Chapter Nine
Musings on *Marquet* [1]

Alex Gardner[2]

The distribution of public wealth and political power

The current Western Australian government is on a mission to bring natural resources and political votes to the city. Like most States of Australia, the economic, social and political development of Western Australia since Federation has seen an increasing concentration of wealth and power in the metropolitan capital city, and a corresponding decline in relative wealth and power of the rural areas. Certain non-metropolitan areas have done relatively well, but they tend to be the ones frequented by metropolitan people for retirement and recreational purposes – the ultimate expression of their wealth and power. As a "boy from the bush", this concerns me.

The reasons for this apparently inexorable trend are no doubt many and varied, and are no doubt repeated in numerous countries around the world. My purpose here is not to outline or analyse them. Some people may contest my assertion, or contend with my concern. Nevertheless, I want to assume some validity for my assertion and concern as the basis for exploring a constitutional aspect to this problem of metropolitan distension and rural demise.

My argument is that a contributing factor to this problem in Australia is the colonial legacy of centralized State government control of public wealth to be reaped from the exploitation of our natural resources. I perceive that a disproportionate share of public natural resources revenues is expended on the development of the metropolitan centres, rather than being expended to develop the public wealth of the people in regions where the resources are worked.

I hasten to add that I have no economic analysis of Treasury papers to support this perception. Such a study would be valuable, but I do not really need it for the purposes of this paper because I believe my perception is generally accepted outside the metropolitan areas. The aggrandisement of the metropolitan centres naturally attracts people looking for economic and social opportunities and this, in turn, generates the understandable demand for a redistribution of political power in our society; in legal terms, the redistribution of electoral districts from rural to metropolitan areas to overcome problems of unequal electoral districts.

Let me illustrate my hypothesis by reference to three articles that appeared in *The West Australian* newspaper in early 2003, a significant year for the consideration of the distribution of natural resources and electoral districts in this State. Two articles concerning the supply of water to Perth appeared in the paper on 29 March, 2003. The first (p. 53) noted the declining levels of groundwater on the Gnangara Mound, a major source of supply on the northern outskirts of Perth. The second article, *Hands off our water: councils* (p. 17) described opposition from local councils in the south-west of Western Australia to the Government's investigation of a proposal to take 45 gigalitres of groundwater from the south-west to Perth.

The clear concern of the local councils is that the growth of Perth will be at the expense of environment and economic opportunities in the south-west. Despite the promises reported in the article that water will not be taken beyond the sustainable yield, any honest water resources manager will tell you that the environment needs every drop of water that it can get. There should be no doubt that any inter-basin transfers of water adversely impact the environment and economy of the area from which the resource is taken. Even so, there is a general sense of foreboding in the south-west that the weight of political influence in the

Perth metropolitan area will create irresistible pressure on the State government to authorise this very large inter-basin transfer of public natural resources. In my opinion, the State government should not authorise the metropolitan community to take the south-west water without paying at least the economic rent (a royalty) to the relevant local government authorities in the south-west. The current law does not make any provision for such payments to occur.

The third article, *Secret plan aims for vote overhaul* (1 March, 2003), revealed that political discussions were being held between the government and the Greens to consider a suite of constitutional reforms dear to the Greens, in return for the Greens support of the Government's electoral reforms aimed at removing electoral vote weighting and transferring country seats to the city. The article noted that four of the five Green Members of the Legislative Council (MLCs) were believed to support the Government's one vote / one value reforms. As I understand it, the fifth Green MLC, who represents the Agricultural region, originally supported the Government's reforms but has since changed her mind. The most significant point from this article is that the electoral reforms were the subject of political bargaining that could have seen them adopted if a mutually satisfactory basis could have been found.

By November, 2003 the State government had lost the court battle over the validity of its 2001 electoral reform legislation: *Attorney-General (WA) v. Marquet*[3] ("*Marquet*"). Although the reform legislation was passed in the Legislative Council in accordance with the standard legislative process that would have seen ordinary legislation validly enacted, the High Court held that this particular constitutional legislation should have been passed by absolute majorities in both Houses of Parliament, in compliance with a special procedure (a "manner and form") for the amendment of the *Electoral Distribution Act* 1947 (WA).

