HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

CROW YOUGARLA & ORS APPELLANTS

AND

THE STATE OF WESTERN AUSTRALIA & ANOR RESPONDENTS

Yougarla v Western Australia [2001] HCA 47
9 August 2001
P60/2000

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

Representation:

D F Jackson QC with S C Churches and P W Johnston for the appellants (instructed by Dwyer Durack)

R J Meadows QC, Solicitor-General for the State of Western Australia with G R Donaldson and J A Thomson for the respondents (instructed by Crown Solicitor for the State of Western Australia)

Intervener:

H C Burmester QC with G M Aitken intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Yougarla v Western Australia

Constitutional law (WA) – Imperial manner and form requirements respecting State legislation – Section 70 of the *Constitution Act* 1889 (WA) provided for the issue of annual sums to Aborigines Protection Board for the welfare of "the aboriginal natives" – Whether provision still in force – Whether repeal by *Aborigines Act* 1905 (WA) effective – Tabling requirement under s 32 of *The Australian Constitutions Act* 1850 (Imp) in respect of certain WA bills – Requirement not complied with – Whether compliance with requirement necessary to validly repeal s 70 of the *Constitution Act* 1889 (WA).

Constitutional law (Cth) – Constitution of State of the Commonwealth – Whether provision in Constitution s 106 excludes construing application of Imperial manner and form requirements for amending State Constitution after federation – Whether compliance justiciable.

Aboriginals – Constitutional law (WA) – Provision in *Constitution Act* 1889 (WA) for annual sum for welfare of "aboriginal natives" – Whether Imperial legislation complied with for repeal of such provision.

Words and phrases – "Constitution of each State" – "repugnancy".

Constitution, s 106.
Constitution Act 1889 (WA), ss 70, 73.
Aborigines Act 1905 (WA).
The Australian Constitutions Act 1842 (Imp), ss 31, 33.
The Australian Constitutions Act 1850 (Imp), ss 12, 32, 33.
Western Australia Constitution Act 1890 (Imp), ss 2, 5.

1 GLEESON CJ, GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The appellants instituted an action in the Supreme Court of Western Australia seeking, with other relief, a declaration that s 70 of the *Constitution Act* 1889 (WA) ("the WA Constitution Act") remains in force. The WA Constitution Act appeared as the First Schedule to an Imperial statute, the *Western Australia Constitution Act* 1890 (Imp) ("the 1890 Imperial Act"). Section 2 of the WA Constitution Act stated that, in place of the Legislative Council then subsisting, there was to be a Legislative Council and a Legislative Assembly and that it was to be lawful for Her Majesty, by and with the consent of the Council and the Assembly, "to make laws for the peace, order, and good government of the colony of Western Australia". Shortly put, the appellants contended that two attempts by that legislature, in statutes passed in 1897 and 1905 respectively, to repeal s 70 of the WA Constitution Act were invalid for failure in compliance with certain manner and form provisions.

The WA Constitution Act

2 The WA Constitution Act was described by Wilson J in *Western Australia v Wilsmore*[1] as the "keystone of the present constitution of Western Australia". It provided for representative and responsible government of the colony. The statute has been amended from time to time, beginning with the *Constitution Act Amendment Act* 1893 (WA) ("the 1893 Constitution Act"), which itself was repealed by the *Constitution Acts Amendment Act* 1899 (WA) ("the 1899 Constitution Act"). In its then amended form, the WA Constitution Act was further amended by the *Australia Act* 1986 (Cth) ("the Australia Act"). It will be convenient to refer later in these reasons to various provisions of the Australia Act, but this appeal is to be decided by reference to the law as it stood before the enactment of the Australia Act.

