

# ***Attorney General (WA) v Marquet: Ramifications for the Western Australian Parliament***

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*The High Court's recent decision in Attorney General for Western Australia and Western Australia v Marquet ('Marquet')<sup>1</sup> is the latest in a line of cases that explore manner and form provisions in the Western Australian Constitution.<sup>2</sup> It reverses a trend over the last 25 years in which 'manner and form' limitations in the Western Australian 'constitution' have been interpreted as posing no significant restraint on the State Parliament's power to alter that constitution. In what could be a watershed decision the High Court invested s 13 of the Electoral Distribution Act 1947 (WA) ('EDA') with paramount significance and binding effect. Section 13 requires bills changing the Western Australian system of electoral distribution to be passed by absolute majorities in each House. The question is: How far do the ramifications of Marquet extend to other aspects of the WA Constitution? Further, are there implications for other States?*

## ***The Marquet Litigation***

The central issue in *Marquet* was whether it was unlawful for the Clerk of the Parliaments, Mr Marquet, to present to the WA Governor for assent two bills. The first purported to *repeal* the *EDA*. The other sought to amend the *Constitution Acts Amendment Act 1899* (WA) ('the *CAAA*') and the *Electoral Act 1907* (WA) by

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<sup>1</sup> (2002) 26 WAR 201

<sup>2</sup> Others include *Western Australia v Wilsmore* (HC) ('*Wilsmore HC* ') 149 CLR 79, *Burke v Western Australia* [1982] WAR 248, *Attorney General for Western Australia (ex rel Burke) v Western Australia* [1982] WAR 241, *McGinty v Western Australia* ('*McGinty*') (1996) 186 CLR 140, *Judamia v Western Australia*, ('*Judamia*') High Court unreported, 9 October 1996, <http://www.austlii.edu.au/au/other/hca/transcripts/1996/P40/1.html>, *Yougarla v Western Australia* ('*Yougarla*') (2001) 75 ALJR 1316. See P Johnston 'Freeing the Colonial Shackles: The First Century of Western Australia's Constitution' in *The House on the Hill: A History of the Parliament of Western Australia* (1991, Parliament of Western Australia, Perth, D Black ed.) 312, 316–28.

adding extra members to the Council and providing a new system of redistribution of both Houses. The second bill was intended to mitigate the disparity between metropolitan and other electoral districts in the Legislative Assembly. Neither bill was passed by the Legislative Council by an absolute majority of members. The crucial issue was whether the bills fell within s 13 of the *EDA* that reads:

It shall not be lawful to present to the Governor for Her Majesty's assent any Bill to *amend this Act*, unless the second and third readings of such Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly respectively. (emphasis added)

### ***Background to Marquet's Case***

Since responsible government in 1890, the electoral system for both Houses of Parliament in Western Australia has always been characterized by some degree of malapportionment between the number of voters in different electoral districts or regions.<sup>3</sup> Attempts by the Labor Party to achieve something close to the notional "one-person one-vote" were largely unsuccessful because, until the last general election, the conservative parties controlled the Legislative Council.

### ***Labor's Window of Opportunity***

The 2001 February election produced a unique situation in Western Australia. Labor was returned to government and in the Legislative Council, for the first time in its history, Labor, Green and Democrat members outnumbered conservative members. Voting in the Council on the two electoral bills was 17 for to 16 against. This was one short of an absolute majority. The President of the Council did not vote. The bills' validity featured prominently in parliamentary debate.

To clarify the situation, the Clerk of the Legislative Council commenced an action in the Supreme Court seeking a declaration whether it was lawful for him to present the bills for assent. Shortly before the Supreme Court delivered judgment a new complication emerged. An article in the 'West Australian' newspaper<sup>4</sup> noted that parliament had been prorogued subsequent to the passage of the bills. It was suggested the bills had lapsed. The Clerk,<sup>5</sup> Mr Marquet, stated at the time: 'The bills are dead.' The point was not raised in the Supreme Court, however.

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<sup>3</sup> As originally enacted, the boundaries of the electoral divisions were specified in a schedule to the *Constitution Act 1889* (WA).

<sup>4</sup> 'Hitch stalls one-vote law'; *The West Australian*, 10 October 2003, 4.

<sup>5</sup> *Ibid.* The article attributes the comment to Mr Marquet as Clerk of the Legislative Council.