By that time, the Government also appears to have given up negotiations with the Greens, and was looking to the Commonwealth Parliament to exercise its external affairs power under s.51(xxix) of the Commonwealth Constitution to establish a requirement for equal electoral districts in State legislative Chambers. This proposal was the subject of a recent inquiry by the Senate Legal and Constitutional References Committee, which gave it qualified support.[4] There are constitutional problems with the course of action proposed, which I will point out. Furthermore, it would be a better solution for Western Australians to resolve the issues with their own political deal.

In my opinion, a parallel reform to the resolution of electoral equality should be the constitutional entrenchment of the distribution of a fair share of the public natural resources wealth to the regions that generate that natural resources wealth. There will be arguments about what is a fair share, but I would start the bidding with a figure of 50 per cent of the natural resources revenues that accrue to the State government from royalties and fees on authorisations to exploit the public natural resources vested in the State. These sums should be paid to the local government authorities in the region and be spent according to the local political will. The development of public wealth in the non-metropolitan regions should help foster the growth of those communities and, in the long run, relieve the pressures for electoral redistributions.

Even if you do not agree with my hypothesis and proposed constitutional reform, I hope I have created enough of a scenario in which to discuss a number of important constitutional issues that arise out of the High Court's decision in the *Marquet Case* and the Senate inquiry. I want to explore my hypothesis and those issues by addressing:

1. The historical-constitutional context of the State Parliament's legislative sovereignty and the distribution of electoral districts and the public wealth from natural resources;
2. The High Court's reasoning in *Marquet* on why a State Parliament is bound to comply

with special manner and form for the enactment of certain constitutional legislation;

3. The problems with the proposal that the Common-wealth Parliament legislate to mandate State legislation achieving the one vote / one value reforms; and
4. The feasibility of entrenching in the State's Constitution a requirement that a certain share of the governmental revenues from exploitation of public natural resources be vested in the local governments of the regions from which the natural resources are taken.

1. The historical-constitutional context

When responsible self-government was established in the Colony of Western Australia in 1890, our "Constitution" shared a number of prominent features with those of other Australian Colonies that had already established self-government in the preceding decades:

1. Western Australians regarded the *Constitution Act* 1889 (WA), enacted by the previous colonial Legislative Council, as having acquired its legal authority by virtue of it having been enacted by the UK Parliament as a Schedule to the *Western Australian Constitution Act* 1890 (UK, 53 & 54 Vict c.26).
2. The bicameral Parliament established by the *Constitution Act* was to be "sovereign" in domestic matters, within certain constitutional limits. One of the important limits related to legislative procedures for the amendment of the Constitution. The Parliament, although empowered by s.5 of the *Western Australian Constitution Act* (UK) to alter the *Constitution Act* by normal legislative process for the most part, was bound to follow special legislative procedures for the alteration of "certain particulars until and unless those conditions are repealed or altered" by the same Parliament.[5] In other words, certain aspects of the Constitution could only be altered by Parliament legislating in accordance with a prescribed *manner and form* that was more difficult to achieve than the simple majority resolutions of the standard legislative process.
3. By s.3 of the *Western Australian Constitution Act* 1890 (UK), "[t]he entire management and control of the waste lands of the Crown in the colony … and of the proceeds of sale, letting, and disposal thereof, including all royalties, mines, and minerals" were vested in the colonial legislature. The significance of this provision was that the Colony, acting through its locally elected legislature, wrested control of the un-alienated natural resources of the Crown from the Governor acting on the instructions of the Imperial Government in London and, thereby, gained control of the revenues that were to be earned from the disposition of those natural resources.
4. The majority of the Colony's population lived outside the metropolitan area of the capital city. Interpolating from the figures provided recently by the Western Australian Attorney-General,[6] in 1890 approximately 25-30 per cent of the Colony's population lived in the Perth metropolitan area, whilst approximately 70-75 per cent of the population lived outside the metropolitan area, with a particular concentration around the Kalgoorlie goldfields. The early pattern of colonial development saw many migrants moving out to exploit natural resources under authority from the colonial government. The first Legislative Assembly was to have 6 Members elected from the Perth area, and 24 Members elected from across the rest of Western Australia. The electoral system was democratically contentious, not only for its restricted franchise, but also for the distribution of the electoral districts, which did not adequately reflect the concentration of population in the goldfields.

