

WESTERN AUSTRALIAN FUTURE FUND BILL 2012

Second Reading

Resumed from 15 August.

MR B.S. WYATT (Victoria Park) [4.57 pm]: I rise as the opposition lead speaker on the Western Australian Future Fund Bill 2012. This is the third time I have spoken on the concept of a future fund; I first spoke about it when it was announced by the Premier in the Premier's Statement earlier this year, and again in my reply speech to the budget as introduced by the former Treasurer, the member for Bateman. The point I have made continually is that this bill is—to borrow an expression from the current Treasurer—a political charade. It is also a political contradiction. One need only look at the front page of *The Australian* of 18 May 2012, and an article titled, "WA to lock away mine boom riches in future fund". It is an interesting read; it goes on to quote Mr Porter, the former Treasurer, when he complained about plunging state government revenues. The article reads, in part —

Mr Porter said the state's revenues were shrinking fast as it was penalised for its success by the Commonwealth Grants Commission. WA would get only 55 per cent of its population share of national GST revenue next year, and this would decline to just 25 per cent by 2015–16.

Then the article quotes Mr Porter —

"The federal Labor government's decision to cut WA's GST share is the single greatest economic threat to WA," he said.

Yet, later the very same article stated—

Mr Porter defended the creation of the future fund, saying the government was spending record amounts on infrastructure, and the best way of using the money was "not to spend it".

So, on the one the hand, revenue is declining and the greatest threat to Western Australia is that declining GST share, yet on the other hand the best way to spend the revenue we do have is to not spend it. In the same article Mr Porter, the former Treasurer, made the point that he was sticking the money away because he thought —

... the money was at risk of being wasted on promises in the lead-up to next year's state election.

As I said, this is a political charade, to quote the current Treasurer not that long ago in this Parliament when dealing with a very similar bill. Indeed, this is a political contradiction.

I will spend some time going over points I previously made in my contribution to the budget debate and I will then spend some time on the Treasurer's so-called manner and form—the manner and form he seeks to entrench in this bill as something beyond the reaches of future Parliaments. I am always intrigued when a conservative government seeks to bind or limit the powers of future Parliaments. I almost expect the Premier to announce a human rights act very soon to bind future Parliaments and to limit their capacity to pass legislation, but of course, the manner and form provision will have absolutely no impact on a future Parliament and I will outline that in some detail.

I start by quoting the Chamber of Commerce and Industry of Western Australia. When the Premier announced in his Premier's Statement that he intended to introduce a future fund, the CCI went about preparing a discussion paper entitled "Examining the issues of Sovereign Wealth Funds", which was released this year. This is not a sovereign wealth fund, but it makes the point that a sovereign wealth fund —

... also needs significant, ongoing injections of savings to be worthwhile. However, both the Federal and State Governments do not have the capacity to deliver these savings now or into the future.

The paper then went on to make the point —

Debt levels in both jurisdictions also remain elevated, and future surpluses must first go to reducing this debt.

The CCI makes the point that saving wealth does not necessarily maximise that and I will outline the fact that bearing in mind the money going to this future fund is borrowed money, that further emphasises the point. The CCI also made the point that there is no capacity in Western Australia to inject savings due to declining GST revenue and elevated debt. The CCI ran the logical and consistent argument that the Premier and former Treasurer have been arguing for a number of years now regarding a declining GST, and of course the CCI made the point about opportunity costs. It is better to invest in productivity enhancing reforms and investment, and I will come to some comments about opportunity costs made by the current Treasurer a number of years ago when he was shadow Treasurer. I conclude my point by again briefly quoting from page 12 of the CCI's document. It states —

The State's substantial infrastructure needs have also seen net debt rise to 7.5 per cent of Gross State Product ... in 2011–12 and will rise to 8.7 per cent by 2014–15. As a result, Western Australia's annual interest bill will rise from \$305 million in 2010–11 to \$605 million by 2014–15.

The CCI makes the point that debt repayment is a more important way to allocate surplus positions.

Not long after the Premier's announcement of a future fund, Adam Creighton made the point in *The Australian* on 24 February 2012 that —

Sovereign wealth funds are poor value for today's taxpayers, an embarrassment for tomorrow's, and they sap the government's incentive to spend and tax prudently and moderately.

Mr Creighton went on to make a point that the federal Future Fund had been generating a real return of two per cent and we would say that is hardly an adequate return on money being squirrelled away in a savings account, particularly in our case in Western Australia where that rate of return is on borrowed money upon which an increasing rate of interest will be paid. I will go through that again very shortly.

Finally, I want to note the Centre for Independent Studies, which also, following the Premier's commitment to a future fund, released a study by Robert Carling and Stephen Kirchner on future funds entitled, "Future Funds or Future Eaters? The Case Against a Sovereign Wealth Fund for Australia". It is a very good piece from the CIS, and I declare my interest, being a member of the CIS. To quote from the CIS, it makes the point that —

The investment returns on the Future Fund's assets are inadequate compensation for the foregone alternative uses of these funds.

