KEEPING THE QUEEN IN QUEENSLAND – HOW EFFECTIVE IS THE ENTRENCHMENT OF THE QUEEN AND GOVERNOR IN THE QUEENSLAND CONSTITUTION?

BY ANNE TWOMEY*

I INTRODUCTION

This year marks the sesqui-centenary of the Queensland Constitution. On 6 June 1859 Letters Patent were issued by Queen Victoria establishing Queensland as a separate colony. On the same day an Imperial Order in Council was made, providing Queensland with a Constitution based upon the New South Wales Constitution. Clause 14 of the Order preserved the application in Queensland of ss 31-3 and 40 of the *Australian Constitutions Act (No 1)* 1842, concerning royal assent, reservation, disallowance and the Governor's instructions. Clause 22 of the Order gave the Queensland legislature the power to amend or repeal the Order in Council and enact a new local Constitution for Queensland, except that it could not amend or repeal clause 14. The provisions of the *Australian Constitutions Act (No 1)* 1842 concerning assent, reservation, disallowance and royal instructions continued to apply to Queensland by paramount force.

The Queensland legislature took up the invitation to enact its own Constitution. It repealed all but clauses 14 and 22 of the Order in Council and enacted the *Constitution Act* 1867 (Qld), which in its preamble recognised that ss 31-3 and 40 of the *Australian Constitutions Act (No 1)* 1842 were preserved and beyond the power of the Queensland legislature. In 1977, fearing that the State might become subordinated to the Commonwealth, either through the delegation of the Queen's powers to the Governor-General or through the repeal of British laws of paramount force concerning vice-regal powers, the Queensland Parliament chose to entrench in its Constitution the role of the Queen in Parliament, the appointment of the Governor, the requirement that the Governor conform to royal instructions and the vice-regal powers concerning royal assent and the reservation of Bills.

Less than ten years later, these provisions had to be altered by the *Australia Acts* 1986 to be consistent with the severance of residual constitutional links with the United Kingdom. Although the Queensland Constitution was thoroughly revised and replaced by the *Constitution of Queensland* 2001, the rump of those 1977 entrenched provisions remains.[1] On their face, these provisions are entrenched and cannot be repealed without a referendum, although this remains the subject of dispute. They also potentially have the significant, but unintended, effect of preventing the Queensland Government from entrenching any other constitutional provisions without holding a referendum to do so. Hence nothing has been entrenched in the Queensland Constitution since 1977.[2]

This article draws on original government documents to address the legal, political and psychological reasons for the enactment of these provisions, their

* Associate Professor, University of Sydney Law School.

1 *Constitution Act* 1867 (Qld), ss 1, 2, 2A, 11A, 11B and 53.

2 Note, however, s 78 of the *Constitution of Queensland* 2001 (and its predecessor, s 56 of the *Constitution Act Amendment Act* 1989) which purports to entrench the existence of local government. The provision is ineffective because it is not doubly entrenched and may be repealed by ordinary legislation.

validity, the effectiveness of their entrenchment and their unintended consequences. It concludes by considering to what extent is the Queensland Government bound by them today.

II BACKGROUND

The Imperial Conferences of 1926 and 1930 accepted that the King was to be advised by the responsible ministers of the self-governing Dominions, including Australia, with respect to matters concerning those Dominions. This meant that the Governor-General ceased to be a representative of the British Government and that the Australian Prime Minister could advise the King on the appointment of the Governor-General or the grant of royal assent to reserved Commonwealth Bills. The Crown had become divisible and there was a separate Crown for the Commonwealth of Australia. The *Statute of Westminster* 1931 gave the Commonwealth Parliament full power to repeal British legislation that had previously applied by paramount force to the Commonwealth and power to enact laws with an extra-territorial effect.

The same concessions were not made with respect to the Australian States.[3] They remained colonial dependencies of the British Crown and it was the King or Queen of the United Kingdom who appointed State Governors, on the advice of British Ministers. The States, unlike the Commonwealth, also remained bound by the *Colonial Laws Validity Act* 1865 so that British laws of paramount force continued to bind them and any State legislation that was repugnant to these laws was 'void and inoperative' to the extent of its repugnancy.[4]

One of the priorities of the Whitlam Government, when it was elected in 1972, was to sever remaining colonial links with the United Kingdom and at the same time to subordinate the States to the Commonwealth. This included terminating appeals from State courts to the Privy Council[5] and bringing the States under the Australian Crown so that Commonwealth Ministers would advise the Queen with respect to State matters.[6] When Queensland and Tasmania petitioned the Queen to refer to the Privy Council, for an advisory opinion, the question of ownership of the seabed adjacent to the States, the Commonwealth argued that its Ministers had the exclusive right to advise the Queen, as it was an Australian matter. British Ministers took the view that they advised the Queen on Australian State matters, but that Commonwealth Ministers also had the right to advise the Queen on the issue, because Commonwealth interests were involved. Both sets of Ministers advised the Queen not to refer the petition to the Privy Council, and she complied.[7] However, the Commonwealth Government continued to argue that the Queen had accepted its advice that it had the *exclusive* right to advise Her Majesty on all Australian matters, including State matters,[8] much to the consternation of the States.[9]

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3 UK, *Parliamentary Debates,* House of Commons, 16 December 1930, col 1037.

4 *Colonial Laws Validity Act* 1865 (Imp), s 2.

5 The *Privy Council (Appeals Abolition) Bill* 1975 (Cth) failed to pass the Senate and became one of the Bills used to justify a double dissolution in 1975. See further: Anne Twomey, *The Chameleon Crown – The Queen and Her Australian Governors* (2006) ch 11.

6 See further: Twomey, ibid ch 8.

7 See further: Twomey, ibid, ch 10.

8 See further: Anne Twomey, 'Constitutional Convention and Constitutional Reality' (2004) 78 *Australian Law Journal* 798. Note that Murphy J attempted to give legal force to the argument that the Commonwealth had the exclusive right to advise the

III THE QUEEN OF QUEENSLAND

Although the British Government resisted pressure from the Commonwealth to change the relationship between the States and the Crown without State agreement, the States felt vulnerable and were uncertain as to how long this resistance could be sustained. The Bjelke-Petersen Government in Queensland, fearful that the British might give way to Commonwealth pressure, devised an elaborate scheme to place opposing pressure on the British Government so that it would not change the *status quo*. First, it enacted the *Appeals and Special Reference Act* 1973 (Qld) which provided for appeals directly from the Supreme Court of Queensland to the Privy Council and for the referral of questions to the Privy Council for advisory opinions. The intention was to supplement and substitute for provisions in the *Judicial Committee Act* 1833 (Imp), in case it was repealed by the Westminster Parliament or was capable of independent repeal by the Commonwealth Parliament.[10]

The Bjelke-Petersen Government then initiated the process[11] for seeking an advisory opinion from the Privy Council on the question of whether the Queensland Parliament had the power to enact a law giving Her Majesty the royal style and title of Queen of Queensland and the question of the effect of the *Royal Style and Titles Act* 1973 (Cth) on the relationship between the Queen and Queensland.[12] Many have regarded this action as a folly designed to gain prestige by making Her Majesty the 'Queen of Queensland'.[13] In fact the motives were more sophisticated.