3 Section 70 of the WA Constitution Act made provision for appropriations to the welfare of what it identified as "the aboriginal natives" and for the issue of

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1 (1982) 149 CLR 79 at 93. The events in the United Kingdom and Australia leading up to the enactment of the 1890 Imperial Act and the WA Constitution Act are detailed in Keith, *Responsible Government in the Dominions*, (1912), vol 1 at 35-39; Melbourne, "The Establishment of Responsible Government", in *The Cambridge History of the British Empire*, (1933), vol 7, Pt 1, 272 at 291-294; and Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979*, (1980) at 193-196.

annual sums by the Treasurer to the Aborigines Protection Board, a body which had been established under the *Aborigines Protection Act* 1886 (WA)[2]. Various questions of construction of s 70 arise but it will not be necessary to deal with them unless the appellants are correct in their contention that s 70 remains in force.

4 Murray J held that s 70 does not remain in force and ordered that the action be dismissed. The Full Court (Ipp, Anderson and White JJ) ordered that an appeal by the present appellants be dismissed.

5 In the Supreme Court, the respondents relied upon two Western Australian statutes as having achieved the repeal of s 70. The statutes are the *Aborigines Act* 1897 (WA) ("the 1897 Act") and the *Aborigines Act* 1905 (WA) ("the 1905

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2 The text of s 70 is as follows:

> "There shall be payable to Her Majesty, in every year, out of the Consolidated Revenue Fund the sum of five thousand pounds mentioned in Schedule C to this Act to be appropriated to the welfare of the aboriginal natives, and expended in providing them with food and clothing when they would otherwise be destitute, in promoting the education of aboriginal children (including half-castes), and in assisting generally to promote the preservation and well-being of the aborigines. The said annual sum shall be issued to the Aborigines Protection Board by the treasurer on warrants under the hand of the Governor, and may be expended by the said Board at their discretion, under the sole control of the Governor, anything in the Aborigines Protection Act, 1886, to the contrary notwithstanding. Provided always, that if and when the gross revenue of the colony shall exceed five hundred thousand pounds in any financial year, an amount equal to one per centum on such gross revenue shall, for the purposes of this section, be substituted for the said sum of five thousand pounds in and for the financial year next ensuing.
>
> If in any year the whole of the said annual sum shall not be expended, the unexpended balance thereof shall be retained by the said Board, and expended in the manner and for the purposes aforesaid in any subsequent year."

The term "Aborigines Protection Board" is defined in s 75 as meaning:

> "the board established under 'The Aborigines Protection Act, 1886,' or any board with similar functions established in its place under any Act adding to, amending, or substituted for the said Act".

Act"). In the interval between 1897 and 1905, federation had arrived. Section 107 of the Constitution provided that every power of the Parliament of a colony continued in respect of the State in question, unless (as was not the position for this case) the power was vested exclusively in the Parliament of the Commonwealth. Further, s 106 declared that the Constitution of each State "as at the establishment of the Commonwealth" was, subject to the federal Constitution, to continue "until altered in accordance with the Constitution of the State".

6 If the 1905 Act achieved the result contended for by the respondents, then there is no need to consider the 1897 Act. Section 65 and the First Schedule of the 1905 Act stated that s 70 of the WA Constitution Act was repealed. However, the appellants contend that, in this respect, the 1905 Act was ineffective because requirements as to manner and form imposed upon the Parliament of Western Australia had not been satisfied with respect to the bill for that Act. They submit, in accordance with well established authority in this Court[3], that this failure with respect to manner and form spelt invalidity.

7 We turn to consider those alleged requirements as to manner and form. Section 5 of the 1890 Imperial Act stated:

> "It shall be lawful for the legislature for the time being of Western Australia to make laws altering or repealing any of the provisions of the scheduled Bill in the same manner as any other laws for the good government of that colony, subject, however, to the conditions imposed by the scheduled Bill on the alteration of the provisions thereof in certain particulars until and unless those conditions are repealed or altered by the authority of that legislature."