### ***The Supreme Court's Decision***

On 11 October 2002 the Supreme Court declared by a majority of four to one<sup>6</sup> that it would be unlawful for the Clerk to present the bills for the Governor's assent. The majority judges held that 'amend' in s 13 of the *EDA* should be given an extended meaning of 'amend or repeal'.<sup>7</sup> Accordingly, the bill to repeal the *EDA* had to be passed by an absolute majority.

The Attorney General then applied to the High Court for special leave to appeal. It was contended by those opposing leave that the bills had lapsed on prorogation so there was nothing for the Court to decide. The Court referred the application to the Full Bench of the High Court.

### ***New Electoral Redistribution***

In the meantime, the electoral distribution commissioners commenced a new redistribution of electoral districts based on the pre-amendment version of the *EDA*. A final report was published on 4 August 2003. The Chief Justice of Western Australia is chairman of the commissioners, and the other members are the Electoral Commissioner and the Commonwealth Deputy Statistician.<sup>8</sup>

### ***The High Court's Decision***

The High Court, by majority, dismissed the appeal. Kirby J dissented. The majority held that s 13 of the *EDA* applied to both the repeal bill and the amendment bill. Absolute majorities were required to pass both. Further, the Western Australian Parliament of 2002 was obliged to observe s 13 by force of s 6 of the *Australia Act 1986* (Cth).

On the preliminary issue, all seven justices held that prorogation had not extinguished the bills. The bills in dispute had been 'passed' by both Houses. There were no further proceedings *pending* in either House. Prorogation could, therefore, have no relevant effect. Accordingly, if valid, they could lawfully be presented for the Royal Assent.<sup>9</sup>

The joint judgment noted that, originally, s 73 of the *Constitution Act* had imposed absolute majority requirements on changes to the 'constitution' of both Houses. In 1899, important aspects of the electoral system, including the distribution of

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<sup>6</sup> Malcolm CJ, Anderson J, Steytler and Parker JJ, Wheeler J dissenting in part.

<sup>7</sup> Malcolm CJ 26 WAR 210–15 [24] – [45]; Anderson J 26 WAR 224–5 [87] – [92]; Steytler and Parker JJ 26 WAR 244–51 [170]–[207].

<sup>8</sup> See s 2 of the *EDA*; *Marquet*, n 2, 26WAR 207 [8] (Malcolm CJ).

<sup>9</sup> *Ibid*, at 252 [85].

electoral districts, had been transferred to a separate statute, the *CAAA*.<sup>10</sup> In 1903, a package of three bills had been introduced into the Legislative Assembly. This had provoked a dispute between the Houses. The Legislative Council refused to pass any of the three bills unless a provision requiring absolute majorities for passage of amendments was included in Redistribution of Seats Bill. The Legislative Assembly was reluctant to accept the Legislative Council's amendment. However, the amendment was made. The resulting Act was repealed and replaced by successive Acts, the *EDA* being the latest of these. The absolute majority requirement was retained in each case.<sup>11</sup>

Reviewing the legislative history, the Justices commented:

The history of the legislation reveals that provisions governing electoral redistribution were *always treated as requiring special consideration by the colonial, later State, Parliament*.<sup>12</sup>

Remarking that '*defining electoral boundaries is legally necessary to enable the election of the Parliament*,'<sup>13</sup> they concluded that 'amend' in s 13 *EDA* must be understood as including *changing the provision* which the *Electoral Distribution Act* makes, no matter what legislative steps are taken to achieve that end.<sup>14</sup> They saw the *purpose* of s 13 as ensuring that *no change could be made to electoral districts* except by absolute majority of both Houses.<sup>15</sup>

Addressing the issue of why s 13 *EDA* bound a later parliament to observe the absolute majority requirement, the joint judgment stated that since 1986, the fundamental constitutional norms in Australia were now be traced to *Australian*, not British, sources. They observed that in 1986, the federal Parliament had enacted the *Australia Act 1986* (Cth). That Act now derives its force from the Commonwealth Constitution.<sup>16</sup> It was ultimately s 6 of the *Australia Act* that obliged the State

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<sup>10</sup> Although its title suggests that it should be read with the *Constitution Act 1889*, the 1899 Act was not expressed to form part of the *Constitution Act*; see N Miragliotta, 'Western Australia: A Tale of Two Constitutional Acts' (2003) 32 *UWA Law Review* 154. In *Western Australia v Wilsmore* (1982) 149 CLR 79 the 1899 Act was held to be a separate enactment. Significantly, no provision like s 73 of the *Constitution Act 1889*, requiring passage of specified bills to be passed with absolute majorities, was incorporated into the *CAAA* in 1899.

