* (Vic); see Twomey, above n 128 at 310

³⁷² Taylor, *The Constitution of Victoria*, above n 10 at 490

³⁷³ *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 at 291 per Callinan J who concluded that laws concerning the distribution of electorates are laws respecting the constitution of a Parliament

³⁷⁴ Twomey, above n 128 at 310 and Twomey, *Manner and Form Limitations*, above n 141 at 184

³⁷⁵ Sections 26, 27(1),(2),(3)(a), 28, 34, of the *Constitution Act 1975* (Vic)

The term 'procedure' applies to procedure during the sitting of Parliament, and does not cover provisions relating to the procedure for filling vacancies when members resign.³⁷⁶ Provisions dealing with vacancies, the inability of the members of one House to be elected to the other, and the resignation of members of Parliament, would not be classified as 'procedures' of Parliament for the purposes of section 6 AA. A relationship could possibly be drawn between these provisions and the 'constitution' of Parliament, in that way bringing it within the ambit of section 6 AA.³⁷⁷

The requirement that there be a session of Parliament each year is arguably of such fundamental importance to the operation of Parliament that, in addition to 'procedure', it also relates to the 'constitution' of Parliament.³⁷⁸ A relationship could also be drawn between the provisions concerning appropriation Bills and the inability of the Council to block the passage of such Bills, and the 'constitution' of Parliament. Furthermore, these provisions deal with the 'powers' that Parliament can exercise, and they also regulate the 'procedure' on appropriation and disputed Bills.³⁷⁹ These provisions could therefore be considered as respecting all three topics, the 'procedure', 'power' and 'constitution' of Parliament, and clearly fall within the ambit of section 6 AA.³⁸⁰ Provisions establishing the constitution and dealing with the legislative powers of Parliament can be considered as both respecting the 'constitution' and respecting the 'powers' of Parliament.

There is judicial authority suggesting that a law respecting the qualification or disqualification of Members of Parliament is not a law with respect to the 'constitution' of Parliament and therefore not

³⁷⁶ Taylor, *The Constitution of Victoria*, above n 10 at 490

³⁷⁷ Sections 27A, 29, 30, 36 and 37 of the *Constitution Act 1975* (Vic). Twomey, above n 128 at 310-2 and Taylor, *The Constitution of Victoria*, above n 10 at 490-2

³⁷⁸ Section 41 of the *Constitution Act 1975* (Vic)

³⁷⁹ Taylor, *The Constitution of Victoria*, above n 10 at 489-90

³⁸⁰ Sections 62-65 of the *Constitution Act 1975* (Vic)

within the purview of section 6 AA.³⁸¹ This is somewhat surprising because the qualifications of members can be seen as directly relating to the representative nature of Parliament. Given that the method of choosing Members of Parliament relates to the 'constitution' of Parliament, it could be persuasively argued that issues relating to the qualifications of members also relate to the 'constitution' of Parliament.³⁸²

- institutions outside of Parliament

Describing functions of significant importance in their own right, provisions which relate to the offices of the Director of Public Prosecutions, the Auditor-General, the Electoral Commissioner and the Ombudsman are not laws with respect to the 'constitution, power or procedure' of Parliament.³⁸³

Provisions relating to local governments do not appear to relate to Parliament's 'constitution, power or procedure' either.³⁸⁴ A weak argument could possibly be made that Parliament has the ultimate authority over local governments, and that any amendment to that authority that may broaden local government's powers could possibly restrict the 'powers' of Parliament. An similar argument was put forward by Hoare J in *Commonwealth Aluminium Corporation Limited v Attorney-General*³⁸⁵ and was subsequently questioned,

³⁸¹ Twomey, above n 128 at 311; *Clydesdale v Hughes* (1934) 51 CLR 518 per Rich, Dixon and McTiernan JJ at 528; *Western Australia v Wilsmore* (1982) 149 CLR 79, per Wilson J at 102; contrasting views in *Kenny v Chapman* (1861) W&W 93, per Stawell CJ at 100 and *McDonald v Cain* [1953] VLR 411, per O'Bryan J at 441 and 444. The authority in *Clydesdale v Hughes* seems to have been accepted in *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 per Gleeson CJ, Gummow, Hayne and Heydon JJ at 77. For further discussion see Twomey, *Manner and Form Limitations*, above n 141

³⁸² Twomey, *Manner and Form Limitations*, above n 141 at 184

³⁸³ Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 134-5

³⁸⁴ Ibid; Taylor, *The Constitution of Victoria*, above n 10 at 490

³⁸⁵ *Commonwealth Aluminium Corporation Limited v Attorney-General* [1976] Qd.R.231

critiqued and dismissed, as discussed earlier in the thesis.³⁸⁶ It is therefore safe to presume that provisions relating to local governments do not relate to the 'constitution, power or procedure' of Parliament and do not fall within the purview of section 6 AA.³⁸⁷

On the other hand, the Crown and the Governor are constituent elements of Parliament and form an integral part of its 'constitution'. Whenever Parliament is asked to make a recommendation to the Crown or the Governor, it is regarded as relating to Parliament's power, especially if that power is exclusive to Parliament. This analysis, however, does not extend to the provisions relating to the executive arm of government, including the Crown acting as the head of the executive³⁸⁸, as confirmed by the Queensland Electoral and Administrative Review Commission when discussing section 14 of the *Constitution Act 1967* (Qld) relating to the appointment of public officers.³⁸⁹

In *Skyring v Electoral Commission of Queensland* an argument was put forward that a law concerning the office of the Governor was not a law with respect to the 'constitution, powers or procedure' of Parliament and as such was not subject to the referendum requirement in section 53 of the *Constitution Act 1867* (Qld). Without directly resolving this argument, the Court simply held that there was a general legislative power to enact manner and form requirements.³⁹⁰

³⁸⁶ See Chapter 2 at section 2.3.4

³⁸⁷ Taylor, *The Constitution of Victoria*, above n 10 at 491

³⁸⁸ For example see sections 87A-88A of the *Constitution Act 1975* (Vic)

³⁸⁹ *Report on the Review of the Elections Act 1983-1991 and Related Matters* Electoral and Administrative Review Commission (Queensland, Brisbane 1991) Appendix D, ppD7f discussed in Taylor, *The Constitution of Victoria*, above n 10 at 479-80 and 490

³⁹⁰ *Skyring v Electoral Commission of Queensland* [2001] QSC 080 per Muir J at 34 quoted in Twomey, above n 128 at 312

- party specific policies

Delivery of water related services is an issue of public policy which does not relate to the 'constitution, powers or procedure' of Parliament. Putting a public policy question, such as privatisation of water, beyond the reach of ordinary majorities in future Parliaments is contrary to the basic notion of democratic decision making and inconsistent with the doctrine of parliamentary sovereignty.³⁹¹

Another example of entrenching what is essentially a question of public policy (and therefore not relating to the 'constitution, power or procedure' of Parliament) is section 1A of the *Constitution Act 1975* (Vic) which recognises Indigenous people of Victoria as traditional owners of the land that the Constitution governs. Recognition of Indigenous people as traditional owners of the land of Victoria is of immense significance and importance in its own right, but it is not an issue that can be characterised as respecting the 'constitution, power or procedure' of Parliament.³⁹²

Entrenchment of provisions that relate to public policies *per se* raises interesting questions regarding the protection of human rights models which often form part of a given political party's public policy platform. Entrenchment of human rights will be discussed in greater depth in chapter 4.

- special case of the Supreme Court

Provisions that relate to the Supreme Court and its jurisdiction, on face value, do not appear to be laws with respect to the 'constitution,

³⁹¹ Taylor, *The Constitution of Victoria*, above n 10 at 492

³⁹² Ibid at 492-3

powers or procedure' of Parliament because they deal with an entirely different branch of government.³⁹³

Despite this, the Victorian Legal and Constitutional Committee in examining the operation of sections 18 and 85 of the *Constitution Act 1975*, found that there is a widely accepted view that the entrenchment of truly fundamental constitutional components of Victoria's system of government may be appropriate, provided that the degree of entrenchment is not so great as to completely incapacitate future Parliaments from action.³⁹⁴ The Committee seemed to accept the proposition that some parts of the Victorian constitutional structure are of such fundamental importance that they ought to be protected, to attract Parliament's careful consideration and to prevent amendment without widely recognised support and consensus.³⁹⁵

The Committee observed a widespread community support for entrenchment, as a tool to protect fundamental constitutional principles. Relying on the decision of the Privy Council in *Bribery Commissioner v Ranasinghe*³⁹⁶ the Committee took the entrenchment of particular parts of a state's Constitution to be consistent with the sovereignty of that state's legislature.³⁹⁷ The Committee held that provisions relating to the features of the *Constitution Act 1975 (Vic)* that were recognised as being of fundamental constitutional importance could be entrenched with an absolute majority requirement, as this represents a modest degree of entrenchment.³⁹⁸

³⁹³ Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 135; Twomey, *Manner and Form Limitations*, above n 141; Taylor, *The Constitution of Victoria*, above n 10 at 490

³⁹⁴ *Legal and Constitutional Committee Report* (Victoria 1989) at 7

³⁹⁵ *Ibid*

³⁹⁶ *Bribery Commissioner v Ranasinghe* [1965] A.C. 172; see part 2.4.2, Chapter 2

³⁹⁷ *Legal and Constitutional Committee Report* (Victoria 1989) at 8

³⁹⁸ *Ibid*

The Committee then sought to investigate whether the jurisdiction of the Supreme Court set out in section 85 of the *Constitution Act 1975* is 'fundamental' or 'essential' to the State's constitutional structure. Section 85(1) provides that the Supreme Court shall be the superior court of Victoria with unlimited jurisdiction in Victoria 'in all cases what so ever'. The Committee found that because of this provision, in any legal dispute citizens are ultimately entitled to have recourse to a court of law which will dispose of that dispute according to the law. The Committee pointed out that the entrenchment of section 85 protects the right of citizens to have a legal dispute decided by a court of law according to the law. The Committee concluded that the constitutional principle being protected in section 85 is the 'Rule of Law', enforced by a court of law. It is the notion of the disinterested application of the law which the Committee believed to be at the heart of the Rule of Law, and to be the basic value enshrined in section 85 of the Constitution, a guarantee that the citizen will be dealt with according to law. This, the Committee held, was of sufficiently fundamental value to Victoria's constitutional system to merit entrenchment by an absolute majority. The Commission noted the duty to 'bear firmly in mind the grave necessity of safeguarding Victoria's fundamental constitutional values'. Without the entrenchment, the Constitution itself would be 'merely a piece of paper, and the protections guaranteed by law to citizens worthless'.³⁹⁹

In a submission to the Committee, His Honour Sir John Young, the Chief Justice of the Supreme Court at the time, provided a statement indicating what he understood to be meant by 'the rule of law':

The phrase 'the rule of law' has been explained in various ways. Essentially, however, it is a concept which implies that all authorities, legislative, executive and judicial and all persons in the State are subject to certain principles which are the same for everyone and which are generally accepted as characteristic of law. These principles are the fundamental notions of fairness, of morals, of justice and of due process.

³⁹⁹ Ibid at 9-10

The rule of law involves equality before the law and it involves consistency and uniformity in the decision of disputes arrived at by the disinterested and impartial application of legal rules to ascertained facts and not by giving effect to what may appear to be popular moods of the moment or individual predilections.⁴⁰⁰

The Committee also pointed out that in addition to the Rule of Law, the provision also gives recognition to the doctrine of the separation of powers and plays a role in maintaining the separation of powers in Victoria. From this, it is possible to argue that there is a relationship between the constitution of Parliament and the rule of law or the doctrine of separation of powers, as fostered by the provisions relating to the Supreme Court. If this argument is accepted by the courts, it would make these provisions within the purview of section 6 AA and therefore validly entrenched.

Furthermore, as observed by Evans, entrenchment of the provisions relating to the Supreme Court may well prove effective as they have long enjoyed a degree of protection and this has been enforced by the Supreme Court to the point of invalidating legislation passed without compliance with the required constitutional provisions. It is likely that the validity of the entrenchment of the powers of the Supreme Court will be upheld by the courts.⁴⁰¹

3.5.3 Authority outside of section 6 Australia Acts

- the *Ranasinghe* principle

It is evident from the above discussion that not all of the entrenchments introduced through the *Constitution (Parliamentary Reform) Act 2003* satisfy the section 6 AA characterisation test because not all entrenched provisions relate to the 'constitution, power or procedure' of Parliament. This was recognised by the Victorian government, which justified the introduction of the

⁴⁰⁰ Written submission number 2 authored by Sir John Young at 2

⁴⁰¹ Evans, *Entrenching Constitutional Reform in Victoria*, above n 109 at 136

requirements in section 18 of the *Constitution Act 1975* (Vic) on the basis of a general power of entrenchment under the *Ranasinghe* principle.⁴⁰²

As discussed in the preceding chapter, it is unlikely that the *Ranasinghe* principle would have much authority in Australian courts. There may, however, be other sources of authority outside section 6 AA, such as the pure procedures theory or reconstitution of Parliament, that may provide authority for entrenchment of provisions in the *Constitution Act 1975* (Vic).

- pure procedures theory

The ‘pure procedures’ theory applies to purely procedural requirements for enacting law. Entrenchment using a referendum or a special majority requirement would not be classified as purely procedural because they are too demanding. An absolute majority or an express declaration requirement, on the other hand, may possibly be classified as purely procedural because they do not appear to diminish Parliament’s law making power and relate purely to the procedure of enacting law.⁴⁰³

If it is accepted that the ‘pure procedures’ theory presents a valid authority for an absolute majority requirement, then the entrenchment of the provisions in the Victorian Constitution relating to the jurisdiction of the Supreme Court could be justified accordingly.⁴⁰⁴ An express declaration requirement would almost certainly be justified as a purely procedural requirement because it is

⁴⁰² Minister’s Response to the comment of the Scrutiny of Acts and Legislation Committee on the *Constitution (Parliamentary Reform) Bill 2003* (Vic) in *Alert Digest* No 5 of 2003; Carney, above n 61 at 202

⁴⁰³ Taylor doubts Goldsworthy’s assertion that an absolute majority requirement can be classified as a purely procedural requirement; see Taylor, *The Constitution of Victoria*, above n 10 at 496.

⁴⁰⁴ As a side note, pure procedures theory would not include justification of the entrenchment of section 75(1) of the *Constitution Act 1975* (Vic) providing for the continuance of the Supreme Court in Victoria because it is protected by a referendum requirement.

not demanding and only requires that legislation amending or repealing any given provision express its intention to do so, having the practical benefit of preventing implied repeals. Provisions relating to local government⁴⁰⁵ or the Supreme Court⁴⁰⁶ also appear to be validly protected by an express declaration clause. These provisions are also protected by a requirement of a referendum, validity of which needs to be tested independently.

- reconstitution

Reconstitution could possibly provide the justification for what appears to be an entrenchment with the use of a referendum requirement. As discussed in the previous chapter, reconstitution refers to a situation where Parliament is reconstructed for the purposes of enacting certain laws. Authority for reconstitution is found in section 2(2) AA, independently of section 6 AA.

Technically, reconstitution differs from a manner and form requirement in that it does not introduce an alternative method for enacting legislation, but rather it shifts the law making power from the original Parliament to a Parliament reconstituted for a particular purpose.⁴⁰⁷ Even though some commentators have rejected the view that Parliament can bind future Parliaments by simply reconstituting itself, there has been significant judicial support *in obiter* favouring reconstitution, as well as support expressed in various academic dissertations.⁴⁰⁸

In light of this, it could be argued that section 18(1B) of the *Constitution Act 1975* (Vic) does not introduce a manner and form requirement, but reconstitutes Parliament to include the electors for the purposes of amending the provisions listed in that section. In the

⁴⁰⁵ Section 18(1BA) of the *Constitution Act 1975* (Vic)

⁴⁰⁶ Section 85 of the *Constitution Act 1975* (Vic)

⁴⁰⁷ Carney, *Overview of Manner and Form*, above n 58 at 86

⁴⁰⁸ See part 2.4.3, Chapter 2

*Trethowan*⁴⁰⁹ case it was suggested that a referendum requirement could be made binding by changing the composition of the legislature for particular purposes, to consist of the Crown, the two Houses and the electors. The same argument could be applied in Victoria, suggesting that Parliament is reconstituted to include the electors for the purposes of section 18(1B). If this argument is accepted, than Parliamentary sovereignty is preserved, the legislature retains its continuing plenary power conferred by section 2 AA, and Parliament's law making power is not restricted because in its reconstituted state it is able to repeal the entrenched law at any time.

If we accept that a referendum requirement can be justified as a reconstitution of Parliament, then the validity of a number of entrenchments introduced to the Victorian Constitution in 2003 which are not captured under section 6 AA needs to be re-examined. This would include provisions protecting the continuance of the Supreme Court, those protecting the Electoral Commissioner and the Ombudsman; provisions establishing the offices of the Director of Public Prosecutions and Auditor-General; and the provisions relating to local government.

