

AN OVERVIEW OF MANNER AND FORM IN AUSTRALIA

By

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Introduction

This article is intended to outline the legal basis for the ability of the Parliaments of the Australian States to bind their successor Parliaments to comply with special procedures prescribed by "manner and form" provisions for the enactment of legislation. Consideration will also be given as to whether the Commonwealth Parliament has the capacity to bind its successor Parliaments in this way.

Manner and form provisions are designed to entrench certain legislative provisions so as to prevent their amendment or repeal by an Act of Parliament enacted in the ordinary course, that is, passed by a simple majority in both Houses of Parliament (or one House in Queensland) and assented to by the Governor as the Queen's representative. Probably the most common manner and form provision imposes a referendum requirement whereby, before royal assent is given to the bill, it must be approved by a majority of the electorate. In this way, the amendment and repeal of legislation is made more difficult, or in other words, the legislation is entrenched. Of course, relatively few provisions are ever entrenched. Many are contained in formal Constitutions but they may also be found in other legislation of a constitutional nature or indeed, in any legislation at all. The reason for entrenching certain provisions is based on a perception that such provisions are so fundamental and important that they should only be amended or repealed with considerable care and after consideration of all the implications. In this way, the Parliament which desires the entrenchment of such provisions, will prescribe a manner and form provision to bind successor Parliaments in the exercise of their power. Whether one Parliament can bind its successor Parliaments in this way depends on whether a legal basis exists which enforces the manner and form provision. An example of Parliament purporting to bind its successor Parliaments is s.53 of the Constitution Act 1867 (Qld), subsection (1) of which provides:

53. Certain measures to be supported by referendum. (1) A Bill that expressly or impliedly provides for the abolition of or alteration in the office of Governor or that expressly or impliedly in any way affects any of the following sections of this Act namely —

Sections 1, 2, 2A, 11A, 11B, 14 and this section 53 shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance with this section and a Bill so assented to consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.

Section 53 above entrenches the office of the Queensland Governor and those prescribed sections of the Constitution by imposing a manner and form requirement for their amendment or repeal. The phrase "manner and form" derives from the proviso to s.5 of the Colonial Laws Validity Act 1865 (Imp.) which enforced certain manner and form provisions in the Australian States until 1986 when the proviso was substantially re-enacted in s.6 of the Australia Acts 1986. As a result of this Act, the Colonial Laws Validity Act

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1865 no longer applies to the Australian States.¹ The Australia Acts 1986 comprise a package of legislative enactments of the United Kingdom, Commonwealth and States' Parliaments which terminated all remaining constitutional ties between the United Kingdom and Australia at both the federal and state levels. The proviso to s.5 of the Colonial Laws Validity Act 1865 imposed by paramount force a restriction on State Parliaments to comply with manner and form provisions falling within the scope of the proviso. However, it was obviously deemed desirable to retain this restriction, which in effect, is a capacity to bind future Parliaments, by enacting s.6 of the Australia Acts 1986. This section now provides the primary legal basis for Parliament to bind its successors by manner and form provisions but there are other legal bases which are considered later in this article. It is important to note at this stage that whatever legal basis is relied upon to bind a future Parliament, the manner and form provision must be adequately entrenched if it is to effectively bind or fetter the powers of a future Parliament. The difference between single and double entrenchment of a manner and form provision is considered once all the legal bases for the enforcement of manner and form provisions are discussed.

Parliamentary Sovereignty

The starting point in any analysis of the capacity of Parliament to bind its successors by manner and form provisions is the Westminster doctrine of Parliamentary Sovereignty — a doctrine which describes the position of the United Kingdom Parliament but only partly pertains to the Parliaments in Australia. The doctrine of parliamentary sovereignty may be defined in terms of a number of principles and is comprehensively described by Professor Wade as follows:

An orthodox English lawyer, brought up consciously or unconsciously on the doctrine of parliamentary sovereignty stated by Coke and Blackstone, and enlarged upon by Dicey, could explain it in simple terms. He would say that it meant merely that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts; that it was always open to the legislature, so constituted, to repeal any previous legislation whatever; that therefore no Parliament could bind its successors; and that the legislature had only one process for enacting sovereign legislation, whereby it was declared to be the joint Act of the Crown, Lords and Commons in Parliament assembled. He would probably add that it is an invariable rule that in case of conflict between two Acts of Parliament, the later repeals the earlier.²

At least four principles are stated in the above passage:

- (1) No Act of Parliament can be held invalid by the courts;
- (2) Parliament cannot bind its successors;
- (3) There is only one process for enacting sovereign legislation: the joint Act of the Crown, Lords and Commons in Parliament assembled; and
- (4) Where two Acts conflict, the later repeals the earlier.

The first principle is clearly not the position in Australia where under the Commonwealth Constitution, the distribution of powers between the Commonwealth and the States effects certain limits on their respective powers. The Australian Courts undertake judicial review of the exercise of power by both the Commonwealth and the States to ensure that they do not extend beyond the scope of their respective powers nor infringe the restrictions imposed

1. Section 3(1) of the Australia Acts 1986.

2. H.W.R. Wade 'The Basis of Legal Sovereignty' [1955] CLJ 172.

on their powers. But within those limits, Acts of Parliament are beyond review by the courts on constitutional grounds.

The second principle that Parliament cannot bind its successors and the third principle stated above describe the orthodox position as regards the United Kingdom Parliament as espoused by Bacon, Coke, Blackstone, and Dicey. But their view has been questioned by Sir Ivor Jennings³ and Professor Friedmann⁴ who argue that the United Kingdom Parliament has the power to bind its successors by reconstituting Parliament in order to repose in the constituted Parliament the sole power to amend or repeal certain legislation. A manner and form provision which requires approval at a referendum before legislation is amended or repealed, reconstitutes Parliament by adding an additional chamber, the electorate. This debate concerning the United Kingdom Parliament is considered to a limited extent later in relation to those grounds for the enforcement of manner and form provisions which exist outside s.6 of the Australia Acts 1986 in relation to the State Parliaments. However, the principal ground for the capacity of State Parliaments to bind successor Parliaments by manner and form is statutory: s.6 of the Australia Acts 1986 and previously, the proviso to s.5 of the Colonial Laws Validity Act 1865 (Imp).

The fourth principle that where two Acts of Parliament conflict, that is, are inconsistent with each other, the later Act repeals the earlier, applies equally in Australia as it does in the United Kingdom as a principle of statutory interpretation. However, in the Australian context, this principle only operates when the later Act is within the powers of the enacting Parliament. If the later Act is required to comply with a manner and form provision but fails to do so, it will be invalid and no repeal is effected. In other words, this fourth principle is subject to the ability of Parliament to bind its successors — a point made by the Privy Council in the notable authority of *McCawley v. The King*.⁵ In that case, the Privy Council upheld the validity of subs. 6(6) of The Industrial Arbitration Act 1916 (Qld) which authorised the Governor-In-Council to appoint the President or any judge of the Court of Industrial Arbitration to be a judge of the Supreme Court. As both the President and judges of the Court of Industrial Arbitration were appointed for seven years, the Privy Council held that their appointment to the Supreme Court under subs 6(6) was limited to seven years or whatever term for which they were appointed to the Court of Industrial Arbitration. The effect of subs. 6(6) was to validly alter the Queensland Constitution which contemplated that all appointments to the Supreme Court be for life. Although recognising that the Queensland Constitution was a flexible constitution, one which could be amended expressly or, impliedly as in this case, the Privy Council recognised that the Queensland Parliament possessed limited sovereignty:

The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted.⁶

One of these “special cases” is that of manner and form.

Should Parliament Be Able To Bind Its Successors?

Before considering the legal basis upon which Parliament can bind its successors, it is worth considering briefly whether it should be able to? What justification is there for

3. I. Jennings *The Law and the Constitution* 3rd edn.

4. W. Friedmann ‘Trethowan’s Case, Parliamentary Sovereignty, and the limits of Legal Change’ (1950) 24 ALJ 103.

5. [1920] AC 691.

6. *Ibid.* at 714.

imposing a binding restriction on the sovereignty of Parliament or its limited sovereignty in the case of the Australian Parliaments?

There appear to be at least two reasons for prescribing a manner and form for the enactment of certain legislation. The first reason is a practical point, namely, to prevent the operation of the fourth principle discussed above, that is, to prevent an *implied* repeal or amendment of legislation by a later inconsistent Act. This may be intended to ensure that any change to the earlier legislation which is on a matter of some importance must be directly considered and intended by the drafters of the later Act rather than be merely an unintended consequence of an implied inconsistency. Given that the reason for adopting a manner and form in these circumstances is not to prevent an express repeal or amendment of the legislation but rather to prevent an implied repeal, no restriction on the real sovereignty of Parliament is intended. However, the ability to formulate a manner and form provision which achieves these objectives and yet does not restrict the sovereignty of Parliament is doubtful. The obvious type of manner and form to adopt in this case would be one which requires the later Act if it is intended to alter the position under an earlier Act to expressly state that its provisions are to operate despite the provisions of the earlier Act. This is a prescription of "form". A similar provision was considered by the High Court in *The South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia*⁷ but was held ineffective against the later South-Eastern Drainage Acts 1931 and 1933 (SA) primarily because The Real Property Act 1886 (SA) which contained the relevant provision prescribing the form of subsequent legislation was not a law "respecting the constitution, powers or procedure of the legislature" to come within the proviso to s.5 of the Colonial Laws Validity Act 1865 (Imp.). Had it been such a law or rather, had the later Act been such a law (since it seems the High Court characterised the wrong Act), then it may have been an effective prescription as to form.⁸ As to which act should be characterised, this is examined later in some detail.