<sup>11</sup> The *Redistribution of Seats Act 1904* was amended in 1911 by an Act that retained the requirement for absolute majorities. This was true of further repeals and amendments in 1923 and 1929.<sup>11</sup> In 1947, the *EDA* repealed the *Redistribution of Seats Act 1911* and the *Electoral Districts Act 1922*, leading to the present situation.

<sup>12</sup> *Ibid*, at 242 [38]. It should be noted that the *Redistribution of Seats Act 1904* amended the *CAAA* which did not contain any requirement for absolute

<sup>13</sup> 202 ALR, at 244 [51]. This is arguably one of the most crucial elements in the joint judgment. Together with the remainder of [51], the statement effects an elision between the *subject matter* of s 13 of the *EDA* (amendment of the *EDA*) and the process of '*defining*' electorates.

<sup>14</sup> *Ibid*, at 244 [51].

<sup>15</sup> *Ibid*, at 244 [51].

<sup>16</sup> 202 ALR, at 248–9 [67].

Parliament of comply with s 13 *EDA*. This was because electoral distribution was a matter pertaining to the ‘constitution of the [State] parliament’.

### ***The Ramifications of Marquet***

*Marquet*, however, is a decision that is likely to engender further controversy. It raises four major issues in the wider context of its consistency with other decisions of the High Court and with general principles concerning the constitutional relationship between the Commonwealth and the States. Those issues are:

1. The consistency of the majority judgments of *Marquet* with earlier authority concerning WA manner and form provisions, particularly *Wilsmore*.
2. The consequences of *Marquet* for future WA legislation to alter the WA Constitution.<sup>17</sup>
3. The validity of the *Australia Acts* and the basis for entrenching manner and form requirements in State constitutional statutes.
4. The extent to which parliamentary proceedings in Western Australia continue to be regulated in accordance with Westminster notions.

#### **1. Consistency with earlier precedents**

The majority judgment’s emphasis on preventing change to the system by ordinary procedures (simple majorities) flowed from the *purpose* that the majority justices attributed to s 13. According to the joint judgment, to interpret “amend” in its usual sense ‘would defeat the evident purpose behind the introduction of the provision in 1904.’<sup>18</sup> That purpose was to ensure that no change could be made to electoral districts save by absolute majority of both Houses of the WA Parliament.

The problem with investing the 1904 provision with a grand purpose is that its enactment proceeded from a legislative misunderstanding. The joint judgment relied on contemporary parliamentary statements that the 1904 proposed amendment merely replicated the *status quo*. This was mistaken because, by 1904, the topic of electoral distribution was no longer in the *Constitution Act 1889*. It was regulated under the *CAAA 1899*. The High Court held in *Western Australia v Wilsmore*<sup>19</sup> that the 1899 Act was separate from the 1889 Act. Section 73 of the 1889 Act did not operate on alterations to the 1899 Act, which contained no equivalent to s 73. The 1904 Parliament therefore enacted the predecessor of s 13 under the misconception that it was subject to the same constraint as that applicable under s 73 of the

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<sup>17</sup> ‘Constitution’ is here used in its wider, generic sense and not just the *Constitution Act 1889*

<sup>18</sup> 202 ALR, at 244 [52]. Compare Kirby J, *ibid*, at 265 [135].

<sup>19</sup> (1982) 149 CLR 79.

*Constitution Act*. The joint judgment in *Marquet* appears to have been written on the basis of the same mistaken assumption.<sup>20</sup>

This presents two contradictory possibilities. The first is that, if *Wilsmore* is correct, the legislators who passed the predecessor of s 13 of the *EDA* in 1904 misunderstood the existing manner and form requirement when enacting it. The second possibility is that the legislators were correct. If so, *Wilsmore* is wrong. These possibilities make a mockery of the notion of parliamentary intent.<sup>21</sup>

The interpretative approach of the majority in *Marquet* is also arguably inconsistent with that of the High Court in *Clydesdale v Hughes*<sup>22</sup> and *Wilsmore*.<sup>23</sup> In those the High Court did not see the absolute majority requirement in s 73 of the *Constitution Act* as an important constitutional safeguard.<sup>24</sup> The High Court has arguably elevated the importance of absolute majority limitations.