8 The conditions identified in s 5 are imposed by s 73 of the WA Constitution Act. Section 73 states that the Western Australian legislature "shall have full power and authority from time to time by any Act to repeal or alter any of the provisions of this Act". There follow two provisos. These operate to limit

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3 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 425-427; *Victoria v The Commonwealth* (1975) 134 CLR 81 at 118-119, 162-164, 181-183; *Western Australia v Wilsmore* (1982) 149 CLR 79 at 96.

the operation of the opening words of the section and impose fetters upon the legislative power of the State[4].

9 In *Western Australia v Wilsmore*, which concerned the first proviso to s 73[5], Aickin J said[6]:

> "Each of the two provisos serves the same purpose, ie to qualify the exercise of the power to repeal or alter certain specified provisions of the [WA Constitution Act] itself."

10 It is the second proviso which is significant for this appeal. It states:

> "Provided also, that every Bill which shall be so passed for the election of a Legislative Council at any date earlier than by Part III of this Act provided, and every Bill which shall interfere with the operation of sections sixty-nine, seventy, seventy-one, or seventy-two of this Act, or of Schedules B, C, or D, or of this section, shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon."

11 Part III (ss 42-53) of the statute was a significant element in the constitutional scheme established by the WA Constitution Act. Part I (ss 2-36)

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4 The law as it existed when the 1905 Act was enacted has been changed by the Australia Act. Section 3 of the Australia Act achieves the result that no law or provision of a law made by the Parliament of Western Australia shall be void or inoperative for repugnancy to a United Kingdom statute such as s 5 of the 1890 Imperial Act; but, nevertheless, the effect of s 6 of the Australia Act is that a State law respecting the constitution, powers or procedure of the State Parliament must comply with the manner and form requirements of a law made by that Parliament, such as s 73 of the WA Constitution Act: *McGinty v Western Australia* (1996) 186 CLR 140 at 295-296. This appeal has to be decided by reference to the law when the 1905 Act was enacted.

5 This stated that it was not to be lawful to present to the Governor for Her Majesty's assent any bill to effect any change to the constitution of the Council or the Assembly unless the second and third readings had been passed "with the concurrence of an absolute majority of the whole number of the members for the time being" of the Council and the Assembly respectively.

6 (1982) 149 CLR 79 at 92.

established an elected Legislative Assembly of 30 members. The subsisting Legislative Council (which had been established in 1870 and had been a partly elected and partly nominated body[7]) was to continue but, as an interim measure, it was to be a wholly nominated body of 15 members until Pt III came into operation[8]. This interim Legislative Council and the elected Legislative Assembly were to be called together for the first time not later than six months after the commencement of the WA Constitution Act[9]. Part III provided for a Legislative Council to consist of 15 elected members. However, Pt III was to come into operation only on the expiration of six years or when the population of the colony (excluding "aboriginal natives") attained 60,000, whichever first occurred (s 42). The figure of 60,000 was exceeded in 1893[10]. The provisions of Pt III then were repealed by the 1893 Constitution Act which dealt afresh with the qualification of members and electors of the two Chambers.

12 Schedules B, C and D, referred to in the second proviso to s 73, provided for appropriations respectively under ss 69, 70 and 71 of the WA Constitution Act. Section 69 dealt with the salaries of officers including the Governor, the Chief Justice, the Puisne Judge and Ministers (Sched B); s 70 with the appropriation of moneys for the welfare of aboriginal natives (Sched C); and s 71 with pensions to Ministers in the former administration (Sched D).

13 The bill for the repeal of s 70 thus required, by reason of the second proviso to s 73, reservation by the Governor for the signification of Her Majesty's pleasure thereon. The phrase "Her Majesty's pleasure" in a provision such as

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7 See Lumb, *The Constitutions of the Australian States*, 5th ed (1991) at 37; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 68-69. Before 1870 the Legislative Council had been a non-elected body which dealt with legislation introduced by the Governor, acting on the advice of the Executive Council: Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979*, (1980) at 33-48.

8 This was the effect of ss 6 and 7 of the WA Constitution Act.

9 The WA Constitution Act was to take effect from its proclamation in the colony; this was to be within three months after receipt by the Governor of "official information of the Royal Assent thereto" (s 77).