Any other type of manner or form provision is likely to restrict the sovereignty of Parliament by rendering it more difficult to amend or repeal earlier legislation, such as, by requiring a special majority for the passage of legislation through the Parliament. If the objective is to prevent an implied repeal only, such provisions extend too far and cannot be justified.

The second reason for prescribing manner and form in order to bind successor Parliaments is to deliberately restrict the exercise of Parliament's sovereignty to enact certain legislation in the ordinary way. The objective here is to render it more difficult to repeal or amend legislation which is considered so important by the Parliament which prescribes the manner and form, that it purports to bind successor Parliaments to prevent them altering that legislation unless they comply with the requirements of the manner and form provision. Such requirements are commonly, approval of the bill by the electorate at a referendum, or a special majority of, for example, two-thirds of the members of a House to pass the bill. Since these special requirements prevent the enactment of certain laws by successor Parliaments in the ordinary manner by simple majority vote, they reflect on the part of the Parliament which prescribed the manner and form provision a distrust of its successors and of the simple majority will of the people. Should the law facilitate this attitude?

Lord Birkenhead L.C. in delivering the opinion of the Privy Council in *McCawley's Case* made these observations:

The first point which requires consideration depends upon the distinction between

7. (1939) 62 CLR 603.

8. Evatt J. at 633-634 rejected any prescription as to form as binding. Cf the English position which according to Professor Wade rejects such a prescription of form as effective: *supra* n. 2 at 176.

constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

The difference of view, which has been the subject of careful analysis by writers upon the subject of constitutional law, may be traced mainly to the spirit and genius of the nation in which a particular constitution has its birth. Some communities, and notably Great Britain, have not 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 possess more experience of the circumstances and necessities amid which their lives are lived. Those constitution framers who have adopted the other view must be supposed to have believed that certainty and stability were in such a matter the supreme desiderata. Giving effect to this belief, they have created obstacles of varying difficulty in the path of those who would lay rash hands upon the ark of the constitution.⁹

These remarks of Lord Birkenhead concern attempts to bind later Parliaments in relation to the constitution but what about legislation on other subject-matters? As will be seen, such legislation may also be entrenched. One could argue that the expression of the people's will through the deliberations of Parliament as a democratically elected body should not be restricted by earlier Parliaments representing the people of another age or time. This argument asserts that the sovereignty of the people should remain intact and unfettered. The counter argument to this, is that if one accepts the possibility that at some time in the future either the will of the people might become distorted in relation to certain issues or that the parliamentary system itself might be manipulated to disregard the rights of minority groups or the majority of the people even, then the adoption of safeguards to protect a state from such occasional lapses in good government are fully justified, particularly in sensitive areas connected with the constitution of the state and the guarantees provided by legislation of the status of a bill of rights.¹⁰ This is an attractive view but for its failure to appreciate that the capacity to introduce safeguards against undesirable legislative measures or undesirable government, is a capacity which can also be used to entrench undesirable laws. There is no guarantee that this capacity to bind future Parliaments will only be exercised in the general public interest.

The above brief discussion merely introduces the principal arguments as to whether or not Parliament should be able to bind its successors. A detailed consideration of such an issue of public policy is beyond the scope of this article.

The Position In The Australian States

There are at least three and possibly four legal grounds upon which manner and form provisions are binding on State Parliaments:

1. Section 6 of the Australia Acts 1986;
2. Grounds outside s.6 of the Australia Acts 1986:
 - (a) Reconstituted Legislature;
 - (b) The Principle of *The Bribery Commissioner v Ranasinghe*¹¹; and
 - (c) Possibly Section 106 of the Commonwealth Constitution.

9. *Supra* n.5 at 703.

10. See also Denis V Cowen 'Legislature and Judiciary' (1953) 16 MLR 273 at 298.

11. [1965] AC 172.

1. Section 6 of the Australia Acts 1986

The only clearly established legal basis for binding manner and form provisions on State Parliaments is s.6 of the Australia Acts 1986. Since that section substantially re-enacts the proviso to s.5 of the Colonial Laws Validity Act 1865 (Imp.) as a result of that Act no longer applying to the Australian States,¹² and as all the caselaw in this area concerns the proviso to s.5, both that proviso and s.6 of the Australia Acts 1986 require close examination.

Section 6 of the Australia Acts 1986 (hereinafter referred to as "section 6") provides:

. . . 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.

Section 5 of the Colonial Laws Validity Act 1865 (Imp.) (hereinafter referred to as the "CLVA") provided:

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

Since the CLVA no longer applies to the Australian States it should be noted that the conferral of power in s.5 "to make laws respecting the constitution, powers and procedure of such legislature" was held to be already conferred by the grant of general legislative power to make laws for the peace, order and good government of the State.¹³ As well, subs.2(2) of the Australia Acts 1986 ensures this power is retained. More important is s.6 of the Australia Acts 1986 which retains the effect of the proviso to s.5 to require compliance with manner and form provisions. Although the wording of s.6 differs from that of the proviso to s.5, two key phrases are adopted from the latter provision: "respecting the constitution, powers and procedure" and "manner and form" thereby ensuring the applicability of their judicial interpretation to s.6. There are, however, three differences of varying significance in the language used in s.6:

- (a) Under the proviso to s.5, the manner and form provision could be contained in any Act of the Imperial Parliament, letters patent, Order in Council or colonial law, whereas now under s.6, the only binding manner and form provisions are those in a law of the State Parliament.
- (b) The proviso to s.5 applied to laws "passed", whereas s.6 refers to "a law made . . . by the Parliament". The significance of this difference in wording is discussed later.
- (c) Section 6 expressly declares that a law made in non-compliance with a manner and form provision "shall be of no force and effect", whereas the proviso to s.5 merely implied invalidity, an implication recognised and enforced for the first time in *Attorney-General for New South Wales v Trethowan*.¹⁴ It should be noted that the ultimate basis for the invalidity of laws enacted in non-compliance with a manner and form provision is not s.6, nor was it the proviso to s.5, for s.6 must be reinforced to prevent its repeal or amendment in the same way as the proviso to s.5 needed to be reinforced. The proviso

12. s.3(1) Australia Acts 1986.

13. See *Clayton v Heffron* (1960-1961) 105 CLR 214.

14. (1931) 44 CLR 394.

to s.5 was reinforced by the doctrine of repugnancy declared by s.2 of the CLVA which prohibited colonial and state legislatures from enacting legislation inconsistent with imperial laws, such as the proviso to s.5, applying by paramount force. Section 6 is reinforced by the remnants of this doctrine of repugnancy retained to a very limited extent by s.15 of the Australia Acts 1986 which prevents the States repealing or amending any of the Act's provisions except by an Act of the Commonwealth Parliament passed at the request or with the concurrence of all the State Parliaments.

The Requirements of Section 6

The prerequisites for a binding manner and form provision under s.6 are basically identical to those which were required under the proviso to s.5. Accordingly, almost all of the judicial authority on the latter provision is relevant to s.6. There are five prerequisites:

(a) The Manner and Form Provision can be contained in any Act of the State Parliament

This point appears quite clearly in s.6 as it also appeared in the proviso to s.5 although the latter, in addition, enforced manner and form provisions in Imperial enactments, letters patent and Orders in Council. Hence, the manner and form provision can be found in *any Act* whether it deals with animals, water pollution or the constitutional powers of the State. However, the legislation to which the manner and form is directed must be a law respecting the constitution, powers or procedure of the Parliament. Every case involving an allegation of non-compliance with a manner and form provision involves at least two laws. The first, earlier in time, is the law which contains the manner and form provision and it can theoretically be a law on any subject matter. The second law, later in time, is the law which is challenged for not complying with the manner and form provision and it is this second law which must be characterised as a law respecting the constitution, powers or procedure of the Parliament. In other words, the characterisation requirement applies only to the second law. This is clearly the position under s.6 as it was under the proviso to s.5 although s.6 avoids the more complicated wording of the proviso. Nevertheless, judicial interpretation of the proviso appears to have departed from this position.

In *The South-Eastern Drainage Board (South Australia) v The Savings Bank of South Australia*¹⁵ a majority of the High Court¹⁶ seems to confuse the position by holding that the proviso to s.5 was not applicable because the Act prescribing the alleged manner and form was not a law respecting the constitution, powers or procedure of the legislature. The alleged manner and form provision was section 6 of the Real Property Act 1886 (SA) which provided:

No law, so far as inconsistent with this Act, shall apply to land subject to the provisions of this Act, nor shall any future law, so far as inconsistent with this Act, so apply unless it shall be expressly enacted that it shall so apply "Notwithstanding the provisions of 'The Real Property Act 1886'".

The impugned Act, the South-Eastern Drainage Act 1900 (SA) created first changes over land which were inconsistent with the provisions of the Real Property Act 1886 (SA) and without complying with s.6 thereof. On this basis, the 1900 Act was challenged and the majority of the High Court rejected this argument, not because the 1900 Act dealing with drainage rights was not a law respecting the constitution, powers or procedure of the legislature, but on the basis that the 1886 Act was not of that kind. The majority appeared to characterise the first rather than the second Act. Did they misread the proviso or are

15. (1939) 62 CLR 603.

16. *Ibid.* see Latham CJ at 618; Starke J at 623; Dixon J at 625; and McTiernan J at 636.

there alternative explanations? There are possibly two other explanations. The first is that the Court decided that the alleged manner and form provision was not one enforced by the proviso because it did not purport to regulate the enactment of future laws respecting the constitution, powers or procedure of the legislature. A comment of Starke J suggests this explanation: "But s.5 [i.e. of the CLVA] has nothing to do with ordinary legislation such as is the *subject of s.6* of the RPA 1886; it deals with laws respecting the constitution powers or procedure of representative legislative bodies . . ." ¹⁷ (emphasis added). The concern expressed appears to be with the character of the legislation contemplated by the manner and form provision as falling within its requirements rather than with the 1886 Act itself.

