Attachment D: Constitutional Entrenchment of a Bill of Rights in Victoria

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A number of groups have suggested during the consultation process that the Victorian constitution be amended to include a judicially enforceable bill of rights. This suggestion might encompass a number of different models for a bill of rights – including the United States model (in which the courts are able to strike down legislation that is inconsistent with the provisions of the Bill of Rights) and the Canadian model (in which the courts are able to strike down legislation that is inconsistent with the provisions of the Charter but in which the Parliament is able legislate notwithstanding the inconsistency). The common element in these models is that the Bill or Charter of Rights is a law of a higher (or constitutional) status than ordinary legislation so that the courts are bound to apply it, notwithstanding later inconsistent legislation.

We do not comment on the merits of such a model for Victoria.

However, we do note that there are significant constitutional questions about whether such a model could validly and effectively be adopted in Victoria.

In general, state parliaments are treated as sovereign legislatures with plenary legislative power (subject only to the Commonwealth Constitution). As s 16 of the Constitution Act 1975 states, "The Parliament shall have power to make laws in and for Victoria in all cases whatsoever". The Parliament's powers extend to amending the Constitution Act itself: s 18. This means that one Victorian Parliament (say the Parliament of 2005) is unable to bind another Victorian Parliament (say the Parliament of 2007). In general, therefore, if the Parliament of 2007 enacts a law that is inconsistent with a law passed by the Parliament of 2005, the 2007 law prevails.

The exception is in the limited set of cases where the Parliament has the power to entrench laws – to define a special procedure (a 'manner and form') by which later legislation must be passed in order for it to be valid. (Examples of such special procedures are referenda,[1] special majorities[2] and absolute majorities.[3])

The question to be considered here is whether a Charter of Rights fits within this limited set of cases so that it can be validly and effectively entrenched, or whether it must remain an ordinary law, subject to express or implied repeal by later inconsistent legislation. There are four possible routes by which a Charter might be entrenched:

a) under the *Australia Act 1986*

b) as a result of the operation of s 106 of the *Commonwealth Constitution*

c) under the *Ranasinghe* principle

d) by being recognised as a 'constitutional statute'

In our view there are significant doubts about whether a Charter could be entrenched using any of these routes.

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1 *Constitution Act 1975* (Vic), s18(1B)(a).
2 *Constitution Act 1975* (Vic), s 18(2)(c).
3 *Constitution Act 1975* (Vic), s 18(2AA)(a).

a) The Australia Act 1986

Section 6 of the *Australia Act 1986* (Cth), enacted as a replacement for s 5 of the *Colonial Laws Validity Act 1865* (Imp),[4] provides the most well-recognised authority for states to entrench legislative provisions. That section states:

> Notwithstanding sections 2 and 3(2) above, a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may from time to time be required by a law made by that Parliament, whether made before or after the commencement of this Act.[5]

The 'entrenchment' provisions (or at least some of them) in the Victorian Constitution requiring that certain laws not be repealed or amended other than by referendum or special majority[6] would appear to constitute relevant manner and form provisions for the purpose of this section.[7] A provision purporting to entrench a Bill of Rights along the same lines would likely be characterised in the same way.

However, the reference to a law 'respecting the constitution, powers or procedure of the Parliament of the State'[8] poses a more significant barrier. Entrenchment provisions will only be effective in placing restraints on future legislation inconsistent with an entrenched provision where that law can be characterised as one with respect to the 'constitution, powers or procedure' of the Parliament. As Twomey emphasises, 'if the law does not fall within that category, even if it is a law which amends the *Constitution Act*, then neither the *Colonial Laws Validity Act* nor the *Australia Acts* impose the purported manner and form requirement.'[9]

In *Attorney-General (WA) v Marquet*, Gleeson CJ, Gummow, Hayne and Heydon JJ made the following observations:[10]

> On its face, the expression "constitution, powers or procedure" of a legislature describes a field which is larger than that identified as "the constitution" of a legislature. It is not necessary or appropriate to attempt to describe the boundaries of the areas within the field that the three separate integers of the expression "constitution, powers or procedure" cover, let alone attempt to define the boundaries of the entire field.

The majority were only concerned with the characterisation of the 'constitution' element, which they said 'extends to features which go to give it, and its Houses, a representative character'.[11] This, they said, includes laws changing the system of voting; but they pointed out that not every law respecting the election of members of

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4 See *Australia Act 1986* (Cth), s 3(1) which reads: 'The Act of the Parliament of the United Kingdom known as the Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a State.'

5 *Australia Act 1986* (Cth), s 6.