At this stage the scope and application of the reconstitution argument is rather uncertain. It could also be argued that if the Victorian government intended the referendum entrenchments in the *Constitution Act 1975* (Vic) to be a reconstitution of Parliament, it would have introduced amendments to section 15 of the *Constitution Act 1975* (Vic) which provides the definition of Parliament, which it did not do. These issues, however, can only be conclusively resolved when considered and judicially determined by the High Court of Australia.⁴¹⁰

⁴⁰⁹ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394

⁴¹⁰ *Ibid* per McTiernan J at 447-8

3.6 Conclusions

Building on the analysis of the law relating to manner and form requirements provided in Chapter 2, this chapter contextualises the theoretical discussion of the law by examining specific entrenchments in the Victorian Constitution, particularly those introduced in 2003. Until that time, an absolute majority requirement and an express declaration clause were the only manner and form requirements found in the Victorian Constitution. In 2003 the Victorian Parliament entrenched a significant portion of the Victorian Constitution, either through a referendum, three-fifths majority or an absolute majority requirement. Parliament introduced these entrenchments through a simple majority in both Houses of Parliament, without bi-partisan support.

An express declaration and an absolute majority requirement do not abdicate Parliament's law making power and therefore constitute genuine manner and form provisions. The *Trethowan* case provides strong authority that a referendum requirement also constitutes a valid manner and form requirement. The situation is less clear with a three-fifth majority requirement. This thesis suggests that a three-fifth majority requirement should not be easily dismissed as invalid. New insights have been presented concerning the degree of special majority requirements that may potentially constitute valid manner and form provisions. If a three-fifth majority amounts to an illegitimate restriction of Parliament's plenary law making power, the following provisions in the Victorian Constitution would be ineffectively entrenched: those relating to the delivery of water services, the Crown and the Governor, provisions establishing the constitution and powers of Parliament, and those that deal with the membership of the houses and qualification of voters.

It therefore appears that, with the possible exception of the three-fifth majority requirement, the entrenchments currently found in the *Constitution Act 1975* (Vic) constitute genuine manner and form provisions. To be legally valid and enforceable, these entrenchments need to find their authority from either section 6 AA, the pure procedures theory or reconstitution.

Provisions in relation to the features that give Parliament a representative character, such as those relating to the system of voting, divisions into regions, or the number of members of Parliament, are most likely laws which relate to the 'constitution, power or procedure' of Parliament and are within the ambit of section 6 AA. Provisions relating to the Crown and the Governor, because they form a constituent element of Parliament, also relate to the 'constitution, power or procedure' of Parliament and would therefore also be authorised by section 6 AA.⁴¹¹

Provisions relating to institutions outside of Parliament, such as the offices of the Director of Public Prosecutions, the Auditor-General or the Ombudsman, despite describing functions of significant importance in their own right, are not laws with respect to the 'constitution, power or procedure' of Parliament. Provisions that relate to the Supreme Court also do not appear to be laws with respect to the 'constitution, power or procedure' of Parliament, although this point is debatable and courts may determine that the jurisdiction of the Supreme Court is a law with respect to the 'constitution, power or procedure' of Parliament. Laws relating to specific economic or social policies, such as privatisation of water services or the protection of human rights, are generally not laws with respect to the 'constitution, power or procedure' of Parliament and therefore can not find their authority in section 6 AA.

It follows that not all provisions entrenched in the Victorian Constitution can be authorised by section 6 AA, and for these provisions to be valid and binding, authority outside of section 6 AA must be sought. It is unlikely that authority for these entrenchments could be found in the *Ranasinghe* principle because it is unlikely that the principle will exert any significant influence on Australian courts. It is, however, likely that some entrenchments could be justified by the pure procedures theory or the concept of reconstitution. For instance, if it is accepted that an absolute majority requirement is

⁴¹¹ Only if the three-fifth majority requirement is considered to be a valid manner and form requirement. If this is not the case, then the requirement is not valid, and the provisions relating to the Crown and the Governor are not validly protected in the *Constitution Act 1975* (Vic)

purely procedural, this would justify the entrenchment of the provisions relating to the Supreme Court independently of section 6 AA. The concept of reconstitution could be used to justify provisions entrenched with a referendum requirement if the courts accept that in amending or repealing the entrenched provisions, Parliament is reconstituted to include, in addition to the Crown and the two Houses of Parliament, the electors voting in a referendum. If this argument is accepted, it could justify the use of a referendum requirement independently of section 6 AA. However, certainty as to the validity and scope of sources of authority for entrenchments outside of section 6 AA, including the *Ranasinghe* principle, pure procedures theory and the concept of reconstitution, can only be conclusively obtained when judicially determined by the High Court of Australia.

Chapter 4

Constitutional entrenchment of the Charter of Human Rights and Responsibilities

4.1 Introduction

On 25 July 2006 the *Charter of Human Rights and Responsibilities Act 2006* (Vic) received Royal Assent. Victoria became the first state in Australia to have a Bill of Rights.⁴¹² The enactment of the Charter in Victoria was preceded by the Australian Capital Territory's *Human Rights Act* in 2004. Other states and territories across Australia are now also looking at changing the law in their respective jurisdictions to better protect human rights.

In December 2008, the Australian Government established a committee to undertake nationwide consultations aiming to find out which human rights and responsibilities should be protected and promoted, and whether human rights could be better protected and promoted, throughout Australia. The Terms of Reference specifically indicated that the options identified by the committee should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.⁴¹³ In 2009 the National Human Rights Consultation Committee released its findings, providing 31 recommendations, advocating that Australia adopt a federal Human Rights Act based on the dialogic model,⁴¹⁴ with a statement of compatibility being required for all Bills introduced into the Federal Parliament, and the Courts being granted interpretative power and possibly the power to issue declarations of incompatibility.⁴¹⁵

⁴¹² For an in depth analysis of the Victorian Charter see Evans C., Evans S., *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, Australia 2008) ('Australian Bills of Rights')

⁴¹³ National Human Rights Consultation *Terms of Reference* (Commonwealth of Australia, Attorney-General's Department, 2008)

⁴¹⁴ *Human Rights Consultation Committee Report*, 2009, Recommendations 17, 18 and 19

⁴¹⁵ *Ibid* Recommendations 6,12, 26, 28 and 29

On 21 April 2010, in response to the Committee's recommendations, the Australian Government released a *Human Rights Framework* outlining a range of key measures to protect and promote human rights in Australia, but it does not include a Human Rights Act or Charter. The framework is structured around the following five principles:

- reaffirming a commitment to our human rights obligations;
- the importance of human rights education;
- enhancing our domestic and international engagement on human rights issues;
- improving human rights protection including greater parliamentary scrutiny; and
- achieving greater respect for human rights principles within the community.

The framework commits to establishing a new parliamentary joint committee on human rights and to introduce legislation requiring each new Bill introduced into Parliament to be accompanied by a statement of compatibility (with the seven core UN human rights treaties to which Australia is a party). The Australian Government will review the operation of the framework in 2014 to assess its effectiveness in the protection and promotion of human rights in Australia.⁴¹⁶

The model adopted in Victoria and the Australian Capital Territory, and recommended by the National Human Rights Consultation Committee, is based on the United Kingdom's *Human Rights Act* 1998. It mostly protects civil and political rights through a simple Act of Parliament which can be easily amended or repealed by future Parliaments. The key attribute of the model is that it aims to promote an institutional dialogue between the legislature, executive and the judiciary. The Charter is not constitutionally entrenched and the

⁴¹⁶ *Australia's Human Rights Framework*, Attorney-General's Department, Commonwealth of Australia April 2010

Victorian courts are not able to strike down laws that are inconsistent with the human rights in the Charter.⁴¹⁷

This chapter will examine the potential entrenchment of the model embedded in the Victorian *Charter of Human Rights and Responsibilities*. It will:

- Discuss the benefits of legislative rather than judicial supremacy in protecting human rights
- Provide a brief summary of the key human rights models currently operating in comparable jurisdictions, including the United States, United Kingdom, Australian Capital Territory, New Zealand, Canada and South Africa.
- Outline, contextualize and examine the key elements of the dialogic model adopted in the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- Discuss ways by which the Charter could be entrenched in the Victorian constitution.
- Recommend the preferred model for the entrenchment of the Charter in Victoria, one where the entire Charter, with all of the components of the model, is entrenched (rather than just the human rights), preserving the dialogic model and ensuring that Parliament remains the final arbiter in resolving human rights issues.

4.2 Legislative v judicial supremacy: reflecting on Jeremy Waldron's dissertation

In some jurisdictions, human rights are found in simple Acts of Parliament while in others they are protected through constitutional entrenchment. One of the primary arguments against constitutional entrenchment is that it gives too much power to the unelected judiciary. The model of entrenchment proposed in this thesis is one where the legislature is the final arbiter in resolving human rights issues, with the judiciary playing a significant role in the debates on human rights issues through institutional dialogue, but without the

⁴¹⁷ Section 32(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

authority to invalidate legislation deemed inconsistent with the Charter. Arguments for and against legislative supremacy will now be discussed to illustrate the benefits of human rights models based on legislative supremacy, as is the case with the Victorian Charter of Human Rights and Responsibilities.

Waldron criticises a system where courts are the main forum for reviewing rights on the basis that it implies mistrust in the public's ability to decide human rights issues themselves. Waldron observes that when a court strikes down legislation, a branch of government that is not a representative institution (the judiciary) is striking down a decision made by the collective representation of the people (the legislature); that people should trust the democratic processes rather than the judiciary in deciding human rights issues because judicial power is undemocratic and human rights are better protected through Acts of Parliament.⁴¹⁸

Democracy can play an important role in protecting human rights. It has the potential to respect human dignity and consider the voices of many people. There is value in majority voting because of the importance of assembling diverse perspectives and experiences when making public decisions. Waldron argues that the scope and content of individual rights should be subject to democratic decision making because human plurality helps develop more innovative and probably more valid options.⁴¹⁹

Waldron approaches the issue by asking the following fundamental question: what procedures for resolving their disagreements should people within a society choose to ensure that their views are

⁴¹⁸ Waldron J, *A Right-Based Critique of Constitutional Rights*, Oxford Journal of Legal Studies, 13 (1993) 18 at 36-8 ('A Right-Based Critique'); Waldron further elaborates on this point in his book: Waldron, *Law and Disagreement*, above n 2 at 219-221

⁴¹⁹ Waldron, *Law and Disagreement*, above n 2; Waldron's arguments are contested by Eisgruber in *Democracy and Disagreement: A Comment on Jeremy Waldron's 'Law and Disagreement'*: Speech at the Journal of Legislation and Public Policy symposium (11 December 2002) arguing that Waldron does not adequately take into consideration the flaws in the democratic institutions. In his book, *Constitutional Self-Government*, Eisgruber is discussing the issue of electorates predominantly seeking self-interest, arguing that "people vote with their pockets".

respected and their opinions treated equally in the process? These procedures have to address the disagreements in a responsible and deliberative fashion. Waldron's argument is that ordinary legislative procedures can do this.

Waldron criticises judicial review on two main grounds. First, that there is no reason to suppose the rights are better protected by judicial review than they would be by democratic legislatures; and second, that quite apart from the outcomes it generates, judicial review is democratically illegitimate.⁴²⁰ Waldron concludes that judicial review of legislation is inappropriate as a mode of final decision making in a free and democratic society, but also acknowledges that his conclusions are based on four assumptions. If these assumptions do not hold, the argument also may not hold. The four assumptions are that the society is one in which:⁴²¹

- there is a democratic culture with electoral and legislative institutions in a reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage.⁴²²
- judicial institutions are in a reasonably good order, set up on a non-representative basis to hear individual lawsuits, settle disputes, and uphold the rule of law. Under this assumption courts do not act on their own motion but respond to particular claims brought by litigants, they deal with issues in the context of binary, adversarial presentation, and refer to their own past decisions on matters relevant to the facts at hand.⁴²³
- most members of the society and most of the officials are committed to the idea of individual and minority rights, and that this forms part of the prevailing ideology. Minorities are

⁴²⁰ Waldron J., *The Core of the Case Against Judicial Review* The Yale Law Journal 115 (2006) 1346 at 1346

⁴²¹ Ibid at 1360

⁴²² Ibid at 1361

⁴²³ Ibid at 1363-4

entitled to a degree of support, recognition, and insulation that is not necessarily guaranteed by their numbers or their political weight.⁴²⁴

- the members of the society who are committed to the idea of rights have a persisting, substantial and good-faith disagreement about rights, what the commitment to rights actually amount to and what its implications are. The consensus about rights is not exempt from general disagreement about all major political issues, which we find in modern liberal societies.⁴²⁵

Waldron argues that, given these assumptions, the society should settle disagreements about rights through majority decision making, through legislative institutions rather than judicial tribunals, and that there is no justification for decisions about rights derived by legislatures to be second guessed by the judiciary.⁴²⁶

Proponents of judicial review believe that it allows for a system within a society that focuses on the real and tangible issues at stake when citizens disagree about rights. Waldron believes that this is not the case, arguing that judicial review is distracted from the 'real' issues by side issues such as precedent, texts, and interpretation. Furthermore, Waldron believes that judicial review is politically illegitimate in light of democratic values. By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside principles of representation and political equality in the final resolution of issues. Waldron also believes that the ability of judges in the regular hierarchy of courts to reason about rights is exaggerated when so much of the ordinary discipline of judging

⁴²⁴ Ibid at 1364-6

⁴²⁵ Ibid at 1367

⁴²⁶ Ibid at 1360

distracts their attention from direct consideration of moral arguments.⁴²⁷

Waldron's main concern with legislative review, and particularly majority decision making, is that legislative procedures may give expression to the so called 'tyranny of the majority', an idea that the rights of the minority may be denied in a system of majority decision making.⁴²⁸ Constitutional limitations and judicial review are defended on the basis that there are moral limits to what people may do, even in a democratic society. In particular, constitutional protection may play a significant role in protecting the rights of minorities. An elected arm of government concerned with re-election may fail to adequately protect the rights of unpopular minorities because the majority may be ignorant or indifferent to them. For example, if protecting rights of prisoners is left solely to elected institutions, then these rights may be neglected if spending tax revenue on prisoners does not win political support from the electorate.⁴²⁹

Waldron argues that the majoritarian aspect actually mitigates the tyranny, because it indicates that there was at least one non-tyrannical thing about the decision, that it was not made in a way that tyrannically excluded certain people from participation as equals.⁴³⁰ Furthermore, Waldron points out that it is not necessary for the minority opinion to be acted upon by the community, what is important is that a decision should properly take into account the

⁴²⁷ Ibid at 1353-4 Waldron differentiates between strong and weak judicial review and indicates that his arguments are directed at strong judicial review, where courts have the authority to decline to apply a statute in a particular case or to modify the effect of a statute to make its application conform with individual rights. Weak judicial review is where judicial review is the subjection of the legislature to the rule of law.