The second possible explanation is that the characterisation of s.6 of the 1886 Act revealed that its requirements did not limit the power of Parliament to make law and hence, were not of the kind made binding by the proviso. Dixon J after stating that it was not a law respecting the constitution powers or procedure of the legislature went on to say:

That it is not a law respecting its powers seems to me to appear clearly enough from its content. It does not profess to limit or qualify the power of the legislature in any way. Nor is it concerned with the procedure of the legislature. Section 6 has, I think, *neither the purpose nor the effect of limiting the power of the Parliament of South Australia to make laws . . .* The section is a declaration as to what meaning and operation are to be given to future enactments, not a definition or restriction of the powers of the legislature. (emphasis added) ¹⁸

If neither of these explanations reflect the reasoning of the majority, then it appears that they did fail to characterise the proper Act. ¹⁹

Another case which deals unsatisfactorily with this issue of which Act to characterise is the *Commonwealth Aluminium Corporation Limited v. Attorney-General for Queensland* ²⁰ (referred to as *Comalco's Case*), a decision of the Full Court of Queensland. The facts involved a 1957 Act which provided for an agreement between Comalco and the Queensland Government pursuant to which Comalco obtained mining rights in Weipa in return for the payment of fixed royalties to the Queensland Government. Section 4 of the 1957 Act prescribed that the agreement was only to be varied by agreement between the Minister and Comalco with the approval of the Governor-in-Council by Order in Council. The agreement and any variation thereof were given the force of law by the 1957 Act. In 1974, the Mining Royalties Act was enacted which authorised the Governor-in-Council to make regulations to fix the rates of royalties payable on mining leases irrespective of any agreement between the Government and the mining companies. When notified of the increased royalty rates imposed without its consent Comalco challenged the validity of the 1974 Act and Regulations for non-compliance with s.4 of the 1957 Act as a binding manner and form provision. The two majority justices, Wanstall S P J and Dunn J held that s.4 of the 1957 Act was not itself an effective manner and form provision and hence, upheld the validity of the 1974 Act and Regulations without having to decide the issue of characterisation. However, both justices touched upon the issue. Wanstall SPJ merely assumed for the purposes of looking at the validity of s.4 that the first Act, the 1957 Act, was a law respecting the constitution, powers or procedure of the legislature. ²¹ Dunn J almost as a closing remark

17. *Ibid.* at 623.

18. *Ibid.* at 625.

19. This is the view of Professor Lumb *The Constitutions of the Australian States* 4th Edn. University of Queensland Press Brisbane 1977 at 99 who was approved by Matheson J. in *West Lakes Limited v The State of South Australia* (1980) 25 SASR 389 at 419.

20. [1976] QdR 231.

21. *Ibid.* at 237.

simply stated the opposite view that both the 1957 and 1974 Acts were not laws of that kind.²² Only Hoare J who dissented in holding that the 1974 Act and Regulations were invalid for non-compliance with s.4 of the 1957 Act as a binding manner and form provision, had to decide the issue of characterisation. Although his Honour appears to characterise both Acts, the use of quotation marks in the following passage with respect to the 1974 Act possibly indicates that only that Act had to be characterised:

The 1957 Act is, I think, a law respecting the constitution powers and procedure of the legislature of Queensland and it does provide for a manner and form in which the provisions of that Act may be amended. As to whether the 1974 Act is an Act "respecting the constitution, powers and procedure of the legislature" it seems to me that because it 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 (*Attorney-General (N.S.W.) v. Trethowan* (1931) 44 C.L.R. 394 per Dixon J. at p. 431).²³

Again, the characterisation of the 1957 Act by Hoare J may be explained on the ground that it establishes the validity of the Act itself.

In contrast to *Comalco's Case*, is the approach of the Full Court of South Australia in *West Lakes Limited v. The State of South Australia*²⁴ to a situation similar to that which arose in *Comalco's Case*. In this case, the agreement between West Lakes Limited and the South Australian Government for the development of a residential estate was ratified by a 1969-1970 Act. Although both under the 1969-1970 Act and the agreement, the consent of West Lakes Limited was required to any variation of the agreement, a Bill was introduced into Parliament in 1980 to enable the making of regulations to vary the agreement without the company's consent. All three justices recognised that it was the 1980 Bill which had to be characterised but only King C J²⁵ and Matheson J²⁶ held it was not a law respecting the constitution, powers or procedure of the legislature. Matheson J examined the 1980 Bill and characterised it as a law with respect to the regulation-making powers of the Minister, not a law relating to the powers or procedures of the Parliament.²⁷ His Honour expressly agreed with Professor Lumb's view of the High Court's approach in the *South-Eastern Drainage Board Case* that the Court mistakenly characterised the first rather than the second Act.²⁸

(b) The Manner and Form Provision binds only future laws respecting the Constitution, Powers or Procedure of the Parliament

This is a significant limitation on the utility of manner and form provisions under s.6 to bind successor Parliaments. Unless the law is able to be characterised as a law respecting the constitution, powers or procedure of the Parliament, no challenge can be made to the validity of that law under s.6 for non-compliance with a manner and form provision. Consideration would then need to be given as to whether the manner and form was binding on other grounds (see later).

Examples of laws which satisfy this characterisation test are: a law to abolish an upper house, a law to add another chamber, or a law to expressly repeal a manner and form provision.

22. *Ibid.* at 260.

23. *Ibid.* at 248.

24. (1980) 25 SASR 389.

25. *Ibid.* at 396.

26. *Ibid.* at 417-420.

27. *Ibid.* at 420.

28. *Supra* n. 19 Lumb.

As noted above, preceding the proviso to s.5 of the CLVA was a conferral of power on all representative legislatures "to make laws respecting the constitution, powers, and procedure of such legislature[s]". The proviso was a restriction on that power which still remains in s.6 of the Australia Acts 1986. The power to make such laws is now found in the plenary grant of power to make laws for the peace, order and good government of the State and in s.2(2) of the Australia Acts 1986. Hence, the language of s.6 originally stems from that conferral of power which preceded the proviso and which was interpreted by Dixon J in *Trethowan's Case* as follows:

The power to make laws respecting its own constitution enables the legislature to deal with its *own nature* and *composition*. The power to make laws respecting its own procedure enables it to prescribe rules which have the force of law for its *own conduct*. Laws which relate to its own constitution and procedure must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws. The power to make laws respecting its own powers would naturally be understood to mean that it might deal with its *own legislature authority*.²⁹ (emphasis added).

The difficulties which arise in this area often concern laws which are inconsistent with the Constitution of a State. Is this sufficient to characterise the law within the terms of s.6? Given that the provisions of most Constitutions deal with the other two arms of government, the executive and the judiciary, as well as, a range of other matters such as a bill of rights or specific freedoms and guarantees, it appears that merely being inconsistent with the formal Constitution does not necessarily mean that it is a law respecting the constitution, powers or procedure of the *Parliament*. The Parliament though, includes the Queen or her representative, the Governor, thereby permitting the entrenchment of that office as has occurred in s.53 of the Constitution Act 1867 (Qld.). Dixon J in *Trethowan's Case* regarded the conferral of power in s.5 of the CLVA as not extending "to the executive power in the constitution".³⁰

A law which expressly repeals a valid manner and form provision is clearly a law respecting the powers and procedure of the Parliament. On the other hand, is a law which simply fails to comply with a manner and form, able to be characterised in this way? If so, is there any point to characterising the law at all? In *Comalco's Case*, the Mining Royalties Act 1974 which fixed the mining royalties payable to the Queensland Government was characterised by Hoare J as a law respecting the powers and procedure of the Queensland Parliament. His Honour held:

. . . because [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] A.C. 717 at p. 743 to 744). It seems to me clear enough that an Act may be categorised under more than one heading.³¹

The startling result of the above approach is that every law which fails to comply with a manner and form provision is able to be characterised within the operation of s.6 thereby

29. *Supra* n.14 at 429-430.

30. *Ibid.* at 429.

31. *Supra* n.20 at 248.

rendering ineffective the prescription that the section only applies to laws respecting the constitution, powers or procedure of the Parliament. That such an approach has this effect is a strong indication of its doubtful validity.³²

(c) Only Mandatory Manner and Form Requirements are Binding

A law challenged under s.6 is only invalid if it has failed to comply with one or more *mandatory* requirements of a manner and form provision. In most cases, all the manner and form requirements are mandatory but in certain cases there may be directory or optional requirements as well, particularly, in complex manner and form provisions designed to resolve deadlocks between the two Houses in a bicameral Parliament. Non-compliance with a directory requirement has no effect on the validity of the law. This is illustrated by the decision of the High Court in *Clayton v Heffron*³³ which concerned an attempt by members of the Legislative Council of New South Wales to prevent a bill to abolish that House being submitted to a referendum pursuant to s.5B of the Constitution Act 1902 (NSW). Section 5B is a complex manner and form provision designed to resolve deadlocks between the two Houses by requiring a bill to proceed through the following legislative stages:

- (i) The bill must be rejected twice by the Legislative Council;
- (ii) A free conference is called between the managers of each house at which no agreement is reached;
- (iii) A joint sitting of both houses is convened by the Governor, not to vote on the bill but simply to deliberate upon it;
- (iv) If no agreement is reached at the joint sitting, the bill can then be submitted to a referendum; and
- (v) If approved by the referendum, the bill can be presented to the Governor for royal assent.