10 Russell, *A History of the Law in Western Australia and Its Development from 1829 to 1979*, (1980) at 196.

s 73 had a particular meaning in what one might call the common law of the English constitution respecting the colonies. Sir Henry Jenkyns[11] wrote in 1902[12]:

> "When a Bill is so reserved it has no force until assented to by the King himself, ie by (in effect though not in form) the Home Government … the Crown [acting] on the advice of the home ministers, who are responsible to the imperial Parliament."

14 Imperial legislation might intrude by specifying requirements as to the manner and form of reservation and the making known in the colony in question of the fact that the Royal Assent had been given in the United Kingdom. The primary issue in the present appeal may now be shortly stated and its resolution indicated. Section 33 of *The Australian Constitutions Act* 1842 (Imp)[13] ("the 1842 Act") provided that no bill passed by what was then the New South Wales Legislative Council and reserved by the Governor was to have any force in that colony until the Governor signified in the manner and within the two year period specified in the section that the Sovereign had given the Royal Assent. That provision, as later extended by s 12 of *The Australian Constitutions Act* 1850 (Imp)[14] ("the 1850 Act") to bills passed by the Legislative Council of Western Australia, was preserved and made applicable by s 2(a) of the 1890 Imperial Act to legislation reserved pursuant to the requirement in s 73 of the WA Constitution Act. The bill for the 1905 Act was reserved and these procedures were complied with. The result was that this statute effectively repealed s 70 of the WA Constitution Act.

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11 Assistant Parliamentary Counsel to the Treasury 1869-1886, Parliamentary Counsel to the Treasury 1886-1899.

12 *British Rule and Jurisdiction Beyond the Seas*, (1902) at 15-16.

13 This is the short title given by the *Short Titles Act* 1896 (Imp) ("the Short Titles Act") to the statute 5 & 6 Vict c 76 being "[a]n Act for the Government of *New South Wales* and *Van Diemen's Land*". The short titles given later in these reasons to *The Colonial Laws Validity Act* 1865, *The Australian Constitutions Act* 1844, *The Australian Constitutions Act* 1850, *The New South Wales Constitution Act* 1855, *The Victoria Constitution Act* 1855, *The Australian Courts Act* 1828, *The Australian Constitutions Act* 1862 and *The Colonial Acts Confirmation Act* 1863 were also given by the Short Titles Act.

14 13 & 14 Vict c 59.

15 However, the appellants submit that s 2(a) of the 1890 Imperial Act left in operation other Imperial legislation imposing manner and form requirements and that these applied to the 1905 Act but were not observed, with the result that there was no repeal of s 70. That submission should not be accepted.

The 1890 Imperial Act

16 We turn now to consider the text and operation of s 2 of the 1890 Imperial Act. By s 2 the Imperial Parliament took steps anticipated in s 76 of the bill for the WA Constitution Act. This had (in s 76) deferred the operation of that statute until the Imperial Parliament had repealed so much of certain Imperial legislation as applied in the colony and was "repugnant" to the bill.

17 Section 2 effected a repeal of "so much and such parts of" three Imperial statutes "as relate[d] to the colony of Western Australia" and were "repugnant" to the WA Constitution Act. This notion of "repugnancy" usually applied in Imperial affairs to give primacy to Imperial over local laws. Here, given the character of the WA Constitution Act, the paramount legislation for the operation of s 2, the situation was reversed so as to favour the local law. The term "repugnancy" had appeared in s 2 of *The Colonial Laws Validity Act* 1865 (Imp)[15] ("the Colonial Laws Validity Act") and had great significance in determining the relationship between enactments of the Parliament at Westminster and all colonial legislatures[16]. The question, as Mason J put it[17], was whether the provisions of any two statutes at issue were so much in conflict "that they [could not] be reconciled one with the other [and] the problem was resolved in favour of the primacy of the Imperial statute, even if it be the first in time". There was some uncertainty, which it is unnecessary to resolve here, as to whether the "covering the field" test for inconsistency developed with respect to

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15 28 & 29 Vict c 63.

