Western Australia: A Tale of Two Constitutional Acts

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This paper examines the circumstances that led to the bifurcation of the Western Australian Constitution and attempts to account for the longevity of the arrangement. It suggests that political considerations have been instrumental in determining the shape and appearance of the Constitution.

THE Western Australian Constitution is notable in the Australian context because it is one of only two codified constitutions which has not been amalgamated into a single statute.[1] The State's Constitution can be found in the Constitution Act 1889 ('CA 1889') and the Constitution Acts Amendment Act 1899 ('CAAA 1899'). This arrangement is historically not unique to Western Australia. Both Victoria and Queensland had, at one time, their principal constitutional statute spread across a number of separate amending statutes rather than strictly confined to the pages of a single Act.[2] However, while other States have since attempted to formally

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1. The Queensland Constitution is the other exception. Unlike the situation in Western Australia, the Queensland Parliament did manage to accomplish a consolidation of its most important constitutional statutes in 2001. However, a number of provisions contained within the Constitution Act 1867 (Qld), Constitution Act Amendment Act 1890 (Qld) and the Constitution Act Amendment Act 1934 (Qld) were entrenched and could only be relocated to the consolidated Bill via a process of popular referendum. As a result, a total of eight provisions located within these Acts remain encased in the original Act: see <http://www.constitution.qld.gov.au/pdf/ConstitutionNotes.pdf>.
2. See, for example, the Victorian Constitution which consisted of the Constitution Act 1855 (Vic) and the Constitution Act Amendment Act 1958 (Vic). These Acts were amalgamated in the Constitution Act 1975 (Vic).

consolidate their constitutional statues in one Act, Western Australia remains the only jurisdiction in Australia to substantially retain this anomaly.

Interestingly, successive Western Australian governments have demonstrated little interest in amalgamating the State's Constitution, despite growing calls that this situation be rectified in the interests of legislative simplicity. This paper examines the circumstances that led to the bifurcation of the Constitution and seeks to account for the longevity of the arrangement. It suggests that political factors have played a key role in determining both the shape and persistence of the Constitution in its present form. More particularly, it argues that there have been reduced incentives for governments to consolidate the Acts in the wake of the *Wilsmore* and *Burke* cases in the 1980s which established that the CAAA 1899 is a mostly flexible constitutional document, many of the provisions of which can be easily altered by ordinary legislative means. This fact renders governments reluctant to pursue the amalgamation of the constitutional Acts if such action imposes restrictions on their ability to amend the CAAA 1899.

The origins of Western Australia's two Constitutional Acts

Western Australia's formal Constitution has not always been located in two separate Acts of Parliament.[3] There was a brief period in the years between 1890 and 1893 when the Constitution existed as a unified statute. However, the passage of the Constitution Act Amendment Act in 1893 marked the beginning of a process by which the original Act was transformed from a cohesive document into a 'confusing bundle of pamphlets and unbound pages'.[4] Over the next three years, Parliament continued to make further amendments and modifications to the Constitution. Each time this occurred it resulted in the creation of an additional smaller constitutional statute. By 1896, the Western Australian Constitution was spread across four Acts of Parliament.[5]

This state of affairs was the result of a particular type of technique used to amend statutes in Western Australia at that time. This technique, known as 'indirect

3. For information on the history of Western Australia's transition to responsible government and associated debates, see JS Battye *Western Australia: A History From Its Discovery to the Inauguration of the Commonwealth* (Oxford: Clarendon Press, 1924); H Colebatch (ed) *A Story of a Hundred Years: Western Australia 1829–1929* (Perth: Gov't Press, 1929); Constitutional Centre of WA's website <http://www.ccentre.wa.gov.au>; B de Garis 'Constitutional and Political Development: 1870–1890' in D Black (ed) *The House on the Hill: A History of the Parliament of Western Australia 1832–1990* (Perth: WA Parliament, 1991); B de Garis 'Political Tutelage: 1829–1890' in T Stannage (ed) *A New History of Western Australia* (Perth: UWA Press, 1981).
4. C Sharman 'The Constitution of Western Australia: 1890 and 1990' in Black ibid, 294.
5. The three Acts in question are: Constitution Act Amendment Act 1893 (WA), Constitution Act 1889 Amendment Act 1894 (WA), and Constitution Act Amendment Act 1896 (WA).

amendment', was used widely until the late 1800s when it was gradually replaced with the 'textual amendment' mode of altering legislation.[6]

Indirect amendment is a form of parliamentary drafting practice used extensively by the UK Parliament until the 1970s.[7] The method consists of repealing the relevant section(s) of the principal Act and then re-enacting the altered provision in a separate Act Amendment Act.[8] It was developed in order to satisfy the 'four corners doctrine', which is the principle that the legislator should not have to go beyond the four corners of the Act in order to comprehend its meaning. The advantage of this particular form of drafting is that it does not require explanatory material to accompany the Act in order to make its contents or intention clear to the reader.[9]

However, the major weakness associated with the use of indirect amendment is what Francis Bennion has referred to as the 'vice of scatter'.[10] Every time an Act is amended in this manner it produces a new statute which could be considered an Act in its own right. This can eventually generate a multitude of smaller Act Amendment Acts each containing one or more sections relevant to the operation of the principal Act. This condition persists until such time as steps are taken to formally insert the various Act Amendment Acts into the principal statute.[11]

While the use of the indirect amendment technique accounts for the circumstances by which the Constitution came to be divided into smaller Act Amendment Acts in the period between 1893 and 1896, it does not shed any light on the reasons why the Forrest government chose to consolidate the various Act Amendment Acts, along with some new amendments, into a wholly new and separate statute entitled the CAAA in 1899. In taking this action, the Forrest government effectively created two discrete constitutional Acts, an arrangement that persists to the present day.