The High Court rejected the argument that the bill if enacted would be invalid for non-compliance with requirement (ii). The Legislative Assembly had sent the appropriate message to the Legislative Council requesting a free conference, but the Legislative Council resolved that there was no basis for holding one. In the joint judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ, the distinction was made between mandatory requirements non-compliance with which spells invalidity for the Act and other requirements of a directory nature which are not intended to have that effect:

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 entirely different thing to find in the 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 principles 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 legislation 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

32. Jeffrey D. Goldsworthy 'Manner and Form in the Australian States' (1987) 16 MULR 403 at 415-417.

33. *Supra* n.13.

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.³⁴

The requirement of a free conference was held not to be mandatory in view of the ease with which such a conference could be aborted by the same non-co-operative attitude on the part of the Legislative Council which necessitated reliance on s.5B in the first place, and in view of the drastic consequences for the public interest and the stability of government if the proposed law was held invalid as an Act.³⁵

(d) Manner and Form Requirements Must Relate to the Legislative Process

One of the most common manner and form requirements is the submission of the bill to a referendum of the people of whom a majority must approve it. Yet it was this referendum requirement which was challenged as an unconstitutional restriction on legislative power in *Trethowan's Case*.³⁶ The doubly entrenched manner and form provision was s.7A of the Constitution Act 1902 (NSW) which provided that the Legislative Council could not be abolished nor could its constitution or powers be altered except by a bill which was passed by both Houses and approved by the electors at a referendum. Both the High Court and the Privy Council upheld the validity of s.7A and its binding effect. The requirement of holding a referendum although it stood outside the internal process of passing laws through the legislature was nevertheless upheld as a valid manner and form requirement within the principle stated by Rich J:

In my opinion the proviso to s.5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin fulfilment of every condition and compliance with every requirement which existing legislation imposed upon the process of law-making.³⁷

Dixon J similarly stated the position, if not more widely:

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.³⁸

The basis for the argument raised in *Trethowan's Case* that the referendum requirement was not a manner and form requirement within the proviso was the use of "passed" in the proviso indicating that the requirements had to relate to the passage of bills through the legislature itself.³⁹ Although this interpretation of "passed" was rejected in that case, it should be noted that s.6 now uses the word "made" rather than "passed" thereby probably removing any basis for the above argument today.

The connection required between manner and form requirements and the legislative process became the subject of further judicial consideration this time by the Full Court of Queensland in *Comalco's Case*.⁴⁰ As noted earlier, this case concerned a challenge to the validity of the Mining Royalties Act 1974 (Qld) and its regulations the effect of which was to prescribe royalty rates higher than those agreed to between Comalco and the Queensland Government in respect of the granting to Comalco of leasehold interests over the bauxite deposits in Weipa. The formal agreement between them provided in clause 3 thereof:

34. *Ibid.* at 246.

35. *Ibid.* at 247-248.

36. *Supra* n.14.

37. *Ibid.* at 419.

38. *Ibid.* at 432-433.

39. *Ibid.* at 432.

40. *Supra* n.20.

This Agreement may be varied pursuant to agreement between the Minister and the Company with the approval of the Governor in Council by Order in Council and no provision of this Agreement shall be varied nor shall the powers and rights of the company hereunder be derogated from except in such manner.

This agreement was authorised by the Commonwealth Aluminium Corporation Pty. Limited Agreement Act 1957 (Qld) sections 3 and 4 of which provided:

3. Upon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act.

The Governor in Council shall by Proclamation notify the date of the making of the Agreement.

4. The Agreement may be varied pursuant to agreement between the Minister for the time being administering this Act and the Company with the approval of the Governor in Council by Order in council and no provision of the Agreement shall be varied nor the powers and rights of the company under the Agreement be derogated from except in such manner.

Any purported alteration of the Agreement not made and approved in such manner shall be void and of no legal effect whatsoever.

Comalco challenged the validity of the 1974 Act and Regulations to the extent that they imposed royalty rates without the company's consent on the basis that both the Act and Regulations failed to comply with s.4 of the 1957 Act — a binding manner and form provision.

A majority of the Full Court comprising Wanstall SPJ and Dunn J rejected Comalco's argument but for different reasons. Wanstall SPJ found s.4 of the 1957 Act to be no bar to the 1974 Act on two grounds:

- (i) s.4 was invalid since it purported to deny Parliament the legislative power to vary the agreement, vesting this power solely in the Executive and Comalco in breach of the principle of *In re The Initiative and Referendum Act*⁴¹ that a legislature cannot "create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence".⁴²
- (ii) s.4 was not a manner and form provision within the contemplation of the proviso to s.5. The proviso "is concerned with the use and operation of the legislative process and nothing else", whereas s.4 of the 1957 Act conferred a power on the Executive and denied Parliament the power of variation. His Honour interpreted "passed" in the proviso to indicate that manner and form provisions related to the enactment of future legislation through the legislative process, and that although s.3 of the 1957 Act conferred on any variation of the agreement the force of law, this was not within the contemplation of the proviso.⁴³

Dunn J in rejecting Comalco's challenge to the 1974 Act and Regulations adopted a view opposing ground (i) above of Wanstall SPJ, in that, his Honour interpreted s.4 of the 1957 Act not as a restriction on the power of Parliament to enact legislation with respect to the formal agreement but only as a restriction on the power of the Executive to vary the agreement without Comalco's consent. In other words, his Honour found that s.4 was not intended to be nor was, a manner and form provision because it did not purport to regulate the Parliament in any respect.⁴⁴ Accordingly, it was unnecessary for him to consider the

41. [1919] AC 935.

42. *Ibid.* at 945.

43. *Supra* n.20 at 236-237.

44. *Ibid.* at 260.

second ground of Wanstall SPJ's decision that the proviso did not contemplate manner and form requirements directed to law-making by the Executive.

In dissent, Hoare J directly tackled this point and unlike Wanstall SPJ was prepared to extend the operation of the proviso to cover manner and form requirements prescribed for law-making by the Executive.⁴⁵ His Honour interpreted in the proviso, laws "passed" to mean "made" whether by Parliament or by the Executive in exercise of delegated power, relying upon comments made by Dixon⁴⁶ and Rich JJ⁴⁷ and subsequently the Privy Council⁴⁸ in *Trethowan's Case* and certain comments by Fullagar J⁴⁹ in *Clayton v Heffron*. However, none of these authorities necessarily supports Hoare J's view as the comments relied upon concerned the point that since manner and form requirements are not limited to matters of parliamentary procedure, a referendum is a valid requirement. They were not directing their attention to whether the proviso regulated the creation of law by the Executive. Indeed, their comments appear to be made only on the basis that the law is made by Parliament — as Dixon J said in *Trethowan's Case*: "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".⁵⁰ (Emphasis added).

Section 6, as noted earlier, has replaced "passed" with "made" but the section goes on to say "by the Parliament". Despite adopting Hoare J's interpretation of "passed" to mean simply "made", the added reference to the Parliament may preclude the application of s.6 to laws made by the Executive. It could be stretching the language too far to argue that laws made by the Parliament encompass laws made by the Executive by virtue of a power delegated by Parliament. Laws can be made either by Parliament or by the Executive albeit pursuant to a power delegated by Parliament. Parliament, in the latter case, enacts a law delegating to the Executive a power pursuant to which the Executive makes subordinate legislation. It would be misleading to describe such subordinate legislation as law made by the Parliament when it has had no part to play in the formulation of the terms of such legislation.

(e) Manner and Form Requirements must not Purport to Abdicate Legislative Power

This requirement relates to the nature of the manner and form provision itself. A distinction must be drawn between a manner and form provision which regulates the procedure by which future legislation is enacted, that is, the law-making process, and a provision which purports to deprive Parliament of the power of law-making.⁵¹ The latter provision may be either one which intends to deprive Parliament of one of its powers or it may be a provision which in practice has that effect. An example of the former kind is a provision which prohibits any repeal of the law forever or for a number of years.⁵² Another example would be a provision which confers on the Governor-in-Council sole power to amend certain legislation by issuing orders-in-council thereby purporting to deprive Parliament of its power to amend such legislation.⁵³ An example of a provision which in practice has the effect of denying Parliament one of its powers is a provision which requires a bill to be approved by 99% of the electorate at a referendum before being presented for royal assent. Since such a percentage in a referendum is impossible to achieve, the provision in effect,

45. *Ibid.* at 249.

46. *Supra* n.14 at 431-432.

47. *Ibid.* at 418-419.

48. [1932] AC 526.

49. *Supra* n.13 at 255.

50. *Supra* n.14 at 432-433.

51. See King CJ in *West Lakes Case supra* n. 24 at 397.

52. See Regula XIX Bacon's Works, ed Spedding, Ellis and Heath 1859 Vol. VII at 370.

53. See *Comalco's Case supra* n.20 where Wanstall SPJ interpreted s.4 of the 1957 Act in this way.

purports to deny Parliament one of its powers.⁵⁴ Both of these examples fall outside the contemplation of section 6 since neither regulate the manner and form of future legislation and are totally ineffective if not invalid.

