CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

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PARLIAMENTARY SOVEREIGNTY

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6

Trethowan's case

I Introduction

Trethowan's case is among the most important and influential constitutional cases decided in any jurisdiction of the British Commonwealth. It was the first major case to deal with a problem common to many of these jurisdictions, including Britain itself: namely, whether, and to what extent, a Parliament can control or even restrict the future exercise of its own legislative power. The problem includes, for example, whether a Parliament can make the future enactment of legislation conditional on its being passed by super-majorities in Parliament, or by a majority of electors in a referendum. Moreover, the ingenious arguments put forward in the case, and adopted in various judgments, proposed novel solutions to the problem that have greatly influenced constitutional thought, throughout the Commonwealth, ever since. They are generally acknowledged to have inspired new theories of Parliamentary sovereignty, which are more amenable to Parliaments being able to bind themselves in these ways. But, however beneficial its consequences may have been, the decision in the case was almost certainly wrong as a matter of law. It is an example of creative judicial statecraft surmounting legal obstacles in the interests of good government.

II Background

In the early part of the twentieth century, members of Upper Houses in State Parliaments were either elected on a restricted property franchise, or (in New South Wales and Queensland) appointed for life by the Governor. Consequently, they 'were more patrician than democratic in character, their membership reflecting the interests of wealth and privilege'.[1] They

[1] D. Clune and G. Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856–2003* (Sydney: Federation Press, 2006), pp. 242–3. Much of the information in this Section was found in this book's thorough account of the political background to the *Trethowan* litigation.

blocked legislation sponsored by Labor governments far more often than that of conservative governments.[2] In New South Wales, Labor quickly committed itself to either abolishing or radically reforming the Legislative Council, on the ground that it was an impediment to the sovereignty of the people who were more accurately represented in the Lower House. Abolition of the Council – to be replaced by popular initiative, referendum and recall, as a check on executive and legislative excess – became part of the party's State platform in 1898 and, from 1911, Labor appointees to the Council were required to 'hereby pledge myself on all occasions to do my utmost to ensure the carrying out of the principles embodied in the Labor Platform, including the abolition of the Legislative Council'.[3] In 1922, the Upper House of the Queensland Parliament was abolished, and in New South Wales, when the radical Labor government of Premier Jack Lang – elected in June 1925 – found itself continually stymied by the Upper House, it determined to follow suit. The brilliant young Labor lawyer H.V. Evatt, then a member of the State Parliament, provided the initial impetus for abolition.[4] By that time, it was widely acknowledged – even by most conservatives – that the Council had to be reformed, if it were to avoid abolition. A nominated Upper House was no longer acceptable.[5]

A Bill to abolish the Council was introduced in January 1926, but abolition had not been an issue at the preceding election, which allowed opponents to object that there was no popular mandate for it. Lang initially tried to ensure its passage by persuading the Governor to appoint to the Council a sufficient number of Labor nominees who were pledged to vote for it. This strategy led to dispute as to whether the Governor was bound by the conventions of responsible government to accede to whatever request for appointments the Premier might make. Twenty-five new members were appointed in December 1925, although the Governor did so 'under protest' after being advised accordingly by the Secretary of State for Dominion Affairs.[6] Nevertheless, when the Council came to vote on its own abolition, enough Labor members either absented themselves or voted against for the Bill to be narrowly defeated (they were subsequently expelled from the Party). When the Governor refused to make

[2] *Ibid*., p. 313. [3] *Ibid*., pp. 243 and 248.

[4] P. Crockett, *Evatt, A Life* (Melbourne: Oxford University Press, 1993), p. 111; K. Buckley, B. Dale and W. Reynolds, *Doc Evatt* (Melbourne: Longman Cheshire, 1994), p. 58.

[5] Clune and Griffith, *Decision and Deliberation*, pp. 278–9.

[6] *Ibid*., pp. 280–2; A.S. Morrison, 'Dominion Office Correspondence on the New South Wales Constitutional Crisis 1930–32' (1976) 61 *Journal of the Royal Australian Historical Society* 323 at 325.

ten further appointments to secure the Bill's passage, Attorney-General Edward McTiernan travelled to London to request that the Governor be instructed to change his mind. Lord Amery, the Secretary of State for Dominion Affairs, turned him down.[7] (Lang later castigated the 'crusted conservatives and … hidebound protocol specialists of Whitehall' for secretly directing the Governor while pretending not to.[8]) Eminent legal scholars such as Arthur Berriedale Keith and William Harrison Moore disagreed about the propriety of the Governor's conduct, although even H.V. Evatt later acknowledged that neither view could be said to be absolutely right or wrong.[9] Keith argued that it was a 'fundamental principle of democracy that changes of substance in the Constitution should only be carried out after they have been definitely and distinctly made the subject of a general election'[10] – or, he might have added, a referendum.

Lang lost an election in late 1927, and the conservative government of Sir Thomas Bavin came to power. Bavin proposed to reform the Legislative Council by making it an elected chamber, and also to protect it from being abolished or stripped of power except with the approval of a majority of voters in a referendum.[11] 'We are determined', he explained, 'that there should be no repetition of what we saw in the last Parliament, when there was an effort to destroy the Legislative Council and to make a fundamental alteration in the Constitution of the state without consulting the people'.[12] Sir John Peden, a long-standing Professor and Dean of Law at Sydney University, and a member of the Council since 1917, is credited with devising the government's strategy: it has been said that Peden's initial idea was 'for a time regarded as so important that the [University Law] faculty administrative officer used to take visitors to the spot in the library where Sir John was said to have had it'.[13] The idea was not original: he was undoubtedly influenced by the views of Berriedale Keith, then the leading British authority on colonial and Dominion constitutions. Peden drafted

[7] Clune and Griffith, *Decision and Deliberation*, pp. 283–5.

[8] J.T. Lang, *I Remember* (Sydney: Invincible Press, 1956), p. 297 and ch. 56 *passim*.

[9] Clune and Griffith, *Decision and Deliberation*, pp. 285–6 and 281 respectively. See also H.V. Evatt, *The King and His Dominion Governors* (2nd edn) (Melbourne: FW Cheshire, 1967), pp. 134–5.

[10] Scotsman, 4 March 1927, quoted in Evatt, *The King and His Dominion*, p. 134 (also referred to by Clune and Griffith, *Decision and Deliberation*, p. 286).

[11] Clune and Griffith, *Decision and Deliberation*, p. 287.

[12] *Parliamentary Debates, New South Wales*, 2nd ser. (*NSWPD*), vol. 117, p. 3621, quoted in C.H. Currey, 'The Legislative Council of New South Wales, 1843–1943' *Journal and Proceedings of the Royal Australian Historical Society* 29 (1943) 337 at 417.

[13] W. L. Morison, 'The Future Scope of Australian Common Law' *Sydney Law Review* 13 335 (1991) at 338.

the Bill to require a referendum with the assistance of Attorney-General F.S. Boyce KC, another member of the Council who was later appointed to the Supreme Court, and E.M. Mitchell K.C., a one-time Law School colleague of Peden's who subsequently helped represent the plaintiffs in *Trethowan's* case.[14] It might be noted that Bavin was himself a barrister of considerable experience and reputation, and was appointed to the Supreme Court in 1935.[15]

The Constitution (Legislative Council) Amendment Bill inserted a new section – s. 7A – into the State's Constitution Act. The crucial provisions of this section are as follows:

> (1) The Legislative Council shall not be abolished nor … shall its constitution or powers be altered except in the manner provided in this section.
> (2) A Bill for any purpose within subsection one of this section shall not be presented to the Governor for His Majesty's assent until the Bill has been approved by the electors in accordance with this section.
> (6) he provisions of this section shall extend to any Bill for the repeal or amendment of this section …

This was described by the Labor Opposition as extraordinarily cunning, largely because of sub-section (6).[16] Crucial to Peden's strategy, this is an example of what has come to be called a 'self entrenching' or 'double entrenching' provision: it applies the referendum requirement to its own future repeal or amendment. Without it, the requirements in sub-sections (1) and (2) would have been ineffective, because a later Parliament wanting to abolish the Legislative Council without holding a referendum could simply have repealed s. 7A by ordinary legislation, and then proceeded to abolish the Council in the same way. The device of self or double entrenchment appears to have been first proposed by Berriedale Keith.[17]

[14] Clune and Griffith, *Decision and Deliberation*, pp. 288–9; K. Turner, *House of Review? The New South Wales Legislative Council, 1934–68* (Sydney: Sydney University Press, 1969), pp. 14 and 17.

[15] See T. Blackshield, M. Coper, G. Fricke and T. Simpson, 'Counsel, notable', in T. Blackshield, M. Coper and G. Williams (eds.), *The Oxford Companion to the High Court of Australia* (Melbourne: Oxford University Press, 2001), pp. 160 at 163 and 166.

[16] *NSWPD*, vol. 113, 15 May 1928, pp. 572–3 (A.C. Wills) and 597 (W. Brennan).

[17] A.B. Keith, *Imperial Unity and the Dominions* (Oxford: Clarendon Press, 1916), pp. 389–90, quoted in *Attorney-General (NSW)* v. *Trethowan* (1931) 44 CLR 417 at 424 (Starke J). See also A.B. Keith, *Responsible Government in the Dominions* (2nd edn) (Oxford: Oxford University Press, 1928), pp. 352–3.

