THE 'PRINCIPLE IN *RANASINGHE*'
A Reply to HP Lee

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In "Manner and Form: An Imbroglio in Victoria",[1] HP Lee criticises some arguments I made in "Manner and Form in the Australian States".[2] In the latter article, I examined the constitutional foundations for restrictive procedures (that is, mandatory procedures for legislating which differ from the standard procedures).[3] I argued that s 2(2) of the *Australia Act*[4] supplies each state Parliament with a continuing constituent power to legislate for the "peace, order and good government" of its state. That legislative power is 'constituent' because it embraces the state's constitution,[5] and it is 'continuing' because, given their inability to amend or repeal the *Australia Act*, the state Parliaments cannot abdicate or restrict it (subject to s 6). I then argued that:

> There seem to be only three possible grounds for restrictive procedures which are compatible with subsection 2(2). The first is s 6 of the *Australia Act*, to which subsection 2(2) is expressly subject: it makes binding requirements as to the manner and form in which laws respecting Parliament's constitution, powers or

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1 HP Lee "Manner and Form: An Imbroglio in Victoria" (1992) 15 *UNSWLJ* 516.

2 J Goldsworthy "Manner and Form in the Australian States" (1987) 16 *Melbourne University Law Review* 403.

3 *Ibid* at 403 n 1

4 *Australia Act* 1986 (Cth); *Australia Act* 1986 (UK). I refer to both as "the *Australia Act*" for convenience, given that their provisions are virtually identical.

5 See for example *Clayton v Heffron* (1960) 105 CLR 214 at 251-2.

> procedure must be passed. The second is that pure procedures or forms for legislation of any sort do not, by definition, impermissibly restrict Parliament's constituent power. The third is that a partial reconstitution of Parliament for special purposes also preserves the power granted by subsection 2(2), at least provided Parliament's ability to act is not destroyed or unreasonably impaired.[6]

I also argued that there are no additional, independent grounds for restrictive procedures. In particular, I rejected the popular notion that the Judicial Committee of the Privy Council in *Bribery Commissioner v Ranasinghe*[7] laid down a general principle which constitutes an additional, independent ground. That principle is supposedly 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".[8] I argued that the decision in that case could be justified in terms either of reconstitution, or of pure procedure or form, but that any broader principle would not be good law in Australia.[9]

HP Lee seems to disagree with this, and to think that *Ranasinghe* establishes a ground for restrictive procedures which is, at least partly, additional to the three I have identified. He says:

> In the case of a special majority requirement which does not fall within the operation of s 6 of the *Australia Act*, the 'reconstitution' argument or Goldsworthy's proposed 'pure procedure and form', the binding effect of a special majority requirement must lie in the invocation of the *Ranasinghe* principle.[10]

In addition, he suggests that given the principle in *Ranasinghe* there is no need for the category 'pure procedure or form'. The rationale I gave for pure procedure or form, he says,

> could be the same rationale for upholding the 'conditions of law-making' as mentioned in *Ranasinghe*.... In other words, the 'pure procedures or form' alternative can be subsumed into the *Ranasinghe* principle.[11]

He seems to suggest that since this is so, why not be content with the principle in *Ranasinghe*: why coin a new, unfamiliar term and use it instead?

The reason that I do not find the so-called 'principle in *Ranasinghe*' satisfactory is that neither it nor its rationale are perspicuous. Moreover, in attempting to elucidate them the judgment of the Privy Council is of little assistance. It is necessary to return to general principles, and in particular, to the concept of continuing constituent power which is central to understanding the legislative powers of our State Parliaments. This is what I tried to do in my earlier article. What I called reconstitution, and pure procedure or form, seem to be the only grounds for restrictive procedures, apart from s 6 of the *Australia Act*, which can be reconciled with that continuing constituent power. In my view clear thinking is enhanced by using these categories rather than an ill-

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6 Note 2 *supra* at 428.

7 [1965] AC 172.

8 *Ibid* at 197. Note 1 *supra* at n 31. See also G Carney "An Overview of Manner and Form in Australia" (1989) 5 *Queensland University of Technology Law Journal* 69 at 90-1.

9 Note 2 *supra* at 425-6.

10 Note 1 *supra* at 533.

11 *Ibid* at 532.

defined 'principle' whose original justification, and consistency with Australian constitutional provisions, are obscure.

Consider this so-called principle. The Privy Council said 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". This cannot be taken literally because it is both too broad and too narrow. It is too broad because the Privy Council itself did not think that every condition of law-making must be complied with. Towards the end of its judgment the Privy Council suggested that it was crucial to its decision to enforce the conditions of law-making in question that they did not detract from the sovereignty of the Ceylonese Parliament.[12] And this must be the case in Australia, because s 2(2) of the *Australia Act* supplies State Parliaments with a continuing constituent power which invalidates any condition of law-making inconsistent with it. For example, a condition of law-making of the kind considered in *Commonwealth Aluminium Corporation Limited v Attorney-General*,[13] requiring in effect the consent of a private corporation before legislation could be passed by Parliament, could not be binding.