There is, as well, a related and well-established principle applicable to all Australian State Parliaments, namely, that Parliament cannot abdicate any of its powers. But it would appear that this principle is distinct from point (e) outlined above. The principle that Parliament cannot abdicate its powers was established in a series of cases⁵⁵ concerned with the capacity of a colonial or State Parliament to delegate one or more of its powers to the Executive. The Privy Council recognised that a grant of power to make laws for the peace, order and good government of a colony or State was a grant of plenary power subject only to the few restrictions imposed by the Imperial Parliament. Accordingly, as colonial and State legislatures were not mere delegates of the Imperial Parliament, they possessed the capacity to delegate one or more of their powers to the Executive provided they did not abdicate their powers. The test stated by the Privy Council as to whether an abdication of power has occurred is simply whether Parliament has always retained the capacity to revoke the delegation and recall the power to itself. In *Cobb and Co. Ltd. v Kropp*,⁵⁶ the Privy Council upheld Queensland's transport legislation which authorised the Commissioner for Transport to fix and impose licence fees. No abdication of power had occurred because:

[The Queensland Legislature] preserved their own capacity intact and they retained perfect control over the Commissioner for Transport inasmuch as they could at any time repeal the legislation and withdraw such authority and discretion as they had vested in him.⁵⁷

In applying this test to either of the examples given above of a provision which purports to deprive Parliament of one of its powers, it simply requires one to determine whether the provision can be repealed. This depends on whether the provision is singly or doubly entrenched. Only if it is doubly entrenched, is the provision incapable of repeal and if it purports to deprive Parliament of one of its powers, then it will amount to an invalid abdication of power. If the provision is singly entrenched, then in terms of the principle stated above, no abdication of power has occurred. However, as noted earlier, the principle that Parliament cannot abdicate its power, is distinct from point (e). Whether the principle adopted by *Cobb & Co Ltd v Kropp* is infringed depends upon the provision being doubly entrenched, whereas non-compliance with point (e) arises irrespective of any determination of single or double entrenchment — indeed, it must so arise for such a determination can only be made after the validity and effectiveness of the manner and form provision is decided. In other words, unless the provision prescribes a manner or form for law-making, it is not an effective manner and form provision within the contemplation of s.6.

Another principle quoted in the context of manner and form is that stated by the Privy Council in *In re The Initiative and Referendum Act*⁵⁸: a legislature cannot “create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence”.⁵⁹ In that case, the Privy Council held invalid The Initiative and Referendum Act (Manitoba) which established a new process of law-making outside of the Parliamentary

54. See W. Friedmann *supra* n.4 at 105-106.

55. *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.

56. [1967] AC 141.

57. *Ibid.* at 156.

58. [1919] AC 935.

59. *Ibid.* at 945.

process whereby proposed laws could be initiated by a percentage of electors and actually enacted into law by obtaining majority approval at a referendum. The invalidity of the Act arose out of the deletion from the legislative process of the Governor's assent. Without deciding the case on the principle just quoted, it was referred to as another serious problem with the Act. The principle was stated after a recognition that Parliament can delegate its powers to subordinate agencies "while preserving its own capacity intact".⁶⁰ This principle appears to concern a situation in which Parliament delegates its powers to a body which is not authorised by the constitutional framework. A manner and form provision which confers on such a body the power of future enactment will be invalid for infringing this principle. And this would seem to be the case whether the manner and form provision is singly or doubly entrenched. But the Australian State Parliaments and possibly even the United Kingdom Parliament, can reconstitute themselves, for example, by abolishing one of the two Houses as occurred in Queensland in 1921 or by introducing another chamber, such as, the electorate when a referendum requirement is imposed for the enactment of certain legislation. Although such a reconstitution may involve an abdication of power by the original parliament by transferring the power to a new legislative body, the transfer of power is valid. The capacity of Parliament to reconstitute itself is considered later as one of the grounds upon which a manner and form provision may be binding outside s.6.

Both *Comalco's Case*⁶¹ and *West Lakes Case*⁶² in relation to their own facts dealt with the issue whether the alleged manner and form provision purported to deprive Parliament of its power to vary the agreement in question. As a question of statutory interpretation, different constructions may be given to such provisions which is evident from *Comalco's Case*. Section 4 of the 1957 Act stipulated that any variation to the agreement in the schedule to the Act required the consent of Comalco and the relevant Minister and was to be given effect by the Governor-in-Council. Wanstall SPJ interpreted section 4 as depriving Parliament of its power to vary the agreement:

. . . to the extent to which [s.4] purports to restrain the Legislature from enacting legislation effecting a variation without agreement of the plaintiff it is plainly invalid, unless it could be construed as a manner and form provision. But it overstrains the latter concept to include in it a provision which touches the Legislature only by impliedly depriving it of legislative power on the subject matter of the agreement. The nettle that must ultimately be grasped by the argument is its logical conclusion that, by s.4, Parliament has set up a body with legislative power, the power of amending an agreement having the force of a law enacted by Parliament, and to do so to the exclusion of Parliament which cannot take the matter of variation directly into its own hands. Thus would the Queensland Legislature 'create and endow with its own capacity a new legislative power not created by the act to which it owes its existence'. (*In re The Initiative and Referendum Act* [1919] AC 935, 945; *Cobb and Co. Ltd. v Kropp* [1967] 1 AC 141, 157). I would hold invalid an enactment purporting to do that. (cf. *The Queen v Burah* (1878) 3 App. Cas. 889, 905 P.C.)⁶³

It is not entirely clear why his Honour applied the principle from *In re The Initiative and Referendum Act* for it would have been more appropriate to rely on the distinction between a provision which regulates and one which deprives Parliament of its law-making powers. However, earlier in his judgment, Wanstall SPJ referred to the principle of *Cobb*

60. *Ibid.*

61. *Supra* n.20.

62. *Supra* n.24.

63. *Supra* n.20 at 236-237.

& Co Ltd v Kropp and how s.4 appeared to infringe this principle for Parliament had delegated the power of varying the agreement, to the company and the Executive without retaining “. . . intact its own power to withdraw or to alter the authority it has conferred upon its agent . . .”.⁶⁴ He rejected the argument that Parliament’s right to disallow any order-in-council giving effect to a variation of the agreement, prevented any abdication of power occurring.⁶⁵ It is difficult to see how Parliament lost its power to revoke the delegation of power when s.4 was only singly entrenched and hence, could be repealed by an ordinary Act of Parliament.

Hoare J in dissent agreed with the interpretation of s.4 by Wanstall SPJ that it conferred the power of variation solely on the Executive with Comalco’s consent but found no abdication of power by Parliament. His Honour recognised that a provision requiring first an agreement before a variation could occur raised certain difficulties as a fetter on Parliament but these difficulties were overcome in this case after taking into account the general purpose of the 1957 Act, the arbitration provisions and Parliament’s power of veto in s.5(4) of the Act.⁶⁶

In contrast, is Dunn J who interpreted s.4 as merely restricting the power of the Executive to vary the agreement and so not depriving Parliament of any power in relation to the agreement.⁶⁷

In *West Lakes Case*, the alleged manner and form provision was interpreted by the Full Court of South Australia so as not to deprive Parliament of any power but merely to restrict the capacity of the Executive to vary the agreement. King CJ discussed the need to distinguish between provisions which prescribe the manner and form for the exercise of power, and those which deprive Parliament of power. The Chief Justice identified particular difficulties with certain kinds of requirements: (i) a *special majority requirement* for the passage of proposed legislation through Parliament may reach “a point at which [such a] provision would appear as an attempt to deprive the parliament of powers rather than as a measure to prescribe the manner or form of their exercise. This point might be reached more quickly where the legislative topic which is the subject of the requirement is not a fundamental constitutional provision”,⁶⁸ and (ii) *extra-parliamentary requirements* such as a “. . . provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure (including in that structure the people whom the members of the legislature represent), does not, to my mind, prescribe a manner or form of law-making, but rather amounts to a renunciation pro tanto of the law-making power. Such a provision relates to the substance of the law-making power, not to the manner or form of its exercise”.⁶⁹

In relation to this last point, King CJ appears to hold that the only valid extra-parliamentary consent to which the legislature can be subjected is that of the electorate. Requiring the consent of any other body amounts to a deprivation of power.

The five prerequisites for s.6 of the Australia Acts 1986 are proposed here as a convenient methodology by which to analyse in any particular case whether a provision does in law constitute a valid and effective, binding manner and form provision — a provision which validly fetters or binds successor Parliaments. Apart from s.6, there are three other possible grounds upon which Parliament may bind its successors.

64. *Ibid.* at 236.

65. *Ibid.*

66. *Ibid.* at 249-250.

67. *Ibid.* at 260.

68. *Supra* n.24 at 397.

69. *Ibid.* at 398.

2. Grounds Outside Section 6 of The Australia Act 1986.

- (a) Reconstituted Legislature
- (b) The Principle of *Bribery Commissioner v Ranasinghe*
- (c) Section 106 of the Commonwealth Constitution

There is little judicial authority in Australia on the capacity of a State Parliament to bind later Parliaments by manner and form provisions outside of s.6. The three grounds discussed here have been raised in judicial decisions but are by no means fully accepted in Australia. The need to consider whether a manner and form provision or a restrictive procedure can be binding outside of s.6 arises primarily in those cases where s.6 does not apply because the law under challenge for non-compliance with the requirements of the manner and form is unable to be characterised as a law respecting the constitution, powers or procedure of the Parliament. This requirement of s.6 as discussed above is a significant restriction on its applicability. Although no similar requirement applies in relation to the three grounds above, grounds (b) and (c) arise only in the case of constitutional amendments. Other manner and form provisions which are not binding under s.6 because their requirements are merely directory, or because they do not relate to the legislative process or purport to deprive Parliament of law-making power, for those same reasons are also not binding outside of s.6. of s.6.

(a) Reconstituted Legislature

This basis for the enforcement of a manner and form provision depends upon the provision reconstituting or reconstructing the legislature for the purposes of enacting certain legislation. The clearest example of a reconstituted legislature is the typical manner and form provision which imposes a referendum requirement. The newly constituted legislature comprises both houses (or one in Queensland) of the original legislature, the electorate, and the Governor. The electorate is added as if it were another chamber. Such a reconstitution is effected for the special purpose of enacting those laws for which the manner and form is prescribed. The crucial point is that this power to enact those laws now lies *solely* with the reconstituted legislature, the original legislature no longer possesses this power and provided the referendum requirement is doubly entrenched, nor is it capable of recalling the power.