There are at least two explanations for Western Australia's dual constitutional Act status. The official account tendered by the Forrest government for initially enacting the CAAA 1899 was that it hoped to preserve the original constitutional Act. The decision to create the CAAA 1899, rather than to consolidate the three smaller Act Amendment Acts in the original Act, had not been the government's original intention. It appears that sometime between the first and second readings of the Bill, the government decided to abandon the plan to re-unite the various Act

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6. Textual amendment is a procedure whereby a direct alteration or modification is made to the text of the principal Act. The benefit of this particular technique is that it allows an Act to be reprinted as a single Act without requiring formal consolidation: see F Bennion *Statute Law* 3rd edn (Harlow: Longman Group, 1990) 228.
7. Ibid.
8. *Western Australia v Wilsmore* (1982) 149 CLR 79, 90.
9. Bennion above n 6, 229.
10. Ibid.
11. Ibid.

Amendments Acts with the principal Act and to create a second constitutional statute.[12] Forrest explained the reason for altering the form of the Bill on the grounds that 'it is not wise nor in accord with precedent to altogether consolidate the Constitution Acts, because they would remove from the statute book the landmarks of the original constitution'.[13]

However, it could be regarded as suspicious that a government ostensibly keen to preserve the original Act for posterity would select an amendment procedure which would have the practical effect of transferring many sections of the CA 1889 into a separate statute. Such a strategy, diligently pursued, would eventually render the original Act a shell.

An alternative interpretation of Forrest's decision to formally split the constitution into two separate Acts is that this was a deliberate political strategy intended to circumvent manner and form provisions located within section 73(1) of the CA 1889. This is a view canvassed by Aicken J in *Wilsmore* in 1981.[14] In his judgment, Aicken J suggested that the technique of repealing provisions and enacting them into a separate Act Amendment Act was sometimes favoured by colonial parliaments in order to evade manner and form provisions located within their constitutions.[15]

Manner and form provisions had been incorporated into the Western Australian Constitution at the insistence of Imperial authorities. The colonial legislators resented fetters being placed on their ability to amend their constitutional Acts by ordinary legislative means.[16] One of the potential advantages of the indirect amendment procedure was that once a provision or provisions was removed and inserted into a separate Act it would be beyond the reach of any manner and form provisions in the

12. B de Garis 'The History of Western Australia's Constitution and Attempts at Its Reform' (2003) 31 UWAL Rev 142.
13. *Hansard* (LA) 29 Aug 1899, 1033.
14. *Wilsmore* above n 8. In this case, Peter Wilsmore, a prisoner who had been found not guilty of wilful murder on the basis of unsoundness of mind, applied to have his name entered on the electoral roll in 1979. Legislation was subsequently passed by Parliament whereby a person could be disqualified from voting if detained in custody under s 653 of the Criminal Code Act 1913 (WA). Wilsmore sued the State of Western Australia and others on the grounds that the new legislation had not been passed with the concurrence of an absolute majority of the members of the Legislative Assembly as stipulated in s 73(1) of the CA 1889 and therefore it was not lawful for the legislation to be presented to the Governor for his assent.
15. 'It is not to be supposed that the propounders of the of this Bill in 1889 ... were unaware of the practice followed in other Australian colonies, at least since 1855, of amending the various provisions in their Constitution Acts by repealing the relevant provision and changing the constitution of either House of Parliament in a separate Act called a Constitution Act Amendment Act which the legislatures had freely amended thereafter without special majority': *Wilsmore* above n 8, Aicken J 91.
16. P Johnston 'Waiting for the Other Shoe to Fall: The Unresolved Issues in *Yougarla v WA*' *Australian Association of Constitutional Law Conference* (15 Feb 2002).

principal Act. This would, in theory, permit the legislatures to freely amend the Act Amendment Act without concern for the attainment of special majorities.

There does appear to be some evidence to support Aicken J's contention. In the first place, the Forrest government's handling of the enactment of the CAAA 1899 could be regarded as slightly unorthodox. The use of indirect amendment had been mostly phased out at the time the CAAA 1899 was drafted. On those occasions where the technique was employed a proviso often accompanied the new Act Amendment Act stating that it be 'construed as one with the principal Act'. No such phrase was incorporated into the new CAAA 1899, even though similar references had been inserted into each of the three preceding constitutional Act Amendment Acts.[17]

Other evidence that potentially corroborates the suspicions of Aicken J is the inconsistent approach adopted by Parliament when applying manner and form requirements to certain amendments to the CAAA 1899, in the period prior to 1980. Section 73(1), as it is now numbered, of the CA 1889 restricts the capacity of the Western Australian Parliament to effect a 'change in the constitution of the Legislative Assembly or of the Legislative Council' unless an absolute majority of the whole number of each chamber has been attained at the second and third readings of the Bill.[18] It appears that section 73(1) was occasionally ignored in relation to amendments to section 43 of the CAAA 1899.[19] On the first two occasions that this provision was amended, in 1927 and 1950, constitutional majorities were not attained. However, in subsequent amendments to this section, in 1965 and 1975, constitutional majorities were expressly sought and obtained.