So the principle in *Ranasinghe* must be: a *sovereign* legislature has no power to ignore conditions of law-making *compatible with its continuing sovereignty* that are imposed by the instrument which itself regulates its power to make laws. But problems for the so-called principle do not end here. As well as being too broad, it is in a different respect too narrow, because it is unjustifiably limited to conditions of law-making imposed "by the instrument which itself regulates its [the legislature's] power to make law". The Privy Council simply assumes, with no apparent justification, that there is something special about a constitution which grants legislative powers, such that conditions of law-making included in it are binding although in other legislation they would not be. Support for that assumption can be found in some of the reasoning of the majority of the High Court in *McCawley v R.*[14] But that reasoning was implicitly rejected by the Privy Council when it reversed the High Court's decision on appeal.[15] Even HP Lee agrees that "there is no reason why a

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12 Note 7 *supra* at 200.

13 [1976] Qd R 231. In this case Dunn J thought that the condition in question, imposed by ss 3 and 4 of the *Commonwealth Aluminium Corporation Pty Ltd Agreement Act* 1957 (Qld), was not a condition of law-making at all, but merely a condition binding the executive government. Wanstall SPJ and Hoare J disagreed with him.

14 (1918) 26 CLR 9. Barton J, for example, said: "The provisions of the Constitution as to the commissions, removal and salaries of the Judges of the Supreme Court are also to be found.... in the *Supreme Court Constitution Amendment Act* of 1861 and in the consolidating *Supreme Court Act* of 1867. It may be said that, standing in those Acts, they may be disregarded by any ordinary law. The fact, however, that a provision in the Constitution is repeated in ordinary legislation cannot possibly detract from its force and effect while it is part of the Constitution": at 32-3. Isaacs and Rich JJ replied, in dissent, that the efficacy of a provision cannot depend on whether the Act of which it is part is labelled 'Constitution': at 47, 52 and 57-8.

15 [1920] AC 691. Note that the Privy Council at 701 said that it was "in almost complete agreement" with the views of Isaacs and Rich JJ.

manner and form cannot be located in an ordinary Act of Parliament".[16] (Later he adds the qualification "provided the subject-matter of the legislation can be regarded by the courts as having fundamental importance".[17] However he proffers no constitutional basis for this qualification.)

So the principle must be simply that a sovereign legislature has no power to ignore conditions of law-making compatible with its continuing sovereignty. But this is still rather unhelpful, for it leaves unanswered the question of what conditions of law-making *are* compatible with continuing sovereignty. It was in answer to that question that I identified the two categories of reconstitution and pure procedure or form. Lee prefers to use the term 'manner and form' but I fear that this, too, may impede clear thinking. 'Manner and form' is a term used in statutory provisions, s 6 of the *Australia Act* and before that s 5 of the *Colonial Laws Validity Act*. As such, its meaning depends not just on general constitutional principles, but on the context and history of those particular Acts. As I pointed out in my earlier article:

> Dixon and Rich JJ interpreted the statutory words 'manner and form' so broadly because they believed that this was intended by those who enacted the *Colonial Laws Validity Act*. Dixon J acknowledged that "the language of the proviso may be susceptible of an interpretation which confines its application to the procedure by and the form in which a Bill is to be dealt with [within the legislature]", but he rejected this because when the proviso was enacted laws requiring things to be done outside the legislature were prominently in view and clearly intended to be included.[18]

It was for this reason that I coined the term 'pure procedure or form', to distinguish restrictive procedures binding independently of s 6 of the *Australia Act* from those binding under it. Indiscriminate use of the term 'manner and form' runs the risk that the broad interpretation of those words adopted in *Trethowan* will be applied inappropriately in cases falling outside s 6. In those cases, the courts should accept the argument rejected by Dixon J, namely, that the only conditions of law-making compatible with continuing, constituent legislative power are those governing "the procedure by and the form in which a Bill is to be dealt with" within the legislature (apart from reconstitution). Use of the term 'pure procedure or form' helps to preserve this distinction. (Incidentally, it is for the same reason that I prefer 'restrictive procedures' to 'manner and form' as a generic term). HP Lee is therefore mistaken in objecting that my argument for pure procedure or form is just "another way of saying that manner and form will bind if it does not deprive Parliament of its law-making power".[19]

The difference that my approach could make in practice is illustrated most vividly in the case of a referendum requirement. What if something like s 7A of the New South Wales Constitution were inserted in the proverbial *Dog Act*,