We jump now to the year 2003 and make a brief comparison with the equivalent prominent constitutional features:

1. The UK Parliament no longer has legislative authority in respect of Australia: s.1 *Australia Acts* 1986 (State, Cth & UK). So, what is it now that gives our State

Constitution its binding legal authority? The High Court has declared recently in *Marquet*[7] that "constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources". The High Court went on to locate the authority of the WA Constitution very much in fact of Federation and the adoption of State Constitutions under s.106 of the Commonwealth Constitution, which provides that "[t]he Constitution of each State … shall, subject to this Constitution, continue as at the establishment of the Commonwealth … until altered in accordance with the Constitution of the State".

2. The State Parliament still enjoys a limited domestic sovereignty; it must comply with specially prescribed manner and form when legislating with respect to certain nominated matters affecting the State Constitution. In *Marquet*, the Western Australian Supreme Court[8] and the High Court held that the State government's electoral reform bills of 2001[9] were invalid because they were not passed in the Legislative Council by the absolute majority required under s.13 of the *Electoral Distribution Act* 1947 (WA). What is of further potential interest is the High Court's reason for holding the manner and form requirement to be binding on the State Parliament by virtue of s.6 of the *Australia Act* . I will explore this issue more below.
3. Over the past century or so, the Western Australian Parliament, like other State Parliaments, has exercised its legislative control over the Crown lands to vest large amounts of the State's natural resources in the Crown in the right of the State. The underlying premise of natural resources management in Australia is the public ownership of much of the country's natural resources: minerals, petroleum, publicly owned forests and conservation lands, vast expanses of rangelands, living natural resources, including flora and fauna, and water, all vested in the States. The States authorise the exploitation of these natural resources under various statutory authorisations such as leases, licences and permits, for which they can charge fees and royalties that reap not only the cost of administration, but also part of the "economic rent"[10] from the exploitation of the natural resources. Interestingly, at the moment, there are neither significant fees nor royalties attached to the exploitation of water. Nevertheless, it is obvious to even the casual observer that a significant amount of public wealth has been generated by the exploitation of natural resources in this State and that much, if not most, of the benefit of that public wealth is delivered to the people of metropolitan Perth.
4. The majority of the State's population now lives in the Perth metropolitan area. On the Attorney-General's figures, 74 per cent of the voting public live in the metropolitan area and 26 per cent live in the rest of the State. The distribution of electoral divisions is a serious political issue that has been much legislated and litigated in the past twenty-five years. The very heavy vote weighting in favour of the non-metropolitan area of the 1970s was substantially lessened in the 1987 reforms of the then Labor government,[11] which saw the enactment of the current law.

   Under this law, the State is divided into two areas: metropolitan and non-metropolitan. The metropolitan area is allocated 34 of the 57 Legislative Assembly single member electoral districts, and 17 of the 34 Legislative Council seats, chosen from three regions. The non-metropolitan area has the remaining 23 Legislative Assembly electoral districts, and the equivalent 17 Legislative Council seats, chosen from three regions. The Legislative Assembly districts were to be devised with a permissible + or – 15 per cent variation from the quotient for each of the two areas.[12]

   When the current Attorney-General and Premier challenged the constitutional validity of this legislation in the High Court in 1996,[13] the current law had the effect of making the largest metropolitan Legislative Assembly district nearly three times as large as the

smallest non-metropolitan electorate in voter enrolments. The number of voters (per member) enrolled in the largest metropolitan Legislative Council region was nearly four times the number of voters (per member) of the smallest non-metropolitan Legislative Council region.

The potential for large discrepancies in the voter enrolments is also exacerbated by the requirement to undertake a re-distribution after only every second election. However, under the 2003 re-distribution completed by the Western Australian Electoral Commission under the current (1987) law, the differences in voter enrolments on the 2002 enrolments, and on the projected 2007 enrolments, would be a little under two and a half times the number of voters in the largest metropolitan electorate compared to the smallest non-metropolitan electorate. (The differences in voter enrolments in the Legislative Council could be expected to be higher, but I have not done the calculations).

The 2003 redistribution will apply to the next State election, due within the next 12 months. What is interesting is that the quotient (average number of voters per electoral district) for the metropolitan electorates has, since 1998, remained at a little under double the quotient for the non-metropolitan electorates. The two chambers of the Western Australian Parliament remain the only two legislative chambers in Australia (besides the Senate) that are not constituted on the basis of a formula that aims to achieve an approximately equal number of voters per member in each electoral district or region.