Despite some indications that the CAAA 1899 was designed to negate manner and form provisions contained within the CA 1889, there is little in the way of concrete evidence to substantiate this position. As illustrated in Table 1, between 1899 and 1950 Parliament appeared to operate under the assumption that it was required to apply section 73(1) of the CA 1889 when undertaking relevant alterations to the CAAA 1899. On those occasions where constitutional majorities were not expressly attained it was thought that the relevant amendment did not affect the 'constitution' of either the Legislative Assembly or the Legislative Council and was therefore not subject to section 73. In fact, a number of amendments to the CAAA

17. One of the last times that indirect amendment appears to have been used was the enactment of the Constitution Act Amendment Act 1921 (WA). On this particular occasion, ss 66 and 67 of the CA 1889 were repealed and the amended provision inserted into s 46 of the CAAA 1899.
18. In 1978, s 73 of the CA 1889 was amended. The Charles Court Coalition government introduced provisions for a popular referendum where a proposed Bill seeks to alter a number of specified provisions, such as the alteration or abolition of the office of the Governor.
19. This section relates to the maximum number of ministers that can be appointed.

Table 1: The Votes of the Western Australian Parliament on the Constitution Acts Amendment Act 1899: 1893–1950

Date and No of Act	Short Title	Legislative Council		Legislative Assembly	
		2nd Reading	3rd Reading	2nd Reading	3rd Reading
57 Vict No 14	Constitution Act Amendment Act 1893	P	P	CM	CM
58 Vict No 15	Constitution Act 1889 Amendment Act 1894	P	P	CM	CM
60 Vict No 18	Constitution Act Amendment Act 1896	P	P	CM	CM
63 Vict No 19	Constitution Acts Amendment Act 1899	P	CM	CM	CM
64 Vict No 2	Constitution Acts Amendment Act 1899	CM	CM	CM	CM
20 of 1904	Electoral Act 1904	CM	CM	CM	CM
27 of 1907	Electoral Act 1907	CM	P	CM[a]	CM
31 of 1911	Constitution Acts Amendment Act 1911	CM	CM	CM	CM
48 of 1919	Legislative Assembly Duration Act 1919[b]	CM	CM	CM	CM
7 of 1920	Parliament (Qualification of Women) Act 1920	CM	CM	CM	CM
34 of 1921	Constitution Act Amendment Act 1921	P	CM	P	P
25 of 1927	Constitution Act Amendment Act 1927[c]	P	P	CM	CM
25 of 1933	Constitution Acts Amendment Act 1933	CM	CM	CM	CM
40 of 1934	Constitution Acts Amendment Act 1934	CM	CM	CM	CM
29 of 1942	Constitution Acts Amendment Act 1942	CM	CM	CM	CM
52 of 1945	Constitution Acts Amendment Act 1945	CM	CM	CM	CM
2 of 1947	Constitution Acts Amendment Act (No 1) 1947	P	P	P	P
4 of 1947	Constitution Acts Amendment (Re-election of Ministers) Act 1947	CM	CM	CM	CM
52 of 1947	Acts Amendment (Allowances and Salaries) Act 1947	P	P	P	P
12 of 1948	Constitution Acts Amendment Act (No 1) 1948	CM	CM	CM	CM
17 of 1949	Acts Amendment (Increase in the Number of Judges on the Supreme Court) Act 1949	P	P	P	P
2 of 1950	Acts Amendment (Increase in Number of Ministers of the Crown) Act 1950	P	P	P	P
45 of 1950	Constitution Acts Amendment Act (No 2) 1950	CM	CM	CM	CM
63 of 1950	Constitution Acts Amendment Act (No 4) 1950	P	P	P	P

P = Pass; CM = Constitutional majority.

(a) Constitutional majority was not expressly sought nor was it recorded as such in *Votes and Proceedings.*
(b) A constitutional majority was not recorded in *Votes and Proceedings* but in *Hansard* (LA) 3 Dec 1919, vol. 61(2).
(c) There is no reference in *Hansard* for the need to attain a constitutional majority.

1899 failed because a constitutional majority could not be obtained in one or both houses of Parliament.[20]

This is not to suggest that the Forrest government was unaware of the possibilities of enacting the CAAA 1899 in this manner, only that there is little evidence that this administration or any other government that followed in the next 80 years managed to profit from this anomaly. It is quite possible that when Forrest quit the Legislative Assembly in 1900 to enter Federal politics, he failed to alert his successors to the fact that the CAAA 1899 was protected from the reach of manner and form requirements located within the original Act.