That is one of the key points. What is another way this public money could be used? The former Treasurer, Mr Porter, made the point that the best way to use this money is not to spend it, because according to him, once the capital works program the government has is finished, there will apparently be no further call for investment for infrastructure spending in Western Australia.

The Leader of the Opposition announced the opposition's position in his contribution to the budget debate on 23 May this year. He made the point that —

A future fund should be a priority when debt levels are low and when there is adequate social and economic infrastructure in the community. That makes sense.

Later, he went on to say —

We propose that the funding earmarked for this fund should go to roads in the regions, public transport in the suburbs and science and technology projects in conjunction with our universities and research institutions.

He went on to make the point about what that would mean. Highlighting the points raised by the CCI and the Centre for Independent Studies, what compensation will we receive for putting this money into a savings account and not investing in productivity enhancing infrastructure? That return is clearly not sufficient.

A number of future funds, money being set aside or attempts at money being set aside have been debated in this Parliament over the years. Since my election, this is the third time this has been debated—the fourth if we count the debate on royalties for regions. The Western Australian Resources Heritage Fund Bill 2007 was introduced by the then Minister for Planning and the Fiona Stanley Hospital Construction Account Bill 2007 was introduced by the then Treasurer, the member for Belmont, to put aside money for the payment of the construction of Fiona Stanley Hospital. On 22 May this year, the former Treasurer made the point that the future fund bill is effectively the same as the Fiona Stanley Hospital bill. He said there were —

... separate accounts under the umbrella of the public bank account—that is how it works.

It is interesting when we look at what was said by the current Treasurer, the then shadow Treasurer, in respect of the Fiona Stanley account bill. The current Treasurer, the member for Vasse, made this point —

The Treasurer says in his second reading speech that the purpose of the bill is to stop political parties getting their hands on this money in future and using it for other political purposes. He wants to stop this money becoming a pork-barrelling slush fund. I think that is somewhat abstract from the political reality. If the Treasurer had established a special purpose account under the Financial Management Act and placed in it \$1.1 billion, and at some stage down the track someone tried to plunder it, does he not think there would not be a fair amount of scrutiny of that decision? It would be plundered only by the government of the day.

From that I assume that back then the Treasurer thought it appropriate that Parliaments of the day could make their own decisions about how public money is spent, and as a result, we are now seeing a reversal of that position and attempts to limit future Parliaments in repealing or amending the future fund bill we are debating

tonight. More importantly, the Treasurer went on to describe the Fiona Stanley Hospital account bill as a “political charade”. He said —

Another issue arises out of the Treasurer’s decision to put \$1.09 billion into this account; that is, the opportunity cost. The member for Dawesville asked about state debt. I understand there are state debt instruments that could be retired with this money. My reading of the budget papers suggests that there is gross debt in the general government sector. Certainly, there is gross debt in the public non-financial corporations sector to which the Treasurer could have allocated this funding.

Certainly he is indeed right; there was gross debt. I tell members now that there is a hell of a lot more gross debt in the general government sector and in the public non-financial corporation sector. The Treasurer, the then shadow Treasurer, was correct in his comments that the better way to spend this money would have been to pay off debt. Importantly, the Deputy Premier got to his feet to make some points about how he thought money should be spent rather than sticking it in the Fiona Stanley Hospital account. The Deputy Premier, the member for Dawesville, said —

An issue that concerned me was the Treasurer putting this money into a specific funding arrangement, which is separate from the normal budget and will not be used to pay off debt. I agree with the shadow Treasurer —

That is, the member for Vasse —

that the government is only doing this because it sounds good and not because it achieves any great purpose. Although the interest that is earned from this money will be available for use in health, the reality is that if it was paying off debt, the state government and the people of Western Australia would be far better off.

That is what the Deputy Premier said. He went on to say —

The government’s argument is a nonsense argument. The government could just as easily have paid off debt and then provided the money when it became available.

The position certainly of the Treasurer, the member for Vasse, and the Deputy Premier, the member for Dawesville, was crystal clear on the Fiona Stanley Hospital account that this bill is modelled on. As the member for Bateman said, what a waste of money. “Pay off debt” was the position of the Liberal opposition at the time, and it was right. I am very surprised that the government is borrowing money to stick into this account. It is an odd thing to do for a conservative government.

I also make the point that the Minister for Planning, when he introduced his heritage fund bill, said the bill would create a genuine sovereign wealth fund to invest in equities and such other to generate a higher rate of return than certainly this will generate. I quote the Minister for Planning, the member for Kalamunda —

It is also relevant to note that the general government sector is forecast to remain net debt free in 2006–07 and in the future. Most public sector debt that exists is held by the major trading agencies, particularly the Water Corporation and the various electricity corporations. We therefore believe that the time has come to establish an investment fund for the state —

The member for Kalamunda, the now Minister for Planning, also agreed with the now Deputy Premier and the now Treasurer that while net debt was forecast to stay negative into the future—negative or low—now was the time to establish a future fund or a sovereign wealth fund, which the member for Kalamunda genuinely tried to establish.