All of this brings me to the current State Government's 2001 electoral reform proposals. The broad aims of the reforms were to achieve one vote / one value in the Legislative Assembly and to affirm the Legislative Council's role as a regional House.[14] The proposal for the Legislative Assembly would have:

- abandoned the division of the State into metropolitan and non-metropolitan regions;
- adopted a single quotient for all electorates across the State; and
- restricted the variation from the quotient to + or – 10 per cent, except for districts with very large geographical areas – 100,000 square kilometres or more – where a variation of + or – 20 per cent would have been permissible and supplemented with a formula for deeming notional voter enrolments on the basis of land area.

The constitution of the Legislative Council was to be modified a little to provide for equal representation by six MLCs for each of the six regions of the State, three in metropolitan Perth and three outside Perth. The reforms would have achieved an acceptable level of equal suffrage in the Legislative Assembly, the House where government is formed. The Legislative Council would have continued to be the only State Upper House constituted on the basis of non-metropolitan vote weighting, but in that it would have shared the good company of the Senate.

This legislation could, and should, have been validly enacted in 2001, in accordance with the absolute majority requirement of s.13 of the *Electoral Distribution Act* 1947. In the current Legislative Council, there are 13 Labor and 5 Green MLCs, which together constitute a potential absolute majority of 18 of the 34 members. However, because of a mistaken view taken that the President of the Legislative Council, a Labor MLC, was not entitled to vote unless the votes were equal, the legislation was passed in the Legislative Council by simple majority only, the standard legislative process.[15]

I have elsewhere explained that this view was a mistaken interpretation of the provision governing the standard legislative procedures in the Council, which did not apply where an absolute majority requirement was applicable.[16] In the absence of an applicable statutory provision, the common law proposition that the chairperson of a meeting has an original deliberative vote should have been applicable, and the President should have voted. This

view was not appreciated at the time; indeed, some may disagree with it now. The Legislative Council passed the legislation by a simple majority only and the legislation was held invalid in *Marquet*. To exacerbate the Government's dilemma, one of the Green MLCs who voted for the legislation in 2001 no longer supports it.

2. Why is a State Parliament bound to comply with a special manner and form?

The Supreme Court and High Court had to deal with a number of issues in *Marquet*, including whether s.13 of the *Electoral Distribution Act* was applicable to the Government's legislative package. Both Courts held that it was, and then addressed the question of whether one Parliament can bind a successor Parliament to comply with a special manner and form that is more difficult to achieve than a simple majority of the standard legislative process. I will address this aspect of the High Court's decision, which deals with two propositions.

The Court's first proposition is that s.6 of the *Australia Act* (Cth) is a superior law that binds the Western Australian Parliament to comply with manner and form applicable to the enactment of legislation respecting the "constitution, powers or procedure of the Parliament". The second proposition was that the electoral reform bills were bills with respect to the "constitution" of Parliament, and so could only be enacted in compliance with the absolute majority requirement of manner and form. Let me explore each of these propositions a little more.

2.1 Section 6 of the *Australia Act* is a superior law

The Court said that the *Australia Act* 1986 (Cth) is the operable version of that Act in Australia. It is an enactment of the Commonwealth Parliament under s.51(xxxviii) of the Commonwealth Constitution, which confers on the Commonwealth Parliament, with the request and consent of the Parliaments of the States directly concerned, the power to make a law that could, at the establishment of the Commonwealth, be made only by the UK Parliament.

The Court gave no analysis of whether a State Parliament could, alone, at Federation have made a law that would bind itself or its successors to follow a special manner and form. Not only does this fail to address a fundamental question of the law of manner and form, it arguably also fails to address the question of whether the enactment of s.6 of the *Australia Act* fell within the realm of s.51(xxxviii).[17]

Instead, the Court relied on the reasoning established in *Attorney-General (NSW) v.* Trethowan,[18] that a State Parliament was bound by manner and form to the extent applicable under s.5 of the *Colonial Laws Validity Act* 1865 (UK), the direct predecessor to s.6 of the *Australia Act*, because the State legislature was subordinate to paramount imperial law of the UK Parliament. Section 6 of the *Australia Act* has effectively replaced the superior UK law. As the Court explained:[19]

> "The *Australia Act* takes its force and effect from the reference of power to the federal Parliament, made under s.51(xxxviii), and the operation that the Act is to be given as a law of the Commonwealth in relation to State law by s 109 of the Constitution. Although the phrase 'subject to this Constitution' appears both in ss 51 and 106, it was decided in *Port MacDonnell Professional Fishermen's Association Inc v. South Australia* that 'the dilemma … must be resolved in favour of the grant of power in par (xxxviii)' ".