⁴²⁸ Ibid at 1395

⁴²⁹ Debeljak J., *The Proposal for an Australian Bill of Rights* Australian Lawyers Alliance National Conference 2005, 20-22 October 2005, Cairns at 14-15 of the conference paper; Roach K., *Dialogic Judicial Review and its Critics* as printed in Huscroft G., Brodie I., *Constitutionalism in the Charter Era* (Butterworths 2004) 49 at 96

⁴³⁰ Waldron J., *The Core of the Case Against Judicial Review* The Yale Law Journal 115 (2006) 1346 at 1396

interests of the minority, together with all the other competing interests. In fact, legislatures are construed in a way that ensures that information about the opinions of different sections of the society is fed into the decision making process. The decision making process is usually in the context of bicameral institutions, with each legislative proposal requiring majority support in each of the two houses.⁴³¹ This point is made in the context of the assumption that most people, including the decisional majority, care about rights just as much as the members of the decisional minority. In addition, Waldron reinforces the point that people who take rights seriously must be expected to disagree about them; but these disagreements will be relatively independent of the personal stakes that individuals have in the matter.⁴³²

Waldron directly responds to a number of arguments in favour of judicial supremacy, pointing out significant outcome-related defects in the way courts approach rights and important outcome-related advantages of legislatures. These are:

- To the argument that judges consider specific cases involving individuals, and that issues of rights are considered in the context of concrete individual situations, Waldron responds that this is only true with lower courts. Waldron believes that higher courts are usually concerned with abstract issues of the specific right in dispute. He also points out that the process of legislation is open to consideration of individual cases, through lobbying, in hearings, debate and consultation.⁴³³
- When such disagreements about rights erupt, the established Bill of Rights plays far too great a role in the legislative decision process. As Waldron points out, Bills of Rights are usually drafted in such a way that their platitudes may be ill-suited to new and evolving explorations of rights

⁴³¹ Ibid at 1378

⁴³² Ibid at 1398-1401

⁴³³ Ibid at 1380

disagreements. In addition, judges tend to be concerned with the legitimacy of a process that they are a part of, often pronouncing judgments based on their authorising texts; debating the interpretation of those texts rather than discussing moral, ethical or philosophical reasons. Legislatures are able to implement legislation that a previously enacted Bill of Rights failed to register.⁴³⁴

- Another argument in support of judicial review of rights is that Courts must provide reasons for their decisions, concerned at persuading the parties and public at large of the correctness of those decisions. Waldron observes that legislators also give reasons for their votes, just as judges do. Second reading speeches are often examined for interpretive purposes.⁴³⁵ Parliamentary debates play a significant role when society is deciding issues about rights, and they not only focus on what courts have said, or what the constitution, statute or precedent says, but more broadly on philosophical, ethical, social and other issues.⁴³⁶

The theory of political legitimacy weighs in favour of legislatures as a process used to resolve disagreements about rights. Waldron suggests that Parliaments provide a reasonable decision-procedure for the citizens they represent, where each person is given the greatest say possible, compatible with an equal say for each of the others. Waldron suggests that this political legitimacy is not available through judicial deliberations.⁴³⁷

Perhaps the most compelling counter argument for judicial review is that it provides an additional access for citizen input into the political system. Debeljak argues that to effectively protect human rights in a democracy, a mechanism not depending solely on the power of the majority, such as judicial review, is required. Debeljak advocates the

⁴³⁴ Ibid at 1382

⁴³⁵ Ibid at 1382

⁴³⁶ Ibid at 1385

⁴³⁷ Ibid at 1393

idea of 'democratic inclusion', a concept that is concerned with rectifying inequalities in the distribution of citizenship rights and enhancing citizens' control of decision making.⁴³⁸ Where decision making in relation to the protection of human rights is monopolised by a Parliament, the judiciary has no authority to review arising issues. Debeljak argues that such a situation is inadequate and that the judiciary should have a role in reviewing the legislature's actions in protecting human rights. The judiciary's role can enhance democratic inclusion and facilitate a public dialogue regarding the institutions of democracy. Constitutional protection and judicial review can play a significant role in minimising institutional imperfections and help achieve an unfailing democratic inclusion in protecting and promoting human rights.⁴³⁹

Waldron responds that this still does not compensate for the fact that judicial review, as a final mode in resolving disagreements, does not fully reflect the principles of political equality so critical in a democratic system. He argues that people should not be able to seek judicial review to gain greater weight for their opinions than electoral politics would give them.

In stressing the difficulty and complexity in protecting basic human rights, Waldron has great reservations about entrenching rights in a constitution where they are placed beyond the scope of political debate and revision.⁴⁴⁰ These concerns are understandable. Inflexibility of constitutional entrenchment is contrary to the ideals of democracy, as it disables representative institutions and may result in an entrenched list of outdated and intractable rights.⁴⁴¹ Waldron

⁴³⁸ Debeljak, *Judicial Politics or Parliamentary Judgments*, above n 3 at 2-4; Marks S, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press, Oxford 2000) at 116

⁴³⁹ Debeljak, *Judicial Politics or Parliamentary Judgments*, above n 3 at 1-4; also see Debeljak J, *The Proposal for an Australian Bill of Rights* Australian Lawyers Alliance National Conference 2005, 20-22 October 2005, Cairns, at 15-16

⁴⁴⁰ *Ibid* at 25-28

⁴⁴¹ It could be argued that such is the case in the 2nd Amendment in the US Constitution.

concludes that human rights issues should be left in the domain of the ordinary political process in which politicians can be held responsible to the electorate.⁴⁴² This appears to be the model preferred by the Victorian Government.⁴⁴³ This is the model that this thesis suggests can be effectively protected through entrenchment in the Victorian Constitution; a model based on democratic decision-making where a Parliament, as the final decision maker, can take into account diverse views and opinions (including those of judges) when resolving human rights issues.

4.3 Human rights models in Western societies

One well known example where human rights form part of the constitutional framework and where the judiciary plays the main role in enforcing human rights is the United States' *Bill of Rights* of 1791. In more recent years, new models emerged in western societies. These differ from the United States' model by affording greater roles to Parliaments in enforcing human rights protection while still maintaining a role for the judiciary. These models include the United Kingdom's *Human Rights Act*, New Zealand's *Bill of Rights*, the Australian Capital Territory's *Human Rights Act*, the Victorian *Charter of Human Rights and Responsibilities Act*, and to some degree the Canadian *Charter of Rights and Freedoms*.

All of these human rights models contain a number of common elements. Firstly, they are either statutory or constitutional enactments. Secondly, they enumerate a broad set of rights against which Parliament and the executive must measure proposed legislation and other government action. Court-centred models, such as the U.S model, require that courts measure legislation and other action against the protected human rights. The interpretive models, such as the Victorian model, require that courts, as far as possible, interpret government action so that it complies with the enumerated rights and that governments provide a public, reasoned account of

⁴⁴² For a more elaborate discussion of Waldron's ideas see Waldron, *Law and Disagreement*, above n 2

⁴⁴³ *Human Rights In Victoria: Statement of Intent* (Department of Justice, May 2005)

whether the action complies or whether non compliance is justified.⁴⁴⁴ Each model is briefly examined below:

4.3.1 United States

The United States *Bill of Rights 1791* is contained in the amendments to the United States Constitution. The rights protected are primarily civil and political rights and are expressed in absolute terms. Congress and the States are not to pass laws contrary to the Bill of Rights, and when individuals believe that their human rights have been breached, they can take action in the courts. The human rights are subject to interpretation by the Supreme Court and can only be altered through constitutional amendment, which involves a demanding process. The Supreme Court forms the final point of appeal in relation to human rights issues.⁴⁴⁵

4.3.2 South Africa

The South African Bill of Rights forms part of the South African Constitution of 1996. The *Bill of Rights* can only be changed through Constitutional amendment. It protects civil and political rights as well as social and economic rights. Some rights, mostly economic rights, are limited by the provision that the State must take measures to achieve realization of the rights within available resources. The *Bill of Rights* applies to all laws, state organizations and private relations. Individuals can take action against breaches of their rights through the courts. Courts have the power to invalidate laws which are inconsistent with human rights.⁴⁴⁶

4.3.3 Canada

The Canadian *Charter of Human Rights and Freedoms 1982* is contained in the Canadian Constitution but it originated from an Act

⁴⁴⁴ See sections 28 and 32-37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁴⁵ *Bill of Rights*, Amendments ratified 15 December 1791

⁴⁴⁶ *Bill of Rights – Sections 7-39 of the South African Constitution Act 1996*

of Parliament, the *Bill of Rights 1960*. The Charter is entrenched and can only be changed through Constitutional amendment. The rights protected are primarily civil and political rights, but the Charter also gives recognition to Canada's multicultural society, provides protections for the equal rights of both English and French as official languages and recognizes existing treaty rights of Indigenous peoples. The rights in the Charter are subject to reasonable limitations as long as these are demonstrably justified. Legislation can override the rights in the Charter. Individuals can take action against breaches of the Charter through the courts. A court has the power to invalidate legislation it finds in breach of the Charter, and in response Parliament can choose to pass an override clause to give effect to the legislation despite it being held to be in breach of the Charter.⁴⁴⁷

4.3.4 United Kingdom

The United Kingdom *Human Rights Act* is an Act of Parliament that can be easily changed by Parliament. It is not entrenched. The rights protected are civil and political rights as listed in the European Convention on Human Rights. A Minister introducing a Bill must either make a statement in Parliament that the proposed legislation is compatible with the Convention rights, or if it is incompatible, make a statement that the government wishes to proceed with the Bill notwithstanding its incompatibility.

Moreover, the Act requires courts to interpret legislation, if possible, in a way that is compatible with human rights. The Act preserves the validity of incompatible legislation, but allows courts to invalidate subordinate laws such as regulations. Higher courts can make declarations that Acts are incompatible with the protected human rights. In response, Parliament has the option to amend legislation to make it compatible, or simply ignore the declaration. Individuals can bring an action to enforce their human rights and can seek just and appropriate remedies. The right to compensation for breaches of human rights is only available if no other remedy is appropriate.⁴⁴⁸

⁴⁴⁷ Part 1 of the *Canadian Constitution Act 1982*

⁴⁴⁸ *Human Rights Act 1998* (UK)

4.3.5 New Zealand

The New Zealand *Bill of Rights Act* is an Act of Parliament that can be easily changed by the New Zealand Parliament. The Act does not override inconsistent legislation. The rights protected are primarily civil and political rights. The Act provides for scrutiny of the proposed legislation by requiring the Attorney-General to alert Parliament to any provisions in a Bill that may be inconsistent with human rights. A court in interpreting legislation is to favour a meaning consistent with the Act. The courts may award compensation to individuals if their rights have been breached by government agencies.⁴⁴⁹

4.3.6 Australian Capital Territory

The Australian Capital Territory *Human Rights Act* is an ordinary Act of the legislature that can be easily changed by the legislature. The Act protects civil and political rights and is designed to encourage increased awareness of, and dialogue on, human rights issues. When a Bill is introduced to the legislature, the Attorney-General is required to indicate whether or not it is consistent with the rights in the *Human Rights Act*. The Act requires courts to interpret legislation consistently with the enacted human rights. If a court is not able to interpret a law consistently with the *Human Rights Act*, the Supreme Court can issue a 'declaration of incompatibility'. Such a declaration does not affect the validity or operation of the law; instead, the Attorney-General is required to respond to the declaration within 6 months of its issue. Individuals have no right of action against government agencies or private individuals for breaches of human rights and there is no right to compensation.⁴⁵⁰

⁴⁴⁹ *Bill of Rights Act 1990* (NZ)

⁴⁵⁰ *Human Rights Act 2004* (A.C.T)

4.4 The Victorian Charter

4.4.1 Consultative committee report and recommendations

At the beginning of 2005, the Victorian government established an independent Human Rights Consultation Committee to investigate models by which human rights can be better protected and promoted in Victoria. The statement of intent released by the government indicated that it was interested in the New Zealand, United Kingdom and the Australian Capital Territory models, where the sovereignty of Parliament is preserved and an institutional dialogue encouraged.⁴⁵¹

For over six months the Human Rights Consultation Committee conducted consultations. They found that 84% of the Victorians consulted believed their human rights should be better protected, and that in addition to a specific Bill of Rights, Victoria needed a change to help build a society in which government, Parliament, the courts and the people have an understanding and respect for basic human rights.⁴⁵² In particular, people from vulnerable minorities expressed the need for rights to be better protected.⁴⁵³

The consultations identified a need for a specific Bill of Rights for Victoria in light of the following considerations:

- Victorian people expressed the need to change the Victorian law to better protect human rights, recognizing that without a Bill of Rights the protection of human rights was inadequate.

⁴⁵¹ *Human Rights In Victoria: Statement of Intent* (Department of Justice, May 2005)

⁴⁵² *Human Rights Consultation Committee Report*, above n 1 at II

⁴⁵³ *Ibid* at V

It was also considered that a Bill of Rights would provide a better response to international human rights obligations.⁴⁵⁴

- A Bill of Rights would enable a more coherent and accessible code of conduct setting out minimum human rights standards for governments and public authorities. This, in turn, would facilitate better transparency in government action and would improve government's accountability to the public.⁴⁵⁵
- In addition to legal protection, a Bill of Rights would present a strong symbolic gesture, build a stronger culture of human rights in Victoria and give expression to important values such as equality, diversity, respect and inclusion. A Bill of Rights would also play a significant educative role regarding human rights.⁴⁵⁶

The Committee followed the government's preferred model, one which preserves the sovereignty of Parliament, and recommended that human rights should be enshrined in an ordinary Act of Parliament. The Committee also considered whether the Victorian Bill of Rights should form part of the Victorian Constitution and whether it should be entrenched. During the consultations it was recognized that constitutional recognition of human rights would be of significant symbolic value. The Committee did not express a view as to whether a Victorian Charter might eventually be included in the Constitution, but suggested that this issue should be decided in a referendum.⁴⁵⁷

The Committee recommended protection of the rights contained in the *International Covenant on Civil and Political Rights 1966*.⁴⁵⁸ Any other rights, such as those found in the *International Covenant on Economic, Social and Cultural Rights 1966*, should be considered as

⁴⁵⁴ Ibid at 3 where it was stated that overall 84% of submissions received indicated support to change the law to better protect human rights.

⁴⁵⁵ Ibid at 10

⁴⁵⁶ Ibid at 13

⁴⁵⁷ Ibid at 20

⁴⁵⁸ Ibid at II

part of the Charter's review in 2011. The Committee further recommended that Parliament should retain the power to limit rights where reasonably justified.⁴⁵⁹

Submissions to the Committee indicated support for a model that gives the judiciary a role in human rights protection and therefore promotes an institutional dialogue between the elected and unelected arms of government.⁴⁶⁰

The Committee conceded that courts should play a vital role in holding Parliament accountable for protecting human rights, in particular for people who are vulnerable and disadvantaged.⁴⁶¹ The recommended model was one where courts, as far as possible, give effect to statutory provisions in a way that is compatible with human rights.⁴⁶² It was recommended that the Supreme Court have the ability to make declarations of incompatibility, but that these declarations have no impact on the validity of the incompatible law.⁴⁶³

The recommended model also impacts on policy development within the government, in the preparation of legislation and policy documents, and in the manner in which procedure is developed for officials interacting with the public.⁴⁶⁴ The Committee recognised the

⁴⁵⁹ Ibid at III

⁴⁶⁰ See submission 839 from the Castan Centre for Human Rights Law prepared by Dr Debeljak

The Public Advocate, Julian Gardner in his submission was concerned that without the dialogue with the courts, Parliament would be held to account only through the election process. He said that this would be insufficient as unpopular minority groups would be dependent upon the majority for the protection of their rights.

⁴⁶¹ *Human Rights Consultation Committee Report*, above n 1 at 81

⁴⁶² Clause 32 of the draft *Charter of Human Rights and Responsibilities* attached to the *Human Rights Consultation Committee Report*, above n 1

⁴⁶³ Summary of the Committee's report prepared by Centre for Comparative Constitutional Studies Law Reform and Public Policy is available at www.law.unimelb.edu.au/cccs/vicchartersummary.html

⁴⁶⁴ *Human Rights Consultation Committee Report*, above n 1 at II

importance of developing a model whereby each arm of government has an identifiable role in protecting human rights.⁴⁶⁵

4.4.2 Charter of Human Rights and Responsibilities Act

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) received Royal Assent on 25 July 2006 and became operational in part from 1 January 2007 and fully operational from 1 January 2008. The Charter did not receive bi-partisan support.⁴⁶⁶ The Charter is encapsulated in an Act of Parliament which can be amended or repealed in the same way as any other Act of Parliament. The Charter requires:⁴⁶⁷

- Parliament to consider the impact of the Charter on legislation,
- Courts to interpret laws in light of the Charter, and
- Public authorities to comply with the Charter.

- outline of the Charter

Part 1 of the Charter stipulates that it does not intend to limit any rights or freedoms that are not included in the Charter.⁴⁶⁸ It indicates that the listed rights apply only to human beings (not corporations) and that the Charter binds the Crown and applies to the Victorian government.⁴⁶⁹

Part 2 of the Charter lists the twenty rights that are protected by the Charter. Most of these rights are civil and political, modelled on the

⁴⁶⁵ Ibid at 67 - 68

⁴⁶⁶ Victorian Legislative Assembly, Parliamentary Debates, 13 June 2006; Victorian Legislative Council, Parliamentary Debates, 20 July 2006

⁴⁶⁷ Evans S., Evans C., *Legal Redress Under the Victorian Charter of Human Rights and Responsibilities* (2006) 17 PLR 264 at 265 ('Legal redress under the Victorian Charter')

⁴⁶⁸ Section 5 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁶⁹ Section 6 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

International Covenant on Civil and Political Rights.⁴⁷⁰ This part also includes a general limitation clause in section 7 indicating that no right is absolute. Section 7(2) provides:⁴⁷¹

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Part 3 of the Charter contains provisions that give effect to the rights set out in part 2. It gives a role in promoting human rights to the *Scrutiny of Acts and Regulations Committee*.⁴⁷² When a Bill is introduced into Parliament a statement is required indicating whether or not that Bill is compatible with the Charter.⁴⁷³ The Charter requires public authorities to comply with human rights⁴⁷⁴ and for courts to interpret legislation in accordance with those rights.⁴⁷⁵ It also specifies that in exceptional circumstances (perhaps in cases of national security) Parliament may expressly declare an Act or a provision which is incompatible with human rights to be excluded from the application of the Charter.⁴⁷⁶

⁴⁷⁰ Opened for signature on 16 December 1966, 999 UNTS 17 (entered into force 23 March 1976)

⁴⁷¹ Section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷² Section 30 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷³ Section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷⁴ Section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷⁵ Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷⁶ Section 31 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Part 4 of the Charter confers specific functions on the Victorian *Human Rights and Equal Opportunity Commission* relating to the monitoring of the operation of the Charter.⁴⁷⁷

Part 5 provides that the Charter be first reviewed in 2011 and every four years thereafter. It confers a regulation-making power on the Governor in Council and provides for consequential amendments to relevant Victorian legislation. The Ombudsman is given power to investigate whether any administrative action is incompatible with the Charter.⁴⁷⁸

- statements of compatibility

The Charter provides that any Bill introduced into Parliament must be accompanied by a statement indicating whether or not it is consistent with the human rights in the Charter.⁴⁷⁹ Section 28 states that a Member of Parliament introducing legislation into Parliament must make a statement assessing its compatibility with the protected rights, explain how it is compatible or explain the nature and extent of its incompatibility with the Charter.⁴⁸⁰ These statements do not bind the judiciary. Sections 28 and 29 read as follows:

28. Statements of compatibility

- (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under sub section (1) to be laid before the House of Parliament into which the Bill is

⁴⁷⁷ Explanatory Memorandum of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) at p28 and Sections 41, 42 and 43 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷⁸ Section 48 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁷⁹ Section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁸⁰ Evans C., Evans S., *Australian Bill of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths 2008) at 50-51 ('Australian Bill of Rights')

introduced before giving his or her second reading speech on the Bill

Note: The obligation in sub-sections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

- (3) A statement of compatibility must state -
 - (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
 - (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
- (4) A statement of compatibility made under this section is not binding on any court of tribunal.