The Queensland Government had received legal advice that it was extremely unlikely that the Queen would refer these questions to the Privy Council for advice or that any such advice would support the power of the Queensland Parliament to enact a law concerning the Queen's royal style and titles. However, this was not the real purpose of the proceedings. The intention was to give the British Government an excuse to do nothing if pressed by the Whitlam Government to change the manner in which the Queen was advised on State matters.[14] The Queensland Agent-General had stressed to the Queensland Government that the Foreign Office would be very wary of questions that were *sub judice* and would advise the Palace to take

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Queen on Australian State matters through his judgment in *Commonwealth v Queensland* (1975) 134 CLR 298, 335.

9 Telex by Sir Wallace Rae, Qld Agent-General, to Keith Spann, Qld Premier's Dept, 9 November 1976, outlining Professor O'Connell's continuing concern about these arguments and the potential for them to be given general acceptance in the future: Queensland State Archives ('QSA') 1043/537918.

10 The *Privy Council (Appeals Abolition) Bill* 1975 (Cth) purported to rely not only on requested British legislation to terminate Privy Council appeals, but also upon the Commonwealth's own legislative power under s 2 of the *Statute of Westminster* 1931 (Imp).

11 The process involved proceedings before the Supreme Court of Queensland to obtain a certificate to have the matter presented as a petition to the Queen for reference to the Judicial Committee of the Privy Council for an advisory opinion.

12 For the full list of questions see: Twomey, see above n 5, 150-1.

13 See, e.g., Professor Colin Howard, who remarked that the 'aim was to single out Queensland from the other States by converting itself into a minor monarchy' and that the 'whole episode bore as much resemblance to a genuine problem as a peanut does to an aeroplane': Colin Howard, *The Constitution, Power and Politics* (1980) 119. Colin Hughes has also described the episode as 'bizarre': Colin Hughes, *The Government of Queensland* (1980) 192.

14 Summary of Professor D P O'Connell's advice, Queensland Cabinet Submission No 18177: QSA 1043/1/185 Part 1.

no action to implement any changes while the constitutional effect of the change to the Queen's royal style and titles was the subject of litigation.[15]

This strategy would have failed, however, if the petition were promptly rejected by the Queen and there was no additional litigation to render the issue *sub judice.* Hence the Queensland Government needed to provoke the Commonwealth Government to challenge the constitutional validity of its reference procedure, in order to drag out the status of the subject as *sub judice* until the Whitlam Government lost office. The Commonwealth Government duly fell into this trap, challenging the validity of the *Appeals and Special Reference Act.* The Queensland Government sent its petition to the British Foreign Secretary with a covering letter noting the legal challenge and seeking confirmation that Her Majesty would feel it inappropriate to make a decision on the petition until the litigation was finalised.[16] The British Government leapt upon the Queensland Governor's suggestion and decided not to present the petition to the Queen until the litigation was resolved.[17]

As with the seabed petitions, the Commonwealth Government argued that its Ministers were the only ones who could advise the Queen on 'Australian' matters, including State matters. The British Government again rejected this argument, confirming that the Queen acted as Queen of the United Kingdom when dealing with State matters, such as the appointment of State Governors.[18]

The High Court handed down its judgment in *Commonwealth v Queensland*[19] on 10 October 1975. The Court held that ss 3 and 4 of the Queensland Act were invalid because they purported to confer power on the Privy Council to decide *inter se* questions, such as those concerning the extent of Commonwealth legislative power. This was contrary to Chapter III of the Commonwealth Constitution which only permitted appeals to the Privy Council on *inter se* matters if the High Court had granted a certificate.

An alternative argument, that the State law was repugnant to British laws concerning appeals to the Privy Council because it replicated and supplemented them, was rejected by the High Court. Gibbs J acknowledged that the Judicial Committee of the Privy Council had previously exercised powers conferred upon it by colonial legislatures in addition to its existing powers.[20] However, Jacobs and McTiernan JJ observed that the Queensland legislature had no power to legislate upon advice to the Queen by her Privy Council on any question whatever.[21]

Although the Queensland Government lost the litigation, it had won the tactical war by keeping the matter *sub judice* until a month before the fall of the Whitlam Government. By doing so it had given an additional excuse to the British Government not to change the status of the States with respect to the Crown on the basis of unilateral Commonwealth advice.

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15 Telegram by Mr Seeney, Qld Agent-General, to Mr Spann, Qld Premier's Department, 30 May 1974: QSA 1043/1/185 Part 1.

16 Despatch from Sir C Hannah, Qld Governor, to the UK Foreign Secretary, 29 November 1973: UK Public Records Office ('PRO') FCO 24/1895.

17 Letter by the UK Foreign Secretary to Sir C Hannah, 18 December 1974: PRO FCO 24/1895.

18 Record of meeting at the Foreign and Commonwealth Office ('FCO'), 18-19 November 1974 between officials of the Commonwealth and UK Governments: PRO FCO 24/1933.

19 (1975) 134 CLR 298.

20 Ibid 312 (Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed).

21 Ibid 324.

IV THE ROLE OF THE BRITISH GOVERNMENT IN THE APPOINTMENT AND REMOVAL OF STATE GOVERNORS

Even after the dismissal of the Whitlam Government in November 1975, the Bjelke-Petersen Government remained suspicious of the intentions of the Commonwealth Government with regard to the Queen and the States. This suspicion was exacerbated by actions of the British Labour Government concerning the extension of the appointment of the Queensland Governor, Sir Colin Hannah. Sir Colin had embroiled himself in controversy in October 1975 by making comments about the 'fumbling ineptitude' of the Whitlam Government.[22] The Queensland Opposition Leader petitioned the Queen for Hannah's removal. The Premier, Joh Bjelke-Petersen, responded by stating that he had such confidence in Sir Colin that he was recommending to the Queen that she extend Sir Colin's term for another three years from when his term was supposed to end in March 1977. The letter to the Queen formally seeking the extension was sent on the unpropitious date of 11 November 1975.

The British Government seriously considered advising the Queen to dismiss Hannah but after the constitutional turmoil caused by Sir John Kerr's dismissal of the Whitlam Government, it decided instead to issue a 'rebuke' to Sir Colin and refuse the extension of his term of office.[23]

Until this point Bjelke-Petersen had believed that it was he who advised the Queen on the appointment, removal and extension of term of the State Governor. He had told the State Parliament on 28 October 1975 that 'appointments to the position of Governor of Queensland are made by Her Majesty on the recommendation of the Government of Queensland.'[24] He had assumed that the role of the British Foreign Secretary was merely that of a 'channel of communication' to the Queen. In January 1976 he discovered that the British Government exercised real power in advising the Queen on State matters and that a British Labour Government could reject his recommendations.

In December 1976 the British Government's refusal to permit the extension of Sir Colin's term of office was leaked to the media. The British Government assumed that it was leaked by Bjelke-Petersen for political reasons.[25] When asked in the Commonwealth Parliament about the resulting controversy, the Prime Minister, Malcolm Fraser, replied that if the States wished to communicate to the Queen through the Commonwealth Government rather than the British Government, he would be only too happy to assist.[26] In the Westminster Parliament, the Foreign Secretary explained that British Ministers remained responsible for advising the Queen on Australian State matters but noted that if Australians wished to change this position, the British Government would not stand in their way.[27]

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22 A transcript of his speech is contained in: UK Government files ('UKG') FWA 1/7/75 Part B.