Effectively, the Commonwealth Parliament has legislated to change State Constitutions, albeit with State parliamentary consent. We will confront below the question whether other heads of Commonwealth legislative power can be used to alter the State Constitutions, perhaps without their consent.

I also want to address further the question of whether a State legislature, like any legislature, can alone bind its successors to follow a particular manner and form in the future; for example, by itself enacting the manner and form requirement by the same process that is

henceforth to apply to legislation on that topic.[20]

The Australian courts have never explored the question whether such a procedure should be essential or adequate for the valid entrenchment of any legislation, whether or not it is covered by the scope of s.6 of the *Australia Act*. There are examples of Australian manner and form that were not enacted by the same procedure to which successor Parliaments are believed to be bound on the authority of *Trethowan*. Section 73(2) of the Western Australian Constitution is a provision of this sort, as was s.7A of the *Constitution Act* 1902 (NSW), the provision in question in *Trethowan*. Section 73(2) requires that a bill to amend certain aspects of the WA Constitution must be passed by absolute majorities and a referendum of the people before being presented for the Crown's assent. That provision was itself only enacted by absolute majorities, so it is arguable that the referendum requirement is invalid. In *Marquet*, s.13 of the *Electoral Distribution Act* had itself been enacted by absolute majorities, so there was no need to address this question, although that is not the way the Court explained itself.

The Dixonian solution in *Trethowan* was to say that a manner and form is binding on the authority of the paramount UK law, but only if it is valid.[21] To be valid, a manner and form can prescribe only a mode of legislating and cannot be a restraint of power. A manner and form that prescribes a procedure that is so demanding that it cannot realistically be met by future legislatures (e.g., a 75 per cent majority vote) would be invalid.

It is suggested that this requirement of validity should be maintained and supplemented by the requirement that a valid manner and form for a restrictive procedure must itself have been employed in its enactment – so-called symmetric entrenchment. Thus, only a successful referendum could introduce a valid referendum manner and form. However, the symmetric entrenchment would have to be "democracy affirming"; it would not be acceptable to have Parliaments entrenching legislation by the opportunistic exploitation of a large swing in political opinion at one election to set super-majorities that cannot be achieved by subsequent legislatures elected with narrow political majorities.[22] In this regard, a requirement of an absolute majority should be unobjectionable because, if the correct view is taken of the vote of the presiding officer, it should not be seen as undemocratic to require a majority of the whole membership of a chamber for a vote on an important issue. Nothing in *Marquet's Case* should prevent the High Court from adopting this view, should it ever seek to re-visit *Trethowan*.

2.2 The scope of laws respecting the "constitution, powers or procedure of Parliament"

The second proposition, that the electoral reform bills were laws with respect to the "constitution, powers or procedure of Parliament", was more straightforward. The Court focused on the word "constitution" and refused to take a narrow view of what it might mean. It should come as no surprise that the Court held that bills purporting to alter the system for the distribution of electoral districts and regions, and the number of members of the Legislative Council, were with respect to the "constitution" of Parliament.

What is a little surprising is this comment by the Court:[23]

> " … it is not necessary or appropriate to explore what is encompassed by the reference in s 6 *Australia Act* to 'powers or procedure' of a legislature, whether in relation to the ability of a legislature to entrench legislation about any subject or otherwise".

Conventional academic thought on this question has tended to conclude that passing a law about a topic that is subject to the requirements of a manner and form does not, of itself, give that law the characterisation of a law with respect to the powers or procedure of Parliament.[24] For example, the fact that a law about the Supreme Court may be protected by a manner and form does not give a future law amending the Supreme Court law the character that brings it within the scope of s.6 of the *Australia Act*. Such a law is a law about the Court,

not Parliament, and some other source will need to be found to make the manner and form in respect of such legislation binding on successor Parliaments. If no source can be found to make binding a manner and form entrenching such laws, then Parliament may simply ignore the manner and form.