29. No effect on Victorian law

A failure to comply with section 28 in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

Section 29 makes sure that there is no judicially enforceable obligation on members of Parliament to produce statements of compatibility. Failure to comply with this requirement does not impugn the validity, operation or enforcement of the subsequent Act. Evans and Evans note that there is nothing in the Charter that 'has the effect of entrenching a manner and form provision that would require that there be a positive statement of compatibility before a bill becomes an Act and that would give the courts jurisdiction to ensure that such manner and form conditions had been met'.⁴⁸¹

From an operational perspective the fact that producing a statement of compatibility is not mandatory is a serious flaw in the current model. The effectiveness of the institutional dialogue would benefit from a repeal of section 29 of the Charter, as this would make statements of compatibility mandatory. Failure to produce a statement should result in invalidity of the Act or invalidity of the relevant statutory provision. At this stage, where no such requirement exists, political pressure is the only mechanism compelling members to seriously consider human rights issues in a statement of compatibility when introducing Bills into Parliament.

⁴⁸¹ Section 29 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) also see Evans, Evans, *Australian Bill of Rights*, above n 480 at 53

Statements of compatibility present the government with an opportunity to explain, justify and communicate the thinking process behind the decision as to whether the Bill in question is compatible with the Charter. Even though statements of compatibility do not affect the validity of legislation, they could aid the interpretation of legislation by the courts.⁴⁸² These statements therefore should include a thorough analysis of the following issues:⁴⁸³

- any reliance on the reasonable limitations test in section 7;
- options that may be available to interpret the relevant statute in a manner that is consistent with human rights;
- consistency across portfolios in interpreting rights and assessing the legislation for compatibility.

Furthermore, statements of compatibility provide the key mechanism in initiating the institutional dialogue by providing an initial assertion on the impact of human rights on the legislated issue. This assertion is subsequently subject to scrutiny by the Supreme Court.

- Scrutiny of Acts and Regulations Committee

The Scrutiny of Acts and Regulations Committee, a parliamentary committee, is required to report to Parliament on the compatibility of all proposed legislation with the protected human rights, as outlined in section 30 of the Charter.⁴⁸⁴ Therefore, the Scrutiny of Acts and Regulations Committee reports could prove to be a useful additional source of human rights analysis of Bills introduced into the Victorian Parliament, particularly if the Committee disagrees with the

⁴⁸² Ibid at 55 indicating that the statements of compatibility could be considered under section 35(b)(ii) and (iii) of *Legislation Act 1984* (Vic)

⁴⁸³ Raman P., *The Role of the Victorian Equal Opportunity & Human Rights Commission in Ensuring Compliance with the Charter of Rights* (LIV Victorian Charter of Human Rights Conference 18 May 2007) at 6

⁴⁸⁴ Section 30 of the *Charter of the Human Rights and Responsibilities Act 2006* (Vic)

government as to whether or not a Bill in question is compatible with the Charter.⁴⁸⁵

- redress for breaches of human rights

The Charter turns its focus away from legal redress for the violation of human rights. The government made its opposition to increased litigation clear from the start, and ensured that there is no obligation on governments to pay damages.⁴⁸⁶ Section 39 of the Charter sets out the remedies available for a breach of human rights:

- (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.
- (2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right –
 - a. to seek judicial review under the Administrative Law 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and
 - b. to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.
- (3) A person is not entitled to be awarded any damages because of a breach of this Charter.
- (4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

It is evident that there is no independent cause of action and no option to seek remedies specifically for a breach of the Charter. There are, however, other avenues by which remedies in one form or another are available for a breach of human rights. At this stage the potentially most effective redress available for breach of human rights is by exerting political pressure on the government, making

⁴⁸⁵ Evans, Evans, *Australian Bill of Rights*, above n 480 at 59-63

⁴⁸⁶ *Human Rights in Victoria: Statement of Intent* (Department of Justice May 2005)

human rights values a relevant aspect of the Victorian political culture.⁴⁸⁷

To better understand how the Charter protects and promotes human rights it is useful to examine the following three concepts:⁴⁸⁸

- The interpretive clause in section 32 of the Charter,
- The Supreme Court's declarations of inconsistent interpretation, and
- The requirement that public authorities comply with human rights.

- the interpretative clause

All Victorian legislation is required to be interpreted consistently with the human rights in the Charter. This is quite a significant and powerful requirement provided by the Charter as it allows courts to consider human rights questions in a wide range of contexts.⁴⁸⁹ Section 32 requires that all statutory provisions be interpreted in a way that is compatible with the protected rights, so far as it is possible to do so consistently with the statutory purpose. Section 32 of the Charter reads as follows:

- (1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
- (2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- (3) This section does not affect the validity of –
 - a. an Act or provision of an Act that is incompatible with a human right; or
 - b. a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

⁴⁸⁷ Evans, Evans, *Legal redress under the Victorian Charter*, above n 467 at 272

⁴⁸⁸ *Ibid* at 265

⁴⁸⁹ Evans, Evans, *Australian Bill of Rights*, above n 480 at 83-111

If the established meaning of the legislation is inconsistent with human rights it will have to be re-examined so as to make it consistent with the Charter.⁴⁹⁰ This provision encourages a rights-consistent interpretation of legislation, unless it is clear that the purpose or intention of the legislation is to the contrary.⁴⁹¹ There will be an overlap between section 32 and common law principles of interpretation such as:

- the requirement for clear and express language before a statute is taken to abrogate fundamental common law rights; and
- the presumption that Parliament legislates consistently with Australia's existing international human rights obligations.⁴⁹²

It may not be enough to rely on existing case law where a more consistent human rights interpretation of the Act is possible. The direction to interpret legislation consistently with human rights would need to be consistent with the human rights and the purpose of the Act being interpreted.⁴⁹³ Evans and Evans suggest an approach to interpretation adopted from the judgment of four of the five judges of the Supreme Court of New Zealand (where a similar provision exists) in *R v Hansen*.⁴⁹⁴ The approach is as follows:⁴⁹⁵

⁴⁹⁰ Evans, Evans, *Legal redress under the Victorian Charter*, above n 467 at 267

⁴⁹¹ Debeljak J., *Parliamentary Sovereignty and Dialogue under the Victorian Charter of Human Rights and Responsibilities: drawing the line between judicial interpretation and judicial law-making* 33 Monash University Law Review 1 at 13 ('Dialogue under the Victorian Charter')

⁴⁹² Evans, Evans, *Legal redress under the Victorian Charter*, above n 467 at 267; Taylor G., *Human Rights Protection in Australia: Interpretation Provisions and Parliamentary Supremacy* (2004) 32 Fed L Rev 57; Kirby M., *Domestic Implementation of International Human Rights Norms* (1999) 5 (2) AJHR 109

⁴⁹³ Evans, Evans, *Legal redress under the Victorian Charter*, above n 467 at 268

⁴⁹⁴ [2007] NZSC 7; 3 NZLR 1 see Evans, Evans, *Australian Bill of Rights*, above n 480 at 99

⁴⁹⁵ Evans and Evans identify this approach as the preferred approach. The second approach is adopted from *Moonen v Film and Literature Board of Review* [2000] 2 NCLR 9 (NZCA) 20-21 [17]-[18] as discussed in Evans, Evans, *Australian Bill of Rights*, above n 480 at 101. The first approach, as outlined in the thesis does not

- (1) Determine the standard meaning of the legislative provision by using standard interpretive principles.
- (2) Does the provision (in its standard meaning) limit any protected rights?
- (3) If the provision does not limit any protected right, adopt the standard meaning.
- (4) If the provision so interpreted does limit protected rights, are the limits on the rights demonstrably justified?
- (5) If the limits are demonstrably justified, adopt the standard meaning.
- (6) If the limits are not demonstrably justified, is the provision capable of being interpreted consistently with the protected rights (that is, in a way that limits rights in a manner that is demonstrably justified)?
- (7) If the provision is not capable of being interpreted consistently with the protected rights (for example, because there is a clear legislative purpose to limit protected rights), adopt the standard meaning and consider making a declaration of inconsistent interpretation.

There is a fine line between courts interpreting legislation consistently with the Charter and courts engaging in impermissible judicial law making, which is a risk that needs to be carefully monitored.⁴⁹⁶ In situations where legislation cannot be interpreted compatibly, the judiciary does not have the power to invalidate it, but the Supreme Court or the Victorian Court of Appeal may issue a declaration of inconsistent interpretation in accordance with section 36 of the Charter.

- declarations of inconsistent interpretation

Legal proceedings that give rise to either a question of law or interpretation of a statutory provision relating to the Charter may be

move to reinterpret a provision unless the limits imposed by the provision on a protected human right are unjustified. The second approach moves immediately to interpretation once it is determined that a protected right is limited.

⁴⁹⁶ Evans, Evans, *Australian Bill of Rights*, above n 480 at 83-111

referred to the Supreme Court. When legislation can not be interpreted consistently with the Charter, the Supreme Court may issue a declaration of inconsistent interpretation in accordance with sections 33 (referral to the Supreme Court) and 36 (issuing of the declaration of inconsistent interpretation) of the Charter. Section 36 reads as follows:

36. Declaration of inconsistent interpretation

- (1) This section applies if –
 - (a) in a Supreme Court proceeding a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter; or
 - (b) the Supreme Court has had a question referred to it under section 33; or
 - (c) an appeal before the Court of Appeal relates to a question of a kind referred to in paragraph (a).
- (2) Subject to any relevant override declaration, if in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.
- (3) If the Supreme Court is considering making a declaration of inconsistent interpretation, it must ensure that notice in the prescribed form of that fact is given to the Attorney-General and the Commission.
- (4) The Supreme Court must not make a declaration of inconsistent interpretation unless the Court is satisfied that –
 - (a) notice in the prescribed form has been given to the Attorney-General and the Commission under sub-section (3); and
 - (b) a reasonable opportunity has been given to the Attorney-General and the Commission to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation.
- (5) A declaration of inconsistent interpretation does not –
 - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made; or
 - (b) create in any person any legal right or give rise to any civil cause of action.
- (6) The Supreme Court must cause a copy of a declaration of inconsistent interpretation to be given to the Attorney-General –
 - (a) if the period provided for the lodging of an appeal in respect of the proceeding in which the declaration was made has ended without such an appeal having been lodged, within 7 days after the end of that period; or

(b) if on appeal the declaration is upheld, within 7 days after any appeal has been finalised.

(7) The Attorney-General must, as soon as reasonably practicable, give a copy of a declaration of inconsistent interpretation received under sub-section (6) to the Minister administering the statutory provision in respect of which the declaration was made, unless the relevant Minister is the Attorney-General.

A declaration of inconsistent interpretation has no effect on the validity, operation or enforcement of the statutory provision to which it relates and it does not create a cause of action.⁴⁹⁷ The power to issue a declaration of inconsistent interpretation provides the judiciary with a mechanism to warn the executive and the Parliament when it believes that legislation is inconsistent with the protected rights.⁴⁹⁸

A declaration of inconsistent interpretation triggers the following process. The Attorney-General is required to communicate the declaration to the Minister responsible for the administration of the Act. The relevant Minister, in turn, is required to make a public parliamentary response to the declaration. The declaration does not dictate the content of the response, and Parliament is under no legal obligation to amend the Act as a result.⁴⁹⁹ The Minister may, however, find him or herself under significant political pressure to amend the Act. This is an indirect but powerful (and potentially effective) enforcement mechanism compelling Parliament to seriously consider human rights. The process of issuing and responding to declarations of inconsistent interpretation is critical in promoting the dialogue on human rights issues between the judiciary and the legislature, which is one of the key aims of the Act.

Some constitutional issues have been identified in relation to courts issuing declarations of inconsistent interpretations. There are three

⁴⁹⁷ Section 36(5) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁴⁹⁸ Debeljak, *Dialogue under the Victorian Charter*, above n 491 at 13

⁴⁹⁹ Sections 36(6), 36(7) and 37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

questions concerning the exercise of judicial power, and constraints placed on it by Chapter III of the Commonwealth Constitution. First, whether such declarations may be issued by state courts when they are exercising only state jurisdiction; secondly whether such declarations may be issued when the court is exercising federal judicial power; and thirdly, whether the High Court can hear appeals relating to the declarations. Issuing declarations by state courts exercising purely state judicial power does not raise any constitutional questions; the issue becomes much more complex when state courts exercise federal jurisdiction or when declarations are the subject of an appeal to the High Court of Australia.⁵⁰⁰

- the override provision

Parliament can override the operation of Charter rights through ordinary legislation. Parliament can expressly declare that an Act of Parliament will operate despite being incompatible with the Charter rights. The override provision is found in section 31 of the Charter:

- (1) Parliament may expressly declare in an Act that that Act or a provision of that Act or another Act or a provision of another Act has effect despite being incompatible with one or more of the human rights or despite anything else set out in this Charter.
- (2) [...]
- (3) A member of Parliament who introduced a Bill containing an override declaration, or another member acting on his or her behalf, must make a statement to the Legislative Council of the Legislative Assembly, as the case requires explaining the exceptional circumstances that justify the inclusion of the override declaration.
- (4) It is the intention of Parliament that an override declaration will only be made in exceptional circumstances.
- (5) [...]
- (6) If an override declaration is made in respect of a statutory provision, then to the extent of the declaration this Charter has no application to that provision.

Note: As the Charter has no application to a statutory provision for which an override declaration has been made, the Supreme Court cannot make a declaration of inconsistent interpretation in respect of that statutory provision. Also, the requirement under section 32 to

⁵⁰⁰ These issues are outside the scope of this thesis. For more information see Evans, Evans, *Australian Bill of Rights*, above n 480 at 150-3

interpret that provision in a way that is compatible with human rights does not apply.

- (7) A provision of an Act containing an override declaration expires on the 5th anniversary of the day on which that provision comes into operation or on such earlier date as may be specified in that Act.
- (8) Parliament may, at any time, re-enact an override declaration, and the provisions of this section apply to any re-enacted declaration.
- (9) A failure to comply with sub-section (3) or (5) in relation to any Bill that becomes an Act does not affect the validity, operation or enforcement of that Act or of any other statutory provision.

Section 31 provides that, in exceptional circumstances, Parliament may expressly declare an Act or a provision to have effect despite being incompatible with the human rights protected by the Charter.⁵⁰¹ What constitutes exceptional circumstances is not defined in the Charter, and is subject to Parliament's determination.

The Charter has no application to a statutory provision for which an override declaration has been made. A note attached to section 31(6) specifically indicates that the override provision nullifies section 32 of the Charter. The requirement for the Supreme Court to interpret provisions in a way that is compatible with human rights no longer applies. Section 31 also annuls section 36, so that the Supreme Court no longer has the power to make a declaration of inconsistent interpretation in respect to provisions for which an override declaration has been made.

As such, the override provision has the potential of inhibiting an institutional dialogue by excluding the Supreme Court from commenting on human rights compatibility in situations declared by Parliament as 'exceptional'. Given that under the Victorian model the Supreme Court has no power to invalidate incompatible legislation, it would have been preferable to omit this override provision from the Charter. Producing a statement of compatibility or incompatibility provides an opportunity for the government to articulate the exceptional circumstances which justify incompatibility with the Charter. This would also preserve the dialogue, having no impact on the validity of the provision in question. The override clause makes

⁵⁰¹ Section 31 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

no contribution to achieving a balance between human rights protection and other considerations. It appears to be a measure aiming to mitigate any possible political backlash relating to inconsistent legislation by preventing the judiciary from commenting on government action.