While it may not be possible to state with absolute conviction that the Forrest government's motive in enacting the CAAA 1889 was to circumvent manner and form provisions located in the CA 1889, it is certain that this action was later to have important constitutional implications. The next section of this paper will examine the political consequences associated with the bifurcation of Western Australia's Constitution into two distinct Acts.

The political implications of a bifurcated Constitutional Act revealed: *Wilsmore* and *Burke*

While most other Australian States were consolidating their various constitutional statutes under the rubric of a single Act between 1902 and 1975, successive Western Australian governments displayed a lack of interest in doing the same. One the of rare exceptions to this occurred in 1963 when the Brand Coalition government sought a consolidation of each of the Acts in preparation for a reprint. The Minister responsible for introducing the initiative, the Hon AF Griffith, briefly raised the issue of whether it was 'desirable' to retain two separate constitutional statutes. However, he concluded that a consolidation of each of the statutes was a more practical and desirable option than attempting a merger of the texts into a single Act.[21]

The Brand government's decision not to proceed with constitutional consolidation failed to attract any expression either of rebuke or support within Parliament. This was not entirely unexpected as there was little reason for Parliament to question the shape and appearance of the State's Constitution at the time. Although the existence of two constitutional statutes was considered by some to be slightly unwieldy, it was also true that for many years the peculiar appearance of the State's Constitution had not been the source of constitutional uncertainty. This was largely because Parliament appeared to operate under the assumption that the two statutes were required to be read as one Act.

20. See eg Constitution Acts Amendment Bill 1926 (WA).
21. *Hansard* (LC) 24 Sep 1963, 1221.

However, in the late 1970s and early 1980s, questions were increasingly raised about the application of manner and form provisions located within section 73(1) of the original Act to the CAAA 1899. The first time the possibility was mooted that section 73(1) applied only to that Act was in *Wilsmore*.[22] According to Peter Johnston, it was the Supreme Court judge presiding over the case who proposed that the two Acts were potentially separate constitutional entities.[23] This line of reasoning was subsequently incorporated by the government into its legal defence as a secondary argument in support of its case. As the matter was eventually decided on other grounds, the judge was not required to rule directly on the relationship of the CA 1889 to the CAAA 1899.[24]

While the *Wilsmore* case was on appeal to the High Court of Australia, the application of section 73(1) of the CA 1889 to the CAAA 1899 was being directly tested in another matter. In 1980, the Charles Court Coalition government sought to increase the size of the Ministry from 13 to 15, which would require an amendment to section 43 of the CAAA 1899. The opposition forces in the Legislative Assembly, consisting of the Australian Labor Party ('ALP') and the National Party ('NP'), indicated that they were not prepared to support the enlargement of the Ministry. While the government was capable of producing a constitutional majority in the Legislative Council, it was unable to count on a similar level of support in the lower house. The government, owing to internal division within the ranks of the Western Australian Country Party,[25] could only call on 28 members in the 55 member Legislative Assembly, one member short of the 29 votes required to produce a constitutional majority.[26]

The government was presented with a solution to its problem on account of a providential ruling from the Speaker of the Legislative Assembly, which was subsequently supported by the President of the Legislative Council. The Speaker ruled that it was not necessary to obtain a constitutional majority in order to alter section 43 of the CAAA 1899. He claimed that the proposed amendment did not 'involve a change or alteration to the constitution of either House' and cited

22. Above n 8.
23. P Johnston 'Freeing the Colonial Shackles: The First Century of Western Australia's Constition' in Black above n 3.
24. Ibid, 320.
25. In 1978, the WA Country Party split into two distinct organisations: the National Country Party, which formed a Coalition with the Liberal Party and the National Party. The two groups re-united shortly after the 1983 State election under the banner of the National Party of Australia. For more information about this event, see J Starcevich 'The National Party of Western Australia: 1974–1988' (unpublished Masters thesis: UWA, 1995); H Phillips, D Black, B Bott & T Fischer *Representing the People: Parliamentary Government in Western Australia* (Perth: UWA Press, 1998) 181-182.
26. The Government did have 29 members in the Legislative Assembly. However, as per the terms of s 24 of the CAAA 1899, the Speaker is entitled only to a casting vote in the event that the ballot is tied.

Clydesdale v Hughes[27] in support of this position.[28] Moreover, the Speaker argued that an absolute majority was not necessary on the basis that on two of the preceding four occasions where the size of the Ministry was increased, Votes and Proceedings showed no evidence of an absolute majority.[29]

The ALP and the NP opposed the Speaker's ruling, with ALP members subsequently walking out of the Legislative Assembly in protest.[30] The ALP claimed that the Speaker's decision was 'the most shameful ever heard ... in this House',[31] while the NP contended that to amend the constitution without an absolute majority would be to 'depart from the spirit of the Constitution'.[32] In order to satisfy concerns about the constitutional validity of the Speaker's actions, the government granted the Opposition permission to bring the matter before the Supreme Court of Western Australia,[33] referred to as the *Burke* case.[34]