A third arguable inconsistency of *Marquet* with *Wilsmore* concerns the different treatment of the expression ‘this Act’ in s 73 of the *Constitution Act* and s 13 of the *EDA*. In *Wilsmore*, the plaintiff argued that the Court should read the expression ‘this Act’ in an expansive, substantive way so as to embrace constitutive elements of the Houses beyond the remnants in the *Constitution Act* at a particular point of time. The High Court rejected that proposition. In *Marquet*, the majority Justices gave ‘this Act’ in s 13 of the *EDA* an expansive meaning. The absolute majority requirement extended to measures beyond the *EDA*. Change to the *system*, not the provisions of the *EDA*, was the central plank of their judgment.

## 2. The consequences of *Marquet* for future legislation to alter the WA Constitution

Two aspects of *Marquet* bode ominous for future proposals to alter the statutes comprising the Western Australian ‘Constitution’. The conclusion that s 13 of the *EDA* may operate on subject matter outside that Act, if applied to s 73(1) of the *Constitution Act 1889*, would mean that certain amendments to the *CAAA 1899* may

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<sup>20</sup> 202 ALR, at 242 [39]. See note 12 above. The relevant passage in the joint judgment is not entirely lucid. It refers to the definition of boundaries of electoral districts ‘as set out in the 1889 Constitution (as amended to 1904)’ as amenable by change only by the absolute majorities referred to in s 73.

<sup>21</sup> The joint judgment, 202 ALR, at 242 [38]-[39], is silent about whether the *Constitution Acts Amendment Act 1899* mandated absolute majorities in respect of amendments to electoral districts between 1899 and 1904.

<sup>22</sup> (1934) 51 CLR 518.

<sup>23</sup> (1982) 149 CLR 79.

<sup>24</sup> The Court, (1934) 51 CLR at 528, simply stated its conclusion in a single sentence without elaboration

now require absolute majorities.<sup>25</sup> Alterations to the *Electoral Act 1907* and the *Interpretation Act 1982* could also come within the purview of s 73(1).<sup>26</sup>

Proposals to reunite the *Constitution Act 1889* and the *CAAA 1899* into a composite Act are also imperiled by the High Court's stricter approach to manner and form provisions.<sup>27</sup>

In *Attorney General for Western Australia ex rel Burke v Western Australia*<sup>28</sup> the WA Supreme Court held that amendments to s 43 of the *CAAA* concerning the number of ministers did not require compliance with s 73(1) of the *Constitution Act*. That decision now needs reassessment.<sup>29</sup>

Another measure requiring reconsideration would be the Constitution Acts Amendment (Voting Ability in the Houses of Parliament) Bill 2002 (WA). This was intended to amend s 14 of the *CAAA* to permit the President of the Legislative Council a deliberative vote.<sup>30</sup> It may now be caught by s 73(1). The same could be said of any amendment of s 46 of the *CAAA* to provide a means for breaking legislative deadlocks between the Legislative Council and the Legislative Assembly.<sup>31</sup>

A further question agitated by *Marquet* is: will the High Court take a similarly broad approach to s 73(2) of the *Constitution Act*? If it does, s 73(2) could become a formidable restraint on constitutional reform in Western Australia. Changes falling within s 73(2) need the approval of WA voters at a referendum.

Section 73(2) extends beyond direct changes to the specified constitutional topics it covers, such as alteration to the office of Governor. It also applies to amendments that *expressly or impliedly affect in any way*, ss 2, 3, 50, 51, and 73 of the

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<sup>25</sup> In *Western Australia v Wilsmore* (1982) 149 CLR 79, Wilson J, at 101–02, noted that if s 73(1) of the *Constitution Act* applied to the *CAAA*, the *Constitution Acts Amendment Act 1973* (WA) could be invalid. That Act lowered the age for Members of the WA Parliament to 18.

<sup>26</sup> One ironic result is that s 73(1), freed from its restricted application to the *Constitution Act 1889*, would probably apply to the *EDA*, rendering s13 of that Act redundant. Consequently, it might not have been necessary to incorporate s 6 in the *Redistribution of Seats Act 1904* (WA).

<sup>27</sup> See the Commission on Government (WA), Report No 5 (1996) Recommendation 5.1.5 – 2, at 100 and the Report of the Joint Select Committee of the WA Parliament on the Constitution (1991) chaired by the Hon J Kobelke MLA. The proposal is discussed in P Johnston and S Hotop, 'Patches on an Old Garment or New Wineskins for New Wine? Constitutional Reform in Western Australia — Evolution or Revolution?' (1990) 20 *University of Western Australia Law Review* 428.