23 Despatch by the Foreign Secretary, Mr Callaghan, to Sir C Hannah, 16 January 1976: UKG FWA 030/1/76 Part A.

24 Queensland, *Parliamentary Debates,* 28 October 1975, p 1520.

25 Memorandum from Mr Dudgeon, FCO, to the UK High Commission in Canberra, 9 December 1976: UKG FWA 012/548/2/76 Part B.

26 Commonwealth, *Parliamentary Debates,* House of Representatives, 7 December 1976, p 3372.

27 UK, *Parliamentary Debates,* House of Commons, 21 December 1976, cols 118-9.

V PROPOSALS TO ENTRENCH THE QUEEN IN THE QUEENSLAND CONSTITUTION

These experiences left the Queensland Government mistrustful of the intentions of both the British and Commonwealth Governments. The Queensland *Constitution Act* 1867 did not deal with the establishment of the office of the Governor or the Executive Council, as these were addressed in the Letters Patent 1925. Nor did the Queensland *Constitution Act* deal with instructions to the Governor or the reservation of State Bills and disallowance of State laws. These matters were dealt with in the *Australian Constitutions Act (No 1)* 1842 (Imp), which applied to the States by paramount force and had been excluded from the original grant of power to the Queensland Parliament. The Queensland Government was concerned that these matters could be changed without its consent under a number of different scenarios.

> 1. The Commonwealth Government could advise the Queen, pursuant to s 2 of the Commonwealth Constitution, to assign her powers and functions with respect to the States to the Governor-General.
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> 2. The Commonwealth Government could persuade the British Government and the Queen to amend the State Letters Patent so that State Governors would be appointed in future by the Governor-General. The Westminster Parliament might also be persuaded to repeal or amend the *Australian Constitutions Act (No 1)* 1842, so that instructions to State Governors could be given by the Governor-General.[28]
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> 3. The Commonwealth Parliament could enact legislation which purported to repeal the application of the *Australian Constitutions Act (No 1)* 1842 to the States, relying on the power given to it by s 2 of the *Statute of Westminster* to amend or repeal Imperial laws.[29]
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> 4. The High Court could take the view that Australia, being an independent sovereign nation, was no longer subject to Imperial legislation and that British Ministers no longer had the right to advise the Queen on State matters. Such a view had been expressed by Murphy J[30] and there was concern in Queensland that in a generation a majority of the High Court might accept such a proposition.[31]

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[28] Queensland, *Parliamentary Debates,* 30 November 1976, p 1945 (Mr Bjelke-Petersen); and p 1952 (Mr Lickiss).

[29] The Queensland Government did not accept that the Commonwealth Parliament had the power to do so, but could not be certain as to how the High Court might decide in the future: Qld, *Parliamentary Debates,* 30 November 1976, p 1945 (Mr Bjelke-Petersen). The High Court later upheld the validity of Commonwealth legislation repealing Imperial laws that applied to the States by paramount force in *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351.

[30] *Bistricic v Rokov* (1976) 135 CLR 552, 567. See also his later comments in: *Robinson v Western Australian Museum* (1978) 138 CLR 283, 343-4; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 236-9; *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 383-4.

[31] Telex by Sir Wallace Rae to Keith Spann, 9 November 1976, summarising the views of D P O'Connell, J Finnis and Sir A Bennett: QSA 1043/537918.

The Queensland Government was concerned that once State Governors were made subordinate to the Governor-General, Commonwealth Ministers could exercise powers over the States, such as advising the Governor-General to instruct a State Governor to refuse assent to a State law or to dismiss a State Government. The federal balance of power between the Commonwealth and the States would be destroyed and the States would become puppets of the Commonwealth Government.

This fear was exacerbated in September 1976 by the WA Labor Conference resolving that if elected a Labor Government would decline to appoint a new Governor and would do away with the office of Governor altogether. The Queensland Government feared that the Labor Party in Queensland might take the same approach, if elected, or collude with the Commonwealth Government to terminate the role of the Governor. It therefore acquired the further aim of entrenching the role of the Governor in the Queensland Constitution against change by a future Queensland Labor Government.

The Queensland Government sought advice from Professor D P O'Connell of Oxford University. O'Connell advised that the entrenchment of the Governor in the State Constitution may not be able to withstand contrary Commonwealth or British legislation, but that it might have a psychological effect, particularly on the British Government. He stated:

> If, as part of entrenchment, a referendum would be required, the need to consult the people of the State would be a democratic reinforcement of the idea that changes should not be made by executive action alone; it might dissuade people from accepting the Commonwealth argument about the duty of the Crown to act upon Commonwealth advice. Secondly, entrenchment would prevent subversion of the office of Governor by the State itself.[32]

O'Connell argued that although the State could not enact a law that was repugnant to ss 31-3 and s 40 of the *Australian Constitutions Act (No 1)* 1842, because that Act applied by paramount force to the States, it could still enact legislation 'parallel' to those provisions (*i.e*. legislation which replicated their terms or their substance), which entrenched them as part of the State Constitution. O'Connell referred to the fact that the High Court in *Commonwealth v Queensland* had not struck down the State legislation on Privy Council appeals on the ground of repugnancy.[33] However, a close reading of that case shows that the reasoning was based upon historical precedents that concerned the extension of the jurisdiction of the Judicial Committee of the Privy Council.[34] It did not establish a general principle that State laws could validly replicate provisions of British laws of paramount force without giving rise to a risk of repugnancy.

There was a further advantage in enacting parallel legislation. The Queensland Government anticipated that the Commonwealth would argue that it had the legislative power under s 2 of the *Statute of Westminster* to repeal British laws of paramount force that applied to the States. The States had always argued that s 9 of the *Statute of Westminster* denied this expansion of Commonwealth legislative power with respect to 'any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia'. However, Queensland was concerned that the Commonwealth would argue that matters concerning the Governor and his or her

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32 Opinion by D P O'Connell, October 1976: QSA 1043/537918.

33 Ibid.

34 *Commonwealth v Queensland* (1975) 134 CLR 298, 312 (Gibbs J, with whom Barwick CJ, Stephen and Mason JJ agreed).

powers and functions were outside State legislative power, as exemplified by the fact that they were governed by British laws of paramount force and letters patent. If the State were to exert legislative power with respect to the Governor, even by enacting legislation that was parallel to the British legislation, it would activate the protection of s 9 of the *Statute of Westminster* and prevent Commonwealth repeal of the British law.[35]

O'Connell queried, however, whether the Queensland Parliament did have the legislative power to alter the office of Governor, the mode of the Governor's appointment or the issue of the Governor's instructions, even if such a law was not repugnant to a British law of paramount force.[36] Intuitively, he thought it did not, although he had difficulty putting his finger on the reason, other than to point to the overriding position of the Crown and the argument that its attributes are beyond the power of the Queensland Parliament. He considered, for example, that neither Commonwealth nor State Parliaments would have the legislative power to alter the law of succession to the throne.[37]

Nonetheless, O'Connell thought that the Queensland legislature did have power to legislate with respect to some aspects of the office of Governor, such as the Governor's salary and functions including the power to summon and prorogue the Parliament. But he was very wary of the idea of legislating concerning the machinery for appointing the Governor or the source of advice to the Queen. He thought that such matters should not be included in any Bill because they were too politically sensitive and it was doubtful as to whether they were within the Queensland Parliament's legislative power. He concluded:

> It would clearly be desirable to bind the Queen to the appointment of the Governor on the basis of advice of the State Premier, so as to keep the Commonwealth out of it, but we should settle for the lesser goal of ensuring that the person appointed cannot be directed by the Commonwealth.[38]

Sir Arnold Bennett QC, who was also advising the Queensland Government, agreed that the Queensland Parliament had no power to direct the Queen on the appointment of the Governor or the sources of advice upon which she might rely. He concluded that any Bill must move away from an attempt to lay down the Queen's duties with respect to the appointment of her representative. He said:

> Any such attempt smacks of a desire to detract from the predominance of the sovereign and to deal with Her power, as though she were a creature of legislation (as is the House of Representatives) whereas in fact she is an institution (a corporation sole) predating the Queensland Constitution and existing beyond and independent of it.[39]

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35 Queensland, *Parliamentary Debates,* 30 November 1976, p 1946 (Mr Bjelke-Petersen); and p 1952 (Mr Lickiss).

36 Cf, the joint opinion by Mr Michael McHugh QC and Mr Bryson to the NSW Government, dated 25 May 1979, that in the absence of repugnancy to British laws of paramount force, a State law concerning the appointment of the Governor would be within the legislative power of the State Parliament. The opinion is discussed in: Twomey see above n 5, 177-8.

37 O'Connell, see above n 32

38 Ibid

39 Memorandum of advice by Sir Arnold Bennett QC, 25 November 1976: QSA 1043/537918.

O'Connell and Bennett were correct in their assessment that such a move would be politically sensitive and might jeopardise the entire Bill. When the New South Wales Government later proposed the enactment of legislation requiring the Queen to act on the advice of the Premier when appointing the State Governor, the British Government objected that it would be unconstitutional. The British Foreign Secretary, Lord Carrington, stated that he had advised the Queen that he 'did not consider that the New South Wales Parliament could, of its own accord, constitutionally legislate in this way'. Lord Carrington informed the New South Wales Governor that it would be his duty to advise the Queen to refuse assent to such legislation, whatever its merits might be.[40]

O'Connell preferred the more subtle approach of freezing convention by recording it in a recital to the proposed Bill. He thought that this would reduce the possibility of a challenge to the Bill but still have the psychological effect of discouraging any change in the convention without the State's consent.[41]

For O'Connell, the most difficult question was how to entrench these proposed provisions in a manner that was both valid and effective. Section 5 of the *Colonial Laws Validity Act* 1865 permitted the entrenchment of laws by the imposition of a manner and form requirement, but this was only effective if the amending or repealing law was one with respect to the 'constitution, powers and procedure' of the legislature. The question was whether the office of Governor could be categorised as falling within the legislature for these purposes. Isaacs J had argued in *Taylor v Attorney-General (Qld)* that the power granted by s 5 of the *Colonial Laws Validity Act* to alter the constitution of the legislature did not include the power to remove the Crown from the legislature.[42] O'Connell doubted whether this was correct and thought that some of the Governor's functions, such as the grant of royal assent, were legislative in nature, bringing the Governor into the definition of legislature.[43] He was more sceptical, however, about whether there was any other effective source of entrenchment beyond the *Colonial Laws Validity Act,* concluding that the *Ranasinghe* principle[44] would be unlikely to be applied by the High Court.[45]

Sir Arnold Bennett also advised on this point. He agreed that it could not be taken for granted that the phrase 'constitution, powers or procedure of the legislature' would cover the Queen as part of the legislature, given the comments of Isaacs J in *Taylor*. Nonetheless, he stated that he leaned to the view that the Crown was a part of the legislature and that entrenchment was worth a try as it 'would be a further obstacle in the way of rabid republicanism'.[46] He also considered that if it was beyond the power of the Queensland Parliament to legislate with respect to the Crown and the office of the Governor because of their fundamental constitutional nature, then it would be beyond the power of the Commonwealth Parliament as well.[47]

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40 Despatch by Lord Carrington to Sir Roden Cutler, NSW Governor, 19 November 1979: UKG FPA 012/1/79, discussed in: Twomey, see above n 5, 182-3.

41 O'Connell see above n 32. See also Memorandum of advice by Sir Arnold Bennett QC, 1 November 1976: QSA 1043/537918.

42 (1917) 23 CLR 457, 474.

43 O'Connell, see above n 32.

44 This is the principle that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law': *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197.

45 O'Connell, see above n 32.

46 Bennett, see above n 41 and Memorandum of advice, 6 August 1976.

47 Ibid.

VI THE *CONSTITUTION ACT AMENDMENT BILL* 1977

The *Constitution Act Amendment Bill,* therefore, had a number of aims in heading off potential threats from different sources, being the United Kingdom, the Commonwealth and a future State Government of a different political persuasion. It dealt with these threats on a number of levels, imposing legal, political and psychological impediments to change.

The recitals sought to freeze constitutional convention by stating that the Queen acts with regard to State matters on the advice of British Ministers given, where 'consistent with constitutional practice', after consultation with the Queensland Premier and no other person.

An express provision was included requiring that the Bill be reserved, just to make sure that it was given assent by the Queen personally and not sent back to the Governor for assent. The intention was to increase pressure on the British Government to maintain existing arrangements by giving them the Queen's personal imprimatur.

The key provision in the Bill was the insertion of s 2A in the *Constitution Act* 1867. It made the Queen a constituent part of the Parliament so that any future law changing her role would be a law respecting the 'constitution' of the legislature for the purposes of s 5 of the *Colonial Laws Validity Act* and therefore have to meet the manner and form requirement of approval at a referendum. Sub-section 2A(2) also replicated part of s 31 of the *Australian Constitutions Act (No 1)* 1842 by providing that every Bill passed by the Legislative Assembly shall be presented to the Governor for assent by or in the name of the Queen.

The Bill attempted to draw the Governor into the constitutional entrenchment attracted by the Queen's role as part of the Parliament. It did so by inserting s 11A in the *Constitution Act,* which stated that the Governor was the Queen's representative in Queensland and that the Governor's office could not be abolished or altered without a referendum. It also provided that the Governor was appointed under the royal sign manual (the Queen's signature) and the signet (a seal applied under the authority of the British Foreign Secretary). The intention was to prevent the Governor being appointed under a Commonwealth instrument or seal.[48]

Section 11B was inserted to ensure that the Governor could only be instructed by the Queen or through British Ministers. It substantially replicated s 40 of the *Australian Constitutions Act (No 1)* 1842, in an attempt to preserve it locally even if it were repealed in the United Kingdom or deemed no longer to apply to the States.[49]

Sub-section 14(2) was also added to make it clear that Ministers held their offices 'at the pleasure of the Governor' who could appoint or dismiss them. In doing so, although the Governor was subject to royal instructions under s 11B, s 14(2) stated that the Governor 'shall not be subject to direction by any person whatsoever nor be limited as to his sources of advice.' The intention was threefold: (a) to preserve the reserve power to dismiss Ministers; (b) to prevent the Governor-General from instructing the Governor to dismiss a State Government; and (c) to ensure that in a constitutional crisis the Governor was entitled to seek advice from others, such as judges.