16 *Ffrost v Stevenson* (1937) 58 CLR 528 at 572-573; *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 186-187; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463-464; *Northern Territory v GPAO* (1999) 196 CLR 553 at 579-580 [51], 636 [219]; Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 398-399.

17 *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463.

s 109 of the Constitution applied also to "repugnancy"; however, it was sufficient to demonstrate repugnancy that, as Dixon J put it in *Ffrost v Stevenson*[18], "the co-existence of the two sets of provisions … would produce an antinomy inadmissible in any coherent system of law".

18 The three Imperial Acts were the 1842 Act, *The Australian Constitutions Act* 1844 (Imp)[19] ("the 1844 Act"), being "[a]n Act to explain and amend the [1842 Act]", and the 1850 Act. The 1842 Act and the 1844 Act were not expressed of their own force to relate to the colony of Western Australia. They did so only because of provisions in the 1850 Act.

19 The repeal of the three statutes of 1842, 1844 and 1850 by s 2 of the 1890 Imperial Act was subjected to two provisos. Their effect was to recognise the repugnancy of those statutes to the WA Constitution Act but nevertheless, for particular purposes, to continue the operation of some provisions of the 1842 Act and the 1850 Act. Neither proviso saved any part of the 1844 Act. The significance of this will appear later in these reasons.

20 The proviso in par (b) to s 2 was temporal in operation. It continued in force so much of the 1842 and 1850 statutes "as relate[d] to the constitution, appointment, and powers of the Legislative Council" of Western Australia, but only until the initiation of the bicameral system to be established in pursuance of the WA Constitution Act by the issue of the first writs for the election of members to serve in the Legislative Assembly.

21 It is upon the operation of the first proviso to s 2 of the 1890 Imperial Act, that in par (a), that the appellants' case turns. This states:

> "The provisions of the [1842 Act and the 1850 Act] which relate to the giving or withholding of Her Majesty's assent to Bills, and the reservation of Bills for the signification of Her Majesty's pleasure thereon, and the instructions to be conveyed to Governors for their guidance in relation to the matters aforesaid, and the disallowance of Bills by Her Majesty, shall apply to Bills to be passed by the Legislative Council and Assembly constituted under the scheduled Bill and this Act, and by any

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18 (1937) 58 CLR 528 at 572.

19 7 & 8 Vict c 74.

other legislative body or bodies which may at any time hereafter be substituted for the said Legislative Council and Assembly".

22 Section 9 of the 1850 Act had authorised the establishment of the Legislative Council with one-third of its members appointed and two-thirds elected. This was implemented in 1870[20]. Shortly put, the appellants' argument is that (i) the Legislative Council had been empowered by s 14 of the 1850 Act to make laws for the peace, welfare and good government of the colony; (ii) s 32 of the 1850 Act had applied to that Legislative Council and it had conferred certain powers upon that body subject to the observance of requirements, one of which was that "a Copy of such Bill shall be laid before both Houses of Parliament for the Space of Thirty Days at the least before Her Majesty's Pleasure thereon shall be signified"; (iii) this tabling requirement in s 32 was preserved by proviso (a) to s 2 of the 1890 Imperial Act; and (iv) it applied to the bill for the 1905 Act but was not observed, thereby denying to the 1905 Act an essential condition precedent to its validity.

23 It should be noted that, in so far as it related to Western Australia, the whole of s 32 of the 1850 Act (along with part of s 31 of the 1842 Act and other provisions in the 1850 Act) had been repealed before the enactment of the 1905 Act. This repeal was effected by s 1 of a general measure of statute law reform, the *Statute Law Revision (No 2) Act* 1893 (Imp) ("the 1893 Revision Act"). However, a proviso to s 1 stated that the repeal of any provision did not affect any enactment in which the repealed provision had been applied, incorporated or referred to. It thus may be assumed that, if s 32 otherwise had any operation with respect to the enactment of the 1905 Act, it did not cease to do so by reason of the 1893 Revision Act.