The override provision, however, could have a significant role to play if the Supreme Court had the authority to invalidate incompatible legislation. In such situations this provision would play an essential role in preserving Parliament's sovereignty by sustaining the validity of legislation that is inconsistent with the Charter. Such legislation would be immune from the Supreme Court's authority to invalidate it, and would remain valid for five years as there is currently a five year sunset clause on the override declarations.⁵⁰²

- obligations on 'public authorities'

The Charter provides that it is unlawful for a public authority to act in a way that is incompatible with human rights, by making decisions that fail to give proper consideration to relevant human rights issues.⁵⁰³ The term 'public authority' is defined in section 4 of the Charter as follows:

- (1) For the purposes of this Charter a public authority is –
 - a. a public official within the meaning of the Public Administration Act 2004; or
 - b. an entity established by a statutory provision that has functions of a public nature; or
 - c. an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or
 - d. Victoria Police; or
 - e. a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or
 - f. a Minister; or

⁵⁰² Section 31(7) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁰³ Section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

- g. members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or
- h. an entity declared by the regulations to be a public authority for the purposes of this Charter –

but does not include –

- i. Parliament or a person exercising functions in connection with proceedings in Parliament; or
- j. A court or tribunal except when it is acting in an administrative capacity; or
- k. An entity declared by the regulations not to be a public authority for the purposes of this Charter.

The definition expressly indicates that ‘public authority’ includes core relevant bodies such as government Ministers, police, public officials, and local councils. There is no difficulty in identifying ‘public authorities’ if they are expressly listed in section 4 of the Charter, although it is worth noting that courts and tribunals are excluded unless they are acting in an administrative capacity. In *R v Williams*⁵⁰⁴, King J indicated that courts may be acting in an administrative capacity when listing trials, but when deciding a trial date or adjourning a trial, the court is acting judicially and therefore does not fall within the definition of a ‘public authority’.⁵⁰⁵

It is more difficult to determine whether an entity is a ‘public authority’ under section 4(1)(b) and (c) of the Charter, which refers to the ‘functions of a public nature’ test. This requires answering the following questions: what is a function of a public nature, and when is such a function being exercised on behalf of the state or a public authority?⁵⁰⁶ Section 4(2) of the Charter provides some guidance in answering these questions; it states:

In determining if a function is of a public nature the factors that may be taken into account include –

⁵⁰⁴ *R v Williams* [2007] VSC 2 (15 January 2007)

⁵⁰⁵ *Ibid* per King J at 50

⁵⁰⁶ Evans, Evans, *Australian Bill of Rights*, above n 480 at 19-24

- (a) That the function is conferred on the entity by or under a statutory provision;
- (b) That the function is connected to or generally identified with functions of government;
- (c) That the function is of a regulatory nature;
- (d) That the entity is publicly funded to perform the function;
- (e) That the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.

Determining whether an entity is a 'public authority' depends on the question of the scope of the role that government plays in contemporary society in light of developments such as privatisation and public-private partnerships.⁵⁰⁷ One example illustrating the potential difficulty in identifying public authorities relates to the question of whether schools fall under the Charter definition of a 'public authority'. Public schools fall within the definition as they perform functions of a public nature on behalf of the State. Private schools, however, can not be classified as public authorities under the Charter, because even though they perform functions of a public nature, they do not perform these on behalf of the State.⁵⁰⁸

- Victorian Equal Opportunity & Human Rights Commission

Since the commencement of the Charter on 1 January 2007, the former *Victorian Equal Opportunity Commission* changed its name to the *Victorian Equal Opportunity and Human Rights Commission* to reflect the new role granted to it under the Charter.⁵⁰⁹ Prior to the commencement of the Charter, the Commission's focus was to provide an impartial and independent complaint handling service in relation to discrimination as covered by the *Equal Opportunity Act*

⁵⁰⁷ Evans, Evans, *Legal redress under the Victorian Charter*, above n 467 at 274; Mantziaris C., *A 'Wrong Turn' on the Public/Private Distinction: Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 14 PLR 197 at 197

⁵⁰⁸ In the United Kingdom's *Human Rights Act* the definition of public authority includes private schools.

⁵⁰⁹ Part IV of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

1995 (Vic). Since the introduction of the Charter, the role of the Commission has grown to cover the following:⁵¹⁰

- presenting the Attorney-General with an annual report on the Charter;
- the capacity to intervene in court or tribunal proceedings that involve interpretation or application of the Charter;
- upon request, reviewing a public authority's programs and practices to determine their compatibility with human rights;
- providing education and raising awareness in Victoria about human rights and the Charter;
- reviewing the effect of statutory provisions and the common law on human rights and providing a report to the Attorney-General when requested to do so;
- assisting the Attorney-General in reviewing the Charter after the first four years of its operation;
- power to intervene or be joined as a party to any proceeding before any court or tribunal in which a question of law arises relating to the application of the Charter.

The Commission is required to prepare an annual report which examines the operation of the Charter including all declarations of inconsistent interpretation and all override declarations made during the relevant year.⁵¹¹ The Commission is of the view that the most significant and critical function may relate to informing and educating the general community about human rights issues.⁵¹²

- review of the Charter

The first review of the Charter by the government is scheduled to take place in 2011, and will consider a number of issues for potential reform to improve the operation of the Charter. The terms of

⁵¹⁰ Section 41 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵¹¹ Section 43 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵¹² Raman P., *The Role of the Victorian Equal Opportunity & Human Rights Commission in Ensuring Compliance with the Charter of Rights* LIV Victorian Charter of Human Rights Conference (18 May 2007) at 13

reference for the review have not been released at the time of writing this thesis, however, it is likely that the review will consider the following:

- legal remedies for an individual whose Charter rights have been violated;⁵¹³
- options for constitutional entrenchment of the Charter, and how this can be effectively achieved;
- the appropriateness of including the rights contained in the *International Covenant on Economic, Social & Cultural Rights*, the *Convention on the Rights of the Child* or the *Convention on the Elimination of All Forms of Discrimination against Women*;
- the recognition of the right to self determination;
- regular auditing of public authorities to assess compliance with human rights.

4.5 An institutional dialogue

The concept of an institutional dialogue is relatively new and refers to a legislative design where human rights are subject to judicial review but the judges' decision either is not binding on or can be modified or reversed by Parliament.⁵¹⁴ The concept of an institutional dialogue has been described by Hogg and Bushell as a situation where 'a judicial decision is open to legislative reversal, modification, or avoidance'.⁵¹⁵ In simple terms, the dialogue is usually structured as follows:

- The legislature scrutinises legislative proposals and enacts the law;
- The judiciary interprets, reviews and possibly invalidates the enacted law;
- The legislature then responds to the judicial review.

⁵¹³ Evans, Evans, *Legal Redress Under the Victorian Charter*, above n 467 at 281

⁵¹⁴ This is a widely accepted definition initially identified by Hogg and Bushell, accepted by Roach, above n 429 at 55

⁵¹⁵ Hogg P. W., Bushell A., *The Charter Dialogue Between Courts and Legislatures* (1997) 35 Osgoode Hall L.J. 75 at 79 ('The Charter Dialogue')

A dialogue is achieved when both the judiciary and the legislature can influence each other in considering human rights issues. An institutional dialogue is designed to facilitate a situation where Parliament is presented with an opportunity to rethink its position on specific issues in light of the court's considerations. The dialogue can only be effective when the parties are willing to listen to each other and modify their positions. The authority for the legislature to respond to judicial review is essential in fostering an institutional dialogue. It ensures that neither the judiciary nor the representative arm have a monopoly in deciding human rights issues.⁵¹⁶

As discussed above, Waldron believes that it is in the interest of democratic legitimacy for the elected legislature to be able to revise and reverse court decisions, and therefore have the final say in resolving issues relating to human rights. Having more than one arm of government deliberating human rights issues ensures that the outcomes are better analysed and benefit from democratic participation. Judicial review gives a politically empowered people an opportunity to think afresh about their understanding of human rights.⁵¹⁷

The ability to have an institutional dialogue allows Parliament to debate, revise and if need be, reject judicial decisions in relation to human rights issues.⁵¹⁸ It is both democratic and educational for citizens to think through the possibility of Parliament overriding court decisions.⁵¹⁹ The dialogue remains beneficial even when the legislature does not reverse court decisions. If the legislature accepts

⁵¹⁶ Debeljak J, *The Proposal for an Australian Bill of Rights* Australian Lawyers Alliance National Conference 2005, 20-22 October 2005, Cairns, at 19-20

⁵¹⁷ Waldron J, *Some Models of Dialogue Between Judges and Legislators*, as printed in Huscroft G, Brodie I, *Constitutionalism in the Charter Era* (Butterworths 2004) at 45

⁵¹⁸ Roach, above n 429 at 67

⁵¹⁹ Ibid at 99

a judicial decision it means that through this dialogue an agreement has been reached.⁵²⁰

Goldsworthy observes that this dialogic exchange between different arms of government encourages a political discourse on constitutional rights. Through this the Charter permits an appeal from the 'rough and tumble of politics' to a 'forum of principle', but the right of final appeal is to the 'more informed and conscientious legislature'.⁵²¹

4.5.1 An institutional dialogue in the Victorian Charter

The Victorian Charter closely reflects the key characteristics of the British model, and to a lesser extent the Canadian model, in protecting and promoting human rights. It adopts an institutional dialogue model for resolving human rights issues, albeit preserving parliamentary sovereignty so that Parliament can have the final say in resolving human rights issues.⁵²²

Under the Victorian Charter the following five mechanisms facilitate an institutional dialogue between the various governing institutions:

- Express statements of rights. Most of the rights in the Charter are expressed in open and broad terms. This acknowledges that human rights are continuous and evolving and that it is difficult to get consensus in a pluralistic society on the specific definition of human rights.⁵²³
- The non absoluteness of rights. Under the Charter both Parliament and the judiciary have the ability to limit rights.

⁵²⁰ Hogg and Thornton, *Reply to 'Six Degrees of Dialogue'* (1999) 37 Osgoode Hall L.J. 529 at 536

⁵²¹ Goldsworthy, *Judicial Review, Legislative Override, and Democracy*, (2003) 38 Wake Forest L. Rev. 451 at 466 see also Waldron J, *Some Models of Dialogue Between Judges and Legislators* and Huscroft G, Brodie I, *Constitutionalism in the Charter Era* (Butterworths 2004) at 35

⁵²² Debeljak, *Dialogue under the Victorian Charter*, above n 491 at 9

⁵²³ Part 2 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

Rights can be limited to achieve a balance with other Charter rights or other values and social aspirations.⁵²⁴

- The requirement of a statement of compatibility. This presents the government with an opportunity to explain, justify and communicate the thinking process behind the decision on the compatibility or incompatibility of a specific law.⁵²⁵
- The judicial assessment of rights violation. Different judicial remedies may be available for rights violations. Under the Charter judicial remedies include an interpretative power⁵²⁶ and the power to make declarations of inconsistent interpretation.⁵²⁷
- The Parliament's response to the judicial assessment. The Charter preserves parliamentary sovereignty. Parliament has the final say in resolving human rights issues. Parliament can either revise its position and accept the judicial decision, or reject the judicial decision in support of its own position in relation to a specific human rights issue.⁵²⁸

The two critical questions structuring the institutional dialogue are: whether the proposed legislation limits Charter rights; and if the legislation does limit rights, whether this limitation is justified under the general limitations power. The Executive initiates the dialogue through the statement of compatibility required under section 28. This presents the Executive with an opportunity to justify any limitations or qualifications on the rights, and to present the proposed legislation in a broader social context.⁵²⁹ Depending on the issue, there may also be other mechanisms through which the

⁵²⁴ Section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵²⁵ Section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵²⁶ Section 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵²⁷ Section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵²⁸ Sections 36(7) and 37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵²⁹ Debeljak, *Dialogue under the Victorian Charter*, above n 491 at 26-31

executive may wish to facilitate the dialogue, such as discussion papers, consultations, exposure drafts or media campaigns.

Once the contested legislation is enacted, it may be considered by the courts who ask the same fundamental questions as Parliament. Judicial consideration of human rights issues should be underpinned by the policy objectives of the Charter. The judiciary must consciously contribute its view in relation to Charter compatibility, and can do so without facing the risk of potential backlash from other institutions or the public because it is the legislature that has the final say in deciding human rights issues. A frank and robust contribution from the judiciary is critical in clarifying its understanding of the protected rights.⁵³⁰

The judiciary, under the Victorian model, can include the following contributions as part of the dialogue:

- the law may be upheld as not limiting rights in an unjustifiable manner;
- a rights-compatible interpretation may be applied to the law (interpretative obligation under section 32); and
- if the judiciary is unable to apply a Charter compatible interpretation to the legislation, it has the authority (under section 36) to issue a declaration of inconsistent interpretation.⁵³¹

Following judicial contributions to the dialogue, the legislature has the option, but is not required, to respond to the section 32 judicial interpretation. If Parliament disagrees with the judiciary's interpretation, it can pass new legislation to repeal or modify the disputed legislation in response to the judiciary's interpretation applied to it. Disagreement between institutions of government on the way human rights issues should be resolved contributes to the functioning of the dialogic model, which does not necessarily envisage consensus. The aim of such a model is for institutions to

⁵³⁰ Ibid

⁵³¹ Ibid at 31-32

become better informed by the freely expressed diverse perspectives.⁵³²

The Executive is required to respond to the judicial declarations of inconsistent interpretation. The Attorney-General is required to present a copy of the declaration of inconsistent interpretation to the Minister administering the statutory provision in respect of which the declaration is made. Within six months after receiving the declaration, the relevant Minister must prepare a written response to the declaration, and present both the declaration and the response to each House of Parliament and publish them in the government Gazette.⁵³³

The response may be to reassess the legislation in light of the judicial opinion and to pass a new law or amend the existing legislation to make it compatible with the Charter. Alternatively, the Executive may disagree with the judicial declaration of incompatibility and leave the legislation unamended. In addition, under section 31, the legislature has the option to override the relevant rights, whether in response to a judicial interpretation or a declaration of incompatibility or when the law is initially enacted.⁵³⁴ When consensus is not reached, the legislature has the final say in resolving human rights issues.

4.5.2 Potential issues with an institutional dialogue model

In a dialogic model of human rights protection, where courts play a role in resolving human rights issues, the distinction between proper judicial interpretation and improper judicial law making is not always clear. In some instances what is presented as judicial interpretation may in substance be judicial law making which possibly erodes Parliament's sovereign law making power.

⁵³² Ibid at 34

⁵³³ Sections 36(7) and 37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵³⁴ Debeljak, *Dialogue under the Victorian Charter*, above n 491 at 34-35

Debeljak argues that the power of judicial interpretation may achieve outcomes contrary to the intentions of the legislature and may undermine the dialogic model.⁵³⁵ Debeljak identifies three difficulties associated with the judicial remedies available under the Victorian Charter:⁵³⁶

- There is no clear line between proper judicial interpretation and improper judicial law making;
- There is a risk that judicial interpretations may be seen by courts to be more effective than declarations because declarations have no impact on the operation of the legislation but judicial interpretations do; and
- The judiciary may therefore unduly prefer interpretations to declarations because of the perceived power differential between the two.

There is therefore an incentive for the judiciary to favour interpretations, which in turn may result in the underuse of declarations. This could be problematic because some judicial interpretations (but not all) may not respect parliamentary sovereignty, although it is important to note that the power of interpretation is not in itself inconsistent with parliamentary sovereignty.

Unlike overly creative interpretations, declarations of inconsistent interpretation promote parliamentary sovereignty because they do not invalidate legislation. Declarations also provide an important trigger for parliamentary contributions to the dialogue because Parliament is required under the Charter to respond to such declarations within six months of their issue. Underuse of declarations may make it more difficult to facilitate a meaningful dialogue between Parliament and the courts, and may therefore undermine the dialogic model of human rights protection.⁵³⁷ Evans

⁵³⁵ Ibid at 11

⁵³⁶ Ibid at 39-56

⁵³⁷ Ibid at 68

and Evans also warn against courts swaying towards implausible interpretations of provisions in order to avoid granting declarations of inconsistent interpretation as that would subvert Parliament's role. Furthermore, Evans and Evans observe that declarations of inconsistent interpretation preserve parliamentary sovereignty and create mechanisms that allow Parliament to make informed decisions relating to laws of concern to the Supreme Court.⁵³⁸ The role of these declarations was summarised by Lord Hutton when discussing their use in the United Kingdom:

Therefore, if a court declares that an Act is incompatible with the Convention, there is no question of the court being in conflict with Parliament, or seeking or purporting to override the will of Parliament. The court is doing what Parliament has instructed it to do.⁵³⁹

The type of dialogue that is preferred is one that guards not only against possible judicial supremacy, but also against a parliamentary monologue. A true institutional dialogue can only occur if there is an honest, robust and respectful exchange of different views, reflective of the diverse expertise and motivations of the institutions involved. Each institution can influence the outcome by expressing the specific concerns it has regarding human rights issues. For example, the judiciary, because it is not subject to the will of the majority, can more easily than Parliament concern itself with the fairness of the treatment of unpopular minority groups. This consideration of human rights issues in turn results in a more informed and considered resolution.⁵⁴⁰

Debeljak believes that to facilitate a successful inter-institutional dialogue, it is necessary to preserve a balance between the use of the interpretative power and the issuing of declarations of inconsistent

⁵³⁸ Evans, Evans, *Australian Bill of Rights*, above n 480 at 150

⁵³⁹ *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46; [2003] 1 AC 837; [2002] 4 All ER 1089 at [63]

⁵⁴⁰ This is discussed in greater detail in Debeljak, *Dialogue under the Victorian Charter*, above n 491

interpretation. What exactly constitutes such a balance is difficult to predict, but a successful dialogue on human rights between the institutions does require a dynamic use of declarations and judicial interpretation that freely expresses the judicial view on human rights issues.