<sup>28</sup> [1982] WAR 241.

<sup>29</sup> This is especially so given the emphasis that the High Court has placed on the principle of responsible government in *Egan v Willis*. (1998) 195 CLR 424. The High Court there adopted a wide interpretation of the powers of the Legislative Council (NSW) to question Government Ministers.

<sup>30</sup> They may only vote at present in the event of a tied vote in those Houses.

<sup>31</sup> This was recommended by the Western Australian Royal Commission into Parliamentary Deadlocks (1984) conducted by Professor E Edwards

*Constitution Act*. Interpreted broadly, s 73(2) potentially applies to *indirect*, as well as direct, changes to the nominated topics, or to indirect changes to the operation of those enumerated provisions.<sup>32</sup>

### 3. The validity of the *Australia Acts* and the basis for manner and form entrenchment

If the High Court majority's strict interpretive approach in *Marquet* is applied to s 73(2), the validity of the *Australia Acts 1986* (UK and Cth) may be threatened. The majority clearly enunciated that s 51(xxxviii) of the Commonwealth Constitution provides the binding force to s 6 of the *Australia Act 1986* (Cth).<sup>33</sup> A law made under s 51(xxxviii) depends on the Parliaments of each affected State validly requesting the Commonwealth Parliament to enact the relevant measure. The issue concerning WA is: Was the *Australia Act (Request) Act 1985* (WA) invalid because it did not comply with the referendum requirement in s 73(2)(e) of the *Constitution Act*? The argument involves two propositions. First, the *Request Act* was a necessary step for the enactment of the *Australia Acts* (Cth and UK). Second, when passed, the *Australia Acts* indirectly 'affected' the powers of the WA Parliament and the function of the Governor under s 2 of the *Constitution Act*,<sup>34</sup> and the office of Governor under s 50 of the *Constitution Act*.<sup>35</sup> Such matters potentially fall within s 73(2)(e) of the *Constitution Act*.<sup>36</sup>

It is clear that a valid State *Request Act* was a precondition to the operation of s 51(xxxviii) and, in turn, of any Commonwealth Act requesting the United Kingdom Parliament, under s 4 of the *Statute of Westminster 1931* (UK), to pass its version of the *Australia Act*. The invalidity of the *Request Act* would thus deprive the

<sup>32</sup> In *Wilsmore*, Wilson J. 149 CLR, at 97, drew a distinction between a *rule* and the *subject matter upon which the rule operates*. He referred to the instance where the CAAA provides that, to be eligible for election to Parliament, one must be qualified to vote, such qualifications being regulated by the *Electoral Act* (WA).

<sup>33</sup> Another possibility is that the *Australia Act* (Cth) could be supported as an exercise of the power in s 51(xxix) of the Commonwealth Constitution, the external affairs power; see L Zines, *The High Court and the Constitution* 4<sup>th</sup> edn, 1997, Butterworths, Sydney, 303–04. Some members of the High Court in *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351 recognised a wide reach of that power to include repeal UK laws affecting the States. Section 51(xxix) appears to be the basis for the State Elections (One Vote, One Value) Bill 2001 (Cth) aimed at correcting malapportionment in state electoral systems. This is discussed by A Gardner, 'Musings on Marquet: The Distribution of Electoral Districts', paper, Samuel Griffith Society Conference, Perth, March 2004, 8–9.

<sup>34</sup> It is arguable that the *Australia Act(s)* affected the role of the Queen and Governor as constitutive elements of the WA Parliament, as provided in ss 2 and 50 of the *Constitution Act*. Section 2(2) of the *Australia Acts* may also have affected the WA parliament's competence to make laws having extraterritorial effect.

<sup>35</sup> Section 7 of the *Australia Acts* stipulates the Governor shall be the Queen's representative in the State. The legal effect of this is not clear, however.

<sup>36</sup> The issue was raised in the Full Supreme Court in *Yougarla v Western Australia* (2001) (1998) 21 WAR 488 but not decided.