Bavin taunted the Labor Party by asking how, given its long-standing commitment to the referendum as the epitome of democracy, it could possibly oppose s. 7A.[18] In the Council, Labor members pledged to support s. 7A if, as logic and consistency demanded, it were itself submitted to a referendum before being enacted; but their proposed amendment along these lines was defeated by a vote of 34–14.[19]

There seems to have been some confusion as to the intended effect of the section. Even Attorney-General Boyce, on introducing the Bill containing s. 7A in the Assembly, assured members that it could be repealed by a subsequent Parliament, quoting Bacon and Dicey as authorities for the proposition that no Parliament could bind itself. 'All that we can do is to throw obstacles in the way of repeal', he added.[20] When reminded by Sir Joseph Carruthers that the whole point of the section was to bind future Parliaments, he replied: 'It is the best we can do.'[21] According to the historian Charles Currey, who lived through the events, opinion as to the bindingness of s. 7A was sharply divided. The view that it was legally binding 'was scoffed at by men of legal learning', both within the legislature and outside.[22] One said that sub-section (6) was 'an absolute absurdity … For this Parliament to purport to bind future Parliaments in this way is simply futile and, to that extent, the Bill is not worth the paper it is written on'.[23] Even Peden was reported to have expressed doubt, acknowledging in April 1930 that 'some eminent lawyers believed that the courts would decide that the Act could be repealed in the ordinary way'.[24] Due to various delays, the Bill did not come into force until just before the general election of October 1930 that returned Labor to government.[25] In the meantime, legislation to reform the Upper House had been introduced, debated and amended, but a proposed referendum not proceeded with.[26]

Upon resuming office as Premier, Lang immediately revived his campaign to abolish the Council. This time he could claim a mandate from

[18] *NSWPD*, vol. 117, 12 March 1929, pp. 3619–21, 3626 and 3715.
[19] *NSWPD*, vol. 113, 15 May 1928, pp. 598–601.
[20] *NSWPD*, vol. 113, 10 May 1929, p. 502.
[21] *Ibid*., p. 506; Clune and Griffith, *Decision and Deliberation*, p. 288.
[22] Currey, 'The Legislative Council', 417.
[23] *NSWPD*, vol. 117, 13 March 1929, p. 3704 (Mr McKell).
[24] Sydney Morning Herald, 1 April 1930, p. 10, quoted in Clune and Griffith, *Decision and Deliberation*, p. 294.
[25] Clune and Griffith, *Decision and Deliberation*, p. 289.
[26] *Ibid*., pp. 289–93.

the people, since his policy speech had plainly spelled out this objective.[27] Even Carruthers, a veteran conservative Councillor, agreed that Lang had a mandate, but insisted that a referendum should nevertheless be held.[28] Governor Sir Philip Game also acknowledged that Lang had a 'popular mandate' to abolish the Council, and that this policy had been 'placed first on the programme he put before the electors in his Policy Speech'.[29] Two Bills – one to repeal s. 7A, and the other to abolish the Council – were introduced in the Council, and quickly passed by both Houses without opposition. Opponents of the Bills apparently decided not to defeat them in the Council, which might have led the Governor to appoint new Labor members at the government's behest, but instead, to seek judicial enforcement of the requirement in s. 7A that a referendum had to be held.[30] In fact, Premier Lang had already sought further appointments, the very day after he was returned to office, and continued to do so while litigation proceeded through the courts, although the Governor, Sir Philip Game, held out until November 1931.[31]

Lang could have submitted the Bills to a referendum, and it has been suggested that 'after his resounding electoral success, the chance of further approval by voters was reasonably good'.[32] He recalled many years later that he was unwilling to do so because 'I had in effect referred it to the people by asking for a mandate that had been given to me'.[33] He was fortified by a legal opinion of the Crown Solicitor, John Tillett, obtained by Attorney-General Andrew Lysacht at the Governor's request, that a referendum was not legally mandatory.[34] The opinion stated that British Parliamentary tradition prevented any Parliament from binding itself in the future.[35]

[27] Turner, *House of Review?*, p. 17.

[28] N.B. Nairn, *The Big Fella: Jack Lang and the Australian Labor Party 1891–1949* (Melbourne: Melbourne University Press, 1995), p. 214.

[29] Letter from Governor to Premier, 2 April 1931, printed by the Legislative Assembly (NSW), State Records Office (NSW), CGS 4545 (2/8206; microfilm copy SR Reels 2784–2785, Folio 650); Premier to Secretary of State for Dominion Affairs, 11 November 1930, DO 35/11156/8–9, quoted in F. Cain, *Jack Lang and the Great Depression* (Melbourne: Australian Scholarly Publishing, 2005), p. 222; see also Currey, 'The Legislative Council', 419.

[30] Clune and Griffith, *Decision and Deliberation*, p. 294.

[31] *Ibid*., pp. 296–9; Turner, *House of Review?*, p. 17.

[32] Nairn, *The Big Fella*, p. 213.

[33] J.T. Lang, *The Turbulent Years* (Sydney: Alpha Books, 1970), p. 108.

[34] Nairn, *The Big Fella*, p. 213; Currey, 'The Legislative Council', 419; Morrison, 'Dominion Office Correspondence', 326.

[35] Memo, 'Repeal of Constitution (Legislative Council) Amendment Act, 1929', 6 November 1930, papers regarding differences between Governor Game and Premier Lang, CGS

On 10 December 1930, the day the Bills were passed, Lang presented Governor Game with a memorandum, which he was advised to send forthwith by cable to the British government, requesting that Game assent to the Bills immediately. Game sent it, adding to the cable that he could see no reason why he should not accept his Ministers' advice.[36] This cable included further legal advice supplied to the Governor, which described s. 7A as

> an unprecedented attempt to convert a flexible and an uncontrolled Constitution into a rigid and controlled one, not by the will of the Imperial Parliament, but by the mere operation of an ordinary local law passed according to the views of a casual and accidental majority in one Parliament.[37]

But on 11 December, several members of the Council, led by Arthur K. Trethowan, instituted proceedings in the State's Supreme Court, seeking a declaration that presentation of the Bills to the Governor for the royal assent would be unlawful, absent a referendum, and also an injunction to restrain such action. Peden, who had become President of the Council in February 1929, was ironically named as the first defendant, because Standing Orders required him to present Bills originating in the Council to the Governor. (In fact, according to newspaper reports, Lang had considered attempting to dismiss Peden as President, by executive minute – to which Game would have had to consent – for refusing to present the Bills.[38]) The other defendants were Ministers of the Crown. Long Innes J granted an interim injunction until the matter could be dealt with by the Full Court. According to one historian, the Chief Justice, Sir Philip Street, was keen to expedite proceedings, and the Full Court of five judges appointed to sit just a few days later was the first for twenty-five years.[39]

Game's cable to London triggered a flurry of activity, in which the Secretary of State for Dominion Affairs, J.H. Thomas, explored alternative ways of saving the Legislative Council, including the exercise of the King's power of disallowance. It was eventually decided that there was too

4545 reels 2784–5, folio 844, State Records Authority of New South Wales, quoted in Cain, *Jack Lang*, p. 222.

[36] Cable, 'Game to Secretary of State for Dominion Affairs', 10 December 1930, DO 35/11156/10, NA, quoted in Cain, *Jack Lang*, p. 224; also referred to by Currey, 'The Legislative Council', 422.

[37] Cable from Governor to Secretary of State, 11 December 1930, DO 35/400 11156/6.

[38] Morning Post, 4 December 1930, and Daily Mail, 9 December 1930, press clippings, DO 35/400 11156/5.

[39] Crockett, *Evatt, A Life*, p. 112.

great a risk that this might arouse a political 'storm which would sweep away the power itself'.[40]

Argument before the Full Court was heard from 15–18 December, just in time for Evatt to appear for the defendants, since he was appointed to the High Court by the Scullin Labor government on 19 December (McTiernan was appointed to that Court the following day). On 23 December, the Full Court handed down its judgment. The expedited nature of the proceedings should be kept in mind when evaluating the quality of the opinions delivered. The Court held by a majority of 4–1 that the requirements of s. 7A were binding, and granted the relief sought. Street C.J., Ferguson, James and Owen J.J. found for the plaintiffs, and Long Innes J dissented.

An appeal was immediately taken to the High Court. Evatt was precluded from sitting in the case, because of his previous involvement as counsel, but McTiernan sat, even though as Lang's Attorney-General in 1926 he had been intimately involved in the initial attempt to abolish the Council (he had fallen out with Lang, and not contested his seat at the 1927 election). After hearing argument on 20–21 January, the High Court on 16 March 1931 rejected the government's appeal by a majority of 3–2. Rich, Starke and Dixon J.J. made up the majority; McTiernan and Gavan Duffy C.J., an earlier Labor appointee to the Court, dissented. Interviewed by Morrison in 1975, at the age of 98, Lang recalled 'a little story told to me by one of the judges' (allegedly McTiernan):

> On the morning the [*Trethowan*] judgment was given in the High Court the weather was very bad. The Chief justice, Sir Gavan Duffy, came down the stairs and said … 'A dirty day for a dirty deed'.[41]

But either Lang's memory or Morrison's report is untrustworthy, because in 1970, Lang claimed that Gavan Duffy had made this comment just before judgment was handed down in one of the *Garnishee* cases.[42]

A further appeal, to the Judicial Committee of the Privy Council, was rejected on 31 May 1932. The Attorney-Generals for both England (Sir William Jowitt) and the Commonwealth of Australia (Sir John Latham) intervened at the request of that court. Lang had asked the Dominions

[40] Memo from Chancellor of the Exchequer, 19 December 1930, DO 35/400 11156/10.