24 It also should be observed that the proviso in par (a) to s 2 of the 1890 Imperial Act was not a departure from previous Imperial legislation which had dealt with the other Australian colonies. For example, it followed the terms of s 3 of *The New South Wales Constitution Act* 1855 (Imp)[21] and s 3 of *The*

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20 By Ordinance 33 Vict No 13 enacted by the Governor of Western Australia on the advice and consent of the Legislative Council then existing, pursuant to powers conferred by s 9 of the 1850 Act.

21 18 & 19 Vict c 54.

Victoria Constitution Act 1855 (Imp)[22]. These statutes had provided respectively for the establishment of bicameral legislatures in New South Wales and Victoria.

25 Moreover, par (a) of s 2 of the 1890 Imperial Act effectively reproduced part of the text of s 12 of the 1850 Act. Section 12 was still in force in Western Australia when the 1890 Imperial Act was introduced; it had rendered applicable and in force in Western Australia after the establishment in 1870 of the Legislative Council certain provisions of the 1842 Act and the 1844 Act, with the substitution of "Western Australia" for "New South Wales". These provisions were identified in s 12 as including those concerning:

> "the giving and withholding of Her Majesty's Assent to Bills, and the Reservation of Bills for the Signification of Her Majesty's Pleasure thereon, and the Bills so reserved; the Instructions to be conveyed to the Governor for his Guidance in relation to the Matters aforesaid; and the Disallowance of Bills by Her Majesty".

26 One such provision in the 1842 Act, that relating to the reservation of bills for the signification of Her Majesty's pleasure, was s 33. This stated:

> "And be it enacted, That no Bill which shall be so reserved for the Signification of Her Majesty's Pleasure thereon shall have any Force or Authority within the Colony of *New South Wales* until the Governor of the said Colony shall signify, either by Speech or Message to the Legislative Council of the said Colony, or by Proclamation, as aforesaid, that such Bill has been laid before Her Majesty in Council, and that Her Majesty has been pleased to assent to the same; and that an Entry shall be made in the Journals of the said Legislative Council of every such Speech, Message, or Proclamation, and a Duplicate thereof, duly attested, shall be delivered to the Registrar of the Supreme Court, or other proper Officer, to be kept among the Records of the said Colony; and that no Bill which shall be so reserved as aforesaid shall have any Force or Authority in the said Colony unless Her Majesty's Assent thereto shall have been so signified as aforesaid within the Space of Two Years from the Day on which such Bill shall have been presented for Her Majesty's Assent to the Governor as aforesaid."

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22 18 & 19 Vict c 55.

27 One evident purpose of par (a) of s 2 of the 1890 Imperial Act was to carry over s 33 (read as required by s 12 of the 1850 Act) from the legislative arrangements in Western Australia operative at the time of the 1890 Imperial Act to the reservation required by s 73 of the WA Constitution Act in respect of certain bills to be passed by the new bicameral legislature.

28 The appellants' submissions fix upon another provision of the 1850 Act, s 32. Imperial legislation predating s 32 of the 1850 Act also had provided for the tabling of colonial laws at Westminster. The statute of 1823, 4 Geo IV c 96, which amongst other things had authorised the erection and establishment of the Supreme Court of New South Wales and the Supreme Court of Van Diemen's Land, had also authorised the creation of an appointed Legislative Council (s 24). Section 31 had stated:

> "Provided also, and be it further enacted, That all Laws and Ordinances to be made in the said Colony, and all Orders to be made by His Majesty, His Heirs and Successors, with the Advice of His and Their Privy Council, in pursuance of this Act, shall be laid before both Houses of Parliament within Six Weeks at latest next after the Commencement of each Session."