Before considering the support which this view has in its application to the Australian State Parliaments, it is important and relevant to first consider whether such a view describes the position of the United Kingdom Parliament and in so doing, see if it is reconcilable with the doctrine of Parliamentary Sovereignty and the principle it espouses that Parliament cannot bind its successors. Only a very brief discussion of this aspect is possible here for it raises major constitutional issues and has been and still is the subject of considerable debate in the United Kingdom and within the Commonwealth.

The controversy which surrounds this issue whether the United Kingdom Parliament can reconstitute itself and so abdicate a power to a new Parliament is illustrated by the debate which developed in the United Kingdom over the Irish Home Rule Bill of 1886⁷⁰ which proposed a separate Parliament for Ireland and a separate Parliament for Britain. In supporting the bill, Lord Bryce⁷¹ argued that Parliament could always repeal the proposed law relying on the sovereignty of Parliament and its inability to bind itself despite the altered composition of Parliament, now no longer comprising Irish members. On the other hand, Anson and Dicey in opposing Home Rule argued that this was probably not so. Anson argued:

I should be disposed to combat this proposition, which lies at the root of the whole

70. Entitled 'Government of Ireland Bill, 1886'.

71. Then Under-Secretary of State for Foreign Affairs. See Hansard, May 17 1886 col 1220.

discussion. It is said that the Imperial Parliament cannot bind its successors, that what one Parliament may enact another Parliament may repudiate. But if the Irish Government Bill had become law *the Parliament of 1885 would have had no successors*. It met as the Parliament of the United Kingdom of Great Britain and Ireland; if the Bill had become law, that Parliament would have ceased to exist, and the assembly sitting at Westminster would have been the Parliament of Great Britain only. A repudiation of the Acts of the Parliament of 1885 by such an assembly would not have been a repeal by one Parliament of the Acts of another Parliament similarly constituted . . .⁷²

Dicey who supported Anson said: "No principle of jurisprudence is more certain than that sovereignty implies the power of abdication."⁷³

Despite this wide comment by Dicey in the debate over Home Rule for Ireland, he otherwise defended strongly the sovereignty of Parliament at Westminster and the consequent inability to bind itself, a position similarly defended by Professor Wade in more recent times. However, other constitutional lawyers have argued that the United Kingdom Parliament does possess the capacity to bind itself by the technique of reconstituting itself for special purposes by prescribing a referendum requirement. Sir Ivor Jennings argued:

'Legal sovereignty' is merely a name indicating that the legislature has for the time being power to make laws of any kind in the manner required by the law. That is, a rule expressed to be made by the King, 'with the advice and consent of the Lords spiritual and temporal, and Commons in this present Parliament assembled, and by the authority of the same', will be recognised by the courts, including a rule which alters this law itself. If this is so, the "legal sovereign" may impose legal limitations upon itself, because its power to change the law includes the power to change the law affecting itself.⁷⁴

Professor Wade counters this reasoning with the point that the authority of Acts of Parliament derives from the common law — the courts, and although Parliament can alter the common law it cannot by statute alter the common law rule that demands that courts obey enactments of the Parliament comprising the Queen, the Lords and the Commons, for this rule is "an ultimate political fact" which can only be altered by revolution.⁷⁵

Dixon J in *Trethowan's Case* commented upon this issue as regards the United Kingdom Parliament by suggesting that if the Parliament enacted a law in non-compliance with a manner and form provision requiring approval at a referendum before being presented for royal assent, ". . . the Courts might be called upon to consider whether the supreme legislative power in respect of the matter had in truth been exercised in the manner required for its authentic expression and by the elements in which it had come to reside. But the answer to this question, whether evident or obscure, would be deduced from the principle of parliamentary supremacy over the law."⁷⁶ Since in that case, the CLVA applied to the New South Wales Parliament, his Honour was not required to consider the issue any further. But the same issue did arise subsequently in South Africa.

The dilemma whether a sovereign legislature was bound by manner and form was squarely

72. W R Anson 'The Government of Ireland Bill and the Sovereignty of Parliament' (1886) 2 LQR 427.

73. A V Dicey *England's Case Against Home Rule* at 244-245.

74. I. Jennings *supra* n.3 at 143.

75. *Supra* n.2 at 186-190. What is lacking in the arguments put forward by Wade, Jennings and others is a detailed analysis of the various ways Parliament may attempt to bind its successors and whether some or all of these ways are effective. Such an analysis is given by Cowen *supra* n.10 at 295 ff.

76. *Supra* n.14 at 426.

presented to the South African Appeal Court in *Harris and Others v Minister of the Interior*⁷⁷ where amendments to the South Africa Act 1909 (Imp.) were challenged for not complying with s.152 of that Act which prescribed a manner and form requiring both Houses to sit and deliberate upon the proposed amendments in relation to voting rights, in a joint sitting and to pass them by a two-third's majority. The CLVA no longer applied to South Africa by virtue of the Statute of Westminster. Nevertheless, while accepting the sovereignty of the South African Parliament, the Appeal Court enforced the manner and form and declared the amendments invalid because the authority to enact those amendments was vested solely in the Parliament as constituted by s.152 of the South Africa Act. In effect then the Court accepted *divisible sovereignty* — that Parliament can be differently constituted for different purposes. How far this point goes was not discussed, in particular, whether the South African Parliament can itself subdivide its powers further?

The above discussion concerns the capacity of a sovereign Parliament to bind itself by manner and form provisions. The Parliaments of the Australian States although possessing limited sovereignty are in no distinguishable position from that of a fully sovereign legislature when considering their ability to bind themselves outside of s.6 by a manner and form provision which reconstitutes their Parliaments. The main authority in Australia is *Trethowan's Case* in the judgments of Rich and Dixon JJ. Dixon J seemed to accept this basis of enforcement for manner and form while not relying on it. Rich J did rely on it, as well as the proviso to s.5 of the CLVA.

Rich J dealt with the two matters which were crucial to this basis of enforcement of manner and form outside the CLVA and equally now outside s.6.⁷⁸ The first is whether a State legislature can reconstitute itself for a special purpose? The second matter is if it can so reconstitute itself, is the original legislature effectively deprived of the power involved? In answering the first question, s.5 of the CLVA conferred on all representative legislatures full power to make laws respecting the constitution, powers and procedure of the legislature — a power which clearly authorised State Legislatures to legislate with respect to their “constitution” which was defined by Dixon J in *Trethowan's Case* to cover “its own nature and composition”.⁷⁹ Rich J relied on s.5 of the CLVA to hold: “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”.⁸⁰ This power today is found in s.2(2) of the Australia Acts 1986. But a further continuing source of power is the general grant of legislative power to the State Parliaments to make laws for the peace, order and good government of the State. The High Court in *Clayton v Heffron*⁸¹ preferred to rely on this power than on s.5 of the CLVA to uphold the power of the New South Wales Parliament to enact s.5B to provide for the resolution of deadlocks between the two Houses. In the joint judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ, a difficulty was noted in relation to s.5 of the CLVA: “But some doubt may perhaps exist as to the substance of s.5B following within the words ‘respecting the constitution powers and procedure of such legislature’, although the same doubt does not appear to have been felt by members of the Court in *Taylor v Attorney-General of Queensland*.”⁸²

Given that a State Parliament has the power to reconstitute itself for special purposes,

77. [1952] 2 SA 428; [1952] 1 TLR 1245.

78. *Ibid.* at 418-419.

79. *Ibid.* at 429.

80. *Ibid.* at 418.

81. *Supra* n.13 at 250-252.

82. *Ibid.* at 249-250.

in what ways can this be achieved and what limits apply? Reconstitution from a bicameral to a unicameral Parliament generally, as well as, for special purposes is permissible.⁸³ The addition of another chamber such as the electorate is also valid.⁸⁴ Reconstitution could also arise in a procedural sense by a special majority requirement.⁸⁵

The limitations on reconstitution cover those matters already discussed in relation to s.6 of the Australia Acts 1986. Parliament cannot abdicate its powers by divesting itself of power. Obviously valid reconstitution does not infringe this limitation. But a purported reconstitution which subjects the exercise of power to the consent of an outside body (other than the electorate) will be invalid.⁸⁶ Apart from these considerations of abdication of power, it is well established that the Crown must remain part of the legislature or the Parliament for the purpose of granting royal assent.⁸⁷

A significant practical difficulty with this basis for the enforcement of manner and form is that in several States laws effecting a reconstitution of the Parliament must comply with manner and form for their enactment.⁸⁸ In Queensland, s.3 of the Constitution Act Amendment Act 1934 requires any bill which provides for the establishment of another legislative body in addition to the Legislative Assembly, to be approved at a referendum before being presented for royal assent. Only if the reconstitution involves the addition of another "legislative body" does this section apply. Although a referendum requirement includes the electorate in the legislative process, it could be argued that the electorate is not a "legislative body" within the meaning of the phrase in the Act, in that, it is not a representative body of the same nature as the Legislative Assembly or the former Legislative Council.