There are mechanisms within the Charter which aim to mitigate any potential illegitimate judicial law making. These include:

- the reasonable limitations clause;⁵⁴¹
- the override power;⁵⁴²
- the absence of an invalidation power;⁵⁴³ and
- Parliament's final say in resolving human rights issues.⁵⁴⁴

These mechanisms emphasise parliamentary, rather than judicial, supremacy and contribute to the dialogic model of human rights protection, helping to facilitate a robust and educative exchange between the governing institutions. Allowing Parliament to have the final say in resolving human rights issues should invite frank judicial declarations. The success of the model lies in striking the right balance between: human rights and democracy; parliamentary sovereignty and rights accountability; dialogue and monologue; and, legislative activism and judicial activism.⁵⁴⁵

4.6 The Canadian example

Although there are some significant differences between the Canadian and the Victorian models of human rights protection, the Canadian model shows that it is possible to have a constitutionally entrenched dialogic model of human rights protection, one which gives the judiciary a role in human rights protection but also ensures

⁵⁴¹ Section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁴² Section 31 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁴³ Section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁴⁴ Section 37 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁴⁵ Debeljak, *Dialogue under the Victorian Charter*, above n 491 at 70-71

that Parliament can have the final say in resolving human rights issues.

The Canadian *Charter of Rights and Freedoms* is a constitutionally entrenched Charter where Parliament can usually have the final say, but judicial remedies also play a significant role, in resolving human rights issues. The main features of the Canadian Charter that protect parliamentary sovereignty and encourage a dialogue on human rights between different arms of government have also been adopted by the Victorian Charter.

The key difference between the Canadian and the Victorian Charters relates to the judicial remedies available. Under the Canadian model courts have the power to invalidate legislation they find incompatible with the Charter. The Victorian Charter places a greater focus on preserving parliamentary sovereignty and imposes greater limitations on the judicial powers of interpretation and declaration, a characteristic borrowed from the British *Human Right Act*. In Victoria, courts can only issue declarations of inconsistent interpretation which, as discussed above, do not invalidate the legislation in question.⁵⁴⁶

Section 1 of the Canadian Charter allows legislatures to prescribe limitations on all Charter rights as long as these limitations can be demonstrably justified in a free and democratic society.⁵⁴⁷ This provision requires clear justification by the legislature when it enacts legislation contrary to the rights in the Charter.⁵⁴⁸ The general limitations power in the Canadian Charter is critical in facilitating the institutional dialogue; it strengthens accountability and reinforces democracy.⁵⁴⁹ This means that the Canadian Parliament is able to legitimately enact legislation that is inconsistent with Charter rights,

⁵⁴⁶ Ibid at 18

⁵⁴⁷ Section 1 of the *Canadian Charter of Rights and Freedoms*

⁵⁴⁸ Roach, above n 429 at 57

⁵⁴⁹ Hogg, Bushell, *The Charter Dialogue*, above n 515 at 82 and Roach K., *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (2001) at 156

as long as this inconsistency is demonstrably justifiable. Section 1 of the Canadian Charter is very similar to section 7 of the Victorian Charter, which also states that human rights may be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.⁵⁵⁰ Any such limitations need to be clearly outlined and examined in the statement of compatibility required by section 28. This process allows Parliament to contextualise the human rights issue in question, outline different options considered, and justify any restrictions on human rights that might have been imposed.⁵⁵¹

Section 33 of the Canadian Charter allows Parliament to enact legislation notwithstanding the fundamental rights of the Charter for a renewable five-year period.⁵⁵² Under this section Parliament is not required to justify the legislation and courts are not able to invalidate legislation enacted pursuant to section 33 on the basis that it is inconsistent with the human rights espoused in the Charter. The main purpose of the override provision in the Canadian Charter is to prevent the invalidation of legislation by the Canadian courts.⁵⁵³ A similar override provision is found in section 31 of the Victorian Charter providing that Parliament may expressly declare an Act or a provision to be effective despite it being incompatible with one or more of the human rights set out in the Charter.⁵⁵⁴ The Charter does not apply to a statutory provision which has been enacted pursuant to section 31. Victorian courts do not have the power to invalidate legislation and the purpose of the override provision in the Victorian

⁵⁵⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s7

⁵⁵¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s28

⁵⁵² Section 33 (1) Parliament of the legislature of a province may expressly declare in an Act of Parliament or the legislature, as the case may be, that the Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

⁵⁵³ Evans, Evans, *Australian Bills of Rights*, above n 412 at 69

⁵⁵⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 31

Charter is different to that in the Canadian Charter.⁵⁵⁵ In Victoria it means that the Supreme Court has no power to make a declaration of inconsistent interpretation and is not required to interpret the provision in question consistently with human rights. Similarly, public authorities are not required to act compatibly with the Charter when exercising power in accordance with a provision enacted pursuant to section 31.⁵⁵⁶

Sections 1 and 33 of the Canadian Charter are the two key provisions that promote parliamentary sovereignty. Section 33, in particular, has greater significance than the Victorian override provision because it ensures that the peoples' elected representatives have the final say in relation to certain human rights issues in a model where the courts are granted the power to invalidate legislation found to be inconsistent with the Charter.⁵⁵⁷ That is why under the Canadian Charter, section 33 plays a unique role in preserving parliamentary sovereignty as well as in facilitating a renewal of the dialogue in relation to certain human rights issues every five years when the override is up for renewal.⁵⁵⁸

Under the Victorian Charter parliamentary sovereignty is preserved through three mechanisms. First, the Supreme Court does not have the power to invalidate incompatible legislation, it can only issue declarations of incompatibility which have no impact on the validity of the laws. Secondly, the override clause in section 31 allows Parliament to exclude the Supreme Court from examining human rights altogether, which may be seen as contradictory to its stated intent of promoting an inter-institutional dialogue. Thirdly, Parliament can respond to judicial interpretation relating to human rights issues, and has the power to amend statutes to override judicial interpretations.

⁵⁵⁵ Evans, Evans, *Australian Bills of Rights*, above n 412 at 70

⁵⁵⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 31(6) note

⁵⁵⁷ Section 52 of the *Constitution Act 1982* see Roach, above n 429 at 63

⁵⁵⁸ Section 33 of the *Canadian Charter of Rights and Freedoms*

Despite these differences, the Canadian model illustrates how constitutional entrenchment of a dialogic model does not necessarily restrain parliamentary sovereignty. Even if section 33 is not often used, the knowledge that it can be used has an impact on the nature of the judiciary's involvement in resolving human rights issues. Under the Canadian Charter, no single arm of government has exclusive power to interpret the limits of constitutional rights, and Parliament has the final say in resolving some human rights issues.⁵⁵⁹ The Canadian Charter is a model of human rights protection where, in circumstances of disagreement, democratic decision making requires legislative supremacy. The Charter preserves Parliament's sovereignty even though human rights are constitutionally entrenched and subject to judicial review. The dialogue between courts and legislatures assists in the legislative selection from a broad range of constitutional options. It also presents an opportunity for the public to have a say on human rights issues through their elected representatives.⁵⁶⁰

The Victorian *Charter of Human Rights and Responsibilities*, like the Canadian model, is a dialogic model which presents the judiciary with a role in the review of human rights issues but ultimately warrants Parliament as the final arbiter on most human rights issues. In Canada the dialogic model has been effectively entrenched as part of the Canadian constitution. A similar entrenchment model, where the entire Charter is entrenched in a Constitution, could be adopted in Victoria.

The entrenchment that this thesis recommends for the *Victorian Charter of Human Rights and Responsibilities* would retain parliamentary sovereignty together with the existing mechanisms for Parliament to legitimately enact legislation that is contrary to human rights as long as this is within the authority of the Charter. The entrenchment model would retain the precisely same role for the judiciary that it currently has under the Charter which, unlike in

⁵⁵⁹ Hogg P, *Discovering Dialogue*, as printed in Huscroft G, Brodie I, *Constitutionalism in the Charter Era* (Butterworths 2004) at 3

⁵⁶⁰ Ibid at 66

Canada, does not allow it to invalidate legislation. In other words, what is recommended here is the entrenchment of the existing dialogue model, rather than an expansion of judicial power to protect the rights set out in section 7. If the entire model embedded in the Victorian Charter is entrenched, then the dialogue model is actually enhanced and the role of Parliament as the final arbiter of human rights issues is reaffirmed.

4.7 Effective entrenchment of the Charter

In the preceding chapter, a number of conditions were identified to ensure effective entrenchment. The first condition is that Parliament can not abdicate its power to make laws. Any requirement imposed needs to constitute a genuine manner and form. Based on the legal analysis in Chapter 2, viable options to entrench the Charter will now be examined.

4.7.1 Express declaration clause

An express declaration clause, similar to the one used to protect provisions relating to local governments or the jurisdiction of the Supreme Court, can afford some protection to the Charter. An express clause could minimise the risk of unintentional implied amendments or repeals.

To effectively protect the Charter from an implied amendment or repeal it is recommended that a requirement of an express declaration clause similar to that in section 18(1BA) and section 85(5) of the *Constitution Act 1975* should be included to specifically protect the *Charter of Human Rights and Responsibilities Act 2006* (Vic) from any implied amendment or repeal.

An express declaration clause is a purely procedural requirement authorised by section 2(2) AA independently of section 6 AA. It applies to any future law, irrespective of whether or not it relates to the 'constitution, power or procedure' of Parliament. A possible express declaration clause to protect the Charter, modelled on sections 18(1BA) and 85(5) of the *Constitution Act 1975* (Vic), is suggested below:

- (1) A provision of a Bill may not repeal, alter or vary the Charter unless –

- a. the Bill expressly refers to the Charter and expressly, and not merely by implication, states an intention to repeal, alter or vary the Charter; and
- b. member of Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying any section of the Charter; and
- c. the statement is so made –
 - i. during the member's second reading speech; or
 - ii. after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - iii. with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.

An express declaration clause is not to be confused with the requirement to produce a statement of compatibility.⁵⁶¹ A statement of compatibility indicates whether or not the Bill being considered by Parliament is thought to be compatible with the Charter, aiming to facilitate a dialogue between different institutions of government and instil an element of transparency and accountability in the process of law making. It does not aim to protect the Charter from repeal or amendment. There is no legal redress available when a statement of compatibility is not produced⁵⁶² and courts are not granted the jurisdiction to enforce the requirement to produce a statement of compatibility.⁵⁶³

4.7.2 Absolute majority

An absolute majority requirement was used to entrench provisions in the original *Victorian Constitution Act 1855* (Imp). The legal validity of an absolute majority requirement as it appeared in the *Victorian Constitution Act 1855* (Imp) was confirmed by the enactment of

⁵⁶¹ The statement of compatibility requirement is set out in section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁶² Section 29 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁶³ Evans, Evans, *Australian Bills of Rights*, above n 480 at 53

section 5 of the *Colonial Laws Validity Act* in 1865. Until recently it was the only form of entrenchment in the *Constitution Act 1975* (Vic).

As demonstrated in the preceding chapter, an absolute majority requirement constitutes a genuine manner and form provision. At most it means that a large number of members of Parliament must attend and vote. It demands that Bills relating to issues which are deemed of particular importance are carefully considered by a large number of Members of Parliament before being enacted. This is essentially a procedural requirement which does not abdicate or substantively diminish Parliament's law making power. It fosters a well considered law making process, promotes democracy and in practice requires a large number of the elected representatives to be involved in the votes relating to Bills deemed of particular significance. Because an absolute majority requirement appears to be purely procedural, it is authorised by section 2(2) AA independently of section 6 AA. As such, an absolute majority requirement applies to any future law, irrespective of whether or not it relates to the 'constitution, power or procedure' of Parliament.⁵⁶⁴

An absolute majority requirement could provide a legally effective protection of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) whilst promoting democratic decision making, without imposing any burdensome restrictions on Parliament's future law making power. A suggested provision affording such a protection to the Charter reads as follows:

- (1) A provision of a Bill may not repeal, alter or vary the Charter of Human Rights and Responsibilities, unless the third reading of the Bill is passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively.⁵⁶⁵

The effectiveness of an absolute majority requirement could be further enhanced if used together with an express declaration clause,

⁵⁶⁴ See part 2.1.2, Chapter 2

⁵⁶⁵ This provision is modeled on section 18(2AA) of the *Constitution Act 1975* (Vic)

a similar protection that is currently afforded in the Victorian Constitution to the jurisdiction of the Supreme Court.⁵⁶⁶

4.7.3 Special majority

Any degree of restriction that extends an absolute majority becomes more than just a procedural requirement. It imposes a restriction that diminishes Parliament's law making power. Unless the governing political party has a particular majority of seats in Parliament, it may be unable to satisfy the special majority requirement imposed on specific laws. There is no guarantee that in any election a party will be able to obtain a majority greater than 50 per cent in either House of Parliament.

As discussed in Chapter 2, the enactment of section 5 of the *Colonial Laws Validity Act 1865* (Imp) may have intended to confirm the validity of special majority requirements present at the time, which in addition to absolute majority requirements also included a two-thirds majority requirement found in the Queensland Constitution. As noted in the previous chapter, this finding forms a solid starting point in discussing the level of majority that may potentially constitute a valid manner and form requirement.⁵⁶⁷

If it is accepted that a special majority up to two-thirds constitutes a valid manner and form provision, it nonetheless remains a restrictive manner and form procedure (rather than a pure procedure) because it diminishes Parliament's law making power. It would have to find its authority in section 2(2) AA read together with section 6 AA. As such, the entrenchment would only apply to future laws respecting the 'constitution, power and procedure' of Parliament.

As such, there are two key reasons why the entrenchment through a special majority requirement would not afford an adequate protection of the *Charter of Human Rights and Responsibilities*.

⁵⁶⁶ An absolute majority requirement coupled with an express declaration clause is currently used in the *Constitution Act 1975 (Vic)* to protect the jurisdiction of the Supreme Court.

⁵⁶⁷ See part 2.1.3, Chapter 2

Firstly, it might not be a genuine manner and form requirement; and secondly, it would only protect the Charter from amendment or repeal by future laws that relate to the 'constitution, power and procedure' of Parliament, leaving the model exposed to amendments by future laws not relating to the 'constitution, power and procedure' of Parliament. For example, those laws purporting to change the role of the Human Rights and Equal Opportunity Commission or the definition of a 'public authority' would not be effectively protected by a special majority requirement.⁵⁶⁸

4.7.4 Referendum

Referendum requirements are used in a number of constitutional documents and are widely accepted in Australia. A referendum requirement has received such widespread acceptance across all sections of Australian society that it is considered a legally valid method of entrenchment. The validity of the referendum requirement as a manner and form provision was tested and confirmed in the landmark *Attorney General (NSW) v Trethowan* case.⁵⁶⁹

A referendum requirement may provide good protection against possible abuses of transient parliamentary majorities and has the potential to promote the basic principles of democratic inclusion. Using a referendum requirement to entrench the Charter would have a particular resonance with the Victorian people and would most probably be accepted by the legal fraternity as well as the general population of Victoria. It would provide an opportunity for the populace to have a say in the protection of human rights.⁵⁷⁰

The Constitution Commission of Victoria consultations in 2001 found that people across Victoria were surprised to learn that the Victorian Constitution was in large part not entrenched and could be changed without the need for a referendum. These consultations specifically

⁵⁶⁸ See part 2.3.4, Chapter 2

⁵⁶⁹ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394

⁵⁷⁰ See part 2.1.5, Chapter 2

identified a strong view among Victorians that the more fundamental elements of the Victorian Constitution should be subject to a referendum requirement, in particular if the Constitution were to provide more extensively for the protection of human rights.⁵⁷¹

Despite this authority and wide acceptance, a referendum requirement severely limits Parliament's law making power. It shifts the law making function from Parliament alone (in most cases consisting of two houses and the Crown) to Parliament plus electors voting in a referendum. The requirement makes it impossible for future Parliaments alone to change the protected law, and is therefore inconsistent with the principle of parliamentary sovereignty as adopted in Australia, and with the authority granted in section 2(2) AA. It is difficult to theoretically justify a referendum requirement as a genuine manner and form, but it has been accepted as such by the High Court in the *Trethowan's* case.⁵⁷²

If a referendum requirement is considered to be a genuine and legally valid manner and form requirement, it would most certainly require the authority of section 6 AA. In that case a referendum requirement would protect the Charter only against future laws that relate to the 'constitution, power or procedure' of Parliament. As discussed previously, this might exclude some future laws that purport to amend the Charter, making it ineffective in protecting the Charter. This is one of the reasons why entrenchment of the Charter with the use of a referendum requirement is not recommended.