Commonwealth and UK Acts of any efficacy in Western Australia.<sup>37</sup> This would raise further issues about the basis on which State manner and form provisions are binding. Presumably, if s 6 of the *Australia Act* (Cth) were not validly enacted, s 5 of the *Colonial Laws Validity Act 1865* (Imp) would revive. But it may have been validly repealed by the *Australia Act 1986* (UK).<sup>38</sup>

The extent to which these problems apply to the other Australian States must be a matter of conjecture.<sup>39</sup> It is unlikely, however, that all of them are faced with the same dilemma as Western Australia concerning the requirement for a State referendum.<sup>40</sup>

#### 4. The diminished relevance of ‘Westminster’ principles in State matters

In *Marquet*, the joint judgment elevated Australian constitutional sources above residual links to the United Kingdom. The High Court disenchantment with residual Imperial laws continuing to regulate state parliamentary affairs was borne out in their approach to the prorogation issue in *Marquet*. The whole Court indicated that the laws and customs of the Imperial Parliament are not necessarily a sound guide to Australian parliamentary practice.<sup>41</sup>

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<sup>37</sup> The majority opinions in *Marquet* held that s 51(xxxviii) of the Constitution was the basis for enacting the *Australia Act* (Cth).

<sup>38</sup> Although there is symmetry between the fact that the *WA Request Act* was directed to both the Commonwealth and UK parliaments, it is not clear whether the UK *Australia Act* would be affected in the same way if the *Request Act* were invalid.

<sup>39</sup> The answer will depend on the terms of the *Australia Acts* and on each state’s constitutional provisions. Whether the lack of a valid WA request invalidates the *Australia Acts* in their relation to the other states raises a question of severance. Were their *Request Acts* dependent on all States enacting valid requesting legislation?

<sup>40</sup> Kirby J, 202 ALR at 283-284 [206] certainly saw constitutional change by referendum as a prerequisite to any fundamental changes, such as those involved in enacting the *Australia Acts*. His views about the validity of the *Australia Acts* are controversial. It appears that His Honour does not intend to maintain some of his objections about the *Australia Act* (Cth) in future; see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203 [108] where Kirby J accepts the majority view in *Marquet* concerning the validity of that Act. His Honour’s concession would not extend to the objection that the *WA Request Act* is invalid for failure to comply with s 73(2) of the *Constitution Act* (WA).

<sup>41</sup> This could have some relevance to the question, to be discussed below, whether the President of the Legislative Council, under s 14 of the *Constitution Acts Amendment Act 1899* (WA), could have voted on the bill to repeal the *EDA*. The interpretation that the President may not vote, even in matters where absolute majorities are required, is based on the practice relating to the Speaker of the House of Commons.

### *Other issues associated with the electoral redistribution episode*

The litigation concerning the 2001 WA electoral redistribution proposals has put the spotlight on several other aspects of the imbroglio. The following issues have surfaced.

#### **1. Was s 13 *EDA* valid when passed?**

Ironically, there is some doubt whether s 13 of the *EDA* was validly passed in the first place. This is because the Votes and Proceedings of the Legislative Assembly records the Speaker of the Legislative Assembly on 3 December 1947 determining the vote on the second reading of the Electoral Districts Bill 1947 in the following terms:

Mr Speaker, having counted the House, and an absolute majority being present, and there being no dissenting voice, the motion was declared to be carried by an absolute majority.<sup>42</sup>

The Speaker's failure to ascertain the precise number who voted 'yes' might not satisfy a court reviewing further breaches of s 13 that an absolute majority had in fact been obtained.

The matter is complicated by the fact that in *Hansard* the vote is recorded in less detailed terms. There the report is as follows: Mr Speaker: 'Twenty-six votes are needed in favour. I must count the House. I have counted the House and there is an absolute majority.'<sup>43</sup>

If the Votes are taken to represent the state of voting on the 1947 measures the *EDA* itself may be invalid.<sup>44</sup> The same thing may be said of the 1929 Act that preceded the *EDA*.<sup>45</sup>

The point of mentioning these possible lapses is that if litigation over manner and form issues becomes more common courts may scrutinise the parliamentary record more assiduously than in the past, given the importance that *Marquet* attached to strict compliance with the *EDA*. It would be incongruent if courts did not insist that that compliance be verified by *clear evidence* of the actual vote.

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<sup>42</sup> Minutes, Votes and Proceedings of Parliament (1947) 222.

<sup>43</sup> *Parliamentary Debates*, volume 120, Legislative Assembly, 2402.

<sup>44</sup> Whether a court can draw the same inferences may depend on whether *Hansard* or the Votes and Proceedings constitutes the true record. In *Joosee v Deputy Commissioner of Taxation* [2002] VSCA 47 the applicant, relying on the votes recorded in *Hansard*, argued that the Constitution Bill 1975 (Vic) had not been passed in the Legislative Assembly by an absolute majority. Batt JA at [5] rejected that claim, relying on the Votes and Records of the House.