[41] A.S. Morrison, 'Further Documents and Comment on the New South Wales Constitutional Crisis 1930–1932' *Journal of the Royal Australian Historical Society* 68 (1982) 122 at 129.

[42] Lang, *Turbulent Years*, p. 187; see *New South Wales* v. *Commonwealth (No 1)* (1932) 46 CLR 155 and *(No 2)* (1932) 46 CLR 246.

Office to advise Jowitt to support the State government's case, but was told that this was constitutionally impossible because the Attorney-General acted independently.[43] In fact, the Attorney-General was initially advised by the Dominions Office that it might embarrass the British government if he openly supported either party in the case. But due to concerns about other Dominion constitutions – in particular, those of South Africa and the Irish Free State – he was eventually asked to support, if he found it possible to do so, the judgment of the High Court, so that those constitutions could have some degree of rigidity.[44] Sir Thomas Inskip, who replaced Jowitt as Attorney-General, did find this possible.[45] Latham for the Commonwealth also supported the plaintiffs.[46] The Privy Council's judgment was delivered in the middle of a State election campaign, brought about by Premier Lang having been dismissed, on 12 May, by Governor Game. Labor lost the ensuing election.

Sydney was at this time a small world, as was the Australian legal profession as a whole. Peden had taught both Evatt and McTiernan at Sydney Law School, and was held in high regard by Evatt.[47] Sir Philip Street, the State's Chief Justice, provided legal advice to Governor Game during the crisis leading to Lang's dismissal; by then, Lang regarded Street as the 'leader' of his government's enemies.[48] Lang's government was notoriously unpopular among Sydney's commercial and legal elites.[49] Owen Dixon believed it to be 'dangerous and thoroughly corrupt, and Evatt and McTiernan as forever stigmatised by their former intimate association with it'.[50] Commonwealth Attorney-General Latham was a personal friend of Bavin's, both being members of the 'Waterfall Fly Fishing Club', which Lang denounced as a sinister cabal of politicians, judges and businessmen.[51]

[43] Telegram from Game to Secretary of State for Dominion Affairs, 20 March 1931; reply, 26 March 1931, DO 35/400 11156/15.

[44] Minute of meeting between H. Bushe, H. Batterby and W. Jowitt, 24 September 1931, DO 35/400 11156/59 and other documents included there; minutes of a further meeting on 6 April 1932, DO 345/400 11156/85.

[45] *Attorney-General (NSW)* v. *Trethowan* [1932] AC 526 at 532.

[46] 'Case for the Intervenant', Privy Council Appeal Book, University of Sydney Law Library (Call No 342.940238).

[47] Buckley, Dale and Reynolds, *Doc Evatt*, p. 54; K. Tennant, *Evatt, Politics and Justice* (Sydney: Angus & Robertson, 1970), pp. 22 and 32.

[48] Morrison, 'Constitutional Crisis', 128–30.

[49] Cain, *Jack Lang*, p. 230.

[50] P. Ayres, *Owen Dixon* (Melbourne: Miegunyah Press, 2003), pp. 60, 182–3.

[51] See 'Latham, Sir John Greig', *Australian Dictionary of Biography Online Edition*, www.adb.online.anu.edu.au/biogs/A100002b.htm?hilite=latham.

III Parliamentary privilege

The litigation in *Trethowan* was remarkable for several reasons. One was that the Supreme Court was prepared to issue an injunction restraining the presentation of Bills to the Governor for the royal assent. Evatt had objected that this would amount to an interference with Parliamentary privilege.[52] Long Innes J. expressed disquiet concerning this aspect of the case. The object of the suit, he observed, was 'to prevent the two Houses of the Legislature from communicating to the third element thereof, His Majesty, their advice in regard to legislation in the process of making', and therefore 'to interfere with the internal affairs of Parliament'. This would 'in all probability, constitute an infringement of the privileges of Parliament, and may provoke a most undesirable conflict between Parliament and the Judiciary'.[53]

Nevertheless, His Honour agreed that the Court had jurisdiction to issue the injunction, and discussed whether it should exercise its discretion in favour of granting the remedy. He indicated that, if compelled to choose between Parliamentary privilege and the rule of law, he would prefer to uphold the latter.[54] Given the decision of the majority on the question of substance, an injunction should be granted if the defendants might otherwise flout the law. He expressed 'great regret and astonishment' that Lang's Ministers had refused to undertake not to present the Bills to the Governor until the final disposition of the case on appeal. The principal defendant, Sir John Peden, was unable to give such an undertaking because he had chosen not to appear or be represented.[55]

Street C.J. and Owen J. also discussed this issue, while Ferguson and James J.J. simply agreed with the view of the Chief Justice. They did not share Long Innes J.'s qualms about the propriety of intervening, because Parliament had itself specifically provided in s. 7A that Bills of the kind in question 'shall not be presented to the Governor for His Majesty's assent' until approved at a referendum. They described this as a 'statutory inhibition' and 'prohibition', whose violation would constitute an illegal act that the courts might be bound to restrain.[56] Owen J. said that to prevent the President of the Legislative Council from presenting the Bills to the Governor 'in direct contravention of an Act duly passed by Parliament is, in no sense, an interference with the rights, powers and privileges of Parliament'.[57]

[52] *Trethowan* v. *Peden* (1930) 31 SR (NSW) 183 at 195.
[53] *Ibid*., 234. [54] *Ibid*., 235. [55] *Ibid*., 234–5 [56] *Ibid*., 205 (Street C.J.); 221 (Owen J.).
[57] *Ibid*., 221; see also 205 (Street C.J.).

As for the Court's discretion to decline to issue an injunction, Owen J. indicated that, if some other remedy issued post-enactment – such as a declaration of invalidity, or damages – would be adequate, that would be the preferred course. But in his opinion, the injury that the plaintiffs would suffer – the temporary deprivation of their rights and privileges as members of the Council – could not be properly compensated by an award of damages.[58] The majority agreed with Long Innes J., that if the defendants had undertaken not to present the Bills to the Governor, an injunction would not have been appropriate.[59]

The High Court did not discuss this issue, because it limited the grounds of appeal to the abstract question of whether the two Bills, if enacted contrary to s. 7A, would be valid. But in 1954, in *Hughes and Vale* v. *Gair*, Dixon C.J. expressed doubt as to the correctness of the Supreme Court's issue of an injunction in *Trethowan*, notwithstanding the express prohibition in s. 7A. He stated that an application for such an injunction is 'very exceptional. We do not think it should be granted on this occasion or in any case'.[60] It is unclear whether the other members of the Court agreed with him in this regard.

The propriety of judicial intervention in on going legislative proceedings has been raised in a number of subsequent cases, including *Attorney-General (WA)* v. *Marquet*, and is thoroughly canvassed elsewhere.[61]

IV The validity and bindingness of s. 7A

The substantive issues were well defined from the start, and ingenious arguments were put by counsel on both sides. In explaining their arguments and counter-arguments, and the judges' responses, I will draw upon judgments from all three of the courts that became involved. For simplicity, I will use the term 'plaintiffs' to refer to the Legislative Councillors who first instituted the proceedings before the Supreme Court, and 'defendants' to refer to the government Ministers against whom relief was sought, in relation to proceedings in all three courts. I will use the term 'majority judges' to refer to those in all three courts who decided in favour of the plaintiffs – in other words, all the judges involved, except Long Innes J. in the Supreme Court, and Gavan Duffy C.J. and McTiernan J. in the High Court.

[58] *Ibid*., 221 (Owen J.).
[59] *Ibid*., 206 (Street C.J.), 221–2 (Owen J.).
[60] (1954) 90 CLR 203 at 204.
[61] E. Campbell, *Parliamentary Privilege* (Sydney: Federation Press, 2003), ch. 7; A. Twomey, *The Constitution of New South Wales* (Sydney: Federation Press, 2004), pp. 240–5.

The defendants challenged the validity or bindingness only of sub-s (6) of s. 7A.[62] They conceded, perhaps wrongly, that s. 7A was otherwise valid and binding. The legislature could validly require that a referendum be held before legislation of a certain kind could be enacted – except for legislation altering or repealing that requirement itself, which the legislature necessarily retained power to enact in the ordinary way. As Loxton KC put it: 'It was legitimate for the legislature to shut a gate and lock it, but we say, that it has in s. 7A thrown away the key.'[63] This argument appears to concede that such a requirement is binding only in the sense that it cannot be ignored, and repealed by mere implication, in accordance with the principle in *McCawley's* case[64] – in other words, it must be expressly repealed before Parliament can act contrary to it.[65] But Parliament necessarily remains free to change its mind and remove the requirement.[66]

It is not clear why the defendants conceded the validity of s. 7A apart from sub-s (6). It is tempting to construe their argument as follows: Parliament can require that a referendum be held for ordinary legislation because it has constituent power, that is, power to change the constitution itself, including provisions governing law-making. But it can subsequently alter or repeal such a requirement for precisely the same reason: it necessarily retains that same constituent power. In other words, it can exercise its constituent power so as to fetter its ordinary power – its power to enact ordinary legislation – but it cannot fetter the constituent power itself. But this distinction is untenable on the facts, because s. 7A (1) and (2), as well as sub-s (6), purported to fetter Parliament's constituent, rather than its ordinary, legislative power. Bills to abolish the Legislative Council, and to change its constitution or powers, are concerned with constitutional matters. Therefore, s. 7A as a whole purported to fetter the constituent power.