3. The proposal for Commonwealth legislation for "one vote, one value" in State Parliaments

The Senate Legal and Constitutional References Committee ("the Committee") reported in early March, 2004 on its inquiry into the *State Elections (One Vote, One Value) Bill* 2001 [2002],[25] proposed by Senator Andrew Murray of Western Australia. In the words of the Committee:[26]

> "The Bill applies to both houses of State Parliaments in those States that have bicameral legislatures. A quota of voters is calculated by dividing the total State enrolment, projected four years in advance, by the number of electorates. The Bill provides that a House of Parliament of a State must be directly chosen by the people of that State, voting in electorates as nearly equal in size as possible but not varying by more than 15 per cent from the quota of voters.
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> "A plus or minus variation from the quota must have regard to a variety of factors. The overriding factor for the allocation of voters to electorates is the community of interest in the area. Other factors include the means of communication with, and its distance from, the capital city of the State, the geographical features of the area and any existing boundaries, including local government boundaries.
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> "… The Bill also provides for certain people with standing to seek judicial review. Standing extends, but is not limited to, registered political parties and a member of the House of Parliament to which the action relates".

The Bill purports to be an exercise of the Commonwealth Parliament's power to legislate with respect to external affairs under s.51(xxix) of the Commonwealth Constitution by implementing the terms of Article 25 of the *International Covenant on Civil and Political Rights* , which obliges a state party, including Australia, to ensure to all individuals within its territory "the right and the opportunity …(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage …". The Bill has the purpose of compelling a reform of the Western Australian electoral distribution system, as well as preventing other jurisdictions from departing from the one vote, one value principle with any future legislation.

I made a submission to the Committee's public hearing, including the following points:[27]

> "[O]ne might see the bill as exercising the external affairs power to implement the terms of an international treaty, but it is probably susceptible to challenge on the basis of prohibitions implied by the High Court from the federal nature of our Constitution, that the Commonwealth Parliament cannot make laws that discriminate against the States or interfere with the essential functioning of the core constitutional organs of the States. … There is nothing really more central to the Constitution of a State than the constitution of its Parliament, and it seems to me as though the bill would amount to the Commonwealth Parliament endeavouring to determine how the State should constitute its Parliament. I think that is likely to be invalid.
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> "… it seems to me as though the bill lacks a remedy. I am not quite sure what the benefit of a challenge would be. I think this is borne out by the High Court decision in the *McGinty Case*.[28] In that case it was argued that there was an implied requirement of representative government to have one vote, one value. The majority of the Court rejected the challenge on the basis that there was no such implication to be found in either the Commonwealth or State Constitutions.
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> "But, reading between the lines, and considering that case in the light of the Court's later decision in *Lange v. Australian Broadcasting Corporation*,[29] I think the judges were worried on two counts. There is no common law foundation for the right to vote and

there is no common law foundation for the distribution of electoral districts. So, if someone were successfully to challenge … the State electoral distribution law, then what remains? There is no common law to fall back on as to what should occur in the constitution of the Parliament. The existing legislation would be invalidated and there would be nothing left except the former, probably less democratic legislation.[30] The question arises: does that leave it to the Commonwealth Parliament to legislate to fill that gap? That would seem to take it further into the implied prohibition".

Professor George Williams made more detailed submissions that canvassed similar points, and advocated a more generally expressed obligation of one vote, one value as a means of endeavouring to avoid the implied prohibition. He suggested the following solution:[31]

"[M]y first preference for this legislation would be to simply embody the international obligation and leave it at that, and implement it in a way that does not operate through federal judicial bodies but simply operates by virtue of section 109 of the Constitution, which overrides inconsistent State legislation, and leaves it to the State Parliament to come up with an appropriate electoral model – and it would need to do so because of its own constitutional system requiring that there be elections and other matters".

Since making my submission to the Senate Committee, I have discussed the question of a judicial remedy with my UWA colleague Peter Johnston and with Professor Williams. A remedy of prospective invalidity, giving time to a legislature to amend its legislation, has been considered and rejected by the High Court.[32] The judges cannot compel a Parliament to enact laws of a particular content. Would the High Court then be compelled to supervise recalcitrant Parliaments by serial pronouncements on their successive enactments? Judicial pronouncements of invalidity may have a political impact with the electorate, but it would also risk embroiling the Court in the political debate. The Court might seek refuge in a pronouncement that a general obligation of this sort is non-justiciable. Suitable remedies may be found from a comparative study of human rights legislation in other countries, but I cannot see a suitable remedy presently available under the Commonwealth Constitution. In the end, it is better that these democratic reforms be achieved by State legislation.