The member for Belmont, as the then Treasurer, in his response to the member for Kalamunda’s Western Australian Resources Heritage Fund Bill, said that there are four problems in doing what the member suggested. Firstly, there is still debt in the public sector. That was the exact issue that was complained about by the Treasurer, then the shadow Treasurer, in respect to the Fiona Stanley Hospital account: there is still debt in the public sector that should be paid off. The second problem is that there are infrastructure deficiencies. Any member of Parliament could point to an infrastructure deficiency in their electorate, whereas the former Treasurer, the member for Bateman, made the point, “Actually, we’re at a point now with the capital works program that the government will solve all those. We need to get our dwindling revenue and not spend it.” He had a contradictory view of the arguments that he had been making about plunging GST returns.

The member for Belmont made a third point. Outstanding superannuation liabilities at the time were around \$5 billion. The member for Bateman, during estimates this year, said that the outstanding superannuation liabilities were now \$8.5 billion. The fourth point, perhaps the key issue in our fiscal arrangements, is the problem of capture. The Australian state relationship of finances does not allow us to capture the wealth that we generate. Certainly that was the key issue complained about by the former Treasurer who said, on 15 March 2011 —

The point is, Leader of the Opposition, that we do not get to keep the revenue from the royalties, because once it has washed through the HFE —

Horizontal fiscal equalisation —

system, it is taken off us, and then some —

The then Treasurer, Mr Porter, the member for Bateman, on 23 May, after complaining about the fact that we do not get to capture our royalties, went on to make the point —

... because of the system that we have in place with GST and the horizontal fiscal equalisation system, over the long run, 60 per cent of that revenue —

Referring to the increased royalty rate that will now form the biggest component of the seed capital for our future fund —

is gone; it is lost. Indeed, had a different system of calculation been undertaken, 280 per cent of that revenue would have been lost. Fortunately, that was not the decision that was made by the commonwealth government.

Somewhere between 60 per cent and 280 per cent of our increased revenue from the royalty increase—the fines increase—is redistributed across Australia, but all that money we are redistributing, we are now sticking in a future fund. Mr Porter also signed off on the GST submission. As we know, the federal government has commissioned Mr Greiner and Mr Brumby to review the GST arrangements to hopefully achieve a fairer outcome for states like Western Australia. The submission that was signed off by the then Treasurer, the member for Bateman, had this at page iv, under the heading “Perverse outcomes” —

One of these relates to Western Australia’s efforts to price more fairly and efficiently the minerals it owns on behalf of the State community, by phasing out certain long standing iron ore royalty concessions. Incredibly, under current fiscal equalisation arrangements, well over 100% of the increase in royalty revenue could be redistributed to other States.

He went on —

The majority (around 70%) of the mining royalties raised in Western Australia that could be invested in services and infrastructure to help Western Australia attract labour and private sector capital are instead redistributed to other States on starkly different economic adjustment paths.

The former Treasurer made that point time and again: we do not get to capture our royalties; it is redistributed. The then Treasurer, the member for Bateman, says, “We’ve lost all this. Over 100 per cent of that increase in royalties, we’ve lost; it has been redistributed.” The former Treasurer said —

It is equivalent to a 100% tax on any excess of one State’s fiscal capacity over the average for all States.

I recall the debate we had in here over windfalls and whether states actually get a financial windfall. The then Treasurer, the member for Bateman, made that point: because of HFE, we do not get a windfall, yet all that money we do not get, because it has been redistributed—I know that because the Treasurer said that in his submission to the GST review panel—we are sticking in this future fund. We know in reality that we are borrowing the equivalent of that amount and sticking it in that future fund. That in itself brings up some interesting contradictions. I put these issues to the then Treasurer, the member for Bateman, during budget estimates on 30 May. The then Treasurer had obviously made the decision he was would leave state politics because he was incredibly frank with the opposition during estimates, which is unusual in itself. Mr Porter said —

I would be happy to acknowledge, as I properly should, that, generally speaking, over a long period more will be paid on debt than will be paid on invested moneys in the type of conservative investment portfolio that we are talking about here.

I then prodded the Treasurer a bit more over that. I was obviously interested in that response from the then Treasurer. The member for Bateman then went on to say —

But I accept the fundamental point that the member is making; that is, between paying off debt to the tune of \$1.1 billion and investing \$1.1 billion, will there be a differential over 20 years and thereby a loss of some quantum between the interest being earned on the investment and the interest being paid on debt? I think the answer is that, yes, there likely will be.

The then Treasurer, the member for Bateman, accepted that in the long run it will ultimately cost more to borrow the money than the rate of return that we would get by sticking this money into a savings account. The Treasurer accepts that point.

In the briefing we received from the Department of Treasury, officials made the point that the assumed interest on our borrowings between 2012–13 and 2015–16 is 3.87 per cent, 4.73 per cent, 4.92 per cent and 4.95 per cent.