6 *Constitution Act 1975* (Vic), s 18.

7 See Carolyn Evans, 'Entrenching Constitutional Reform in Victoria' (2003) 14 *Public Law Review* 133. See also *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, where the NSW Constitution's requirement that the abolishment of the Legislative Council must be supported by referendum was held to constitute a manner and form requirement. Note, however, the comments of King CJ in *West Lakes Ltd v South Australia* (1980) 25 SASR 389 at 397 on when a special majority requirement might cease to be a question of manner and form and become an impermissible abdication of parliamentary power.

8 *Australia Act 1986* (Cth), s 6.

9 Anne Twomey, *The Constitution of New South Wales* (2004), 276.

10 (2003) 202 ALR 233, 250.

11 Ibid.

parliament was a matter affecting its constitution,[12] with reference to the decision in *Clydesdale v Hughes* holding that a law with respect to qualification for election was not such a matter.[13]

'Powers or procedure' has been held to include provisions dealing with parliamentary deadlocks[14] and making rules for its own conduct in addition to standing orders.[15] It does not, however, extend to the parliamentary privileges of members of parliament.[16]

In this context, it appears as though the *Australia Act* would not ensure that a Bill of Rights could be effectively entrenched. A law restricting freedom of religion, for example, is unlikely to be characterised as with respect to the 'constitution, powers or procedure of the Parliament', and so would be a valid exercise of the parliament's power to amend its own laws.

On one construction of s 6, though, any law amending a manner and form provision might be considered as one with respect to the 'powers or procedure' of the Parliament. For example, if a referendum was required to amend the Bill of Rights, and then a law was passed purporting to restrict freedom of religion, that law, by purporting to override the referendum requirement changes the procedure previously laid down by the Parliament. However, this would allow any law subject to a manner and form provision to be entrenched, no matter what its substantive content. As Twomey argues, '[t]his cannot be the intention of either s 5 of the *Colonial Laws Validity Act* or s 6 of the *Australia Acts* 1986, which are concerned only with matters respecting the Parliament.[17]

In our view, therefore, entrenchment through the Australia Acts is not likely to be effective.

b) Section 106 of the Commonwealth Constitution

Section 106 of the Commonwealth Constitution reads:[18]

> The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

By providing that a Constitution of a State can only be 'altered in accordance with the Constitution of the State', s 106 appears to give effect to entrenchment provisions found within a State Constitution. Indeed, the authorities suggest that the 'constitution' of a state is not limited to its *Constitution Act*,[19] so the effect of s 106 could extend to other legislative provisions which could be described as part of the state's 'constitution'.

However, courts have been reluctant to interpret s 106 as allowing states an unrestricted ability to bind their legislative successors to existing constitutional provisions. In *Attorney-General (WA) v Marquet*, Kirby J suggested that s 106 only

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12 Ibid, 250-251.

13 (1934) 51 CLR 518, 528.

14 *Clayton v Heffron* (1960) 61 SR (NSW) 768.

15 Twomey, above n 9, 281.

16 *Arena v Nader* (1997) 42 NSWLR 427, 436.

17 Twomey, above n 9, 281.

18 *Constitution of Australia*, s 106.

19 See, eg, *Yougarla v Western Australia* (2001) 207 CLR 344, 380 (per Kirby J): 'there is no doubt that the word "Constitution" in s 106 was expected to have a larger denotation than simply the Constitution Acts of the colonies, then in force.'

requires that a Constitution be altered in accordance with procedural requirements of binding force and does not give states an unfettered power to entrench laws: '[t]hey simply refer back to the requirements of the state Constitution and thus beg the question to be answered'.[20]

An argument might also be made that by enacting the *Australia Act*, the Commonwealth had purported to 'cover the field' and that any attempt by a state to entrench provisions beyond those covered by s 6 of the *Australia Act* would be inconsistent with the Commonwealth law.[21] Such a conclusion is possible because s 106 is 'subject to this Constitution'[22] and, as Gleeson CJ, Gummow, Hayne and Heydon JJ said in *Marquet*:[23]

> 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.

It thus appears unlikely that s 106 allows any additional scope for entrenchment beyond that provided for in s 6 of the *Australia Act*.

c) under the Ranasinghe principle

Another basis on which State entrenchment provisions might be supported is the 'Ranasinghe principle', said to derive from the decision of the Privy Council in *Bribery Commisioner v Ranasinghe*. That case considered the Ceylon (Constitution) Order-in-Council 1946, which contained a requirement that in order to amend or repeal any of the provisions of the Order, a certificate was to be produced by the Speaker as proof that the proposed law had received a two-third majority. Such a Bill was not to be presented for Royal Assent without a certificate.