⁵⁷¹ *A House of Review*, above n 327 at 16; the Commission had received 150 written submissions, many of which came from organizations representing larger groups within the Victorian Community. The Commission also met with over 500 people at its public seminars. The Consultation people published the information and ideas gained through the consultation process. See publications under <http://www.dpc.vic.gov.au>

⁵⁷² *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394 This leads the author to conclude that on this point the *Trethowan's* case was decided erroneously. However, the author notes that the electors are powerless to initiate a referendum on their own, and that Parliament has to pass the Bill before it is allocated to electors voting in a referendum. Parliament may choose not to pass a Bill and therefore not submit the issue to the electors voting in a referendum.

- ***reconstitution of Parliament***

A referendum requirement can be more comfortably explained as a 'reconstitution' of Parliament. This means that Parliament is reconstituted to include, in addition to the two houses of Parliament and the Crown, the electors voting in a referendum. It was suggested in *Trethowan's* case that a referendum requirement could be justified as a change in the composition of Parliament to include the electors voting in a referendum, because Parliament has the power to make laws respecting its own constitution, including its own nature and composition.⁵⁷³

This power for State Parliaments is currently provided for in section 2(2) AA, authorising Parliaments to alter their own constitutions as part of their plenary legislative power. This authority appears to be further supported by section 16 AA which indicates that

[A] reference ... to the Parliament of a State includes, in relation to the State of New South Wales, a reference to the legislature of that State as constituted from time to time in accordance with the *Constitution Act 1902* [...]⁵⁷⁴

It follows that the same would apply to the legislature of Victoria or any other Australian State. This is significant because it means that reconstitution does not require the authority granted in section 6 AA, and therefore is not restricted only to future laws respecting the 'constitution, power or procedure' of Parliament.

As such, the Charter could possibly be protected by reconstituting Parliament for the purposes of dealing with laws that amend or repeal the Charter. In such a situation Parliament that considers a Bill

⁵⁷³ *Attorney General (NSW) v Trethowan* (1931) 44 CLR 394, 430 per Dixon

⁵⁷⁴ This provision, however, was directed at a reconstituted NSW Parliament as an alternative procedure for enacting certain laws; which, technically, did not take away the power to enact such laws from Parliament as ordinarily constituted. See section 2.4.1 re procedures for resolving deadlocks between two houses of Parliament.

proposing to amend or repeal the Charter would consist of the two Houses, the Crown and the electors voting in a referendum. This would occur irrespective of whether or not the Bill is in relation to the 'constitution, power or procedure' of Parliament.⁵⁷⁵

To ensure an effective reconstitution in Victoria, an express amendment of the definition of 'Parliament' as embedded in section 15 of the *Constitution Act 1975* (Vic) would need to take place. This may not be an easy task as the definition itself is entrenched by a requirement of a three-fifths special majority.⁵⁷⁶ Section 15 currently states that:

the legislative power of the State of Victoria shall be vested in a Parliament which shall consist of Her Majesty, the Council, and the Assembly.

In order to effectively entrench the Charter with a referendum requirement as a reconstitution of Parliament, the following provisions are suggested for insertion into section 15 of the *Constitution Act 1975* (Vic):⁵⁷⁷

- (1) The legislative power of the State of Victoria shall be vested in a Parliament, which shall consist of Her Majesty, the Council, and the Assembly, to be known as the Parliament of Victoria.
- (2) Notwithstanding section 15(1), to repeal, alter or vary the Charter of Human Rights and Responsibilities, the legislative power of the State of Victoria shall be vested in a Parliament which shall consist of Her Majesty, the Council, the Assembly and the electors voting at a referendum in accordance with Part 9A of the *Electoral Act 2002*.
- (3) It shall not be lawful to present to the Governor for Her Majesty's assent any Bill by which the Charter of Human Rights and Responsibilities may be repealed, altered or varied unless the Bill has been passed by the Assembly and the Council and approved by a majority of the electors voting at a referendum conducted in accordance with Part 9A of the **Electoral Act 2002**.

⁵⁷⁵ See part 2.3.4, Chapter 2

⁵⁷⁶ Based on the assumption that this constitutes an effective entrenchment, which is uncertain. See discussion in Chapter 2

⁵⁷⁷ This provision is modeled on sections 15 and 18(1B) of the *Constitution Act 1975* (Vic)

A referendum requirement is likely to be popular and have a particular resonance with the Victorian people as it allows the electorate to make direct contributions to the protection of human rights. The concept of reconstitution, however, is quite novel and has not been directly tested in Courts. A referendum requirement, therefore, is not recommended as an entrenchment option for the Charter. It is preferred to have a more certain form of entrenchment to protect the Charter.

4.7.5 Symmetric entrenchment and double entrenchment

Chapter 2 advocates a mandatory symmetric entrenchment, where the same rule governs both the enactment and the repeal of legislation. Even though at this stage symmetric entrenchment is not mandatory to ensure legal validity, it would constitute good practice in affirming the basic principles of democracy. Introduction of a requirement intended to protect the Charter should itself be introduced following the same manner and form procedure it is introducing.⁵⁷⁸

If the law introducing a manner and form requirement to protect the Charter is itself inadequately protected, it can be easily repealed either expressly or impliedly. To make the entrenchment effectively binding it itself needs to be entrenched. The requirement protecting the entrenchment could be, but does not necessarily have to be, the one that the provision itself prescribes. For instance, a provision that purports to protect the Charter through an express declaration clause could itself be protected by an absolute majority requirement. Double entrenchment is critical in ensuring that the Charter is effectively entrenched.⁵⁷⁹

⁵⁷⁸ See part 2.4.4 and 2.4.5, Chapter 2. It is worth noting that the symmetric entrenchment model proposed in Chapter 2 would not apply to reconstitution because, technically, reconstitution is conceptually different from a manner and form requirement.

⁵⁷⁹ See part 2.4.1, Chapter 2

4.8 Recommended model for Victoria

The Victorian Parliament considered options for protecting and promoting human rights as early as 1987. At the time, the Legal and Constitutional Committee recommended the insertion of a non-binding *Declaration of Rights and Freedoms* into the Victorian Constitution.⁵⁸⁰ The declaration was introduced into Parliament but never became law. In 2002 the Constitutional Commission of Victoria recommended that the Victorian Constitution expressly deal with human rights.⁵⁸¹

Three years later, in 2005, the Human Rights Consultation Committee recommended that legal recognition be given to human rights through a specific Charter of Human Rights and Responsibilities. It indicated that in addition to legal protection, the Charter would present a strong symbolic gesture, building a stronger culture of human rights in Victoria by giving expression to important values and better educating the public about human rights.⁵⁸² In addition, as a result of the consultations, the Consultative Committee recognized that warranting constitutional recognition of human rights would be of significant value. Constitutional entrenchment of the *Charter of Human Rights and Responsibilities* would strengthen this symbolic gesture and further acculturate human rights as part of our society. Submissions indicating a preference for an entrenched human rights Charter also acknowledged that a legislative model could be the first step in a process eventually leading to constitutional recognition, as was the case in Canada.⁵⁸³

⁵⁸⁰ *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* Legal and Constitutional Committee, Parliament of Victoria, (1987) Chapter 5

⁵⁸¹ *A House for our Future*, above n 326 at 69

⁵⁸² *Human Rights Consultation Committee Report*, above n 1 at 13

⁵⁸³ *Ibid* at 20

This thesis recommends that the *Charter of Human Rights and Responsibilities* be inserted in its entirety as a separate part of the *Constitution Act 1975* (Vic). In the Victorian jurisdiction, constitutional entrenchment of the Charter would have no greater legal weight than a legislative entrenchment of the Charter. It would, however, amount to a significant symbolic gesture of the importance and value placed on human rights as part of our society's cultural norms. This thesis recommends that the entire Charter, and therefore the model it promulgates, be entrenched with the use of an express declaration clause and an absolute majority requirement. This could be achieved by introducing into the *Constitution Act 1975* (Vic) the following provisions:

- 1) A provision of a Bill may not repeal, alter or vary the Charter of Human Rights and Responsibilities unless –
 - (a) the third reading of the Bill is passed with the concurrence of an absolute majority of the whole number of the members of the Council and of the Assembly respectively; and
 - (b) the Bill expressly, and not merely by implication, states an intention to repeal, alter or vary the Charter; and
 - (c) the member of the Parliament who introduces the Bill for the Act or, if the provision is inserted in the Act by another Act, the Bill for that other Act, or a person acting on his or her behalf, makes a statement to the Council or the Assembly, as the case requires, of the reasons for repealing, altering or varying any section of the Charter; and
 - (d) the statement is so made –
 - i. during the member's second reading speech; or
 - ii. after not less than 24 hours' notice is given of the intention to make the statement but before the third reading of the Bill; or
 - iii. with the leave of the Council or the Assembly, as the case requires, at any time before the third reading of the Bill.
- 2) A provision of a Bill which excludes or restricts, or purports to exclude or restrict, alter or vary the operation of the Charter is to be of no effect unless the requirements of sub section (1) are satisfied.

The consequence would therefore be that any provision of a future law (rather than the entire law itself) that attempts to repeal, alter or vary the Charter, would be of no effect unless it fulfilled both, the stipulated express declaration and the absolute majority requirements. As discussed above, these are essentially procedural requirements that do not restrict Parliament's law making power. Such an entrenchment would protect the Charter from inadvertent

amendment or repeal by any future laws, whether or not these are laws respecting the 'constitution, power and procedure' of Parliament. Furthermore, this form of entrenchment is consistent with the entrenchment provisions found in section 18 of the *Constitution Act 1975* (Vic), and similar to the one currently used to protect the jurisdiction of the Supreme Court, which have been part of the Victorian Constitutional framework for some time and whose validity has been tested and confirmed. In addition to effectively protecting the Charter, an absolute majority requirement would also promote democratic decision making by encouraging most of the elected representatives to be involved in the debates on Bills intending to amend or repeal any part of the Charter.

The recommended model is one where all five parts of the Charter are constitutionally entrenched to afford protection for all of the provisions in the Charter. The specific components that the recommended model would entrench include:

- The general human rights limitations power under section 7 of the Charter, where rights can be reasonably limited to achieve a balance with other Charter rights, values or social aspirations. Parliament would still retain the power to limit human rights listed in the Charter, as long as these limitations can be reasonably justified in a free and democratic society.
- The institutional dialogue model including: issuing of statements of compatibility under section 28 of the Charter; the judicial interpretative power under section 32 of the Charter; the power for the judiciary to make declarations of inconsistent interpretation under section 36 of the Charter; the inability of the Courts to invalidate legislation deemed inconsistent with the Charter; and Parliament's power to respond to declarations of inconsistent interpretation.
- The ability for Parliament to override the operation of the Charter through ordinary legislation in accordance with section 31.
- The scope of the obligations and responsibilities arising out of the Charter, by entrenching the Charter's definition of a "public authority" and what constitutes compatible conduct by public authorities.
- The actual human rights included in the Charter. The stipulated requirement entrenching the Charter would need

to be followed to remove or amend the existing rights or to add new rights. This would make it more difficult to remove rights, but also more difficult to add new ones, for instance inclusion of additional economic, cultural and social rights would need to follow the stipulated requirement.

- The role and functions of the Scrutiny of Acts and Regulations Committee and the Equal Opportunity and Human Rights Commission. This would guarantee these bodies a degree of independence and would add a greater degree of transparency, certainty and credibility to the power that they exercise.
- The mandated regular reviews of the Charter, ensuring that the Charter does not become a static document and that it evolves with time in light of the changing social norms and preferences relating to human rights protection.
- The override clause and the provisions outlining the power granted to the Supreme Court (including the interpretive power and the power to issue declarations) would also be protected. These elements of the Charter ensure that the key characteristics of the model, in particular the sovereignty of Parliament and the promotion of an institutional dialogue, are protected. It ensures that no one arm of Victoria's governing institutions holds a monopoly in deciding human rights issues.

It is precisely because the entire model encapsulated in the Charter would be entrenched that it would be possible for Parliament to enact legislation that is incompatible with the rights outlined in the Charter or to override the Charter altogether, as long as this is within the authority of the Charter. This in effect would entrench the dialogue model because it would protect the power of Parliament to limit the rights in accordance with section 7 of the Charter, the power of the Supreme Court to issue declarations of inconsistent interpretation, and the power of Parliament to respond to these declarations and override the operation of the Charter. Any future Parliament that wishes to repeal, alter or vary any of these key elements that make this model dialogic would have to adhere to the stipulated manner and form provisions.

Parliament would retain all powers granted to it under the Charter. An express declaration and an absolute majority would not be required each time a right was limited or breached, because these

are authorised under the Charter (for example, in limiting rights in accordance with section 7 or breach of the rights with the use of the override clause in section 31).

Similarly, entrenchment of the Charter would not change the role that Courts are given under the Charter. Courts would still be unable to invalidate legislation they believe is incompatible with the Charter. This is because the Charter clearly states that the interpretative power granted to Courts has no impact on the validity of an Act or provision of an Act that is incompatible with a human right.⁵⁸⁴ Furthermore, the Charter stipulates that if the Supreme Court can not interpret a provision consistently with a human right, the Court can make a declaration of inconsistent interpretation, and that such a declaration does not affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made.⁵⁸⁵

Courts would not be granted the power to invalidate laws which are incompatible with the human rights outlined in the Charter on the basis that they were not enacted in accordance with the manner and form requirement, because such incompatible laws are not necessarily repealing, altering or varying the Charter. Enacting legislation that is incompatible with human rights in certain circumstances is allowed and regulated under the Charter and therefore this would not involve repealing, altering or varying the Charter. The situation would be different if only Part 2 of the Charter, which lists human rights, were entrenched. This would resemble the United States model, and Courts would have the power to invalidate legislation purporting to change these rights without fulfilling the stipulated manner and form requirement.

Enactment of laws that purport to change the nature of the model embedded in the Charter would, however, need to follow the stipulated manner and form requirement. A provision that purports

⁵⁸⁴ Section 32(3) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁸⁵ Section 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

to repeal, alter or vary any component of the model would need to be enacted in accordance with the stipulated manner and form requirement. This would include provisions which: purport to change the definition of 'public authority'; or the powers of the equal opportunity and human rights commission; or a provision attempting to repeal or add new human rights to the list in Part 2, or attempting to repeal the override clause, or vary the redress available for breaches of human rights to include damages.

For example, assume that the Government wishes to enact legislation that limits free speech. It believes that this can be justified in accordance with the reasonable limits provided by the Charter and enacts it with the use of a simple majority. It does not comply with the manner and form provision, as it rightly believes that there is no need to do so as it is not repealing, altering or varying any part of the Charter. It is acting within the confines of the Charter's jurisdiction. When the issue arises before the Courts, the Courts may determine that they are unable to interpret this limitation compatibly with the Charter. The Courts may believe that the limits on free speech are not reasonable and the right has been breached. The Courts could not argue that this law in effect amends part of the Charter and therefore should have been enacted in accordance with the manner and form requirement. In such situations the Courts are only granted the power to issue declarations of inconsistent interpretation. This in turn promotes the dialogic model of human rights protection which the Charter promotes.

On the other hand, assume that Parliament is purporting to enact legislation that would apply Charter rights not only to human beings but also to corporations. Such legislation would need to be enacted in accordance with the stipulated manner and form provision because it specifically alters section 6 of the Charter which currently provides that these rights apply only to human beings. If such a law were enacted by a simple majority, Courts could legitimately invalidate it on the basis that the stipulated manner and form requirement was not fulfilled.

4.9 Conclusions

The *Charter of Human Rights and Responsibilities Act* was passed by the Victorian Parliament and received Royal Assent in 2006. It sets out a dialogic model of human rights protection, where both the

judiciary and the legislature play a role in resolving human rights issues. The key characteristic of the model is that Parliament remains sovereign in determining human rights issues and courts can not invalidate legislation deemed to be inconsistent with Charter rights.

The Charter enacts human rights based largely on those contained in the *International Covenant on Civil and Political Rights*.⁵⁸⁶ The Charter includes a general limitations clause, allowing Parliament to limit human rights as long as these limitations can be reasonably justified in a free and democratic society.⁵⁸⁷ Parliament is required to consider the impact of the Charter on legislation, and to issue statements of compatibility in relation to all Bills being considered by Parliament. Even though there is no independent cause of action and no option to seek punitive remedies under the Charter, courts play an important role in protecting and promoting human rights by being required to interpret all Victorian legislation consistently with the human rights in the Charter, and if this is not possible, to issue declarations of inconsistent interpretation. These declarations do not invalidate laws to which they apply, but they require a formal parliamentary response.⁵⁸⁸ This approach reflects the Victorian government's preference for a model of human rights protection which facilitates an institutional dialogue but ensures that Parliament has the final say on human rights issues.