However, from the Western Australian Treasury Corporation's weighted average effective interest rates over the five years leading up to 2011, the average interest rate was 5.58 per cent. Bear in mind that the aimed rate of return for the future fund, as pointed out by the former Treasurer and by the document given to the opposition by the DTF officials, is 5.2 per cent, thus confirming the point made by the former Treasurer that there will be a differential over the 20 years. Yes, as the member for Bateman said, it will cost more to borrow this money than it will on the return that we are going to get from the future fund.

I pose one question, which relates to the problem of trying to set out a 20-year limit on managing state finances: what if Western Australia at some point in the future loses its AAA credit rating? What happens then to the future fund? It utterly blows it out of the water. At the moment, from what I can gather, the future fund will buy a hell of a lot of Queensland bonds. That is what we will do. We will buy a hell of a lot of Queensland bonds and hope that our credit rating stays better than its credit rating. I am not sure, but I dare say we will not buy enough, but does that at any point lower Queensland's rate of borrowing while increasing our own, bearing in mind we are borrowing money to invest in Queensland's bonds? I offer that merely by way of speculation.

The Centre for Independent Studies also made the point that the real rate of return on the federal government's future fund was 2.2 per cent. If we were to apply that, based on the budget inflation rates of 5.2 per cent that this government handed down in May this year, the real rate of return we will get in 2012–13 is 1.7 per cent, 1.95 per cent and 1.95 per cent on borrowed money. I do not think anyone anywhere perhaps outside this chamber would accept that rate of return on borrowed money if in the end the Western Australian Future Fund Bill ultimately passes.

I would like to make one final point before returning to the constitutional issues and the so-called manner and form issues that the Treasurer has tried to introduce in this bill. The ultimate amount of money that will be in the future fund will be \$4.7 billion. In today's money, as pointed out during our briefing with Treasury, that \$2.6 billion generates in today's dollars about \$130 million a year to spend. Going on what the Premier announced about Willetton high school, we are getting about one and a half high schools. That is what we will be able to use this future fund for 20 years from now—to build one and a half high schools in the future. Interestingly, the average inflation rate between 1973 and 2012 was considerably higher than the inflation rate across the forward estimates. That was at 5.8 per cent, which would mean that we would be getting effectively, in today's dollars, \$78 million. We are putting aside \$4.7 billion of borrowed money to have an annual return of \$78 million in today's dollars. Heavens above! No wonder the current Treasurer, the current Deputy Premier and the Minister for Planning thought it was such an appalling idea to stick money in the Fiona Stanley account—that was not borrowed money; this is—and no wonder they said a better way to use that money was to pay off debt.

I want to turn to the manner and form provisions in clause 10 of the future fund bill, "Manner and form of amendment or repeal during accumulation period". Manner and form provisions are interesting provisions. The Treasurer and the government are seeking to entrench clauses 6, 7, 8 and 9 and 10 of the bill, which are of course the operative parts of the bill, and also apply the manner and form provision to clause 10 itself—that is, to doubly entrench the manner and form requirement. According to the Department of Treasury briefing—I went and looked—it is modelled on the Electoral Act 1907. Apparently, advice was received from the Solicitor-General on this manner and form provision. I would be very surprised if the Solicitor-General, being the quality lawyer that he is, advised the Treasurer that that will stand up and bind a future Parliament. There is no doubt in my mind that the manner and form provision requiring the absolute majorities in both houses of Parliament will not actually bind a future Parliament, as any future bill that seeks to repeal or amend the bill will not be a law respecting the constitution, powers and procedure of the Parliament, as defined under section 6 of the commonwealth Australia Act 1986.

This area of constitutional law has been a topic of interest of mine. We know the old Diceyan theory that I would have thought a conservative government would subscribe to—that is, that Parliaments are sovereign and one Parliament cannot bind a future Parliament, particularly Parliaments that do not have a codified constitution, such as ours. We have a flexible constitution. It is partly codified, but, as we know, the Colonial Laws Validity Act and then the Australia Act and our own Constitution have given our Parliament plenary powers to make legislation for the peace, order and good governance, to be limited in a very small circumstance.

Perhaps the pre-eminent Australian scholar in this area, someone I will be speaking to at the Constitutional Centre very shortly, is Professor Anne Twomey from the University of Sydney, who has published extensively on manner and form. To be frank, there is not a lot around on manner and form in respect of state governments. When we look at constitutions and the ability to bind future Parliaments, it tends to take place at a commonwealth level and not so much at a state level, simply because the commonwealth Constitution supposedly sets out the powers of the constitution, whereas state constitutions have a plenary power. Unlike the commonwealth Constitution, state constitutions are flexible rather than rigid, meaning that, subject to enforceable manner and form requirements—that is the key, enforceable—they can be amended by the

enactment of ordinary legislation. As state Parliaments have plenary legislative power, manner and form provisions are not effective in limiting that power unless supported by a higher law. One such law was section 5 of the Colonial Laws Validity Act 1865, which applied to us until 1986 when the Australia Act was passed. That confirmed that the representative legislatures had full power to enact laws respecting the constitution, powers or procedure of each legislature but added the proviso —

... provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

As Professor Twomey has written, the history and purpose of section 5 of the CLVA has been discussed by the Privy Council in a number of different cases, including *McCawley v The King* in 1920. It was intended to remove doubts about the power of colonial legislatures to amend their own constitutions rather than to be a fetter on their powers. Even as early as 1920, the Privy Council made the point that section 5, which ultimately became section 6 of the Australia Act, was not meant to be a fetter on the colonial parliaments of Australia.