Prior to the full bench of the Supreme Court handing down its decision in *Burke*, the High Court issued their ruling in *Wilsmore*.[35] A full bench of the High Court found that the CAAA 1899 was a complete Act in its own right and not an amendment to the original Constitution.[36] In particular, Wilson J concluded that the reach of section 73(1) was limited to the CA 1889 due to the existence of the phrase 'of this Act' which could be found within this section.[37] This effectively meant that

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27. *Clydesdale v Hughes* (1934) 51 CLR 518. In this case, the appellant, Clydesdale, accepted an appointment as a member of the Lotteries Commission while serving as a member of the Legislative Council. The respondent, Hughes, claimed that Clydesdale, in continuing to act in his capacity as a member of the Commission, had violated s 38 of the CAAA 1899 which prohibits members of Parliament from accepting an office of profit under the Crown. In the meantime, while the action against Hughes was pending, the government passed an amendment that was designed to protect Clydesdale from the full force of s 38 of the CAAA 1899. Hughes claimed that the Constitution Acts Amendment Act 1933 (WA) did not pass with the requisite constitutional majority as prescribed under s 73 of the CA 1889. The High Court of Australia ruled in favour of the appellant, finding that the Constitution Act Amendment Act 1933 (WA) had been validly passed on the basis that it did not effect a change in the constitution of the Legislative Council.
28. *Hansard* (LA) 2 Sep 1980, 852.
29. Ibid, 852-853.
30. H Phillips 'The Modern Parliament: 1965–1989' in Black above n 3, 217-218.
31. *Hansard* above n 28, 853.
32. Ibid, 857.
33. Johnston above n 23, 324.
34. *A-G (WA) (Ex rel Burke) v Western Australia* [1982] WAR 241.
35. The Supreme Court deliberately reserved its judgment in the *Burke* case until the High Court had handed down its findings in *Wilsmore*: Phillips above n 30, 218.
36. The case was sent on appeal from the WA Supreme Court. The ruling of the court in this particular instance was that any proposed change in the qualification or disqualification for electors or for membership of either House is a change affecting the constitution of that house.
37. According to Johnston, there does not appear to be any explanation for this state of affairs. When the colonial Parliament had originally drafted s 73 of the CA 1889 it had included a phrase which would have absolutely guaranteed that the reach of the manner and

the CAAA 1899 was not merely an appendage of the original constitution but a 'Principal Act' and as such unaffected by the provisions requiring a constitutional majority.[38] The implication of this ruling was that the CAAA 1899 was not subject to section 73(1) of the CA 1899.[39]

Within months of the High Court issuing its decision in *Wilsmore*, the Supreme Court released its findings in the *Burke* case. The Supreme Court held that an Act seeking to increase the size of the Ministry was constitutionally valid on the ground that the requirements set down in section 73(1) do not apply because the relevant statute did not effect a 'change in the Constitution of either House'.[40] More importantly, the Supreme Court ruled that section 73(1) 'applies to a Bill for an Act to amend the Constitution Act 1889-1980' and not the CAAA 1899.[41] This confirmed that the reach of section 73(1) of the CA 1899 did not extend to the CAAA 1899.

The post-Wilsmore and Burke environment: a history of attempts to consolidate the Western Australian Constitution

The realisation that many of the provisions within the CAAA 1899 could be altered by ordinary legislative means prompted the first expressions of interest in amalgamating the constitutional Acts. In 1980 and 1981[42] the ALP, which had been frustrated by three consecutive failures to challenge the Charles Court government on constitutional matters in this period, raised the issue of consolidation, initially in the form of a question, and again in 1982 when it moved an urgency motion that this situation be rectified.[43] Despite the claims of the Court government that the matter was 'under consideration', the issue disappeared from the political agenda.

It was not until the early 1990s that discussion about amalgamating the Acts re-surfaced. There were a couple of factors which fuelled debate on the issue. First, the centenary of responsible government in Western Australia in 1990 prompted increased interest in the State's constitutional arrangements. Constitutional reform, and more particularly amalgamation, was urged in some quarters as a way of updating

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form provision would have extended not only to the CA 1899 but to any other Act which purported to alter the constitution of either house of Parliament. Johnston concludes, 'Whether this was merely for elegant expression or was a product of more deliberate intent to confine the operation of s 73 is a matter of speculation': Johnston above n 23, 318.

38. *Wilsmore* above n 8.
39. Johnston above n 23.
40. *A-G (WA) v WA* above n 34, Burt CJ 245, Wickham J 245, Wallace J 246.
41. Ibid, William & Wallace JJ 246.
42. *Hansard* (LC) 4 Sep 1980, 1032; 8 Apr 1981, 656.
43. The ALP spokesman on this matter, the Hon J Berinson QC, indicated that three recent decisions handed down by the courts, namely 'the *Wilsmore* case, ... the challenge to the Act creating two additional State ministers, and the challenge to the government's most recent gerrymander of the State's electoral boundaries [reveal] the shambles to which the Constitution documents are now reduced': *Hansard* (LC) 17 Aug 1982, 2303.

the Acts in order to make their contents more accessible to the general public. This was the official position advanced by the Joint Select Committee of the Legislative Assembly and the Legislative Council on the Constitution ('JSCC'), which had been established by the Burke Labor government to examine the matter of constitutional reform and more specifically the issue of consolidation.