Be that as it may, the defendants argued that sub-s (6) was either invalid or ineffectual because: first, under the State's flexible, uncontrolled constitution, Parliament enjoyed plenary authority of the same sovereign nature as that of the United Kingdom Parliament, and a sovereign Parliament

[62] On the distinction between validity and bindingness, see J.D. Goldsworthy, 'Manner and Form in the Australian States' *Melbourne University Law Review* 16 (1987) 403 at 405–6.

[63] Reported in *Sydney Morning Herald*, 21 January 1931, p. 17.

[64] *McCawley* v. *R* [1920] AC 691.

[65] See summary of the defendants' argument at (1930) 31 SR (NSW) 183 at 187–8 and 188–9.

[66] Argument of Loxton KC reported at (1931) 44 CLR 394 at 401–2.

cannot bind itself; and secondly, sub-s (6) was repugnant both to s. 4 of the Imperial Act 18 and 19 Vict c. 54, and to s. 5 of the Colonial Laws Validity Act.[67]

As for the first argument, the plaintiffs replied that general theories concerning Parliamentary sovereignty, and the powers of the Imperial Parliament, were irrelevant. The State Parliament was a subordinate legislature, whose powers were conferred by superior constitutional instruments. Whether s. 7A was valid and binding turned on the meaning of these instruments, and not on false analogies between the State and the Imperial Parliaments, or on philosophical analysis of the abstract concept of sovereignty. This reply arguably overlooked the established principle that the Imperial Parliament had intended to invest colonial legislatures with power of the same plenary nature as its own power, but almost all the judges in all three courts agreed with the submission.[68] They directed their attention to the two Imperial Acts that conferred constituent power on the State Parliament, and therefore, so shall we.

The first Act, commonly called the Constitution Statute, enacted the State's first Constitution Act, an amended version of legislation passed in New South Wales that was included in a schedule to the Statute.[69] Section 4 of the Statute provided that:

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

Section 5 of the Colonial Laws Validity Act 1865 (the 'CLVA'), which applied to the New South Wales legislature, provided that:

> [E]very Representative Legislature shall … 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

[67] (1930) 31 SR (NSW) 183 at 187.

[68] *Trethowan* v. *Peden* (1930) 31 SR (NSW) 183 at 198–9 (Street C.J.), 208 (Ferguson J.), 213 and 216 (Owen J.), 228–9 (Long Innes J.); *Attorney-General (NSW)* v. *Trethowan* (1931) 44 CLR 394 at 418 (Rich J.), 422 (Starke J.), 425–7 (Dixon J.), 434–5 (McTiernan J.); *Attorney-General (NSW)* v. *Trethowan* (1931) 47 CLR 97 at 99 and 104 (PC).

[69] The terms 'Constitution Statute' and 'Constitution Act' were prescribed by the Interpretation Act 1897 (NSW).

> 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.

With respect to s. 4, the defendants argued that the Imperial Parliament had expressly declared that the State legislature could alter the Constitution Act 'in the same manner as any other law', subject only to conditions imposed in the original Act, which could themselves be – and had in fact already been – repealed.[70] They also argued that the CLVA had been intended merely to reaffirm the pre-existing law, and not to affect the operation of s. 4.[71] The plaintiffs replied that s. 4 applied only to the original Constitution Act, and therefore was exhausted or 'spent' when that Act was repealed and replaced by the State's Constitution Act of 1902. Moreover, of the two Imperial instruments, the CLVA was intended to be comprehensive and paramount, and being the most recent statement of the Imperial Parliament's will, it impliedly repealed s. 4 insofar as there was any discrepancy between them.[72] Most of the judges accepted one or the other of the plaintiffs' submissions.[73] I will assume that they were right to do so, and in what follows, confine my analysis to the meaning and effect of CLVA, s. 5. This does not affect the substance of the defendants' arguments.

The defendants' objection to sub-s (6) was that it purported to restrict a constituent power – to make laws with respect to the legislature's own constitution, powers and procedure – which CLVA, s. 5 conferred on all representative colonial legislatures, including that of New South Wales. Section 5 declared that such legislatures 'shall … have, and be deemed at all times to have had' this 'full power'. The defendants insisted that it was therefore a 'continuing' power: the legislature could not abdicate, alienate or restrict a power that the Imperial Parliament had declared it 'shall have', because the legislature could not amend or repeal an Imperial Act applying to it by paramount force.[74] It could not have been plausibly

[70] (1930) 31 SR (NSW) 183 at 188. It was clear from the Despatch from the Secretary of State for the Colonies to the Governor of NSW, which accompanied the Constitution Statute, that s. 4 was intended to enable those conditions to be repealed by ordinary legislation: see the judgment of McTiernan J, (1931) 44 CLR 394 at 439.

[71] (1930) 31 SR (NSW) 183 at 188; (1931) 44 CLR 394 at 403.

[72] *Ibid*., 183 at 191–2.

[73] *Ibid*., 183 at 200 (Street C.J.), 212 (James J. concurring), 217 (Owen J.); (1931) 44 CLR 394 at 417 (Rich J.), 428–9 (Dixon J.); (1932) 47 CLR 97 at 104 (PC).

[74] Dixon J. placed some emphasis on the phrase 'shall … be deemed at all times to have had' the power: (1931) 44 CLR 394 at 430. It could be argued to mean that the legislature must be deemed at all times, *past and future*, to have had the power. But it was probably

supposed that the Imperial Parliament would have countenanced a colonial legislature discarding the power that it had been given. As Dixon J. paraphrased this argument, the power was 'superior and indestructible', because 'the legislature … continues to retain unaffected and unimpaired by its own laws the power given by this provision'.[75] Or as McTiernan J. put it, s. 5 was 'an overriding charter which keeps the legislature continuously supplied with plenary power to make laws respecting its own constitution, powers and procedure', notwithstanding any attempt to divest itself of the power.[76]

For the defendants, it logically followed that sub-s (6) was invalid, because 'the provision for a referendum takes from Parliament the power to do as it likes and makes its will dependent on the volition of a body it is unable to control', and Parliament 'could not submit its volition to the volition of a third person'.[77] Since Parliament necessarily retained the continuing power conferred on it by CLVA, s. 5, it remained free to alter its own constitution, powers or procedure, and could not be compelled to first seek the approval of a person or group external to it – not even its own electors. Section 5 conferred the power on Parliament alone, and not on Parliament plus the electors. As Long Innes J. put it:

> 'Full power' to make laws necessarily involves equally full power to unmake or repeal them; and sub-section 6 of section 7A purports to shackle or control that full power, because it makes the exercise of that power dependent upon the approval of an outside body which does not form part of the Legislature itself.[78]

The plaintiffs replied that CLVA, s. 5 empowered a representative legislature to convert its Constitution into a rigid or controlled one, even by the insertion of a referendum requirement. It was the intention of the Imperial Parliament to make colonial legislatures their own constitution-makers, and if they wanted to insert a referendum requirement into their constitutions, they should not have to go cap-in-hand and beg the Imperial Parliament to do it for them.[79] There were two alternative ways, the plaintiffs argued, by which a State Parliament could

included merely to ensure that the legislature would be deemed to have had the power *at all past times*, even before the CLVA was enacted. Its correct interpretation depends partly on whether the words 'at all times' attach to 'be deemed', or to 'to have had'.

75 (1931) 44 CLR 394 at 430.

76 *Ibid*., 443.

77 Loxton K.C., reported in (1931) 44 CLR 394 at 403 and 400 respectively; see also 402.

78 (1930) 31 SR (NSW) 183 at 232.

79 (1931) 44 CLR 394 at 406.

do this itself.[80] I will refer to these, for convenience, as 'reconstitution' and 'manner and form' respectively. Reconstitution involves altering the composition or structure of the legislature, and manner and form, the procedure by which, or the form in which, laws are passed. Reconstitution depended on the power that CLVA, s. 5 conferred on each legislature to alter its own constitution, quite independently of the proviso that follows and qualifies that power, whereas manner and form depends on the proviso.

It is worth noting that, by relying exclusively on these two alternatives, the plaintiffs conceded that the power conferred by CLVA, s. 5 was, in itself, a 'continuing' one. They did not argue that it was a 'self-embracing' power that could be used to abolish or diminish itself, independently of the manner and form proviso.[81] As Dixon J. put the point, '[c]onsidered apart from the proviso, [s. 5] could not reasonably be understood to authorize any regulation, control or impairment of the power it describes. It does not say that the legislature may make laws respecting its own powers including this power'.[82] The two alternatives the defendants put forward were intended to show that s. 7A was consistent with the power being a continuing one. I will discuss reconstitution first.

A Reconstitution

The plaintiffs argued that a referendum requirement could be made binding by changing the composition of the legislature itself, so that for particular purposes, it would consist of the King, the two Houses and the electors speaking by referendum.[83] If s. 7A had done this, the defendants' main objection would be rebutted: the legislature would be shown to retain, undiminished, the continuing power conferred by CLVA, s. 5, and to be able to repeal s. 7A at any time – except that, for this particular purpose, the legislature would consist of the King, the two Houses and the electors. On this construction of s. 7A, the electors were not external to the legislature, with the ability to veto Bills passed by the two Houses; they were, instead, an internal, constitutive element of it. The 'full power' was untouched and intact, but the power-holder was reconstituted.

[80] They are clearly distinguished at (1931) 44 CLR 394 at 407–8 (argument of counsel for Trethowan), in the judgment of Rich J., *ibid*., at 418, and in the plaintiffs' submissions before the Privy Council at [1932] AC 526 at 530.