Delivering the opinion of the Council, Lord Pearce said:[24]

> [T]he proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.

The basis for this finding appears to be that, although a Parliament may have power to amend any of its own laws, including those stipulating the procedures which must be followed in enacting laws, a proposed law which fails to meet the prerequisite requirements has in fact not reached the status of a law, and so is ineffective in overriding those requirements.[25] As Dixon J said in *Trethowan*, where a Bill is required to be approved at a referendum before being presented for assent, 'it would be an unlawful proceeding to present such a Bill for the royal assent before it had been approved by the electors…the Courts would be bound to pronounce it unlawful to do so'.[26]

These principles might be put forward as supporting a wider power of State Parliaments to entrench legislative provisions than that provided by the *Colonial Laws*

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[20] (2003) 202 ALR 233, 279.
[21] See Twomey, above n 14, 294.
[22] *Constitution of Australia*, s 106.
[23] *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, 248.
[24] [1965] AC 172, 198.
[25] See Peter Hanks, Patrick Keyzer and Jennifer Clarke, *Australian Constitutional Law: Materials and Commentary* (7th ed, 2004) 325-326..
[26] *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394, 426.

Validity Act or the *Australia Act*. However, some members of the High Court have, in recent times, expressed scepticism about this proposition. In *McGinty v Western Australia*, Gummow J said:[27]

> The case may stand for the proposition that a manner and form provision which appears in the written constitution of a unitary State where no paramount law, such as s 5 of the 1865 Act, remains in force, continues to place a restraint upon law making, and that the question of the observance of the restraint is justiciable.

While, as Twomey points out, 'there has been no definitive rejection of the application of the *Ranasinghe* principle to the States',[28] it seems the High Court is unlikely to use the principle to give effect to entrenchment laws not otherwise within the scope of s 6 of the *Australia Act*.

d) 'Constitutional statutes'

In *Thoburn v Sunderland City Council*,[29] a decision of the English Divisional Court, Laws LJ argued that there was a special category of 'constitutional statute' which could not be repealed by a later statute unless that statute expressly stated its intention to do so. This category of 'constitutional statutes' included a statute that

> (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights.

A Charter of Rights would come within this category:

> The special status of constitutional statutes follows the special status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts which distributed and enlarged the franchise, the HRA, the Scotland Act 1998 and the Government of Wales Act 1998.[30]

If this principle were adopted in Australia, it might allow for partial entrenchment of a Victorian Charter of Rights. It would not prevent the Parliament from legislating inconsistently with the Charter; but it would require it to use unmistakeably clear language if it intended to do so.

However, we regard it as most unlikely that this principle would be adopted in Australia.

First, the approach in *Thoburn* is inconsistent with the analysis of the Privy Council in *McCawley v The King*.[31] The Privy Council there rejected an argument that the constitution of Queensland could not be amended by implication and could only be amended by legislation that 'in plain and unmistakable language refers to it; asserts the intention of the Legislature to alter it; and consequently gives effect to that

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27 (1996) 186 CLR 140, 297; see also the comments of the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) in *Attorney-General (WA) v Marquet* (2003) 202 ALR 233, 251: '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.'

28 Twomey, above n 14, 298.

29 [2002] 3 WLR 247. Discussed at greater length in Simon Evans, "Why is the Constitution Binding? Authority, Obligation and the Role of the People" (2004) 25 *Adelaide Law Review* 103.

30 [2002] 3 WLR 247, [62] (citations omitted).

31 [1920] AC 691.

intention'.[32] The Privy Council regarded both the Queensland constitution and the British constitution as 'uncontrolled constitutions' to which such a principle was inapplicable.

Secondly, it would require the Courts to unilaterally make a fundamental change to basic constitutional arrangements that have operated in Australia for more than two centuries.

Conclusion

The prospect of a Bill of Rights being validly entrenched in a way which protects it from being amended by inconsistent future legislation is at least uncertain. It is important that any attempt to do so takes account of this uncertainty. Entrenchment provisions which prove ineffective in achieving their purported objective would not be a new phenomenon (arguably, several of the purportedly entrenched provisions introduced in the 2003 amendments to the Constitution Act are ineffective). However, given the expectations and public reliance an entrenched Bill of Rights would encourage, a later finding that its entrenchment provisions are of no effect may be damaging to its legal foundations, and its public support.

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32 [1920] AC 691, 705-706.