Interest in the matter was also a result of growing concerns about the adequacy of the State's constitutional arrangements. A number of academics[44] and government reports[45] identified serious problems with the operation of the Constitution. A recurrent theme was that the Constitution contained deficiencies that made possible the abuse of executive power, as evidenced by the WA Inc years.[46] In most cases, the recommendation for reform included support for the notion of constitutional consolidation as the minimum first step in reforming the Constitution.[47]

Despite increasing calls for amalgamation of the State Constitution throughout the late 1980s and early 1990s, it was not until 1997 that a model for constitutional consolidation was officially presented to Parliament for its consideration. In 1997, Labor MLC, John Cowdell, introduced the Constitution Acts Amendment Bill to Parliament. Cowdell argued that the Constitution, in its present form, was a 'fragmented, dysfunctional document' and a source of 'embarrassment'.[48] He complained that 28 out of 130 sections were completely obsolete and three of the five schedules irrelevant. Cowdell's Bill was closely modelled on a draft version devised by the JSSC but which was never formally introduced to Parliament. However, the Bill was subsequently withdrawn before reaching the third reading due to concerns that any attempt to consolidate the Acts in this form would be constitutionally invalid.[49]

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44. See eg P Johnston & S Hoptop 'Patches of an Old Garment or New Wineskins for New Wine? (Constitutional Reform in Western Australia – Evolution or Revolution)' (1990) 20 UWAL Rev 428; P O'Brien & M Webb (eds) *The Executive State: WA Inc & The Constitution* (Perth: Constitutional Press Co, 1991); Sharman above n 4.
45. These included: WA Royal Commission *Report into the Use of Executive Power* (Perth, 1995); *Report into Commercial Activities of Government and Other Matters* (Perth, 1992); *Report on Government* Report No 5 (Perth, Aug 1996).
46. For more information on the WA Inc years, see B Stone 'Taking WA Inc Seriously: An Analysis of the Idea and Its Application to West Australian Politics' (1997) 56 AJPA 71; B Lawrence 'Paddy's Vision and the Campaign to Expose and Combat WA Inc' in J Moon & B Stone (eds) *Power and Freedom in Modern Politics* (Perth: UWA Press, 2002) 89; O'Brien & Webb above n 44.
47. In addition to this, the WA Constitutional Committee identified the need for consolidation in order to facilitate 'teaching about its key features', even though this issue was not part of the group's terms of reference: WA Constitutional Committee *Final Report* (Perth, 1995) 101.
48. *Hansard* (LC) 15 Oct 1997, 6792.
49. There is a difference of legal opinion as to how to consolidate the Acts. Some constitutional lawyers claim that a referendum is required to amalgamate the Acts while others take the view that all that is required is to repeal the CAAA 1899 and incorporate its provisions within the original Act.

Government inertia, inter-party disagreement and political advantage: explaining the persistence of two Constitutional Acts

Although there has been steady interest in amalgamating the constitutional Acts, this has yet to occur. There are a host of factors that complicate the process of consolidating Western Australia's Constitution. One of the biggest obstacles is convincing elected officials to place the matter on their agenda. Governments, particularly newly elected ones, are frequently consumed with matters of policy and administration. There is considerable competition among Ministers to ensure that their legislation is given a priority listing by the Cabinet Standing Committee on Legislation for introduction to Parliament.[50] This can make it extremely difficult for constitutional matters, which do not directly advance the government's political or electoral aspirations, to gain legislative priority over its core election promises or more immediate policy concerns.

Practical constraints on the government's time can interfere with even the best intentions to proceed with minor constitutional reform, particularly when it is unlikely to directly advance the government's immediate political interests. This is true of the last two administrations which promised to consolidate the Constitution. In 1996, the Richard Court Coalition government indicated that it was keen to sponsor constitutional consolidation, promising that Western Australia would have a new easy-to-read and consolidated Constitution for Christmas that year. Despite the fairly modest intention to amalgamate the two statutes this did not occur.[51] Similarly, one of the election promises of the Gallop Labor government was to undertake constitutional reform if elected to office in 2001. However, within months of that government commencing its term in office it announced that these plans would be set aside. The Gallop Labor government justified this on the basis that it had other priorities, such as 'getting through electoral reform'.[52]

Quite apart from the problems associated with governments finding the time to pursue this matter, there are few electoral incentives to prioritise consolidation. This is a result of the fact that public interest about issues of a constitutional nature is

50. The Cabinet Select Committee on Legislation consists of a small group of government ministers who determine the priority listing of all new Bills to go before Parliament. This Committee is normally comprised of the Premier or the Treasurer, the Leaders of each of the Legislative Assembly and the Legislative Council and the Attorney-General.
51. G Meertens 'Rewrite for Constitution' *The West Australian* 10 Aug 1996. It is also worth pointing out that the Attorney-General of the Court Coalition government, Hon P Foss QC, was not wholly in favour of constitutional reform on the basis that the public would not read or understand any revised version of the Constitution.
52. 'Convention Off' *The West Australian* 10 Aug 2001.

normally very low. Survey data indicate that awareness about the existence of the Western Australian Constitution is minimal, with 54 per cent of people claiming to know 'hardly anything' or 'nothing' about the Acts.[53] This situation is compounded by the fact that the public do not typically regard constitutional reform as matter of significance. This is borne out by opinion polling which demonstrates that constitutional issues consistently do not influence electors' voting decisions: see Table 2.