Sections 1, 2, 2A, 11A, 11B and 14 were all purportedly entrenched by s 53, which was itself entrenched. It required the approval by a referendum of any Bill that expressly or impliedly in any way affected those sections. Entrenchment was

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48 O'Connell, see above n 32 and Opinion 5 November 1976.

49 Ibid.

intended: (a) to defend the provisions against amendment or repeal by a future State Government; (b) to reinforce the application of the *Melbourne Corporation* principle to any Commonwealth legislation that sought to interfere with fundamental aspects of State Constitutions;[50] and (c) to provide a psychological impediment to British interference. Whether it was possible to entrench the Crown and the office of the Governor remained a matter of debate amongst Queensland's constitutional advisers, but all thought it was worth a try.[51]

VII THE BRITISH GOVERNMENT'S REACTION TO THE RESERVED BILL

The *Constitution Act Amendment Bill* passed the Queensland Legislative Assembly on 8 December 1976 and was reserved by the Governor for the signification of Her Majesty's pleasure.

As it was the Queen of the United Kingdom who dealt with Australian State matters, rather than the Queen of Australia, Her Majesty was advised on whether to give assent or not by her responsible British Ministers. This meant that the Bill was closely examined by British civil servants. They raised a number of concerns about the Bill. In particular, they were worried about the recitals which referred to the Queen being advised by a British Secretary of State, after consultation, where consistent with constitutional practice, with the Queensland Premier and no other person.[52]

British officials concluded that the recital did not prevent the Secretary of State from consulting his colleagues and did not involve any requirement that the Secretary of State follow the view of any person consulted.[53] As a matter of practice, the only Australian the Secretary of State consulted on such matters was the Premier, so they concluded that the recital accurately reflected existing practice[54] and in any case had no legal force. The grant of royal assent was therefore recommended.

VIII THE GRANT OF ROYAL ASSENT BY COUNSELLORS OF STATE

When the Queen is absent from the United Kingdom, Counsellors of State fulfil her functions within the United Kingdom. This is done pursuant to the *Regency Act* 1937 (UK). It was unclear at the time the *Regency Act* was enacted, whether it was intended to apply to the Dominions. By that time the *Statute of Westminster* 1931 had been passed, but it had not been adopted by Australia, so the requirement for a declaration that Australia had requested and consented to it did not formally apply.[55] The application of the *Regency Act* to the Dominions was raised during its passage

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50 Bennett, see above n 41.

51 See the summary of the opinions of O'Connell, Bennett and Finnis in: Telex by Sir Wallace Rae to Keith Spann, 9 November 1976: QSA 1043/537918. See also: Explanatory Memorandum, *Constitution Act Amendment Bill* 1976 (Qld).

52 Memorandum by Mr Hime, FCO, to Mr Berman, Legal Adviser, FCO, 17 December 1976: UKG FWA 012/548/2/76 Prt B.

53 Memoranda by Messrs Gardiner and Rushford, Legal Advisers, FCO, 7 February 1977: UKG FWA 012/548/4/77.

54 Memorandum by Mr Gardiner to Mr Rushford, Legal Adviser, FCO, 7 February 1977: UKG FWA 012/548/4/77.

55 Note that the year before, a formal Australian request and consent was obtained prior to the enactment of *His Majesty's Declaration of Abdication Act* 1936 (UK) and recorded in the preamble to that Act.

through the Westminster Parliament. The British Government took the position that it was up to each Dominion to decide whether the *Regency Act* bound it or whether it should enact its own legislation on the subject.[56]

The Counsellors of State comprise the spouse of the monarch and the next four adult persons in the line of succession to the throne. In 1953, the *Regency Act* was amended to include the Queen Mother, for she would otherwise have lost her position as a Counsellor of State as she was no longer the spouse of the reigning monarch. By this time Australia had adopted the *Statute of Westminster,* so the 1953 amendment clearly did not extend to Australia at the Commonwealth level.

The consequence of the British Government's ambivalent approach to the issue and the different times that the *Regency Act* was enacted and amended, is continuing uncertainty as to its application to the Australian States. Bogdanor has contended that neither a Regent nor a Council of State has any power in relation to the government of any other jurisdictions where the monarch is also head of state. He observed that it 'is for the other Commonwealth countries to make such provision for the minority or incapacity of the sovereign as they think suitable'.[57] On the other hand, the NSW Law Reform Commission concluded that the *Regency Act* 1937 applied by paramount force to the States, as well as applying to the Commonwealth.[58]

In practice, the British Government regarded Counsellors of State as being confined to British and colonial matters, while the monarch continued to perform duties with respect to the Dominions while travelling overseas. In 1945, for example, the British Prime Minister's Office advised the Lord Chancellor that it was established practice for Counsellors of State to deal only with United Kingdom business and for the King to continue to deal with the business of the Dominions, regardless of whether he was in Ottawa or Cape Town.[59]

In 1954 and 1959, when the Queen was travelling on royal tours, the States were told that any Bills they reserved for her assent would have to await her return to the United Kingdom, unless a Privy Council meeting could be held during her trip in another country.[60] The view that Counsellors of State could not act in any way in relation to Commonwealth countries other than the United Kingdom was reinforced again in 1969 in a letter from the Queen's Private Secretary to the Foreign Office, and accepted as ongoing practice in 1985.[61]

It was therefore curious that when the *Constitution Act Amendment Bill* 1977 (Qld) was reserved, assent was actually given by the Queen Mother and Princess Anne as Counsellors of State on 9 March 1977, while the Queen was visiting Australia. It appears to have simply been an oversight, as no consideration was given to whether such action was valid.

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56 UK, *Parliamentary Debates,* House of Commons, 2 February 1937, col 1452; and 4 February 1937, col 1853.

57 Vernon Bogdanor, *The Monarchy and the Constitution* (1995) 49-50.

58 NSW Law Reform Commission, *Working Paper on Legislative Powers* (1972) para 167.

59 Letter from UK Prime Minister's Office, to the Hon Sir A Napier, Office of the Lord Chancellor, 17 October 1945: PRO: LCO 2/3372.

60 UK, Commonwealth Relations Office, 'Australian States: Royal Assent to Reserved Bills', 1954; Memorandum by Sir C Dixon, Parliamentary Counsel, to Sir R Hone, FCO, 9 July 1959; and Commonwealth Relations Office, 'Counsellors of State', October 1959: PRO DO 35/5071.

61 Draft Memorandum by the Private Secretary to the Foreign Secretary, to Mr R Fellows, Buckingham Palace, December 1985: UKG FPA 012/1/85 Part H.

Even if the *Regency Act* 1937 applied to the Commonwealth and the States (which in itself is doubtful) on the ground that it was enacted before the *Statute of Westminster* came into force, the Queen Mother, in that capacity, was only permitted to take up such a role by the *Regency Act* 1953 (UK), which clearly did not apply to the Commonwealth of Australia. Accordingly, it would not have been legally valid for the Queen Mother to act as a Counsellor of State in fulfilling the Queen's functions as Queen of Australia.