4. Constitutional entrenchment of the fair distribution of the public wealth from natural resources

Let me conclude where I started: a political trade-off for electoral distribution reform that entrenches a fair distribution to regional local governments of the public revenues from the exploitation of public natural resources. If such a proposal could be enacted by legislation passed on the basis of symmetric entrenchment, and requiring a democratically acceptable vote for its amendment, would it be binding on future Parliaments? Subject to the High Court *obiter dicta* in *Marquet* (discussed in section 2.2 above) that left open the scope of subjects that could be entrenched by force of s.6 of the *Australia Act*, it is questionable whether legislation relating to the distribution of natural resources revenues would be characterised as respecting the "constitution, powers or procedures of Parliament". If such legislation is not characterised as within the scope of s.6, then the Parliament may simply ignore the manner and form unless there is some other source of authority that would make the manner and form binding on this type of topic.

The prospect of finding an alternative source of making manner and form binding must now face the following *obiter dicta* of the High Court in *Marquet*:[33]

"The conclusions reached about the operation of s 6 of the *Australia Act* make it unnecessary to decide whether, separately from and in addition to the provisions of that section, there is some other source for a requirement to comply with s 13 of the *Electoral Distribution Act*. It is enough to notice two matters. First, as indicated earlier in

these reasons, the continuance of the Constitution of a State pursuant to s 106 of the federal Constitution is subject to the *Australia Act* . … Secondly, the express provisions of s 6 can leave no room for the operation of some other principle, at the very least in the field in which s 6 operates, if such a principle can be derived from considerations of the kind which informed the Privy Council's decision in *Bribery Commissioner v. Ranasinghe* and can then be applied in a federation".

The principle in Ranasinghe is usually stated as:[34]

"… 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".

In effect, the *Ranasinghe* principle elevates a Constitution to the status of a superior law that cannot be ignored by the legislature that is established under it. The principle was enunciated in a constitutional context that contained no equivalent of s.6 of the *Australia Act* . The significant point about the scope of the principle is that, although one must find the manner and form in the "Constitution" (or at least some quasi-constitutional instrument), it is not limited to operating in respect of laws respecting the "constitution, powers or procedures of Parliament". Neither would it be necessary for the legislation in question to be purporting to amend the text of the Constitution in order to attract the operation of the principle.[35] In fact, one could expect that almost any subject matter could be protected by a constitutional manner and form, if the people and the legislature thought it important enough to install the proposition in the Constitution.

The Victorian Parliament last year amended the *Constitution Act* 1975 (Vic) to entrench a new Part VII, providing for the continued "responsibility of public authorities for ensuring the delivery of water services and their accountability to responsible Ministers for ensuring that delivery".[36] It may be that the Victorian Parliament has confidence in the binding authority of manner and form inserted in its Constitution. There have been a number of decisions in the Victorian Supreme Court upholding the requirements of the manner and form protecting the jurisdiction of the Supreme Court, but without referring to either s.6 of the *Australia Act* or any other source of binding authority for the manner and form.[37] There is ample authority for the operation of the *Ranasinghe* principle in Australia; there is just a lack of judicial reasoning explaining it.

The High Court in *Marquet* did provide its own escape for permitting some operation to the *Ranasinghe* principle by stating that there was no room for the operation of some other principle "at the very least in the field in which s 6 operates". In my opinion, even this comment is not all that helpful. The present learning on s.6 is that the manner and form may be found in any law; it does not have to be found in a constitutional instrument. The *Ranasinghe* principle could be a useful source of reasoning to read down some of the breadth of s.6, by giving binding effect only to manner and form in a constitutional instrument. If we are to accept manner and form constraints on the sovereign legislative powers of our Parliaments, we want a simple way of recognizing their binding authority. Those matters that are to constrain future Parliaments should be seen as part of the constituent political bargain and expressed in our Constitutions.

I hope that one day our State Constitutions will more fully express vital aspects of our communities' aspirations for a fair and sustainable use of natural resources, including the fair distribution of the public revenues from the use of our public natural resources.

Endnotes:

1. The full title of this paper is *Musings on* Marquet*: The Distribution of Electoral Districts and Natural Resources Rent.*

2. The contributions of Dr James Edelman to Sections 2 and 3 of this paper are gratefully acknowledged.

3. [2003] HCA 67; 78 ALJR 105.

4. Commonwealth of Australia, Senate Legal and Constitutional References Committee, *State Elections (One Vote, One Value) Bill*2001 [2002], March, 2004.

5. This proposition was also to be found in s.5 of the *Colonial Laws Validity Act* 1865 (UK).

6. Commonwealth of Australia, Senate Legal and Constitutional References Committee, Inquiry into *State Elections (One Vote, One Value) Bill*,2001 [2002], transcript of public hearings held on Friday, 13 February, 2004, evidence of Mr McGinty, the Attorney-General of Western Australia.