The lack of popular support for constitutional reform reduces pressure on governments to consolidate the Acts. However, even when the government supports such an initiative this is not always sufficient to guarantee the success of a reform Bill in Parliament. Constitutional reform is by its nature a sensitive topic because it involves the highest law of the jurisdiction to which it is meant to apply. It is not uncommon for some members, particularly National Party and Liberal Party members, to favour the view that constitutions are 'inviolable' documents which should only be substantially altered or amended under the most pressing of circumstances.[54]

In addition to the natural bias against attempting to undertake any type of major modification to the State's Constitution, there are often disagreements within Parliament about what form it should take. Even on those occasions where opposing forces in Parliament might agree in principle on the need for reform they often disagree about how this should be achieved. Some believe that a strict consolidation of the Acts is all that is required while others regard this as an opportunity significantly to overhaul the basis of the Constitution. This problem was acknowledged in the final report of the JSCC. The JSCC stressed that given the politically delicate nature of the issues under review it was important to 'proceed slowly and cautiously ... rather than aspire to great changes which would almost certainly founder against the political and constitutional realities'.[55]

Another factor that explains the persistence of this state of affairs is that the CAAA 1899, in its current form, benefits government. The finding of the courts in both the *Wilsmore* and *Burke* cases confirmed that while the CAAA 1899 continues to be subject to manner and form provisions found in section 73(2) of the CA 1889 it is free from the dictates of the entrenchment provisions located in section 72(1) of the CA 1889. This means that the CAAA 1899 is mostly a flexible constitutional

53. Phillips et al above n 25.

54. It is this type of sentiment which ostensibly hampered the efforts of Liberal Attorney-General, Hon IG Medcalf, to amalgamate the Acts in 1980. When asked in Parliament about the possibility of consolidating the CA 1889 and the CAAA 1899, Medcalf indicated that he had met with 'a certain amount of what might be called extremely old-fashioned opposition which indicates that the Constitution is inviolable and should be touched by no one': *Hansard* (LC) 4 Sep 1980, 1062.

55. Joint Select Committee of the WA Legislative Assembly and the Legislative Council *Report on the Constitution* (Perth, 1991) 4.

Table 2: Electoral Priorities of Australian Voters Between 1992 - 2001

Issue	June 1992	July 1994	March 1995	April 1998	Nov 1999	March 2001
Aboriginal issues	2	6	7	6	3	3
Children	5	11	5	7	5	5
Defence	1	2	2	1	7	4
Drugs	1	2	1	6	8	11
Economy	24	19	26	11	7	15
Education	18	22	19	29	40	37
Environment	13	12	12	9	7	11
Equality	n/a	n/a	n/a	n/a	n/a	5
Family	2	7	4	7	2	3
Health	14	24	26	37	47	34
Housing	6	2	3	3	*	1
Immigration	13	7	10	7	15	8
Industry and business	16	13	11	6	6	8
Interest rates	2	1	7	1	*	1
Law and order	4	6	12	14	10	10
Moral issues	n/a	n/a	n/a	n/a	n/a	4
Petrol prices	n/a	n/a	n/a	n/a	n/a	8
Quality of govt/politicians	8	9	14	9	6	6
Republic/monarchy/ flag/constitution	1	4	1	1	2	1
Research	n/a	n/a	n/a	n/a	n/a	2
Rural Australians	n/a	n/a	n/a	n/a	2	3
Social welfare	17	24	23	18	23	27
Taxation	11	11	12	16	15	15
Trade and foreign policy	12	10	13	4	5	6
Transport/roads	5	6	5	2	6	8
Unemployment	75	56	39	49	33	22
Work conditions	5	4	5	2	3	4
Other	8	13	7	8	12	9
Sub-total	**98**	**96**	**95**	**97**	**94**	**95**
No opinion	2	4	5	3	6	5

Source: Roy Morgan Gallop Poll (figures in percentages)

* Sample size is less than 0.5%

statute and that Parliament is able to alter most of its provisions without having to obtain constitutional majorities.

The political advantage associated with this was acknowledged by the Attorney-General of the Charles Court Coalition Government, the Hon IG Medcalf, in 1982. Medcalf advanced the view that:

> It was made quite clear by the High Court in the *Wilsmore* case that an absolute majority is not required to amend the Constitution Acts Amendment Act but it is required to amend the Constitution Act. What a significant difference it makes to the situation. If we were to combine the Constitution Act and the Constitution Acts Amendment Act into one Constitution Act, we could well end up with a situation in which we needed an absolute majority to amend everything in that Act. At the present stage, we need an absolute majority to amend only the Constitution Act of 1889.[56]

There are definite advantages to the major governing parties in allowing this state of affairs to persist. Many of the operative aspects of the State's constitutional arrangements are in fact located in the CAAA 1889. This statute contains matters that affect the day-to-day functioning of Parliament, including provisions relating to the size and composition of each chamber, the qualification and disqualification for membership to Parliament and the size and nature of the Ministry. Moreover, it appears that since *Wilsmore*, the number of direct amendments to the CAAA 1899 has increased significantly. Whereas the CAAA 1899 was directly amended on 38 occasions between 1899 and 1980, in the period 1981-2000 it was altered 33 times. These figures could be interpreted as meaning that governments have found it easier to amend this Act since the High Court's ruling in the *Wilsmore* and *Burke* cases and have actively taken advantage of the legislative opportunities that these judgments produced: see Table 3.