[81] This is modern terminology invented by H.L.A. Hart, *The Concept of Law* (2nd edn) (Oxford: Clarendon Press, 1994), ch. 7, s. 4.

[82] (1931) 44 CLR 394 at 430–1.

[83] (1930) 31 SR (NSW) 183 at 191.

It was agreed on all sides that a State Parliament could change its own composition, either by abolishing one of its existing Houses or by adding a new House or other decision-making body.[84] This was indisputable, given that such Parliaments had power to change their own constitutions, and that s. 9 of the Constitution Statute expressly defined 'the legislature' so as to include not only the legislature as originally constituted, but 'any future legislature which may be established' through the powers of amendment conferred by s. 4 of the Statute and by the Constitution Act itself.

In the Supreme Court, Ferguson J. suggested that the same was true even of the United Kingdom Parliament. The principle that Parliament cannot shackle its own legislative power, he said:

> does not mean … that it is beyond the power of the King, with the assent of the Lords and Commons, to pass an Act today which it is impossible for the King, with the assent of the Lords and Commons, to repeal tomorrow. Tomorrow there may be no Lords and Commons, or rather, those two estates may not compose the Parliament of tomorrow. What I conceive to be the true rule is that the sovereign Legislature of today, however constituted, cannot pass a law which the equally sovereign Legislature of tomorrow, however it may be constituted, cannot repeal.[85]

He thought the same reasoning applied to the New South Wales legislature, although he did not clearly apply it to the facts, and towards the end of his judgment, seems to rely on manner and form rather than reconstitution.[86]

In the High Court, Dixon J. also hinted that reconstitution was in principle possible:

> The power [in CLVA, s. 5] to make laws respecting its own constitution enables the legislature to deal with its own nature and composition … Laws which relate to its own constitution … must govern the legislature in the exercise of its powers, including the exercise of its power to repeal those very laws.[87]

He also said that if the British Parliament were to require the assent of the electors before any part of a particular Act could be repealed, and that requirement were later ignored, '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'.[88] But he

[84] See, e.g., *ibid*., 227 (Long Innes J.). [85] *Ibid*., 207; see also 210.
[86] *Ibid*., 210–11. [87] (1931) 44 CLR 394 at 430. [88] *Ibid*., 426.

went on to decide the case on the basis of manner and form, rather than reconstitution.

Notably, even McTiernan J., who powerfully dissented in the High Court, did not reject the reconstitution argument outright. In setting out his conclusions, he said:

> the submission of the Bill to repeal sec. 7A to the electors would be necessary if the electors have been made a part of a Legislature which thereupon became the only authority competent to repeal sec. 7A. In my opinion sec. 7A has not that result.[89]

Whether or not s. 7A did have that result depended on the answers to two contentious questions: (a) whether or not a State Parliament could be constituted differently for different purposes, with the constituent power granted by CLVA, s. 5 being divided accordingly, and (b) whether or not s. 7A was most plausibly interpreted as doing this.

As for (a), the defendants argued that there could be only one State legislature in existence at any one time, so that if the electors were to be made part of the legislature for passing some laws, they had to be made part of it for all purposes.[90] McTiernan J. accepted this argument, on the ground that the many references to 'the legislature' or 'the Parliament' of the State, in the Constitution Statute, the CLVA, and the State and Commonwealth constitutions, were all references to the same body, which exercised general, plenary legislative power within the State.[91] In the Supreme Court, Long Innes J. accepted that the legislature could be constituted differently for different purposes, but insisted that the constituent power had to remain vested in the legislature as constituted for ordinary purposes: the power conferred by s. 4 of the Constitution Statute was necessarily possessed by 'the legislature' as defined by s. 9 of the Statute, and an alternative legislature *ad hoc* did not fall within that definition.[92] If the electors were not made part of the legislature for general purposes, they remained outside the legislature that retained full constituent power, and any requirement that they must assent to constituent legislation would be invalid for disabling that legislature from exercising its power.[93] Long Innes J. thought that the same reasoning applied to the power vested in the 'representative legislature' by CLVA, s. 5, which was defined by CLVA, s. 1 as 'severally … the authority, other than the Imperial Parliament or Her Majesty in Council, competent to make laws for any colony'.[94]

[89] *Ibid*., 446. [90] (1930) 31 SR (NSW) 183 at 195. [91] (1931) 44 CLR 394 at 447–8.
[92] (1930) 31 SR (NSW) 183 at 230. [93] *Ibid*., 231. [94] *Ibid*., 230–2.

The majority in the Supreme Court chose to ignore these powerful arguments. In the High Court, Rich J. simply denied that there was any reason to define 'the legislature' as whatever legislature was competent to legislate on general matters. The legislative body could consist of different elements for the purpose of legislation on different matters, and the constituent power conferred by CLVA, s. 5 could be divided accordingly.[95]

As for (b), the defendants argued that s. 7A had neither the intention nor the effect of making the electors part of the legislature.[96] They were on solid ground here, because s. 7A does not expressly alter the definition of the legislature, and indeed, it uses the term 'the legislature' several times, plainly referring to the legislature as ordinarily constituted.[97] Subsection (3) refers to Bills passing through 'both Houses of the legislature' before being submitted to the electors (who are nowhere described as being part of the legislature), and goes on to state that the referendum is to be held on a day to 'be appointed by the legislature'; sub-s (4) then refers to the vote being taken 'in such manner as the legislature prescribes'. Moreover, as Owen J. pointed out, the word 'manner' in sub-s (1) indicates that the section was intended to lay down the manner for passing legislation.[98] There is no foothold whatsoever within the terms of s. 7A, or in the Parliamentary debates that preceded its enactment, for the argument that it was intended to change the composition of the legislature by including the electors within it. Nor is there any foothold for an argument that the section has this effect by necessary implication. There is no good reason to think that, just because the electors are required to assent to a Bill before it is passed, they have been made part of the legislature.[99] This is because there is nothing nonsensical about requiring that a body external to the legislature must assent to legislation before it can be enacted. Section 128 of the Commonwealth Constitution does not (notwithstanding Rich J.'s apparent suggestion to the contrary)[100] make the electors part of the national Parliament for the purpose of constitutional amendment. Nor do referendum requirements in other jurisdictions have such an effect.

[95] (1931) 44 CLR 394 at 419–20.

[96] (1930) 31 SR (NSW) 183 at 195.

[97] This was recognised by Gavan Duffy J.: (1931) 44 CLR 394 at 412.

[98] (1930) 31 SR (NSW) 183 at 215; see also *ibid*., 219. But at 218–19, His Honour implied that s. 7A could also be regarded as reconstituting the legislature: '[I]t is also a law respecting the constitution of the Legislature; it introduces an element (the vote of the people) into the Constitution itself'.

[99] Long Innes J. is therefore wrong to suggest otherwise, at *ibid*., 228.

[100] (1931) 44 CLR 394 at 420.

The reconstitution argument in this statutory context was plainly fanciful – a contrived rationalisation of a pre-determined conclusion – which is no doubt why, in the High Court and the Privy Council, only Rich J accepted it.[101] Because the argument was not authoritatively endorsed or rejected, it remains to be decided whether or not a State Parliament can alter its own composition by making the electors a constituent part of it for particular purposes only. In other words, issue (a) above remains undecided.[102]

B Manner and form

The second legal justification the plaintiffs offered for the referendum requirement was that it amounted to a 'manner and form' by which laws 'respecting the constitution, powers or procedure of Parliament' had to be passed, and therefore was valid and binding by virtue of the proviso to CLVA, s. 5. This was more plausible than the reconstitution gambit.

The defendants had a powerful argument in response, although to their detriment, they did not distinguish it clearly from a weaker argument. The powerful argument was that, because s. 5 of the CLVA declared that the legislature 'shall have' a 'full power', the proviso had to be construed so as to be consistent with the legislature's continued possession of that power; therefore, the words 'manner and form' could not include a requirement that wholly or partially deprived the legislature of the power.[103] Since s. 7A provided that Parliament could not pass certain laws without the assent of an external body (the electors), it was in substance a law that partially deprived the legislature of the power.[104] Although s. 7A itself expressly purported to prescribe the 'manner' by which the specified laws had to be passed, this was not a manner by which *the legislature* had to exercise *its* power to pass such laws. Instead, it was a manner by which the legislature *together with an external body* had to exercise *their shared* power to pass laws. It was therefore not within the scope of the proviso.

The weaker argument was that, partly for this reason, and also because CLVA, s. 5 used the word 'passed' rather than 'enacted', the proviso was

[101] Note also that the Commonwealth Attorney-General supported the plaintiffs' manner and form argument, but not their reconstitution argument: see 'Case for the Intervenant'.

[102] Gavan Duffy C.J. thought that Parliament might, in principle, be able to alter its composition either for general or for particular purposes, but had not done so here: (1931) 44 CLR 394 at 413.

[103] *Ibid*., 444–5. [104] *Ibid*., 442.

confined to procedures or forms within the legislature itself, and excluded any requirement that had to take place outside it. According to this argument, only if the proviso were construed in this way would it be fully consistent with the legislature retaining its full power intact.