<sup>45</sup> In that instance, the Deputy President used the same formula at the third reading in the Legislative Council of the 1929 Bill as that used by the Speaker on the second reading in the Assembly in 1947.

## 2. Whether the President of the Legislative Council could have voted

The greatest irony about the imbroglio is that the President, consistent with the accepted understanding of s 14 of the *Constitution Acts Amendment Act 1899*,<sup>46</sup> did not exercise a deliberative vote when, perhaps, he could have.

Based on Westminster practice,<sup>47</sup> where the Speaker in the House of Commons is regarded as independent, this provision has been taken to apply universally to special majority requirements as well as ordinary bills.<sup>48</sup> A number of considerations suggest that this is a misinterpretation of s 14.<sup>49</sup>

First, s 14 in terms operates in circumstances where voting is by ‘a majority of *the members present*’, provided that a minimum number of members are in attendance to constitute a quorum. It contemplates the kind of situation relating to *normal* measures and motions. The quorum is calculated expressly to exclude the President. Section 73 of the *Constitution Act* and s 13 of the *EDA*, on the other hand, explicitly require the majority to be determined on the basis of the ‘*whole*’ membership of the House with no reference to excluding the President. There appears to be no reason why the *whole* membership should be read *not* to include the President. Moreover, s 73 effectively works to provide its own quorum.<sup>50</sup>

Further, given that the State’s constitution is predicated on representative democracy,<sup>51</sup> legislative policy supports the proposition that the electors who returned the President should not be disenfranchised on a crucial vote concerning their electorate.

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<sup>46</sup> The presence of at least *one-third of the members* of the Legislative Council, exclusive of the President, shall be necessary to constitute *a quorum* for the dispatch of business; and all questions which shall arise in the Legislative Council shall be decided by a majority of votes of the members present, other than the President, and when the votes are equal the President shall have the casting vote: provided always, that if the whole number of members constituting the Legislative Council shall not be exactly divisible by 3, the quorum shall consist of such whole number as is next greater than one third of the members of the Legislative Council. [Emphasis added]

<sup>47</sup> As discussed above, the High Court joint judgment in *Marquet* suggests the practices of the Westminster Parliament as increasingly irrelevant to the interpretation of State laws relating to parliamentary procedures.

<sup>48</sup> While s 36 of the *Constitution Act* adopts the privileges and powers of the House of Commons unless Parliament legislates otherwise, manner and form limitations on constitutional amendments such as absolute majorities were not part of imperial parliamentary procedure in 1889.

<sup>49</sup> I am indebted to Professor Geoffrey Lindell who first queried whether the assumption behind this orthodox interpretation was correct. Alex Gardner, to whom I mentioned Professor Lindell’s view, has also suggested the traditional view may be misconceived. see A Gardner, ‘*Marquet v Attorney-General of Western Australia: ‘All this may not have been necessary’’* (2003) 5 *Constitutional Law and Policy Review* 78.

<sup>50</sup> Even if all members in the chamber vote in favour there must still be half the membership plus one voting. Regarding the meaning of ‘absolute majority’, see *Samuel Watson v Mam and the Australian Electoral Commission* Fed No 357/95 Cooper J at [17].

<sup>51</sup> *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *McGinty v Western Australia* (1996) 186 CLR 140.

Finally, where the number of members is even<sup>52</sup> s 14 of the CAAA has no work to do in the event of a tie. In normal circumstances<sup>53</sup> the President cannot exercise a casting vote that would materially affect the outcome. With 34 members, as at present, excluding the President means only 33 can vote. The highest possible even vote would be 16–16 which with the President’s casting vote is still less than an absolute majority.

These propositions have not been tested in the courts. Rather, the Government has chosen to pursue a legislative alternative. It introduced a bill in late 2002 to amend s 14 to give the President a deliberative vote in all cases.<sup>54</sup> Being an amendment to the CAAA it was considered that it could be passed by ordinary majorities. That assumption must be questioned in the light of *Marquet*.

### 3. The validity of the current electoral distribution

A final complication exists: Is the 2003 WA electoral distribution invalid because of the constitution of the Electoral Distribution Commission?