In recent years particularly, the incentive for government to turn its attentions to consolidating the Constitution has been further reduced by the difficulty of attaining constitutional majorities in the Legislative Council. Labor governments have traditionally failed to produce a constitutional majority in the Legislative Council, which has hampered its efforts to achieve many of its proposed constitutional reforms when in office. Similarly, since the introduction in 1987 of proportional representation for elections to the Legislative Council, it has also proven difficult for the Coalition to secure constitutional majorities in that chamber. Under these circumstances, it would make little sense for either political bloc to seek a change to the Constitution that would potentially complicate their ability to amend the CAAA 1899.

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56. *Hansard* (LA) 17 Aug 1982, 2306.

Table 3: Alterations to the Constitutional Acts Amendment Act 1899-2000

1899–1980	1981–2000
S 3 amended by no 7 of 1920	S 4 repealed by no 10 of 1998
S 7 amended by no 7 of 1920	S 3 amended by no 46 of 1963
S 11 amended by no 31 of 1954	S 3 amended by no 59 of 1978
S 12 amended by no 32 of 1954	S 5 inserted by no 40 of 1987
S 15 inserted by no 72 of 1963	S 7 amended by no 48 of 1962
S 16 repealed by no 72 of 1963	S 7 amended by no 72 of 1963
S 17 repealed by no 72 of 1963	S 7 amended by no 52 of 1973
S 20 amended by no 7 of 1920	S 6 inserted by no 40 of 1987
S 21 amended by no 48 of 1919	S 7 amended by no 8 of 1983
S 25 amended by no 46 of 1963	S 8 inserted by no 40 of 1987
S 26 repealed by no 27 of 1907	S 8B repealed by no 40 of 1987
S 27 repealed by no 27 of 1907	S 9 amended by no 46 of 1963
S 28 repealed by no 27 of 1907	S 10 amended by no 40 of 1987
S 29 repealed by no 27 of 1907	S 10 amended by no 36 of 2000
S 30 repealed by no 27 of 1907	S 20 amended by no 48 of 1962
S 32 amended by no 111 of 1975	S 20 amended by no 52 of 1973
S 38 amended by no 4 of 1947	S 18 inserted by no 13 of 1981
S 43 amended by no 28 of 1927	S 19 inserted by no 13 of 1981
S 46 inserted by no 34 of 1921	S 20 amended by no 8 of 1983
S 50 amended by no 113 of 1965	S 21 amended by no 40 of 1987
Sched II repealed by no 46 of 1963	S 31 inserted by no 78 of 1984
	S 31 amended by no 24 of 2000
	S 32 amended by no 78 of 1984
	S 33 inserted by no 78 of 1984
	S 34 inserted by no 78 of 1984
	S 38 amended by no 12 of 1948
	S 38 amended by no 46 of 1963
	S 38 amended by no 111 of 1969
	S 38 amended by no 15 of 1975
	S 35 inserted by no 78 of 1984
	S 43 amended by no 2 of 1950
	S 43 amended by no 2 of 1965
	S 43 amended by no 86 of 1975
	S 43 amended by no 5 of 1980
	S 38 amended by no 78 of 1984
	S 46 amended by no 63 of 1950
	S 46 amended by no 28 of 1977
	S 39 inserted by no 78 of 1984
	S 39 amended by no 40 of 1987
	S 39A repealed by no 78 of 1984
	S 39B repealed by no 78 of 1984
	S 39C repealed by no 78 of 1984
	S 40 inserted by no 78 of 1984
	S 41A repealed by no 78 of 1984
	S 42 inserted by no 78 of 1984
	S 43 amended by no 10 of 1986
	S 44A inserted by no 38 of 1990
	S 45 repealed by no 19 of 1989
	S 47 repealed by no 40 of 1987
	S 47A repealed by no 40 of 1987
	Sched IV repealed by no 19 of 1989

Conclusion

This paper has examined the circumstances in which Western Australia came to possess two constitutional Acts. It suggests that while it is not possible to provide a definitive explanation for this state of affairs, there does appear to be some evidence to support the view that the bifurcation of the Constitution might have resulted from efforts by the Forrest government to evade manner and form requirements located in the original Act. In addition, the paper has explored the reasons why successive State governments have not sought to amalgamate the statutes. It argues that while inertia partly accounts for the persistence of this arrangement, it is also true that since the ruling of the courts in the *Wilsmore* and *Burke* cases there has been reduced incentive for governments of both political persuasions to give serious consideration to consolidating the Acts. This finding, particularly, is consistent with the conventional wisdom that governments are reluctant to undertake constitutional reforms which might potentially limit their freedom of action in relation to constitutional change.