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16 Note 1 *supra* at 533.
17 *Ibid* at 536.
18 Note 2 *supra* at 418.
19 Note 1 *supra* at 532.

requiring that a referendum be held before a law repealing or amending any part of that Act should receive the Royal assent? Would that restrictive procedure be valid, binding future attempts to repeal or amend that Act? Assuming that no attempt were made to amend or repeal the restrictive procedure itself, s 6 of the *Australia Act* would not apply. This is because on that assumption, the amendment or repeal would be dealing with dogs, not the constitution, powers or procedure of Parliament.[20] That leaves, in my view, reconstitution, and pure procedure or form, as the only remaining alternatives. Let us also assume that the restrictive procedure cannot plausibly be construed as reconstituting the Parliament, as indeed (*pace* Rich J in *Trethowan's* case) s 7A itself cannot be.[21] That leaves pure procedure or form. But now the difficulty is that by requiring a referendum, the restrictive procedure deprives the Parliament of its power to act without the assent of an outside body. That seems incompatible with s 2(2) of the *Australia Act*, for reasons given at the outset of this article.

In *West Lakes Ltd v South Australia*,[22] King CJ said that ordinarily, a requirement that an extra-parliamentary individual or group of individuals must consent to legislation would be a renunciation *pro tanto* of lawmaking power, rather than a manner and form for exercising that power. However, he distinguished referendum requirements on the ground that:

> Such a requirement, although extra-parliamentary in character, is easily seen to be a manner and form provision because it is confined to obtaining the direct approval of the people whom the 'representative legislature' represents.[23]

The question, on this view, is whether the entity whose consent is required forms "part of the legislative structure (including in that structure the people whom the members of the legislature represent)".[24]

King CJ was discussing the meaning of the words 'manner and form' in the proviso to s 5 of the *Colonial Laws Validity Act* (now, in effect, s 6 of the *Australia Act*). In that context, in the absence of some such distinction as the one he suggested, it would follow from the decision in *Trethowan's* case that a power to veto over legislation to which s 6 applies could be given to *any* extra-parliamentary entity.[25] But outside the context of s 6 such a distinction is less plausible. Section 2(2) of the *Australia Act* supplies *the Parliament* of each State with continuing power - not the electorates they represent, and not the 'legislative structures' which include the electorates. A law enabling the electorate to veto Parliament's exercise of that power is surely incompatible with the words of s 2(2). Such a law is nevertheless valid insofar as it can,

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20 A law to repeal or amend the restrictive procedure would be a law respecting the constitution, powers or procedure of the Parliament, because a restrictive procedure is, by definition, such a law: see note 2 *supra* at 416.

21 This is because s 7A itself uses the term 'the Legislature' in a manner inconsistent with any suggestion that its intention and effect is to reconstitute the legislature: *ibid* at 414.

22 (1980) 25 SASR 389.

23 *Ibid* at 397.

24 *Ibid* at 398.

25 Note 2 *supra* at 419.

given *Trethowan*, be regarded as a 'manner and form' which is binding by virtue of s 6. That is because s 6 expressly applies "notwithstanding ss 2 and 3(2)". But outside s 6 neither the decision nor the reasoning in *Trethowan* are authoritative, for the reasons I have given. Parliament should be able to amend the *Dog Act* in the ordinary way, and ignore the restrictive procedure. Moreover, even if this conclusion is rejected, my main point stands: that these issues are obscured if what I call 'pure procedure or form' is not distinguished from 'manner and form'.

Some (and I do not refer to HP Lee) might prefer these issues to be obscured because, for example, my approach makes the entrenchment of a Bill of Rights in a state constitution more problematic (as indeed it does). They might think that my approach is too 'black letter', elevating legalistic technique over substantial policy considerations. I am not averse to policy considerations being taken into account, or even to their sometimes over-riding 'strict' legal reasoning. But if this is to happen it is better to know when, to what extent, and at what cost. And to know this requires that strict reasoning be over-ridden only after, and not before, it is pursued to its conclusion.

To summarise, I claim first, that the so-called principle in *Ranasinghe* must be radically reformulated to be compatible with both Australian law and general principle; secondly, that this process is not greatly assisted by analysis of the Privy Council's judgment in that case; thirdly, that what emerges from this process are the two categories I have identified, those of reconstitution, and of pure procedure or form; and fourthly, that important issues are obscured if the term 'manner and form' is used indiscriminately to include every kind of binding restrictive procedure. HP Lee has not persuaded me that these claims are erroneous.[26]

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26 Incidentally, I agree with HP Lee that the relevant provisions of ss 18 and 85 of the *Constitution Act* 1975 (Vic), as amended, are valid and binding even in situations not involving attempts to enact laws respecting the constitution, powers or procedure of the Parliament. This is because, in my view, they lay down pure procedures or forms for future legislation.