The Colonial Laws Validity Act applied until the passage of the Australia Act. Section 3 of the Australia Act makes the point that the Colonial Laws Validity Act no longer applies to legislation passed after the Australia Act. We are looking at the Australia Act in particular, but, as I said, due to the paucity of case law around section 6 of the Australia Act, we tend to also look at section 5 of the CLVA.

Writing for the Lawbook company in the mid-1980s, Professor Twomey noted the following —

The important point to note is that s 6 of the *Australia Acts* only requires compliance with manner and form constraints for the enactment of laws respecting the “constitution, powers or procedure” of the Parliament. It does not give any overriding force or effect to manner and form requirements to the extent that they apply to the enactment of other types of laws.

The question is: will a future bill to amend the Western Australian Future Fund Act 2012 be considered a law “respecting the constitution, powers or procedure of the Parliament”? Absolutely not. Therefore, the plenary powers of Parliament mean that Parliament can pass any laws by way of the normal process—ordinary legislation—unbound by the manner and form constraints of absolute majorities in both houses of Parliament. I want to deal with three questions, which I will put to the Treasurer during consideration in detail. Which law must be one with respect to the “constitution, powers or procedure of the Parliament”? Again, this has caused some debate and indeed some confusion. Professor Twomey makes the point that it is the amending subsequent law and not this law; a future Parliament has to pass a bill to amend or appeal this future fund legislation and that bill has to be in respect of the “constitution, powers or procedure of the Parliament”.

Justice Menzies in *Clayton v Heffron* (1960) put the position thus —

Where the Colonial Laws Validity Act does not apply to the making of a constitutional amendment, then the power of the Parliament of the State is free from any fetter and the passing in normal manner of an Act inconsistent with the Constitution as it stands amends the Constitution without the need for a previous express amendment of the Constitution.

Clearly, laws respecting the constitution of Parliament include laws concerning whether it is bicameral or unicameral and whether the people participate in its exercise by way of referendum. Professor Twomey points out that judges have defined “constitution” in terms of the Parliament and concluded that section 5 of the CLVA and section 6 of the Australia Act would be applicable to a law that abolished a house of Parliament or created a new house or body that formed part of the legislature for the purposes of enacting legislation.

I can tell members now that a future bill that may seek to amend or repeal the legislation we are debating tonight will not be considered a bill that is about “respecting the constitution, powers and procedure of the Parliament”. It will not be caught by this manner and form provision. It is clear from section 5 of the CLVA and section 6 of the Australia Act that neither the manner or form provision itself nor any provision that it purportedly entrenches need be one “respecting the constitution, powers and procedure of the Parliament”. Instead, it is the law that purports to amend or repeal such a provision, the amending law, that must be a law “respecting the constitution, powers and procedure of the Parliament”. That was stipulated by Professor Twomey and referred to by the High Court in the *Marquet* decision, which I will come to in just a second. The question is: when a future WA government introduces legislation to repeal or amend this, will that legislation be considered a law “respecting the constitution, powers and procedure of the Parliament”? Clearly not. Therefore, the manner and form provision in this act does not apply. That is crystal clear. I doubt that any constitutional expert of note would be willing to give advice contrary to that.

Secondly, what does “constitution, powers or procedure of the Parliament” encompass? How broad is that term? The key High Court case law on this is a Western Australian case called *Attorney General (WA) v Marquet* [2003] HCA 67. Prior to *Marquet*, the courts had concluded that the constitution of Parliament encompasses the

nature and composition of Parliament; section 5 of the Colonial Laws Validity Act or section 6 of the Australia Act would cover laws abolishing a house of Parliament, for example—god forbid if people tried to abolish the upper house!—or adding a new house or a new body that formed part of the Parliament for the purpose of enacting legislation. In *Marquet*, the majority, comprising Chief Justice Gleeson and Justices Gummow, Hayne and Heydon, introduced a new element to the meaning of “constitution” by relating it to —

... features which go to give it, and its Houses, a representative character.

Their honours noted that —

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 explore what is encompassed by the reference in s 6 of the *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. It is enough to focus on the expression the “constitution” of the Parliament.

Their honours, led by the Chief Justice, went on to find —

The “constitution” of a State Parliament includes (perhaps it is confined to) its own “nature and composition”. The Attorneys-General for New South Wales and Queensland, intervening, both submitted that s 6 of the *Australia Act* should be read strictly and that, accordingly, the “constitution” of a State Parliament should be understood as referring only to the general character of the legislature rather than the rules pursuant to which members are returned to a chamber.