7. [2003] HCA 67 at para. 66; 78 ALJR 105 at 116. In this paper, references to the decision of the "Court" are to the majority judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ.

8. [2002] WASCA 277.

9. *Electoral Distribution Repeal Bill* 2001 and *Electoral Amendment Bill* 2001 (WA).

10. The economic rent is the surplus value from the exploitation of the natural resource above that required to induce the exploitation of the resource.

11. *Acts Amendment (Electoral Reform) Act* 1987 (WA).

12. The quotient is calculated by dividing the number of enrolled voters by the number of electorates for the area. The electoral distribution system is set out in the *Constitution Acts Amendment Act* 1899 ss. 6 & 19, and the *Electoral Distribution Act* 1947 (WA).

13. *McGinty v. Western Australia* (1996) 186 CLR 140.

14. Second reading speech of the Minister on the electoral reform legislation, Legislative Assembly of Western Australia, *Hansard* , 1 August, 2001, pp. 1850-1855.

15. A simple majority requires that there be present at least a quorum of one third of the members and that a resolution be passed with the majority support of those members present and voting. An absolute majority requires that the resolution be supported by a majority of the whole membership of the chamber. The standard legislative process for the Legislative Council of Western Australia is defined in *Constitution Acts Amendment Act* 1899 (WA), s.14.

16. A Gardner, *Marquet v. Attorney-General of Western Australia: 'All this may not have been necessary'*, (2003) 5 *Constitutional Law and Policy Review*, 78-80.

17. The Court was comforted by the fact that none of the parties challenged the validity of the *Australia Act* : [2003] HCA 67 at para 69; 78 ALJR 105 at 117.

18. (1931) 44 CLR 394.

19. [2003] HCA 67 at para 67; 78 ALJR 105 at 116.

20. Indeed, the legitimacy of a manner and form created otherwise than in this manner is a "conceptual difficulty" suggested by Gummow J in *McGinty v. WA* (1996) 186 CLR 140 at 297.

21. (1931) 44 CLR 394 at 431.

22. Martin Squires, *In a bind: entrenching a bill of rights in Western Australia* , LLB Honours thesis, 2003, The University of Western Australia Law Library.

23. [2003] HCA 67 at para 74; 78 ALJR 105 at 117.

24. G Carney, *An Overview of Manner and Form in Australia* (1989) 5 *QUT Law Journal* 69

at 78-79.

25. A copy of the Bill is available from the Australian Parliamentary website at: http://www.aph.gov.au/senate/ committee/legcon_ctte/ one vote one value/index.htm.

26. Paragraphs 2.3, 2.4 and 2.6 of the report of the Committee, which is available from the Australian Parliamentary website at: http://www.aph.gov.au/senate/committee/legcon ctte/index.htm.

27. The transcripts of the Senate Committee's hearing on 13 February, 2004 are available from the Australian Parliamentary website: http://www.parlinfoweb.aph.gov.au /piweb/browse.aspx?NodeID=16. My explanation of the points is slightly supplemented here.

28. (1996) 186 CLR 140.

29. (1997) 189 CLR 520.

30. Of course, were the Justices to be confronting an enactment that proposed a departure from previously acceptable legislation, the Court may be prepared to invalidate the new legislation and fall back on the older acceptable legislation, as pointed out by McHugh J in *Levy v. Victoria* (1997) 189 CLR 579. This may make the judicial process look very political.

31. Report of the Senate Legal and Constitutional References Committee, *supra*, note 19, at paragraph 3.54.

32. *Ha v. New South Wales*(1997) 189 CLR 465 at 503-504.

33. [2003] HCA 67 at para [80]; 78 ALJR 105 at 118-119. The comments here mirror those made by Gummow J in *McGinty v. WA* (1996) 186 CLR 140 at 297.

34. [1965] AC 172 at 197.

35. *Victoria v. Commonwealth* (the *PMA Case*) (1975) 134 CLR 81 at 163-4, per Gibbs J.

36. *Constitution (Water Authorities) Act* 2003 (Vic).

37. *City of Collingwood v. Victoria (No 1)*[1993] 2 VR 66; *City of Collingwood v. Victoria (No 2)* [1994] 1 VR 652; *BHP v. Dagi* [1996] 2 VR 117.