The second matter outlined earlier is even if the State Parliaments have the capacity to reconstitute themselves for special purposes and in fact do so, does this prevent the original legislatures from enacting legislation in respect of those special purposes and/or recalling that power to itself? The trend in judicial authority⁸⁹ is to accept that the original legislature is prevented from acting in these respects but there are difficulties with this view. Prior to the Australia Acts 1986, the argument in favour of the original legislature being able to ignore and override the manner and form was based on the power conferred by s.5 of the CLVA that at all times the representative legislature possessed full power to make laws respecting its constitution. It was argued that the "representative legislature" was the legislature established by the State Constitution and accordingly, did not encompass reconstituted legislatures established for special purposes.⁹⁰ Section 2(2) of the Australia Acts 1986 refers to the "Parliament of a State" which Goldsworthy⁹¹ argues refers to the "Parliaments (or 'Legislatures') as defined from time to time in each State Constitution" and so in order to effect a reconstitution there must be an express or implied amendment to the definition of a State Parliament contained in the State Constitution. He further argues that a typical manner and form imposing a referendum requirement does not necessarily effect such an amendment.⁹²

83. See *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457 and *Clayton v Heffron supra* n.13.

84. See *Trethowan's Case supra* n.14. What about some other outside body? See *West Lakes Case supra* n.24 and Goldsworthy *supra* n.32 at 423.

85. See Goldsworthy *supra* n.32 at 420.

86. See *West Lakes Case supra* n.24.

87. See *In re Initiative and Referendum Act supra* n.14 and *Taylor v Attorney-General of Queensland supra* n.83.

88. See s.18 Constitution Act 1975 (VIC); s.73 Constitution Act 1889 (Imp.) (W.A.).

89. See *Trethowan's Case supra* n.14 per Rich and Dixon JJ and *Harris v Minister of the Interior supra* n.77.

90. See *Trethowan's Case ibid.* per McTiernan J at 447.

91. *Supra* n.32 at 413-415.

92. *Ibid.* at 414.

Reliance on this interpretation of "representative legislature" in s.5 of the CLVA to exclude a reconstituted legislature, was rejected by Rich J in *Trethowan's Case*:

If the legislative body consists of different elements for the purpose of legislation upon 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 to treat s.5 as conferring upon the body constituted to deal with that subject authority to pass the law although it related to the powers of the legislature. An examination of s.7A shows that a legislative body has been created for the purpose of passing or co-operating in passing a particular law.⁹³

The issue today is whether s.2(2) of the Australia Acts 1986 in referring to a "Parliament of a State" rather than a "legislature" prevents this interpretation by Rich J of s.5 of the CLVA applying to s.2(2)? It could be reasonably argued that this difference in terminology is irrelevant for the scope of s.2(2) of the Australia Acts 1986 is quite different from s.5 of the CLVA in that s.2(2) grants to State Parliaments a general capacity to make laws previously enjoyed only by the Imperial Parliament. As a section which confers Imperial residual power as well as those powers conferred previously by the CLVA, the scope of the power under s.2 of the Australia Acts 1986 can be no less than it was under s.5 of the CLVA.

(b) The Principle of *Bribery Commissioner v Ranasinghe*

The Privy Council in *The Bribery Commissioner v Pedrick Ranasinghe*⁹⁴ stated what is sometimes referred to as the *Ranasinghe* Principle:

. . . a Legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make laws.⁹⁵

On the basis of this principle, apart from the proviso to s.5 of the CLVA, the Privy Council enforced s.29(4) of the Ceylon Constitution contained in an Imperial Order-in-Council of 1946 which 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 Bribery Amendment Act 1958 which was inconsistent with the Constitution and which failed to comply with s.29(4) was found to be void.

The CLVA was no longer applicable to the Ceylon Parliament, instead the above principle was stated. The derivation of the principle is not entirely clear from the opinion although some reliance was placed on the previous opinion of the Privy Council in *McCawley v The King*⁹⁶ the conclusion of which was: "The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted."⁹⁷ However, the basis for that restriction was not stated in *McCawley's Case* but the most obvious basis would have been the proviso to s.5 of the CLVA which bound the Queensland legislature (unlike the Ceylon legislature when *Ranasinghe's Case* was decided). The only reference in *Ranasinghe's Case* to the proviso in s.5 of the CLVA was made merely in relating the facts and decision in *Trethowan's Case*.⁹⁸ The Privy Council did state, however, that the principle it espoused arose "independently of the question whether the legislature is sovereign",⁹⁹ later adding, that the need to obtain a two-thirds majority vote in the House

93. *Supra* n.14 at 419-420. See also *Clayton v Heffron supra* n.13 at 251 where the joint judgment adopts the same approach in relation to s.5 of the Constitution Act 1902 (NSW).

94. [1965] AC 172.

95. *Ibid.* at 197.

96. *Supra* n.5.

97. *Ibid.* at 714.

98. *Supra* n.94 at 199.

99. *Ibid.* at 197.

of Representatives “. . . did not limit the sovereign powers of the Parliament itself which can always, whenever it chooses, pass the amendment with the requisite majority.”¹⁰⁰

No significance appears to have been given to the fact that the Ceylon Constitution was contained in an Imperial order-in-council nor should it have been since the doctrines of paramountcy and repugnancy no longer applied in Ceylon.

Despite the inadequate justification given for the principle by the Privy Council, particularly in reconciling it with the principle of Parliamentary Sovereignty, there is much to commend its recognition given that it relates to manner and form provisions contained in the Constitution or as they described it, “the instrument which itself regulates its power to make law”.¹⁰¹ In the case itself this was the formal constitution and the opinion of the Privy Council makes reference only to legislation of this kind. But what if the manner and form is in another Act nevertheless concerned with the constitution of the legislature or even a general Act? Could it be argued that any Act which prescribes a manner and form for future legislation regulates the power to make law?

Ranasinghe's principle has received some judicial approval in Australia. Hoare J in *Comalco's Case*¹⁰² referred to the principle with approval as a basis for the enforcement of manner and form provisions outside of s.5 of the CLVA but did not rely on it.¹⁰³ Earlier, Gibbs J in *Victoria v The Commonwealth and Connor*¹⁰⁴ in obiter, approved the decisions in *Harris v Minister of the Interior*,¹⁰⁵ and *Ranasinghe's Case* itself. His Honour adopted the statement of the principle given by Lord Pearce in the last mentioned case but noted that the principle was not limited to constitutional amendments.¹⁰⁶ Further, Gibbs J agreed that it was a principle which arose whether or not the legislature is sovereign.¹⁰⁷ The principle has also been approved in *West Lakes Case*¹⁰⁸ by Matheson and Zelling JJ¹⁰⁹ Matheson J found that the principle was inapplicable to the West Lakes Development Act 1969 — 1970 (SA) for it was not “. . . an instrument which regulates the power to make law of the Parliament of South Australia in the sense clearly intended by Lord Pearce.”¹¹⁰

The sense intended by Lord Pearce would appear to be the formal constitution, otherwise, the scope for imposing restrictive procedures on later Parliaments would be far wider than that under s.6 of the Australia Acts 1986. It was argued in *West Lakes Case* that Gibbs J in *Victoria v The Commonwealth and Connor* in suggesting that *Ranasinghe's* principle was not limited to constitutional amendments, indicated that for the principle to apply the manner and form provision could also be prescribed by an Act other than the formal Constitution. Matheson J rejected any suggestion that the principle extended to all Acts of Parliament nor did he interpret Gibbs J's remarks as endorsing that view.¹¹¹

100. *Ibid.* at 200.

101. *Ibid.* at 197.

102. *Supra* n.20.

103. *Ibid.* at 247.

104. (1975) 134 CLR 81 at 163.

105. *Supra* n.77.

106. *Supra* n.20 at 163.

107. *Ibid.* at 164.

108. *Supra* n.24.

109. *Ibid.* at 413: Zelling J. after citing *Ranasinghe's Case* accepted without deciding that it is possible to have a binding manner and form outside the CLVA but “. . . given the general rule that the Acts of one Parliament do not bind its successors it would require very clear words before a court would find that that was what had happened.”

110. *Ibid.* at 421.

111. *Ibid.* at 422.

(c) Section 106 of the Commonwealth Constitution

Section 106 of the Commonwealth Constitution provides for the continuation of the State Constitutions and subjects them to the Commonwealth Constitution. The section provides:

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.

The phrase "until altered in accordance with the Constitution of the State" was interpreted by the Full Court of Western Australia in the *State of Western Australia v Wilsmore*¹¹² to require that a State Parliament observe any manner and form provisions in the State Constitution. In that case, Western Australia sought special leave to appeal to the Privy Council against a decision of the Full Court¹¹³ that an amendment to the Electoral Act (WA) was void for non-compliance with s.73 of the Constitution Act 1889 (Imp.). Section 73 prescribed a manner and form for any changes to the "Constitution" of either House, that they be approved by an absolute majority in each House.¹¹⁴ Special leave was refused pursuant to s.39(2)(a) of the Judiciary Act (Clth) because non-compliance with the manner and form infringed s.106 of the Commonwealth Constitution, in that, the State Constitution had not been "altered in accordance with the Constitution of the State" and hence, involved a matter arising under the Commonwealth Constitution. Burt CJ (with whom Lavan SPJ and Jones J concurred) concluded 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.¹¹⁵

There are at least two possible interpretations of the final phrase in s.106. The first is that it provides a constitutional guarantee that any manner and form provision prescribed by a State Constitution for its own amendment, must be observed whether or not any other legal basis exists for its enforcement. This appears to be the view of Burt CJ. The second possible interpretation is that s.106 merely contemplates the amendment of State Constitutions after 1901 thereby ensuring that s.106 has a continuing effect in maintaining State Constitutions as they exist from time to time and subjecting them to the Commonwealth Constitution. Hence, the final phrase was inserted to avoid an interpretation of s.106 which prevented the States from amending their Constitutions within their respective powers of amendment, or to avoid an interpretation that s.106 subjected only the Constitutions of the States as they existed as at 1901 to the Commonwealth Constitution. If s.106 is construed in this way, it cannot be relied upon as an additional basis for the enforcement of manner and form provisions in State Constitutions. Consistent with this interpretation is the view of Goldsworthy¹¹⁶ that "in accordance with" in the final phrase of s.106 simply means "not in violation of" and therefore, the binding nature of any manner and form provision is left to be determined under the general law and derives no force from s.106 itself.