Did the *Regency Act* 1953 apply to the States? The High Court, in *Bistricic v Rokov* concluded that a 1958 British Act that amended the *Merchant Shipping Act* 1894 did not apply to the States because it was not expressed to do so and that no necessary intendment to so apply the Act could be discerned.[62] Hence the *Merchant Shipping Act* took a different form in the United Kingdom to that which applied in the Australian States. The same argument could be made in relation to the *Regency Act* 1953 (UK) which does not expressly apply to the States and does not appear to be intended to do so.

At the time that the *Constitution Act Amendment Act* 1977 (Qld) was enacted, ss 31-3 of the *Australian Constitutions Act (No 1)* 1842 still applied. They provided that the Governor could reserve a Bill 'for the Signification of Her Majesty's Pleasure thereon'. While it is possible that these provisions were impliedly amended by the *Regency Act* 1937 (UK), so that a Council of State could substitute for Her Majesty in signifying her pleasure, on the authority of *Bistricic v Rokov* it would appear that the *Regency Act* 1953 (UK) would not have had this effect with respect to the application of the law in Queensland.

This leads to the rather bizarre and highly ironic possibility that the grant of royal assent by Counsellors of State to this Queensland Bill concerning royal assent was valid pursuant to British law and would be recognised as valid by British courts, but would not be valid under Queensland law or be recognised as such by the courts of Queensland.

What is the consequence of a Bill being given assent by the wrong person? Section 4 of the *Colonial Laws Validity Act* 1865 was enacted to make it clear that if the Governor assented to a Bill that ought to have been reserved in accordance with royal instructions, then the grant of assent was still effective and the Bill became a valid law. If, however, the requirement for reservation was legislative, then assent by the Governor in breach of the law was regarded as a nullity.

For example, in 1942 the States passed legislation to refer certain matters to the Commonwealth Parliament for the duration of the war and a period of five years afterwards.[63] The Governors of New South Wales, South Australia and Queensland gave royal assent to the Bills, whereas the Victorian Governor reserved it for royal assent. The British Government took the view that all the Bills had to be reserved and that those given assent by the Governors of New South Wales, South Australia and Queensland were invalid.[64] The grant of royal assent by the State Governors in these cases was treated as a nullity, so that the Bills could then be reserved for the King's assent or assent could be given by the Governor pursuant to instructions given by the King.[65] If the same approach were taken with respect to the *Constitution Act Amendment Act* 1977, it would remain a Bill that had not received

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62 *Bistricic v Rokov* (1976) 135 CLR 552. See also: *Ukley v Ukley* [1977] VR 121.

63 See, for example, the *Commonwealth Powers Bill* 1942 (NSW).

64 Memorandum by Mr C W Dixon and Mr Roberts-Wray: PRO: DO 34/1120/G621/2-11.

65 Memorandum by Mr C W Dixon, 16 June 1943: PRO: DO 34/1120/G621/2-11.

assent and could presumably be given assent by the Governor today, on the basis that the reservation of Bills was terminated by the *Australia Acts* 1986.[66]

Given the inconvenience and legal chaos that could well ensue from such a finding, not to mention the lack of legal precedent and the technical nature of such an argument, it is unlikely that it would be adopted by a court. It is likely that a court, if faced with the flaws in the grant of assent to the *Constitution Act Amendment Bill,* would take a pragmatic approach and find that it nonetheless became a law when assent was given, even if it were given by the wrong persons.[67]

IX THE VALIDITY OF THE 'PARALLEL' PROVISIONS

As noted above, s 2A(2) re-enacted part of s 31 of the *Australian Constitutions Act (No 1)* 1842, and s 11B(1) re-enacted the effect of s 40 of that Act. Sections 31 and 40 both applied by paramount force to Queensland and the Queensland legislature had no power to enact laws that were repugnant to them. The Queensland Government argued that the enactment of these new provisions as 'parallel' laws was not repugnant to British laws of paramount force.

Although the Queensland provisions were not directly inconsistent with ss 31 and 40 of the *Australian Constitutions Act (No 1)* 1842, it is arguable that the British legislation intended to 'cover the field' with respect to the reservation of Bills and obedience to royal instructions. If this were the case, then ss 2A(2) and 11B(1) (and the consequential reference in s 14(2) to the Governor's duty under s 11B) would have been void and inoperative for repugnancy.[68]

Whether or not the 'cover the field' test applies to repugnancy, as opposed to s 109 inconsistency, remains uncertain.[69] On the one hand, one could argue that clauses 14 and 22 of the Order in Council of 6 June 1859, which first conferred a Constitution on Queensland, gave the Queensland legislature full power to enact its own Constitution and repeal the provisions of the Order in Council *except* for those clauses continuing the application of ss 31-3 and 40 of the *Australian Constitutions Act (No 1)* 1842. It therefore evinced a clear intention to cover the field and to exclude from the Queensland legislature the power to enact legislation on the subject.[70]

On the other hand, s 2 of the *Colonial Laws Validity Act* only rendered laws void and inoperative to the extent of the repugnancy, 'but not otherwise'. Higgins J in *Union Steamship Co of New Zealand Ltd v Commonwealth* considered that s 2

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66 Note the complicating factor that the *Australia Acts* 1986 formally amended ss 11A, 11B and 14 even though they might never have been laws.

67 For example, the *de facto* officer doctrine or some kind of analogous reasoning might be applied. See: E Campbell, 'De Facto Officers' (1994) 2 *Australian Journal of Administrative Law* 5.

68 *Sharples v Arnison* [2002] 2 Qd R 444, [22]-[23] (McPherson JA).

69 Alex Castles, 'The Paramount Force of Commonwealth Legislation Since the Statute of Westminster' (1962) 35 *Australian Law Journal* 402; and *Yougarla v Western Australia* (2001) 207 CLR 344, [17] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

70 The conferral of power on the Queensland legislature by s 5 of the *Colonial Laws Validity Act* to 'make laws respecting the constitution, powers and procedure' of the legislature, may have impliedly amended or repealed clause 14 of the Order in Council, to the extent that laws concerning assent and reservation would be regarded as laws respecting the powers or procedures of the legislature.

conveyed 'a grant of validity to the Acts of the legislature even where they deal with matters dealt with by a British Act extending to the colony; for the colonial Act is to be valid except to the extent of any actual repugnancy or direct collision between the two sets of provisions.'[71]

If ss 2A(2) and 11B(1) were deemed inoperative on the ground of repugnancy at the time they were enacted, they might have been effectively revived in their operation by s 9A of the *Acts Interpretation Act* 1954 (Qld) which gives provisions the same effect and validity that they would otherwise have had if the *Australia Acts* had been in force at the time of their enactment.[72] If valid and effective, this provision would restore the operation of ss 2A(2) and 11B(1).[73]

X THE EFFECTIVENESS OF THE ENTRENCHMENT IN THE *CONSTITUTION ACT AMENDMENT ACT* 1977

Assuming, for present purposes, that the *Constitution Act Amendment Act* 1977 is valid, were all the provisions that it purported to entrench, effectively entrenched? At the time it was being drafted, the Queensland Government's constitutional advisers had doubts about the effectiveness of the entrenchment provision and differed in their views as to how likely it would be to withstand legal scrutiny. The primary problem was that s 5 of the *Colonial Laws Validity Act* and its replacement, s 6 of the *Australia Acts,* only supported the imposition of manner and form conditions on laws 'respecting the constitution, powers or procedure' of the Parliament. A law establishing a republic which removed the Queen as a constituent part of the Parliament of Queensland would certainly be a law respecting the 'constitution' of the legislature and a law removing the requirement for the Governor to give assent to a Bill for it to become a law, may also be a law with respect to the 'powers' or 'procedure' of the Parliament. However, it is more doubtful that a law concerning the use of the Royal Sign Manual and Signet in appointing the Governor or a law altering a power of the Governor that did not concern the legislature, would be a law with respect to the constitution of the Parliament.