The majority in the Supreme Court failed to come to grips with either argument. Street C.J., with whom James J. concurred, simply asserted that he had reached the contrary conclusion: 'in truth all that sub-section 6 of s. 7A does is to provide a special procedure' for passing laws, which did not 'shackle and control the present Parliament': 'insistence upon the observance of a special form of procedure … is a matter of manner and form'.[105] The only substantive argument he offered in defence of this view was one of policy.[106] Ferguson J. declared that 'the Legislature has full power to alter [s. 7A] by repealing sub-section (6)', although it had to follow the 'manner' prescribed by the sub-section[107] – simply ignoring the apparent inconsistency between the former proposition and the latter. Owen J. reasoned that s. 7A provided the 'manner' by which the laws in question had to be passed, partly because s. 128 of the Commonwealth Constitution describes its referendum requirement as the 'manner' by which constitutional amendments must be passed[108] – seemingly oblivious to the fact that the whole point of s. 128 is to deny the federal Parliament full power to amend the Constitution.[109]

In the High Court, Starke J. was even more deaf to the plaintiff's argument, asserting that '[t]he greater the constituent powers granted to the legislature, the clearer, it seems to me, is its authority to fetter its legislative power, to control and make more rigid its constitution'[110] – as if CLVA, s. 5 were merely a transitory provision, conferring a power that could be used to diminish or even abolish itself.

There was an effective rebuttal of the weaker of the defendants' two arguments. The plaintiffs argued that the historical context in which

[105] (1930) 31 SR (NSW) 183 at 202–3.

[106] See text to n. 133, below.

[107] (1930) 31 SR (NSW) 183 at 211; see also 206–7: 'There is no dispute as to the power of Parliament to pass the repealing Bill; the only question … is as to the stages through which it must pass'.

[108] *Ibid*., 219.

[109] In argument before the High Court, Dixon J. suggested that s. 128 of the Commonwealth Constitution might itself be a law with respect to 'manner and form' which was binding because of CLVA, s. 5: (1931) 44 CLR 394 at 404. But this is clearly untenable, partly because s. 128 governs all constitutional amendments, and not merely those 'respecting the constitution, powers or procedure' of the Commonwealth Parliament. McTiernan J.'s account of s. 128 is clearly preferable: *ibid*., 444.

[110] *Ibid*., 423–4.

CLVA, s. 5 had been enacted showed that a manner and form requirement could prescribe action outside the legislature itself. They referred to a letter of the Law Officers within the then Colonial Office concerning the enactment of the CLVA.[111] This showed that the purpose of the proviso in s. 5 was to ensure that pre-existing requirements for colonial law-making would remain binding, notwithstanding the confirmation that colonial legislatures had 'full power' to alter their own constitutions. These pre-existing requirements included requirements of special majorities, including two-thirds majorities, within the legislature; reservation of Bills for the Queen's personal assent; and the tabling of Bills before both Houses of the Imperial Parliament. The last of these requirements had 'nothing to do with any of the units of the Legislature' – it was a 'form' required to be satisfied in the making of law even though it concerned matters 'happening in regard to units not part of the legislature'.[112] In the High Court, Rich and Dixon J.J. found this point to be decisive.[113] '[T]he law governing the reservation of Bills and the laying of copies before both Houses of the Imperial Parliament were matters prominently in view when s. 5 was framed. It is evident that these matters are included within the proviso', and this ruled out '[a]n interpretation which restricts the application of the words of the proviso to conditions occurring, so to speak, within the representative legislature'.[114]

The problem is that, while this effectively rebuts the weaker of the defendants' two arguments, it simply fails to address the stronger one. There is an obvious qualitative difference between a requirement that a Bill must be laid before an outside body such as the Imperial Parliament, pending the royal assent, and a requirement that it must be positively approved by an outside body such as the electorate. The former requirement does not deprive the legislature itself of the power of enactment: it merely gives members of the Imperial Parliament notice of the Bill. They might seek to persuade Ministers to advise the monarch not to assent to it, or they might propose Imperial legislation to override it, but since the monarch is part of the colonial legislature, and the Imperial Parliament is able to override colonial laws, none of this is inconsistent with the State legislature retaining full power of enactment. The latter requirement, on the other hand, is plainly inconsistent with the legislature retaining its full power of enactment. So the defendants' stronger argument – that even if a manner and form requirement can require some action outside the

[111] (1931) 44 CLR 394 at 407 and 409 respectively.
[112] *Ibid*., 409. [113] *Ibid*., 418–19 (Rich J.), 432 (Dixon J.). [114] *Ibid*., 432 (Dixon J.).

legislature, it cannot deprive the legislature of its full power to legislate – stands unanswered.

The High Court majority and the Privy Council went on to adopt a sweeping, unqualified interpretation of 'manner and form'. Rich J. said that:

> In my opinion the proviso to sec. 5 relates to the entire process of turning a proposed law into a legislative enactment, and was intended to enjoin the fulfilment of *every condition* and compliance with *every requirement* which existing legislation imposed on the process of law-making.[115]

Dixon J. agreed:

> 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.[116]

Starke J. took the same view, quoting Berriedale Keith's statement that '*[a]ny rule whatever* which has been laid down by any legislative authority with regard to the mode of modifying the constitution is a fetter on the freedom of the Dominion Parliament which it cannot break save in the way appointed by the Act imposing the fetter'.[117]

The Privy Council endorsed Rich J.'s definition, and stated that the words of the proviso were 'amply wide enough' to cover a referendum requirement.[118]

The problem with this very broad interpretation is that it enables the proviso to be used to restrict or even extinguish the legislature's constituent power, rather than merely to regulate its exercise. Dixon J., at least, acknowledged that manner and form requirements could qualify or control the legislature's 'full power' to make laws respecting the matters specified by CLVA, s. 5 only to a limited extent: they 'cannot do more than prescribe the mode in which laws respecting these matters must be made'.[119] But if the so-called 'mode' in which such laws must be made can require the assent of a body external to the legislature, then the 'full power' can in effect be taken from the legislature and given to a larger law-making entity of which the legislature is merely a part.

[115] *Ibid*., 419; emphasis added.
[116] *Ibid*., 432–3; emphasis added.
[117] Keith, *Imperial Unity and the Dominions*, pp. 389–90, quoted by Starke J.: (1931) 44 CLR 394 at 424; emphasis added.
[118] (1931) 47 CLR 97 at 106 and 104 respectively.
[119] (1931) 44 CLR 394 at 431.

The defendants objected that if the assent of the electorate, as a body outside the legislature, could be required, then logically, so could the assent of other external bodies such as private associations or corporations, or some other condition making it virtually impossible for laws to be passed. As Ferguson J. recounted the submission, it was urged 'that Parliament might with equal force claim the right to provide that the repealing Bill should be submitted to the Tattersall's Club, or that three years should elapse after its introduction before it should finally become law'.[120]

Ferguson J. dismissed this objection, in a passage appealing to the orthodox defence of legislative sovereignty:

> [U]nder any reading of the constitution it is conceded that the Legislature might do things quite as drastic. It might lawfully abolish one House or Parliament, or possibly both, create a third house, or thirty, extend the franchise to every man and child in the State old enough to hold a pencil, restrict it so that nobody should have a vote or sit in Parliament except young women between fifteen and eighteen, or provide that after the next dissolution there should be no further election for twenty years … All that means is that there is nothing in the constitution forbidding the Legislature to do insane things. One would not expect to find such a provision there. The constitution of every free civilised community is based on the assumption that the body to which it commits the power of making its laws may be trusted to bring to the exercise of that power a reasonable degree of sanity. If at any time that trust should prove to be misplaced, then the State would be in very evil case, and would be hard put to it to find a way of escaping disaster.[121]

This may underestimate the possibility of a Parliament seeking to tie its hands to protect the interests of an external body. A private corporation, entering into an agreement with the government involving the investment of a vast sum of money for the sake of long-term returns, might demand legally binding constraints to prevent the agreement being unilaterally changed either by a future government or by Parliament. Although it would be unwise, it might not be 'insane', for Parliament to seek to meet that demand and enact such constraints.[122] But more importantly, Ferguson J.'s response simply misses the point of the defendants' objection, which is one of logic rather than prophecy. It is not a prediction that Parliament is likely to impose such constraints, but rather, a *reductio*

[120] (1930) 31 SR (NSW) 183 at 202 and 208. [121] *Ibid*., 208–9.

[122] Two Australian cases in which this was subsequently argued to have happened are *Commonwealth Aluminium Corporation Pty. Ltd* v. *Attorney-General (WA)* [1976] Qd R 231, and *West Lakes Ltd* v. *South Australia* (1980) 25 SASR 389.

ad absurdum, which points out that if a referendum requirement is consistent with the 'full power' granted by CLVA, s. 5, then logically, so is a requirement that a private corporation must assent to legislation. If no logical distinction can be drawn between these requirements, then the absurdity of the latter demonstrates the impermissibility of the former.