At this stage the Victorian Charter is a simple Act of Parliament, similar to the United Kingdom's *Human Rights Act 1998*. The Charter is not entrenched and does not form part of the Victorian Constitution. A number of submissions to the Consultation Committee suggested that a legislative model should be seen as the first step in a process leading to constitutional entrenchment of

⁵⁸⁶ International Covenant on Civil and Political Rights (adopted on 16 December 1966, entered into force on 23 March 1976) 999 UNTS 171

⁵⁸⁷ Section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

⁵⁸⁸ Section 39 (cause of action), section 32 (interpretative clause), section 36 (declaration of inconsistent interpretation) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)

human rights, as was the case in Canada.⁵⁸⁹ Entrenchment of the Charter, whether legislative or constitutional, could be considered by the Government when the operation of the Charter is reviewed in 2011.

This Chapter illustrates how the Victorian model of human rights protection may be effectively entrenched in the Victorian Constitution and recommends that the *Charter of Human Rights and Responsibilities* be constitutionally entrenched in its entirety and form part of the *Constitution Act 1975* (Vic). Entrenchment of the entire Charter would shield the key elements of the dialogic model, and in particular Parliament's supremacy in resolving human rights issues. Furthermore, entrenchment of the model in the Victorian Constitution would foster a powerful symbolic gesture helping to acculturate human rights in our society. Such an entrenchment model is possible, as demonstrated by the constitutionally entrenched dialogic model of human rights protection in Canada. Despite constitutional entrenchment, under the Canadian model, Parliament retains the final say in resolving some human rights issues.

Building on the conclusions on the law relating to manner and form outlined in Chapter 2, a number of entrenchment options to protect the Charter have been identified and examined in this Chapter. Any manner and form provision requiring the authority of section 6 AA would be ineffective as it would only protect the Charter from future laws relating to the 'constitution, power or procedure' of Parliament.

Parliament could potentially be reconstituted to include the electors voting in a referendum when repealing, altering or varying the Charter. This would mean that any proposed amendment or repeal of the Charter would be subject to a referendum. A referendum requirement might have a particular resonance with the Victorian people as it ensures that the electors have an opportunity to make direct contributions to the protection and promotion of human rights. The concept of reconstitution, however, is quite novel and has

⁵⁸⁹ *Human Rights Consultation Committee Report*, above n 1 at 20

not been directly tested in courts. Because this method of entrenchment is uncertain, it is not recommended here.

The recommended method of entrenchment to protect the Charter is an absolute majority requirement coupled with an express declaration clause. Both requirements, on the assumption that they are purely procedural, do not require the authority of section 6 AA and can effectively protect the Charter from any future laws, whether or not they relate to the 'constitution, power and procedure' of Parliament. This entrenchment is similar to the one currently used in the *Constitution Act 1975* (Vic) to protect local governments and the jurisdiction of the Supreme Court. An absolute majority requirement enhances democratic decision making by encouraging most of the elected representatives to be involved in the debates on Bills intending to amend or repeal the Charter.

Even though symmetric entrenchment is not mandatory in Victoria, introduction of any requirement intended to protect the Charter should follow the same requirement it is purporting to introduce. Furthermore, to make the entrenchment effectively binding, it needs to be doubly entrenched to ensure that the amendment or repeal of the requirement itself is effectively protected. The model of entrenchment recommended in this Chapter promotes democratic decision making in relation to human rights, preserves parliamentary sovereignty and promotes the dialogic model of human rights protection.

Chapter 5

Conclusions and Recommendations

5.1 Formulating the question

Each of the preceding chapters presents specific conclusions on the issues considered in that chapter. This final chapter will not attempt to duplicate what has been said before, but will contextualise the questions posed and consolidate the conclusions formulated in previous chapters. In addition, it will provide specific recommendations for law reform in an attempt to translate the theoretical discussion into a practical application.

5.1.1 Evolution of the doctrine of parliamentary sovereignty

The Victorian *Charter of Human Rights and Responsibilities* is a simple Act of Parliament, which can be amended or repealed just like any other piece of legislation. This allows for the elected, representative Parliament to be the final arbiter in resolving human rights issues, but by the same token, it makes human rights vulnerable to the whims of everyday politics.

This thesis examines ways in which a law deemed of significant importance, the *Charter of Human Rights and Responsibilities*, can be better protected in Victoria through the use of manner and form provisions. Manner and form provisions usually require Parliament to comply with specific conditions for the effective repeal or amendment of the law in question, and thus impose restrictions on Parliament's power to legislate, giving rise to a persisting dilemma: how can human rights be effectively protected while upholding parliamentary sovereignty?

In considering this question, it is necessary to reflect on the doctrine of parliamentary sovereignty and institutions in our society that make final decisions in legal disputes. As Dicey defined it, parliamentary sovereignty means that Parliament has the right to make or unmake any law whatever and that no person or body is recognised as having a right to override the legislation of Parliament.⁵⁹⁰

⁵⁹⁰ Dicey, above n 6 at 40

The doctrine of parliamentary sovereignty is an organic notion still evolving both in the United Kingdom and Australia, being reshaped to meet new challenges arising from an ever-changing regional and global geopolitical progress. This is particularly pertinent in the United Kingdom, with British membership of the European Union and the devolution of legislative authority to Scotland, Wales and Northern Ireland.

5.1.2 Parliamentary sovereignty as applied in Australia

The doctrine of parliamentary sovereignty, as reflected in Australian state constitutional law, is different from the traditional British concept. The former can be best described as partially 'self-embracing', where Parliament's law making power can not be limited substantially but can be limited procedurally. Manner and form requirements provide an example of such a procedural limitation on a state Parliament's power to legislate. This limitation, however, is carefully controlled. Furthermore, a procedural limitation on law making power cannot amount to an abdication or a substantive diminution of Parliament's law making power.

Until 2003 the Victorian Constitution was largely uncontrolled. In 2003, the Victorian constitutional landscape changed significantly with the introduction of specific procedures for amending or repealing certain provisions, such as a three-fifth special majority and referendum requirements. Authority for these limitations on Parliament's power needs to be sourced from constitutional instruments that define Parliament's power. Section 2 AA confirms a State Parliament's plenary law making power, subject to the one exception found in section 6 AA, which provides authority for procedural restrictions in relation to the enactment of certain laws.

In addition to questions regarding parliamentary sovereignty, the idea of entrenchment also raises questions regarding the basic notions of fairness, the abuse of power for political gain and the creation of a stale-mate situation which may leave the populace with unwanted laws from earlier times. All of these questions are examined in this thesis, with conclusions and recommendations brought together in this chapter.

5.2 Conclusions on the law relating to manner and form

A key function of a Parliament is to enact legislation. This usually involves a Bill passing through a simple majority in both Houses of Parliament before receiving the Royal Assent. In some instances Parliaments may impose additional restrictions on specific laws through manner and form requirements, making them more difficult to amend or repeal than ordinary legislation. Understanding the law relating to manner and form requirements is of fundamental importance in defining the operation of state constitutions. It is also critical in understanding how laws may be effectively entrenched in the Victorian jurisdiction.

5.2.1 Genuine manner and form can not abdicate Parliament’s power to make law

Even though State Parliaments are given wide legislative powers to make laws for the peace, order and good government of their State, genuine manner and form requirements cannot abdicate Parliament’s power to legislate.⁵⁹¹ Requirements may be either purely procedural or restrictive. Key differences between the two are summarised in the table below:

	Pure procedures (purely procedural requirement)	Manner and form (restrictive requirement)
Impact on parliament’s power	Parliament’s law making power not diminished.	Parliament’s law making power diminished
Source of authority	Section 2 AA	Section 2 AA and Section 6 AA
Scope of application	Applies to laws in all cases whatsoever	Applies only to future laws respecting the constitution, power and procedure of Parliament
Examples	Express declaration clauses Absolute majority requirements	Referendum requirement Special majority requirements (possibly)

⁵⁹¹ Confirmed by *McCawley v The King* [1920] A.C. 691; section 2 AA; section 16 of the *Constitution Act 1975* (Vic); also see part 2.1, Chapter 2

Requirements that are purely procedural do not affect Parliament's substantive law making powers. For example, provisions relating to the quorums of the Houses of Parliament, express declaration clauses and possibly absolute majority requirements are not excessively demanding or too burdensome. Restrictive manner and form requirements such as special majority or referendum requirements may diminish Parliament's law making power, but cannot validly abdicate it.

This thesis suggests that by enacting section 5 of the *Colonial Laws Validity Act 1865 (Imp)*, the Imperial Parliament potentially intended special majorities that were in colonial constitutions at the time, to be valid. This includes the two-thirds majority requirement found in the Queensland constitution. The author submits that this finding presents new perspectives in discussing the degree of majority that may potentially constitute a valid manner and form requirement. If a conclusion is reached that a two-thirds majority does constitute a valid manner and form requirement, it would follow that the majority requirements of a lesser degree (such as three-fifths) would also constitute valid manner and form requirements. The issue, however, remains speculative until judicially resolved by the High Court of Australia.

5.2.2 Authority for manner and form provisions

Section 2 AA, which in part re-enacted section 5 CLVA, indicates that State Parliaments possess plenary law making power as fully as their predecessors. It provides the source of authority for purely procedural requirements because these are not restrictive and do not diminish Parliament's constituent power to legislate. If the law stopped at section 2 AA, it would have conferred full power on the Parliament to make laws, in line with the doctrine of parliamentary sovereignty as traditionally defined, and there would have been no legal avenue for introducing manner and form restrictions. This, however, is not the case. An exception to Parliament's unrestricted plenary law making power is found in section 6 AA.

The enactment of section 6 AA reflects a desire to retain authority to impose manner and form requirements, which was previously authorised by the final part of section 5 CLVA. This re-enactment of section 5 CLVA also confirms acceptance of the majority judgment in the *Trethowan* case, which contributes greatly to the understanding

of the law relating to manner and form provisions. Section 6 AA states that Parliament's plenary legislative power conferred by section 2 AA can be restricted by the use of manner and form requirements; however, such requirements can only apply to future laws which respect the 'constitution, power or procedure' of Parliament. As discussed above, manner and form requirements authorised by section 6 AA can not abdicate or substantively diminish Parliament's law making powers. Section 6 AA does, however, authorise some requirements that diminish Parliament's law making power, albeit not substantively.

Authority for restrictive manner and form provisions may also be sourced outside of section 6 AA. In addition to the pure procedures theory discussed above, the three possible grounds for such manner and form requirements include:

- the concept of reconstitution;
- the *Ranasinghe* principle; and
- section 106 of the Commonwealth Constitution.

Reconstitution of Parliament for the purposes of enacting certain laws may provide a valid form of authority for conditions that at face value appear to be manner and form requirements. For example, it may be argued that a referendum requirement is actually a reconstitution of Parliament, where in order to amend or repeal the entrenched law, Parliament is reconstituted to consist of the Crown, two Houses of Parliament and the electors voting in a referendum. If this argument is accepted, it would mean that a referendum requirement could apply to any future law, and would not be limited only to future laws respecting the 'constitution, power or procedure' of Parliament, as is the case under section 6 AA.

In light of the *obiter dicta* comments by the High Court in *Marquet*, it is unlikely that the *Ranasinghe* principle would have any application with respect to the Australian States and Territories. Section 106 of the Commonwealth Constitution, which complements section 6 of the *Australia Acts*, does not appear to provide any additional authority for manner and form requirements outside of section 6 AA.

5.2.3 Mandating symmetric entrenchment

Under current law, a simple majority can be used to introduce manner and form requirements. This has been the case with most of the manner and form provisions found in the Victorian Constitution. Authority for such enactments was confirmed in the *Trethowan* case, where a referendum requirement contained in section 7A of the *Constitution Act 1902* (NSW) was held to be valid and binding despite being enacted by a simple majority.

This raises questions about fairness and the potential abuse of the power to entrench as it allows Parliaments to restrict the legislative power of future Parliaments. This thesis suggests that this potential problem needs to be addressed, and to that effect, recommends introducing mandatory symmetric entrenchment. A provision that mandates symmetric entrenchment requires the enactment of entrenchments to follow the same procedure that constitutes the entrenchment. The following provision could be introduced as section 16 AA of the *Constitution Act 1975* (Vic) to mandate symmetric entrenchment:⁵⁹²

Section 16 AA: Requirement for symmetric entrenchment

- (1) If Parliament passes a law (in this section called the entrenching law) prescribing a specific manner and form requirement for making particular enactments, the entrenching law must itself be enacted in accordance with the same manner and form requirement that it prescribes for other enactments.
- (2) A law, including the entrenching law, will be of no force or effect unless made in accordance with the prescribed manner and form requirement.

It is further suggested that any such provision should itself be entrenched to effectively bind future Parliaments.

⁵⁹² These provisions are modeled on section 26 of the *Australian Capital Territory (Self-Government) Act 1988* (ACT) and drafted to complement the entrenchment provisions currently in section 18 of the *Constitution Act 1975* (Vic)

5.3 Are the entrenchment provisions in the Victorian Constitution valid?

In 2003, the Victorian Parliament entrenched a significant number of provisions in the *Constitution Act 1975* (Vic). These provisions were entrenched with the use of a referendum requirement, an absolute majority requirement and a three-fifth majority requirement. Even if all three constitute genuine manner and form provisions,⁵⁹³ not all are valid and binding because not all entrenched provisions are within the scope of section 6 AA which applies only to laws respecting the ‘constitution, power or procedure’ of Parliament. The protected provisions that deal with institutions outside of Parliament or which relate to party specific policies are unlikely to be within the purview of section 6 AA. For these to be valid and binding, authority outside of section 6 AA must be sought.

As discussed earlier, it is unlikely that the *Ranasinghe* principle will have much weight in Australian courts. The pure procedures theory may only be applied to purely procedural requirements, such as an express declaration clause and probably an absolute majority requirement. Reconstitution may justify entrenchments involving a referendum requirement, where Parliament is reconstituted for the purposes of enacting certain laws so as to include not only the Crown and two Houses of Parliament, but also electors voting in a referendum. Certainty as to the validity of the *Ranasinghe* principle, pure procedures theory or reconstitution as authority for manner and form requirements is at this stage merely speculative and can only be conclusively ascertained judicially by the High Court of Australia.

⁵⁹³ This is based on the assumption that a three fifth majority is valid, which may or may not be the case; see section 2.1.3

5.4 Effectively entrenching the Charter of Human Rights and Responsibilities in the Victorian Constitution

The *Charter of Human Rights and Responsibilities Act 2006* sets out a model for the protection of human rights which precipitates an institutional dialogue and ensures that Parliament remains the final arbiter in resolving human rights issues.

The Victorian Charter is not entrenched and does not form part of the Victorian Constitution, it is a simple Act of Parliament that can be amended or repealed like any other law. Entrenchment of the Charter, whether legislative or constitutional, should be considered by the government when the operation of the *Charter of Human Rights and Responsibilities Act 2006* is reviewed in 2011.

A number of entrenchment methods to protect the Charter have been identified in Chapter 4. Any manner and form requirement relying solely on the authority of s 6 AA (such as a special majority requirement) would not be entirely effective as it would only protect the Charter from future laws relating to the 'constitution, power or procedure' of Parliament.

The recommended entrenchment model is where the *Charter of Human Rights and Responsibilities* in its entirety forms a separate part of the *Constitution Act 1975* (Vic) and is protected with purely procedural requirements, the use of an express declaration clause and an absolute majority requirement. The consequence would therefore be that any provision of a future law (rather than the entire law itself) that attempted to repeal, alter or vary the Charter, would be of no effect unless it fulfilled the stipulated express declaration and the absolute majority requirements. The recommended model is one where all five parts of the *Charter of Human Rights and Responsibilities Act* are constitutionally entrenched affording protection to all of the provisions in the Charter, including:

- the general human rights limitations power under section 7 of the Charter,
- the institutional dialogue model including: issuing of statements of compatibility under section 28 of the Charter;

- the judicial interpretative power under section 32 of the Charter; the power for the judiciary to make declarations of inconsistent interpretation under section 36 of the Charter; the inability of the Courts to invalidate legislation deemed inconsistent with the Charter; and Parliament's power to respond to declarations of inconsistent interpretation,
- the ability for Parliament to override the operation of the Charter through ordinary legislation in accordance with section 31.

It is precisely because the entire model encapsulated in the Charter would be entrenched that it would be possible for Parliament to enact legislation that is incompatible with the rights outlined in the Charter or to override the Charter altogether, as long as this is within the authority of the Charter.

As discussed above, symmetric entrenchment is not mandatory in Victoria. It would, however, make for good policy if the introduction of a requirement intended to protect the Charter followed the same requirement it is purporting to introduce. Furthermore, to make the entrenchment effectively binding, it itself would need to be entrenched to ensure that the amendment or repeal of the requirement itself is effectively protected.

The proposed entrenchment model would promote democratic decision making in relation to human rights, preserve parliamentary sovereignty and promote the dialogic model. Making the Charter a part of the Victorian Constitution would send a strong symbolic gesture in relation to the role that human rights play in our society. Given that other aspects such as water services and local governments have found a place in the Victorian Constitution, it is only logical for human rights to also have a place there.

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