I come to the key finding of the majority of the High Court, led by the Chief Justice —

For some purposes, the nature and composition of the Western Australian Parliament might be described sufficiently as “bicameral and representative”. But the reference in s 6 of the *Australia Act* to the “constitution” of a State Parliament should not be read as confined to those two descriptions if they are understood, as the submissions of the Attorneys-General for New South Wales and Queensland suggested, at a high level of abstraction. That is, s 6 is not to be read as confined to laws which abolish a House, or altogether take away the “representative” character of a State Parliament or one of its Houses. At least to some extent the “constitution” of the Parliament extends to features which go to give it, and its Houses, a representative character. Thus, s 6 may be engaged in cases in which the legislation deals with matters that are encompassed by the general description “representative” and go to give that word its application in the particular case.

There is no way that the High Court or indeed the Western Australian Supreme Court would consider a bill that seeks to amend or repeal the Western Australian Future Fund Act 2012 as a bill that impacts on the representative character of our Parliament or our constitution. Therefore, applying the High Court’s own definition, interpretation and approach to how broad “constitution, powers or procedure of the Parliament” is, will not capture a future bill that seeks to amend or repeal the future fund act.

This may be an argument made by the Treasurer and this will come up during consideration in detail. Is it the Treasurer’s view that the manner and form provision, hence the double entrenchment—I suspect this may be the argument—deals with the powers or procedures of Parliament and, therefore, any future act will necessarily be captured because it will be considered the “constitution, powers or procedure of the Parliament”? No is the simple answer to that. Professor Twomey again has written extensively about this point. She makes the obvious point —

The effect would be that whatever subject the manner and form provisions protected, be it the executive, the judiciary, local government, the *Real Property Act*, or the Wild Dog Destruction Board, would effectively be entrenched. This 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.

Professor Twomey then went on to stipulate that —

In such cases ... one must look to the substance of the amending or repealing law. If the substance of that law is not one with respect to the ‘constitution, powers or procedure’ of the Parliament, then its incidental effect as a later law in impliedly amending an earlier manner and form requirement, should not result in a change in the characterisation of the law.

We cannot simply stick a manner and form provision in a law about the destruction of wild dogs and say that is now caught as a part of our constitution, powers and procedures of Parliament; we still need to look to the substance of what that law is about. As the High Court found in *Attorney-General (WA) v Marquet* in 2003 in a majority decision led by the Chief Justice, unless that law goes to the representative character of the houses of

Parliament, it will not be caught and a manner and form provision will not bind a future Parliament, and, as per section 6 of the Australia Act, which prescribes the plenary power of state Parliaments to make orders for the peace, order and good government of the state, a future Parliament can make laws as per the ordinary passage of legislation.

I will ask the Treasurer during consideration in detail what particular position he takes on the meaning of “the constitution, powers or procedure of the Parliament”, as he clearly has a very broad view that is not supported by the High Court in *Marquet*. I have heard the Treasurer on radio say that this bill will bind future Parliaments and a future Labor government will not be able to get hold of this money, so I know that the Treasurer will be ready to answer those questions. The question is whether we have means of binding future Parliaments other than the Australia Act. There is an earlier case, *Ranasinghe*, but it is clear that the High Court said—in particular, the judgement of Justice Kirby, who was not part of the majority decision—that none of the principles of *Ranasinghe* applied to *Marquet*, and that section 6 was exclusive in how we can bind Parliaments by manner and form provisions. Certainly, Justice Kirby’s decision in *Marquet* followed the earlier judgement of Justice Gummow in *McGinty v Western Australia* in 1996. It seems that manner and form cases in Australia regularly originate in Western Australia. I do not mean to reflect on the Clerk of the Parliaments, of course, about why that may be the case, but it seems that Western Australia has its fair share of manner and form disputes that find their way not just to the Supreme Court of Western Australia but all the way to the High Court—and thank the Lord, because we actually have a relatively recent decision of the High Court regarding manner and form in *Marquet*.

Justice Gummow also considered section 106 of the Commonwealth Constitution, which no doubt the Treasurer would know, as he would have been anxious to ensure that his manner and form provision is valid and would actually bind a future Parliament of Western Australia. In *McGinty*, Justice Gummow was of the view that if a manner and form provision is not made effective by another higher law, such as section 6 of the Australia Act, it is not given any additional force by section 106 of the Commonwealth Constitution. In *Marquet*, Justice Kirby took the same view, noting that section 106 of the Commonwealth Constitution does not of itself supply a power of entrenchment; rather it simply refers back to the state constitution. It simply makes the point that if we are going to amend the state constitution, look at the state constitution for how we go about doing that; it does not provide another authority for a state Parliament to bind a future state Parliament.