Street C.J. also dismissed the defendants' objection: '[t]he suggestion of extravagant possibilities does not in my opinion serve any useful purpose', and it was unnecessary to determine how far Parliament could go in providing that laws should be immutable.[123] One might have thought that logical analysis was a useful purpose. In the High Court, the objection was just ignored, even though it was clearly and forcefully argued.[124] The Privy Council declined to consider hypothetical cases, on the ground that it only needed to decide the precise point in issue, and could consider other cases if and when they arose.[125]

Five decades later, King C.J. of the South Australian Supreme Court ventured an answer to the objection:

> When one looks at extra-Parliamentary requirements, the difficulty of treating them as relating to manner and form becomes greater. It is true that Dixon J in *Trethowan's* case … gave 'manner and form' a very wide meaning … *Trethowan's* case … however, concerned a requirement that an important constitutional alteration be approved by the electors at a referendum. Such a requirement, although extra-Parliamentary in character, is easily seen to be a manner and form provision because it is confined to obtaining the direct approval of the people whom the 'representative legislature' represents … 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 lawmaking, but rather amounts to a renunciation pro tanto of the lawmaking power. Such a provision relates to the substance of the lawmaking power, not to the manner or form of its exercise.[126]

What this makes clear is that the defendants and dissenting judges in *Trethowan* were right that, as a general rule, a requirement that an external body must assent to legislation cannot be regarded as a legitimate manner and form requirement, because it partially deprives the legislature of its power. The majority judges' broad interpretation of the proviso

[123] (1930) 31 SR (NSW) 183 at 202.
[124] See the account of Loxton K.C.'s argument in *Sydney Morning Herald*, 21 January 1931, p. 17.
[125] (1931) 47 CLR 97 at 104.
[126] *West Lakes Ltd* v. *South Australia* (1980) 25 SASR 389 at 397–8.

is therefore wrong: it just cannot be the case that 'every requirement', 'every condition', 'any rule whatsoever', and 'all the conditions' to which a State legislature might subject future law-making, amount to binding 'manner and form' requirements.

The majority judges must be regarded as having, in effect, created an exception to this general rule, so as to permit the imposition of referendum requirements. But there was no logical basis in the words of CLVA, s. 5 for this exception: that provision gave full, continuing, constituent power *to the legislature*, and not to the broader 'legislative structure', including the electorate, of which the legislature is merely the apex. Admittedly, the exception is laudable as a matter of political principle, despite its logical deficiency.

C Political principle and legal logic

Lang accused the Australian courts of distorting the law due to political bias.[127] Years later, the Canadian scholar Edward McWhinney criticised the majority judges for engaging in 'a piece of *ad hoc* decision-making … designed to counter the (according to general opinion today) rather incompetent and arrogant administration that happened to hold office in the State of New South Wales at that time'.[128] But these criticisms are too harsh. No doubt the judges were influenced by a desire to protect one of the few institutions (the Upper House) able to check a Premier widely regarded – even within his own Party – as dictatorial and dangerous.[129] But their decision also advanced three broader political principles of undeniable appeal: constitutional stability, direct popular sovereignty and self-determination. A requirement that fundamental constitutional changes must be put to the people serves the first two principles; permitting a State legislature to impose such a requirement, without needing the Imperial Parliament's assistance, serves the third. This is not to say that there are no countervailing principles.[130]

[127] Attributed to Lang by Boyce K.C., Premier Stevens and others, according to *Sydney Morning Herald*, 1 June 1932, p. 11.

[128] E. McWhinney, 'Trethowan's Case Reconsidered' *McGill Law Journal* 2 (1955–56) 32 at 37.

[129] For conflicting views within Labor itself, see G. Freudenberg, *Cause for Power: The Official History of the New South Wales Branch of the Australian Labor Party* (Leichhardt: Pluto Press, 1991), chs. 7 and 8.

[130] McTiernan J. offered a rather feeble response to the invocation of political principle. To the plaintiffs' argument that the State Constitution would be defective if Parliament

The majority judges, in all three courts, appear to have been influenced more by these political principles than by 'strict legalism' and logical analysis.[131] McTiernan J's dissent is superior in technical legal terms, even to Dixon J.'s subtle ruminations. It is of course true that in law, pure logic is often sterile, and must then be guided by underlying principles. But it is doubtful that the principle of direct popular sovereignty can be found within, or underlying, CLVA, s. 5. As for the other two principles, recourse to underlying principles does not provide a legal warrant for rewriting legal provisions that at best give only partial expression to them.

The majority judges seem to have taken a creative, 'statesman-like' approach, remoulding s. 5 for the sake of good government, and quietly brushing legal technicalities under the carpet. Consider, for example, their tendency to assert conclusions while ignoring powerful counter-arguments, as in the case of Rich J.'s uncritical endorsement of the feeble reconstitution argument, and the general refusal to consider 'hypothetical cases'. This is especially true of the Privy Council's cursory and high-handed disposal of the complex issues raised: its published opinion is full of assertions but, as Richard Latham observed, 'hardly amounts to a statement of reasons for judgment at all'.[132] Starke J.'s judgment is even more perfunctory. It does not follow that the majority judges' decision was wrong in a moral or political sense: one of the most fascinating questions in legal theory is the extent to which judges are morally justified in changing the law, for a good cause, while giving the appearance of merely interpreting it.

could not impose a referendum requirement itself, and had to request the Imperial Parliament to do so, he replied:

> Whether such a request would indicate a greater defect in the Constitution than a request for power to enable the Legislature to cut the knot of legislative provisions for two or more referenda, so that it could act as it deemed expedient in an emergency which could not in its judgment permit of the delay involved in taking the referendum or referenda, by which some existing law or new law had been fortified against repeal or amendment, is a speculation which will not decide the issue in this appeal: (1931) 44 CLR 394 at 449.

For a more powerful response, see M.J. Detmold, *The Australian Commonwealth: A Fundamental Analysis of Its Constitution* (Sydney: Law Book Co., 1986), pp. 208 and 212–6. Note also the 'conceptual difficulty' raised by Gummow J. in *McGinty* v. *Western Australia* (1996) 186 CLR 140 at 297, which applies to the events in *Trethowan's* case as described in the text to n. 19, above.

[131] The words in quotation marks are, of course, Dixon's, in O. Dixon, 'Address Upon Taking the Oath of Office as Chief Justice', in *Jesting Pilate, And Other Papers and Addresses* (Woinarski, ed.) (Melbourne: Law Book Co., 1965), 245 at p. 247.

[132] R.T.E. Latham, *The Law and the Commonwealth* (Oxford: Oxford University Press, 1949), p. 566.

Some of the judges openly acknowledged their attraction to basic political principles. While denying that the Court was concerned with the wisdom or expediency of s. 7A, Street C.J. said that:

> Parliament in its wisdom might well think that there were possible changes of so important and so far reaching a character that a special procedure ought to be followed before they could become law, and it might think that in respect of some of such changes the need for hastening slowly was such that the provision for a special manner of procedure should not be liable to be repealed by a simple Act passed in the ordinary way … [A] proposal of so far reaching and so momentous a character as that for the substitution of a unicameral system for the bicameral system … is one which Parliament might not unreasonably consider of such importance that a special form of procedure should be made compulsory … A provision of this kind [is] introduced into the Constitution as a safeguard against hasty changes in the composition of the Legislature …[133]

Rich J. in the High Court said much the same thing.[134] Ferguson J. emphasised self-determination, asking why New South Wales should not have the right, if it chose, to adopt a referendum requirement similar to that in the Commonwealth Constitution.[135] Dixon J.'s disapproval of confining 'a constitutional provision basal in the development of the self-governing Colonies' to 'matters of procedure' may also reflect a concern with self-determination.[136]

Dixon J. avoided any comment on the merits, preferring to couch his reasoning in strictly legal terms. It is impossible to believe, however, that he was not influenced by the desirability of requiring fundamental constitutional changes to be approved by the electors. In 1935, he described the 'discovery' of this means of requiring a referendum to alter a State constitution as possibly 'the most important legal development of the time'. He depicted it as a modern reconciliation and demarcation of the equally fundamental but competing principles of the supremacy of Parliament and the rule of law:

> The law existing for the time being is supreme when it prescribes the conditions which must be fulfilled to make a law. But on the question of what may be done by a law so made, Parliament is supreme over the law.[137]

The problem with this analysis is, as we have seen, that the majority judges' decision to uphold the validity of s. 7A was not consistent with

[133] (1930) 31 SR (NSW) 183 at 203. [134] (1931) 44 CLR 394 at 420–1.
[135] (1930) 31 SR (NSW) 183 at 211. [136] (1931) 44 CLR 394 at 432.
[137] O. Dixon, 'The Law and the Constitution', in *Jesting Pilate, And Other Papers and Addresses* (Woinarski, ed.) (Melbourne: Law Book Co., 1965), 38 at 50.

Parliament remaining 'supreme over the law'. Given this logical flaw in his analysis, which he was too astute not to have discerned, it seems that even Dixon J. delivered a 'quasi-political decision, based on a far-sighted view of ultimate constitutional policy, of the type with which the Supreme Court of the United States in its greatest periods has made us familiar'.[138]

V Aftermath and consequences

The Legislative Council had survived, but was reformed in 1933, by legislation approved by a narrow margin at a referendum held in accordance with s. 7A. Membership of the Council was restricted to 60 members with twelve year terms, to be chosen at a joint sitting of the two Houses of Parliament. Provision was made for deadlocks between the Houses to be capable of resolution by referendum. Lang strenuously opposed this legislation, but even the Federal Labor Party supported it.[139] A.B. Piddington, a legal associate of Lang's, unsuccessfully sought injunctions to prevent the Bills receiving the royal assent, on the ground that s. 7A had not been properly followed.[140] Whether the survival of the Council was an unmixed blessing remained, of course, open to debate. In 1955, one commentator observed that after fourteen years of continuous Labor government, the Council had become 'a haven for retired politicians and Union officials'.[141] It survived a further attempt at abolition in 1960.[142] Since then, partly because of the experience in Queensland, support for Upper Houses on the ground that they are vital to a system of constitutional checks and balances has strengthened.