112. (1981-1982) WAR 179.

113. *Wilsmore v State of Western Australia* (1981-1982) WAR 159.

114. The Full Court enforced s.73 without clearly explaining on what basis except for referring to *Ranasinghe's Case*. On appeal to the High Court (1981) 149 CLR 79 Wilson J. (with whom Gibbs CJ, Stephen, Mason and Aickin JJ generally agreed) at p 96 expressly left open on which basis s.73 was binding out of the four he cited: s.5 CLVA; s.5 of the Constitution Act; s.106 of the Commonwealth Constitution; and *Ranasinghe's Case*. It was held that s.73 did not apply to the amendments in issue.

115. *Supra* n.112 at 18.

116. *Supra* n.85 at 427.

Even if s.106 does provide an independent ground for the enforcement of manner and form provisions, they must be found in the State Constitution (the definition of which is not clear) and they must regulate a law which amends the Constitution itself and not some other law.

Entrenchment of Manner and Form Provisions

Although a manner and form provision may be binding on a Parliament on any of the legal bases discussed above, to be effectively binding, it must be adequately entrenched. A manner and form provision may be either singly or doubly entrenched but in order to be an effective, binding provision, it must be doubly entrenched.

Single entrenchment of a manner and form provision exists when the requirements prescribed by that provision for the enactment of future laws do not apply to a law to amend or repeal that particular manner and form provision. In other words, there is no difficulty in amending or repealing the manner and form provision itself by an Act passed in the ordinary way. Hence, a manner and form provision which is only singly entrenched is not an effective, binding, entrenched provision.

Difficulty arises though when legislation which the singly entrenched manner and form provision intends to bind, simply ignores the requirements of the manner and form provision and is enacted in the normal way. Is this legislation open to challenge? In answering this question, the starting point is to decide whether the legislation by ignoring the manner and form provision has impliedly repealed it? The preferable view¹¹⁷ is that no implied repeal is effected because it is not possible to point to a provision in the legislation which is inconsistent with the manner and form provision. All that is inconsistent is that the legislation has been enacted in a way not in compliance with the requirements of the manner and form provision. This view is, however, rejected by Goldsworthy¹¹⁸ who argues: “. . . the later Act declares that ‘such-and-such is the law’ while the earlier Act in effect declares that ‘such-and-such shall not be the law’: there is a contradiction here sufficient to construe the latter as having been impliedly repealed.”¹¹⁹ With respect, this reasoning fails to meet the conditions necessary for the implied repeal of statutory provisions, namely, that there be provisions inconsistent with each other. The end result is that for a manner and form provision to be repealed, it must be done expressly. Hanks¹²⁰ even suggests that this express repeal should be effected by one Act and the proposed legislation now no longer subject to the manner and form provision should be enacted separately.

If then no implied repeal of the singly entrenched manner and form provision is effected by legislation which ignores its requirements, is the legislation invalid for non-compliance? The answer has to be yes although no authority has made this clear because all of the cases in which a manner and form provision has been upheld and enforced, were cases of double entrenchment. In *Comalco's Case* s.4 of the 1957 Act purported to prevent any alteration of the terms of the agreement without Comalco's consent — this agreement being given the force of law by the 1957 Act. Only Hoare J in dissent upheld s.4 as an effective manner and form provision but, with respect, misread s.4 to prevent the alteration of the 1957 Act as well as the agreement.¹²¹ Section 4 only regulated the alteration of the agreement, not

117. See P.J. Hanks *Australian Constitutional Law* 3rd edn. Butterworths Sydney 1985 at 109.

118. See Goldsworthy *supra* n.32.

119. *Ibid.* at n.19.

120. *Supra* n.117 at 109.

121. *Supra* n.9 at 248.

the Act itself and hence, was not doubly entrenched. But Hoare J's interpretation rendered it doubly entrenched and this may account for why he did not consider whether the subsequent 1974 Act which ignored the requirements of s.4 had impliedly repealed s.4. Yet, at the end of his judgment, he said he would say "nothing as to whether the 'entrenching' provision of s.4 may be avoided in some other way."¹²² In *West Lakes Case*, the alleged manner and form provision was only singly entrenched, a point picked up by Zelling J who noted that an express repeal was not prevented since there was no double entrenchment.¹²³ But he made no reference to implied repeal.

The view given above that legislation which ignores a singly entrenched manner and form provision is invalid derives support from the wording of s.6 itself in relation to those manner and form provisions enforced by that section. Section 6 states: ". . . a law . . . respecting the constitution, powers or procedure . . . shall be of no force or effect unless it is made in such manner and form . . .". Although made in the context of a doubly entrenched manner and form provision, certain comments of Fullagar J in *Clayton v Heffron*¹²⁴ are equally applicable with respect to singly entrenched provisions:

It may repeal or alter a 'manner or form' which has been prescribed, but, until it has specifically repealed or altered the prescribed "manner or form", a law which has not been "passed" in the prescribed "manner or form" will not be a valid law.¹²⁵

Any prescription of manner and form may be repealed or amended, but, while it stands, the process prescribed by it must be followed. That was decided by *Trethowan's Case*.¹²⁶

In relation to manner and form provisions enforced outside s.6, the same position is reached, that the manner and form provision must be complied with unless it is removed from the statute book.

Double entrenchment of a manner and form provision exists when the requirements of the manner and form apply not only to the enactment of certain future laws, but as well, to any law which purports to amend or repeal the manner and form provision itself. Only if the manner and form provision is doubly entrenched, is it effectively binding on future Parliaments, in that, it cannot be expressly or impliedly amended or repealed unless its own requirements are complied with. Consequently, the enactment of future laws for which the manner and form is prescribed must still comply with that manner and form.

The manner and form provision in *Trethowan's Case*, s.7A of the New South Wales Constitution was doubly entrenched by subs.6 which was upheld by a majority¹²⁷ of the High Court and affirmed by the Privy Council as an effective technique to ensure that the remainder of the section could not be repealed unless its own manner and form requirements were complied with.

Whether or not a manner and form provision is doubly entrenched depends upon the wording of the provision itself. In *Trethowan's Case*, subs.6 of s.7A was added to apply the manner and form requirements to a bill to repeal s.7A itself. In other cases, the provision may simply state: "No bill to amend or repeal any of the provisions of this Act shall be presented to the Governor for royal assent unless it is approved by the electorate at a referendum." Because the manner and form provision itself is one of "the provisions of

122. *Ibid.* at 250.

123. *Supra* n.24 at 414-415.

124. *Supra* n.13.

125. *Ibid.* at 255.

126. *Ibid.* at 262.

127. *Supra* n.14 per Rich J at 418, Starke J at 424; and Dixon J at 431-432.

this Act", it is therefore doubly entrenched.

The technical nature of single and double entrenchment underlies the effectiveness of every manner and form provision whether enforced under s.6 or outside s.6.

The Position in the Commonwealth

There appears to have been no attempt by the Commonwealth Parliament to bind itself by a manner and form provision. The Parliament is already bound by two such provisions in the Commonwealth Constitution, section 57 in relation to deadlocks between the two Houses, and section 128 in relation to the amendment of the Constitution itself. Both provisions are effectively binding; initially by virtue of being imposed by Imperial law and still today by virtue of s.8 of the Statute of Westminster and s.15 of the Australia Acts (1986), thereby preventing a situation similar to that which arose in South Africa, arising in Australia. Even if the situation did arise here, no doubt the principle of *Bribery Commissioner v Ranasinghe* would be relied upon to enforce these provisions.

The real issue here is whether the Commonwealth Parliament can impose further fetters on itself by prescribing manner and form provisions? In other words, can the Commonwealth entrench certain legislation which it wishes to protect from hasty amendment or repeal? There is little authority in relation to this issue but it would seem that unless the legislation is incorporated into the Constitution pursuant to the amendment procedure in s.128, no entrenchment is possible. Only two grounds for entrenchment by manner and form potentially apply to the Commonwealth: (i) Reconstituted Legislature and (ii) *Ranasinghe's* principle, but both these grounds depend upon constitutional amendment. A manner and form provision which reconstitutes the Commonwealth Parliament would have to comply with s.128 since the Parliament is defined in s.1 as comprising the Queen, the Senate and the House of Representatives. Hence, not even a referendum requirement could be introduced. Further, if *Ranasinghe's* principle is limited to manner and form provisions in the formal Constitution or even legislation of a constitutional nature, which appears to be the correct view, then again s.128 needs to be complied with.

However, certain other suggestions are made by George Winterton by which the Commonwealth Parliament may bind its successors by prescribing the "form" of future legislation or by the creation of special legislatures. These are fully explored in his article.¹²⁸

Conclusion

The capacity of Parliament to bind its successors by manner and form provisions clearly exists in the Parliaments of the Australian States by virtue of s.6 of the Australia Acts 1986 and previously by virtue of the proviso to s.5 of the CLVA. However, this basis is limited to laws respecting the constitution, powers or procedure of the Parliament. Precisely how this characterisation occurs has yet to be explained by the Courts. But this problem is avoided if reliance can be placed on the alternative legal bases for the enforcement of manner and form provisions: a reconstituted legislature or *Ranasinghe's* principle. However, even these grounds are not without practical difficulties. They remain, nevertheless, important alternatives to s.6 of the Australia Acts 1986 upon which manner and form provisions already contained in State Constitutions and legislation of a constitutional nature are binding.

128. George Winterton 'Can the Commonwealth Parliament Enact "Manner and Form" Legislation?' (1980) 11 FLR 167.