The consequence of the High Court’s majority decision in *Marquet* is that section 6 of Australia Act will be treated as the exclusive source for the enforcement of manner and form requirements, with the result that many provisions in state constitution acts and other legislation that are supposedly entrenched may indeed be repealed by an ordinary majority. Indeed, sections of the Constitution Acts Amendment Act 1899 may be repealed by an ordinary passage of Parliament; it may not even require an absolute majority, if the amending act does not meet the definition of an act representing the constitutional powers or procedures of Parliament. The Australia Act makes the point at section 2. It gives to the Parliament of each state the powers to make orders for the peace, order and good government of that state. They are the plenary powers of state Parliaments. On Federation we gave a list of powers to the Commonwealth Constitution, but the states have a plenary power to make laws for the peace, order and good government of our states. Section 6 of Australia Act, which as I said effectively continued on from section 5 of the Colonial Laws Validity Act, made the point that, notwithstanding those plenary powers and the fact that we can, as a Parliament, pass laws about the peace, order and good government of our state —

... 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.

It is obvious from the points that I have made and also the points I have relied on from the High Court’s decision in the *Attorney General (WA) v Marquet* in 2003 that, as the High Court stated, the express provisions of section 6 can leave no room for the operation of some other principle, at the very least in the field at which section 6 operates.

Professor Twomey noted that if there had been a desire to expand the powers of the state to entrench laws—clearly there was not, because this exact issue was considered as recently as 1986—broader terminology could have been used in the Australia Act. Therefore, the only basis upon which the plenary powers of the WA Parliament are constrained is when the Parliament is considering the passage of legislation that is respecting the constitution, powers and procedures of the Parliament; and any act to amend or repeal the Western Australian Future Fund Bill 2012 will not be considered such and, therefore, any manner and form provisions that seek to bind a future Parliament will not apply.

The Treasurer is proud of clause 10—I heard him on radio—but it will not bind a future Parliament. I have no doubt that any constitutional lawyer of note will agree with that position. Indeed, if that was the case, why did the *Royalties for Regions Bill 2009* not have a manner and form provision? Why did the *Cat Bill 2011* not have a

manner and form provision? Why does any of the law and order legislation that the government apparently proudly passes not have a manner and form provision? The reason they do not is that they will not bind a future Parliament. I dare say that the former Treasurer and Attorney General, the member for Bateman, would know this and he would not have included that clause 10. I think that clause 10 is a construct of the Treasurer. I think that the Treasurer has said, “Let us get something in here to bind future Parliaments for the 20-year duration of this bill to 2032”—the member for Cannington is right that he may have been guided by the Premier—so that no future Parliament, Labor or Liberal, will be able to get their hands on the borrowed money earning a very poor rate of return in this savings account. That is why, interestingly, the royalties for regions legislation did not have a manner and form provision, Minister for Regional Development; it is because it would not bind the Parliament. Minister for Police, the reason why the Prostitution Bill 2011, which I dare say we will not see again, or any piece of legislation does not have a manner and form provision is that it does not bind a state Parliament. Why does the government not stick a manner and form provision in all of its legislation? Why does the government not do that? It is because it cannot; there has to be a limit, and there is a limit to what a government can do to bind and constrain the plenary power of a state Parliament.

This issue has been knocking around since the late 1800s. This has been considered for over 100 years. The English Parliament itself is the epitome of Diceyan theory. It is a sovereign Parliament. The European Union has had some impacts on the Westminster Parliament in the United Kingdom, much to the chagrin of many English members of Parliament. However, it was the UK Parliament from which initially came the Colonial Laws Validity Act, and then ultimately the Australia Act. It had to pass the Australia Act, with much mirth, I dare say, in the United Kingdom in 1986 to give us effectively our own governing rights. A future Parliament cannot be bound in the United Kingdom. We have this little quirk of history only because of the Colonial Laws Validity Act passed by the Imperial Parliament in 1865, and then our own Constitution Act Amendment Act, which had this hiccup that we ultimately had to revert to England to change our Constitution. That found its way through to the Australia Act 1986, but the limit is, of course, that we are our own authority; we are now as a state and as a nation our own authority. That is what the Australia Act did, and it is extraordinary to think that it was as recently as 1986 before that happened. Section 6 of the Australia Act took out section 5 of the Colonial Laws Validity Act and made that point. If we are going to make a law, there are some laws that simply cannot be changed by an ordinary piece of legislation—laws such as those that go to the representative character of the houses of Parliament. A bill to amend or repeal the proposed Western Australian Future Fund Act, whether it comes to this Parliament in five years or 15 years, would not be considered such and would not be bound by any manner and form provision, because as courts have found over 100 years, the state Parliament, or the colonial Parliament before it, has plenary powers to make legislation. That is why this legislation is fundamentally flawed in respect of clause 12, because it will have absolutely no impact on a future state Parliament. I hope that the Treasurer is able to perhaps table in the Parliament the advice that he received from the Solicitor-General which supports the inclusion of clause 10 in this legislation and which actually says that this will bind a future Parliament; a future Parliament will not be able to amend or repeal this act unless it gets an absolute majority of both houses of Parliament. It simply will not apply. I make that point. The reason we do not see a manner and form provision in every piece of legislation that comes from the government of the day is that there is that obvious and necessary constitutional limit upon which we can bind future Parliaments.