The Queensland Parliament quickly took advantage of the decision in *Trethowan* to insert a referendum requirement into its Constitution Act. Ironically, the device used in New South Wales to protect the Upper House from abolition was used in Queensland for the opposite purpose.

[138] Latham, *The Law and the Commonwealth*, p. 564 (although not with reference to *Trethowan*).

[139] Clune and Griffith, *Decision and Deliberation*, pp. 324–30; Morrison, 'Dominion Office Correspondence', 338–9.

[140] *Piddington* v. *Attorney-General* (1933) 33 SR (NSW) 317. See also the sequel: *Doyle* v. *Attorney-General* (1933) 33 SR (NSW) 484. The main argument was that by requiring Bills to be 'submitted to' the electors, s. 7A required that copies of the Bills be distributed to them. See Clune and Griffith, *Decision and Deliberation*, pp. 330–2. This was the same Piddington who had been appointed to the High Court by the Hughes Labor government in 1913, but, in the face of fierce criticism from the Bar, resigned before hearing any cases.

[141] McWhinney, 'Trethowan's Case Reconsidered', 41, n. 34.

[142] See *Clayton* v. *Heffron* (1960) 105 CLR 214.

The Upper House had been abolished there in 1922, and in 1934, the new provision inserted into the constitution proscribed its re-establishment absent a referendum.[143] (This supplied an answer to a point that Evatt had raised in the 1920s, when he warned that abolition of the Legislative Council might be futile, because a future Parliament could just as easily re-establish it.)[144] Several other states later adopted referendum requirements, to protect a variety of constitutional provisions.[145]

The legal foundation for these and other law-making requirements changed in 1986. The Australia Act 1986 (UK and Cth) repealed the CLVA with respect to Australia, although s. 6 re-enacted the substance of the manner and form proviso. The intention was undoubtedly, in part, to preserve the effect of the decision in *Trethowan*. Therefore, even if the interpretation given to the words 'manner and form' in that case was legally erroneous, as I have argued, it must now be regarded as having received legislative endorsement by their unqualified re-enactment in s. 6.[146] Consequently, the majority judgments in *Trethowan* remain the foundation for the law on 'manner and form' in Australia.

Professional reaction to the decision was mixed. Commonwealth Attorney-General Sir John Latham rightly described it as 'a landmark in the constitutional history of the Empire'.[147] Berriedale Keith, unsurprisingly, claimed that '[i]t is plain indeed that the meaning of the proviso to the [Colonial Laws Validity] Act of 1865 was exactly to cover such an action as was intended by the Act of 1929, despite the ingenuity with which the contrary view was argued'.[148] But this is extremely dubious, given the traditional British commitment to legislative supremacy and constitutional flexibility, which prevailed at the time the CLVA was enacted, and the purpose of that Act, which was to empower rather than limit colonial legislatures.[149] That is why legal officers in Britain were initially puzzled

[143] Constitution Act Amendment Act 1934 (Qld) s. 3.

[144] Crockett, *Evatt, A Life*, p. 60.

[145] See P. Hanks, P. Keyzer and J. Clarke, *Australian Constitutional Law, Materials and Commentary* (7th edn) (Sydney: LexisNexis Butterworths, 2004), pp. 315–6.

[146] Kirby J. was therefore right to say that: 'It is now too late to correct the judicial decisions that construed the proviso to s. 5 as an authority to fetter the constituent and legislative powers of Australia's State Parliaments': *Attorney-General (WA)* v. *Marquet* (2003) 217 CLR 545 at 609 [194].

[147] Quoted in *Sydney Morning Herald*, 1 June 1932, p. 11.

[148] A.B. Keith, *The Constitutional Law of the British Dominions* (London: Macmillan, 1933), p. 106; repeated in A.B. Keith, *The Dominions as Sovereign States* (London: Macmillan, 1938), p. 169.

[149] Hence Sir Victor Windeyer's observation that the result in *Trethowan's* case would have surprised those whose actions led to its enactment: V. Windeyer, 'Responsible

by the decision. In Treasury, R.R. Sedgwick described the High Court's decision as 'very surprising'.[150] H. Grattan Bushe, a senior officer in the Dominions Office who was intimately involved in the events, observed that:

> I find it difficult to follow the decision. A subordinate Parliament can be bound by a superior Parliament, but how can a subordinate Parliament, acting in matters which are within its sovereignty, bind its successors? It is very curious to see that they have relied upon section 5 of the Colonial Laws Validity Act, (which was meant to enfranchise Colonial Legislatures) as having a restrictive effect.[151]

But the decision in *Trethowan* helped change the traditionalists' ingrained habits of thought. It inspired new theories concerning the doctrine of parliamentary sovereignty and the ability of Parliaments to bind themselves.[152] Dixon J. had agreed with Ferguson J. that even the British Parliament might be able to reconstitute itself for special purposes, or lay down binding requirements as to manner and form.[153] Many judges and scholars have quoted Dixon J.'s dictum that, even in Britain itself, if a referendum requirement were ignored, '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'.[154] This stimulated Richard Latham and Ivor Jennings, in the 1930s, and other academic lawyers subsequently, to think afresh about such issues.[155] They applied the concepts of reconstitution and manner and form to the British Parliament, and other Parliaments not subject to the CLVA. Some asked why, even if a Parliament were 'sovereign' in the sense that it could not limit its substantive law-making power, it should not be able to change its own structure, or the procedure or form by which it had to exercise that power. They could see no good reason why it could not, perhaps especially when, as in the case of the British Parliament, its structure and procedures were determined by common law or custom rather than a

Government – Highlights, Sidelights and Reflections' *Journal of the Royal Australian Historical Society* 42 (1957) 257 at 283–4.

150 Memo, 23 December 1930, DO 35/400 11156/10.

151 Minute, 18 March 1931, DO 35/400 1156/11.

152 P. Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (Oxford: Oxford University Press, 2005), pp. 72, 82 and 87.

153 See Ferguson J.'s dictum at text to n. 85, above.

154 (1931) 44 CLR 394 at 426.

155 Oliver, *The Constitution of Independence*, ch. 4.

superior written law. It is perhaps ironic that *Trethowan* sparked thinking along these lines, given that it was obviously a case in which a Parliament's substantive power *had* been limited. But other scholars went further, and concluded that, since any Parliament's law-making power was conferred and governed by law, there was no reason in principle why it could not use its constituent power to change that law, even if the effect were to limit its own power rather than merely to regulate its exercise. Their view, to use modern terminology, is that a Parliament's constituent power could be 'self-embracing' rather than 'continuing'.[156]

Remarkably, even Evatt quickly came to accept Dixon J.'s view that, to enhance the rule of law, courts should enforce requirements imposed by one Parliament upon law-making by its successors. Indeed, he thought that they should find a way to do so even if s. 5 of the CLVA were inapplicable. '[I]t is of the essence of self-government', he said, 'that there must be power to render similar constitutional safeguards [similar to s. 7A] legally effective. It may be that, [even] without the Colonial Laws Validity Act, provisions such as the Privy Council discussed in *Attorney-General for New South Wales* v. *Trethowan* may be deemed legally effective'.[157] Elsewhere, he recommended that 'once a Dominion is given complete power to determine the form of the Dominion Constitution [i.e., is released from the CLVA] … there should be implied a power to adopt a form of Constitution which is binding. In other words, if it is a 'Constitution' at all, it should, by definition, bind the Legislature for the time being …':[158]

> [L]egal thought seems no longer to debar Parliament itself from setting up a Constitution which, by reason of its very nature as such, is intended to restrict the liberty of the legislative, as well as of all other organs within the appropriate constitutional unit … In such circumstances it would become the duty of the Judiciary to enforce the terms of the Constitution … [Not] all Courts of justice will prefer the power of the existing Legislature to the supremacy of the law. Bacon's dogma will hardly be allowed to stand in the way of modern notions of constitution making and constitution breaking.[159]

'Bacon's dogma' – that 'a supreme and absolute power cannot conclude itself, [and] neither can that which is in nature revocable be made fixed' – had earlier been quoted by the Solicitor-General in explaining

[156] Hart, *The Concept of Law*, ch. 7, s. 4.
[157] H.V. Evatt, 'Constitutional Interpretation in Australia' *University of Toronto Law Journal* 3 (1939) 1 at 20.
[158] Evatt, *The King and His Dominion*, p. 215.
[159] *Ibid*., pp. 309–10.

his opinion that s. 7A was not binding.[160] Evatt had certainly changed his tune.

In *Harris* v. *Minister of Interior* (1952), the concept of reconstitution was invoked by the South African Supreme Court in holding that self-entrenched provisions of the South African Constitution were valid and binding, even though the CLVA was not applicable. Indeed, the concept was expanded to include the idea that procedural requirements as well as structural elements can form part of the definition or constitution of 'Parliament', which Parliament itself can change, although only as so defined.[161] This case, together with *Trethowan*, had such an impact on constitutional theory throughout the Commonwealth that by 1976, a leading commentator plausibly asserted that, even within Britain itself, 'the great majority of modern constitutional lawyers' had come to favour the new 'manner and form' theory.[162]

[160] See text to n. 20, above.

[161] *Harris* v. *Minister of Interior* [1952] (2) SA 428, esp. at 463–4 (Centlivres C.J.). See D.V. Cowen, 'Legislature and Judiciary' *Modern Law Review* 15 (1952) 282 at 287 and 289–90.

[162] G. Winterton, 'The British Grundnorm: Parliamentary Sovereignty Re-examined' *Law Quarterly Review* 92 (1976) 591 at 604.