When the *Australia Acts* were being negotiated, the Queensland Government realised that it would have to amend ss 11A and 11B of the *Constitution Act* 1867 (including a consequential amendment to s 14) to remove references to British Ministers and British seals, such as the Signet. The Queensland Government was reluctant to hold a referendum to remove these provisions, due to the expense, delay and the possibility that it might fail.[74] It therefore requested that the amendments be made directly by the *Australia Act* 1986 (UK).

The Queensland Government argued that the *Australia Act* 1986 (Cth), which relied on s 51(xxxviii) of the Constitution, could not be used to amend these entrenched provisions of State Constitutions.[75] This was because s 51(xxxviii) only

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71 (1925) 36 CLR 130, 155-6.

72 Note that any limitation on the legislative power of the Queensland Parliament derived from clause 14 and 22 of the Order in Council of 6 June 1859 would have been removed by s 2 of the *Australia Acts* 1986. Note also that s 13 of the *Australia Acts* 1986 repealed most of s 11B anyway.

73 See the discussion of the validity and effectiveness of such provisions in Anne Twomey, *The Constitution of New South Wales* (2004) 288-91.

74 Telex by Queensland Solicitor-General to other Solicitors-General, 5 May 1983 (NSW Government files).

75 Letter by Queensland Solicitor-General to other Solicitors-General, 22 February 1984: QSA 1158/575807.

extended to the exercise of a power 'which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom…' At that time the States had the legislative power to amend their own Constitutions, so s 51(xxxviii) would not support Commonwealth legislation amending State Constitutions. Although Dr Finnis was confident of the correctness of this conclusion, he was concerned that the High Court might accept the argument that in 1901 only the United Kingdom Parliament had the power to amend *entrenched* State constitutional provisions 'regardless of manner and form requirements'. He therefore proposed that the State constitutional amendments only be inserted in the United Kingdom Bill.[76]

It was later decided that both the United Kingdom and the Australian versions of the *Australia Acts* 1986 should be identical in their substance and provision numbering, to ensure a seamless operation. The Queensland and Western Australian Governments agreed to this, on the basis that the inclusion of the State constitutional amendment provisions in the Commonwealth Act was beyond the Commonwealth Parliament's legislative power. The somewhat Machiavellian view was taken that it would be 'a very shrewd way of emphasising that at least in part, the 51(38) Bill was beyond power.'[77]

If, however, the entrenchment of ss 11A, 11B and 14 of the *Constitution Act* 1867 was at least partially ineffective because a State law that amended them in the same way as the *Australia Acts* would not have been regarded as a law respecting the constitution, powers or procedures of the Parliament, it would mean that the Queensland Parliament could have made the equivalent amendments itself by ordinary legislation. If this is the case, then it is even clearer that s 51(xxxviii) of the Commonwealth Constitution did not confer upon the Commonwealth Parliament the power to enact s 13 of the *Australia Act* 1986 (Cth), because at the time of federation, the State could have enacted such a law without the need to comply with manner and form requirements.[78]

Indeed, the Queensland Government later contended that s 14 of the *Constitution Act* 1867 was not effectively entrenched. The *Constitution Act Amendment Act* 1977 purported to entrench the whole of s 14, not just s 14(2) which it had inserted in the *Constitution Act* 1867. Sub-section 14(1) included a requirement that all appointments to public offices[79] be made by the Governor in Council, apart from Ministers, whose appointments were to be made by the Governor alone. As a law with respect to the appointment of public servants was not likely to be characterised as one respecting the constitution, powers or procedure of the Parliament, it was not effectively entrenched by s 6 of the *Australia Acts*. The question, then, was whether there was any other effective source of entrenchment. The conclusion reached by the Solicitor-General, the Crown Solicitor, Finnis and the Electoral and Administrative Review Commission ('EARC') was that there was not and that s 14(1) of the

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[76] Letter by Dr J Finnis to Mr Schubert, Qld Premier's Dept, 2 February 1984: QSA 1158/575807.

[77] Letter by the WA Solicitor-General to the Qld Solicitor-General, 20 January 1984: QSA 1158/575807.

[78] This argument is, of course, subject to the argument that the *Australian Constitutions Act (No 1)* 1842 did not 'cover the field' in a manner that rendered parallel legislation void and inoperative for repugnancy.

[79] There was a proviso that excluded minor appointments.

Constitution Act 1867 could be repealed without compliance with any manner and form condition.[80]

Section 146 of the *Public Service Act* 1996 was accordingly enacted. It repealed s 14(1) of the *Constitution Act* and amended the doubly entrenched s 53 of the *Constitution Act* by removing reference to the entirety of s 14. This approach might be termed 'courageous', rather than cautious, for two reasons. First, there was, at the time, a significant body of work supporting the possible existence of other grounds for the effective entrenchment of constitutional provisions, including the 'reconstitution' theory, the *Ranasinghe* principle and theories concerning the operation of s 106 of the Constitution.[81] The High Court's decision in *Attorney-General (WA) v Marquet* has since given some comfort to the Queensland position, as the Court took a dismissive view of alternative forms of entrenchment other than s 6 of the *Australia Acts,* although it still did not completely rule them out.[82]

Secondly, while a law repealing s 14(1) is unlikely to be regarded as a law respecting the constitution, powers or procedure of the Parliament, a more difficult question arises as to whether a law amending the entrenching provision in s 53 of the Constitution, by excluding from it the entirety of s 14, would be a law with respect to the 'power' of the Parliament or its 'constitution' given the significant parliamentary role held by Ministers. Section 14(2) was intended to preserve the reserve power of the Governor to dismiss ministers and to prevent the Governor being directed in the exercise of this power by others.[83] If the office of Governor is effectively entrenched and protected from alteration by s 11A of the *Constitution Act,* then it is at least as arguable that s 14(2) concerning the Governor's powers was just as effectively entrenched and that a law purporting to remove this entrenchment itself breaches the manner and form requirements of s 53 of the *Constitution Act.*[84]

The stakes were high in deciding to include s 146 in the *Public Service Act* 1996. If s 146 breaches a manner and form requirement, then the entire Act would also be of no force or effect.[85] As its validity has not been challenged, the issue remains untested.

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80 See: EARC, *Report on the Review of the Elections Act 1983-1991 and Related Matters,* December 1991, Vol 2, Appendix D; EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, paras 4.7, 4.26, 4.27 and 6.196 and Public Submission No 20, Appendix 1 (Crown Solicitor) and Appendix 2, (Professor John Finnis).

81 See, e.g.: George Winterton, 'Can the Commonwealth Parliament Enact "Manner and Form" legislation' (1980) 11 *Federal Law Review* 167; Jeffrey Goldsworthy, 'Manner and Form in the Australian States' (1987) 16 *Melbourne University Law Review* 403; and Gerard Carney, 'An Overview of Manner and Form in Australia' (1989) 5 *Queensland University of Technology Law and Justice Journal* 69.