I commenced my speech 54 minutes ago, making the point that the future fund is a political charade. As the then Treasurer and member for Bateman himself said of the Fiona Stanley Hospital account upon which this legislation is based, this is a political charade. As confirmed by the former Treasurer, to quote him again, because it is a wonderful quote —

I would be happy to acknowledge, as I properly should, that, generally speaking, over a long period more will be paid on debt than will be paid on invested moneys in the type of conservative investment portfolio that we are talking about here.

Mr E.S. Ripper: So they are deliberately setting up a loss-making proposition.

Mr B.S. WYATT: Thank you, member for Belmont. The government is deliberately setting up a loss-making proposition—that is what it is doing—which is why we, the opposition, are very comfortable with the position we have taken. I know that the infrastructure demands of Western Australia will continue to grow. I know that people will still demand more roads, more rail and more science-based investment from the state government, and that is where the Labor opposition will redirect this money. That will be a significant difference at the next election. I look forward to public debate on this issue, because I think Western Australians need to have a debate on this. Very rarely will we find a government that spends three years, nearly four years, complaining about plunging revenues then making the point that the best way to spend our plunging revenues is not to spend them and that it will stick them in a savings account—even worse, though, on a real rate of return of less than two per cent on borrowed money. I do not think that any organisation or any individual would conduct their finances in such a way.

Finally, I spent a lot of time on the issue of manner and form because I think it was worthy of some comment. I do not think the Treasurer has the written advice from the Solicitor-General that backs up the inclusion of clause 10 in this bill.

Mr T.R. Buswell: What happens if I do?

Mr B.S. WYATT: That is why I have asked the Treasurer to table it. I would like to see it, because I dare say—I am very confident—that a future bill will simply not be bound by the manner and form provisions. There will be some interesting debate on this issue. The consideration in detail of these issues of constitutional law, manner and form and rate of returns will be interesting, and I look forward to that debate.

MR W.J. JOHNSTON (Cannington) [5.55 pm]: I want to participate in this debate on the Western Australian Future Fund Bill 2012, and I want to make a point about differentiating this bill from the bill for Fiona Stanley Hospital. The point I make about the Fiona Stanley Hospital bill, which also set up a special account, was that there was actually money. There was a very large surplus in a particular year —

Mr E.S. Ripper: It was 2006–07.

Mr W.J. JOHNSTON: Yes, 2006–07. The surplus that year was \$2.303 billion, and part of that surplus was allocated to an account. I make that point because, as the former federal Treasurer Peter Costello pointed out in debating the federal Future Fund legislation, there is no point putting money into a future fund if a government is borrowing money at the same time. Money should be put into a sovereign wealth fund—a future fund—only when a government is either not borrowing or is repaying debt, and that is exactly what happened with the Fiona Stanley Hospital bill. There was a large surplus. Cash was actually around—money was not being borrowed—and it was placed in the account. The other point I would make is that that money was then held for only a very short time until the construction of the hospital commenced, so it is of a completely different nature from what is being proposed by this bill. There was a simple purpose. Cash was available. No borrowings were involved, and it was clear what was going to occur.

Recently, there was a similar arrangement with the \$350 million one-off payment made by Rio Tinto and BHP Billiton, the two foreign-owned mining companies that dominate Western Australia’s resource sector, when they got agreement from the state government to amend their state agreement acts. That \$350 million was allocated notionally to the construction of the children’s hospital. I make a point about that. It is interesting that when we track that money through the budget papers, we see that it was not allocated to the special account until about 18 months after the payment was made, but, again, there was actually cash. As I say, it was not handled in the same way as the Fiona Stanley money, but money was there. That is a big contrast with what we are doing with this bill, because no money is actually being deposited into the account. In every year of the forward estimates, apart from 2015–16, the government is intending to borrow money. The government intends, according to the budget papers, to borrow \$3 364 million this year, \$2 959 million next year, and \$853 million in 2014–15. It is only in 2015–16 that a whole series of accounting tricks are used to argue that \$598 million will be repaid. So, no cash is actually available to the government to put into the WA Future Fund. What is happening here is that we are creating a notional account within the government bank account that will be called the WA Future Fund. Therefore, it is not like those future funds which people talk about in the media, and which the Premier has even referred to in some commentary he has made, of foreign countries such as Singapore, where they put their surpluses into a fund that is separate to the government bank account and they invest the money. All this is is a notional allocation of the government’s bank account.

I have a copy of the breakdown by Credit Counterparty from the government bank account for the quarter ended 30 June 2012. According to this document, which is available on the Treasury website, there is currently \$6 460 761 000 in the bank account.

Sitting suspended from 6.00 to 7.00 pm

[Leave granted for Mr W.J. Johnston’s speech to be continued at a later stage of the sitting.]

Debate thus adjourned.

[Continued on page 6040.]