There are two possible constitutional objections to the constitution of the Commission. First, the Chief Justice holds office as a Commissioner. This raises the spectre of a *Kable*<sup>55</sup> limitation upon the state parliament’s legislative competence to appoint a serving judge of the Supreme Court. The question raised by *Kable* is: Is the Chief Justice’s tenure of office as an Electoral Commissioner ‘incompatible’<sup>56</sup> with his duties and functions as a member of the Supreme Court? Is the appointment likely, in the public’s eyes, to compromise the independence and integrity of that Court?<sup>57</sup> That problem is especially acute where, as in the present

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<sup>52</sup> It might be objected that when the *Constitution Act* first came into force the number of members in the Council was uneven (15) so that a tie could be broken by an effective casting vote of the President. The answer is that at the time the number of members in the Assembly was double that of the Council so the same problem would have applied to the Speaker.

<sup>53</sup> That is, excluding special cases such as where for example a member dies or an unqualified person votes.

<sup>54</sup> Constitution Acts Amendment (Voting Ability in the Houses of Parliament) Bill 2002 (WA). The amendment would extend beyond the case votes requiring special majorities and apply to ordinary legislation.

<sup>55</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>56</sup> Regarding incompatibility, see G Carney, ‘*Wilson & Kable: The Doctrine of Incompatibility – An Alternative to Separation of Powers?*’ (1997) 13 Queensland University of Technology Law Journal 175 and K Walker, ‘*Persona Designata, Incompatibility and the Separation of Powers*’ (1997) 8 Public Law Review 153.

<sup>57</sup> In brief, the principle in *Kable* is that a State cannot confer a non-judicial function on its Supreme Court or a judge of that court that is incompatible with the capacity of the court or judge to exercise invested federal jurisdiction. See P Johnston and R Hardcastle, ‘State court judges and *Kable*

case, the Chief Justice has judicially reviewed the legislation he is charged to administer.<sup>58</sup> That this could present a problem was apparent to at least one Member of Parliament.<sup>59</sup>

The second complication is the use of the Commonwealth Deputy Statistician as a member.<sup>60</sup> Constitutional difficulties, of the kind considered in *The Queen v Hughes*<sup>61</sup> arise where Commonwealth office holders discharge State executive functions.

## ***Conclusion***

*Marquet* is a reminder of the potential for manner and form challenges to produce wide-ranging controversies that may extend into matters outside the litigation itself. Not only can they embroil the courts in political controversy; they can engender uncertainty about other aspects of State constitutions that have previously been considered settled. *Marquet* also prompts the question: Given the maturity of Australia's form of representative government, what role is there for continuing manner and form restrictions? This is particularly so for a State like Victoria that has recently increased manner and form coverage in its Constitution.<sup>62</sup>

Arguably, it is preferable for legislatures to resolve these controversies themselves, where possible, such as, in the case of WA, by legislating to clarify the President's power to vote on a special majority. Such matters are better left to parliamentary disposition. ▲

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limitations' (2002) 4 Constitutional Law and Policy Review 1. Malcolm CJ, the present chair of the Electoral Distribution Commission, applied *Kable* recently in striking down s 102 of the *Justices Act 1902* (WA); see *Re Grinter; Ex parte Hall* [2004] WASCA 79 (22 April 2004) [37]–[48].

<sup>58</sup> Even if not vulnerable to *Kable*-incompatibility, there are practical reasons why current members of the Supreme Court should not perform executive functions of this kind. The problem would be illustrated if there were a challenge to the present electoral distribution. The Chief Justice could probably have to disqualify himself from sitting.

<sup>59</sup> *Parliamentary Debates*, Legislative Assembly, 11 September 2001, 3564; the former Attorney General, The Hon Cheryl Edwardes MLA, referring to the principle of separation of powers, commented on the fact that the Chief Justice is one of the Electoral Commissioners.

<sup>60</sup> See *Marquet* (WASC) 26 WAR at 207 [8] (Malcolm CJ).

<sup>61</sup> [2000] HCA 22. The problem concerns whether the Commonwealth can consent to one of its officers performing duties under state laws where the subject is not one within s 51 of the Commonwealth Constitution.

<sup>62</sup> *Constitution (Parliamentary Reform) Act 2003* (Vic). Three levels of entrenchment feature in the Act, absolute majorities, three-fifth majorities and referendums. These cover not just parliamentary matters but also entrench the Supreme Court and Executive Government by a referendum requirement under s 18. See C Evans, 'Comment: Entrenching Constitutional Reform in Victoria' (2003) 14 Public Law Review 133, 134–5.