82 (2003) 217 CLR 545, [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ). Their Honours considered that s 6 of the *Australia Acts* leaves 'no room for the operation of some other principle, at the very least in the field in which s 6 operates'. The question then arises as to the breadth of this field.

83 Note that a version of s 14(2) now appears as s 34 of the *Constitution of Queensland* 2001, but it is not entrenched.

84 The alternative argument, that neither s 14(2) nor s 11A is effectively entrenched, is also arguable. It is the Queen who is the constituent part of Parliament. A law that alters the office of her representative or his or her powers (except perhaps powers that are regarded as parliamentary in nature) would not appear to amount to a law respecting the constitution, powers or procedure of the Parliament.

85 See further, Twomey, see above n 73; and Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006) 197.

XI THE UNINTENDED CONSEQUENCES OF THE ENTRENCHMENT OF S 2

In addition to the provisions that it added to the *Constitution Act* 1867, the *Constitution Act Amendment Act* 1977 also purported to entrench the existing ss 1 and 2 of the *Constitution Act* 1867. Section 1 simply states that there shall be a Legislative Assembly. Section 2 confers legislative power on Her Majesty, with the advice and consent of the Legislative Assembly, 'to make laws for the peace welfare and good government' of Queensland in 'all cases whatsoever'. The problem with entrenching this provision is that any future law which purports to entrench provisions by requiring the approval of the people in a referendum as a condition of making a law may well be in breach of s 2 of the *Constitution Act* 1867.[86] Hence any future entrenching law, being a law respecting the constitution, powers or procedure of the Parliament, would have the effect of impliedly amending or repealing s 2 of the *Constitution Act* 1867, and would therefore have to comply with the prescribed manner and form, being approval by the electors in a referendum.[87] In other words, a referendum is required in Queensland to entrench anything else in the Queensland Constitution.

It has long been argued that any exercise of the power to entrench a law should, on policy grounds, comply with the same manner and form as it proposes to impose with respect to future laws.[88] EARC recommended in 1993 that 'without the prior approval of the people by referendum there should be no further entrenchment of any part of the Queensland Constitution.' [89] The Queensland Constitutional Convention and the Queensland Constitutional Review Commission took the same view.[90] Although EARC recognised the legal argument that the entrenchment of s 2 of the *Constitution Act* 1867 might have already achieved this result,[91] the later bodies focused on the policy argument.

It appears that the Queensland Government did not realise the potential consequences of the entrenchment of s 2 at the time the *Constitution Act Amendment Act* 1977 (Qld) was enacted. The Queensland Solicitor-General later referred to these consequences as 'a possibly unwitting result' of the 1977 constitutional

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86 Note the contrary argument, by Finnis, that an entrenching measure in a Bill would not amend or affect s 2 of the *Constitution Act* 1867. Rather it would be likely to be interpreted as merely regulating the exercise of s 2: EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, Public Submission No 20, p 21.

87 Suri Ratnapala, *Australian Constitutional Law – Foundations and Theory* (2nd ed, 2006) 350.

88 See, e.g., *McGinty v Western Australia* (1996) 186 CLR 140, 297 (Gummow J) and *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, [216] (Kirby J).

89 EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, para 4.110. See also: Queensland Parliamentary Committee for Electoral and Administrative Review, *Report on Consolidation and Review of the Queensland Constitution,* (November 1994) para 136.

90 Queensland Constitutional Convention, Gladstone, June 1999, Communiqué, Theme 1, para 1.3; and Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that relate to the Queensland Constitution* (February 2000), Rec 12.2.

91 EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, paras 4.104-4.109. The Commission stated that it was unable to determine an authoritative answer to this legal question.

amendments.[92] When it dawned on the Queensland Government that this was an impediment to future entrenchment, it sought agreement from the other States to rectify the problem by using the *Australia Act* 1986 (UK) to delete from s 53 of the *Constitution Act* 1867 the entrenchment of s 2 of that Act.[93] However, the other States regarded this as a Queensland problem that was unrelated to the residual links project and were unwilling to support such an amendment.[94] Accordingly, this amendment was not made and the problem remains. The Queensland Parliament therefore did not attempt to entrench new provisions in the *Constitution of Queensland* 2001, despite recommendations that it do so.[95]

XII CONCLUSION

To what extent is the Queensland Parliament bound by ss 1, 2, 2A, 11A, 11B and 53 of the *Constitution Act* 1867 (Qld) today? Was it being too cautious in leaving them untouched when the *Constitution of Queensland* 2001 was enacted?

It is arguable that some or all of these purportedly entrenched provisions were invalidly made or ineffectively entrenched. It may be the case that there was a defect in the grant of royal assent to the *Constitution Act Amendment Act* 1977, so that it never became a law, but it is more likely that a court would adopt a pragmatic approach and find grounds for its validity. There is also a technical argument that parts of ss 2A and 11B which replicated British laws of paramount force were void for repugnancy, but this argument no longer has much relevance given the amendments made to s 11B by s 13 of the *Australia Acts* and the application of s 9A of the *Acts Interpretation Act* 1954 (Qld).

The most relevant question is the effectiveness of the entrenchment of these provisions. If s 6 of the *Australia Acts* 1986 is the only source of effective entrenchment, then ss 1, 2 and 2A would appear to be effectively entrenched, as laws amending or repealing them would most likely be laws respecting the constitution, powers or procedure of the Parliament. The status of ss 11A and 11B is far more doubtful, as the office of Governor and the procedure for the Governor's appointment appear to be a step removed from the constitution of the Parliament.[96] As for whether there are other sources of power for the effective entrenchment of provisions such as s 14 of the *Constitution Act,* this remains unlikely, but still uncertain.[97]

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92 Letter by Qld Solicitor-General to other Solicitors-General, 17 January 1984: QSA 1158/575807.

93 Letters by Qld Solicitor-General to other Solicitors-General, 17 January 1984 and 22 February 1984: QSA 1158/575807.

94 Letter by Acting Qld Solicitor-General to Mr Schubert, Qld Premier's Dept, 20 June 1984: QSA 1158/575807.

95 EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, para 4.91; Queensland Constitutional Convention, Gladstone, June 1999, Communiqué, Theme 1, para 1.3 and Queensland Constitutional Review Commission, *Report on the Possible Reform of and Changes to the Acts and Laws that relate to the Queensland Constitution* (February 2000), Rec 12.1.

96 The effectiveness of the entrenchment of s 11A has been described elsewhere as 'questionable': Suri Ratnapala and ors, *Australian Constitutional Law – Commentary and Cases* (2007) 806.

97 Note the purported entrenchment in s 18 of the *Constitution Act* 1975 (Vic) of provisions concerning the executive, the courts, the DPP, the Auditor-General and access to information.

Given the uncertainty that abounds on the topic and the lack of clear authority, the caution of the Queensland Government in leaving most of the entrenched provisions of the *Constitution Act* 1867 untouched was probably wise. The difficulties caused by these entrenched provisions and their potential unintended consequences serve as a salient warning for all governments. Freezing provisions by way of entrenchment may appear most beneficial at the time that it is done, but what one entrenches in haste to achieve a particular political aim is often regretted at leisure.