Thereafter, s 29 of *The Australian Courts Act* 1828 (Imp)[23] contained a stipulation in like terms for the tabling of laws and Ordinances to be made in New South Wales and Van Diemen's Land.

29 Whilst the Legislative Council of 1870 was in operation, the requirement of tabling found in s 32 of the 1850 Act had "relate[d] to the colony of Western Australia", within the meaning of s 2 of the 1890 Imperial Act. The issue in this case is whether, on the footing that this requirement was repugnant to the WA Constitution Act, nevertheless it was preserved by par (a) of s 2 so as to apply to any bill to repeal the operation of s 70 of the WA Constitution Act.

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23 9 Geo IV c 83. A provision to like effect was made by the statute 10 Geo IV c 22 with respect to the nominated law-making body established by that statute for the settlements in Western Australia. See also s 36 of the First Schedule to *The New South Wales Constitution Act* 1855 and *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 419, 432.

30 In our view, s 32 of the 1850 Act had no application to the bill for the 1905 Act and, as a result, the appeal to this Court fails. We turn to explain why this is so.

Imperial control of colonial legislative processes

31 For any provision of the 1842 Act or the 1850 Act to apply to bills to be passed by the Legislative Council and Legislative Assembly to be established for Western Australia under the WA Constitution Act, that provision must, in the terms of s 2 of the 1890 Imperial Act, "relate to" one or more of the subjects specified in par (a) of that section. Those subjects are identified in par (a) as:

(i) the giving or withholding of Her Majesty's assent to bills;

(ii) the reservation of bills for the signification of Her Majesty's pleasure thereon;

(iii) Instructions to be conveyed to Governors for their guidance in relation to (i) and (ii); and

(iv) the disallowance of bills by Her Majesty.

32 These four categories identify particular means by which control was exercised over colonial affairs by the Executive Government of the United Kingdom. Category (iv), the disallowance of bills, differed from categories (i), (ii) and (iii). It concerned steps taken by the Sovereign on the advice of the British Ministers as opposed to steps taken by the colonial Governor. The power of disallowance has been described as follows[24]:

> "The power of disallowance is a right, vested in the Crown, to remove a law from the Statute Book. It has no application to Bills, so that if the legislative authority is conferred upon the Governor with the advice and consent of a legislative body (*ie*, not on the Governor alone), he must have

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24 Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 227 (footnote omitted). See also, with respect to the provision for disallowance in s 59 of the Constitution: *Sue v Hill* (1999) 199 CLR 462 at 495-496 [75]-[77]; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 692-693; Inglis Clark, *Studies in Australian Constitutional Law*, (1901) at 321-334.

given assent before any question of disallowance or non-disallowance can arise."

Disallowance was a different notion to that of reservation, category (ii) of the four categories. When a bill was reserved, the Governor could not subsequently give assent. That had to be given, if at all, by the Sovereign. The significance of this will be referred to later in these reasons.

33 With respect to the States, including Western Australia, s 8 of the Australia Act now provides that legislation which has been assented to by the Governor shall not, after 3 March 1986, be subject to disallowance by Her Majesty. Provision with respect to the withholding of assent and reservation for Her Majesty's pleasure now is made by s 9 of the Australia Act[25].

34 Category (iii) identified in s 2(a) of the 1890 Imperial Act refers to the Instructions issued to Governors by the Home Government. In the nineteenth century, the legal significance to be attached to Instructions had been a matter of some debate[26]. The efficacy of land grants passed by early Governors of New South Wales contrary to their Instructions had been disputed but not conclusively resolved[27]. In 1861, in South Australia, Boothby J had proceeded on the footing that Instructions had the force of law so that no colonial Act to which the

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25 Section 9 states:

> "(1) No law or instrument shall be of any force or effect in so far as it purports to require the Governor of a State to withhold assent from any Bill for an Act of the State that has been passed in such manner and form as may from time to time be required by a law made by the Parliament of the State.
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> (2) No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon."

26 Swinfen, *Imperial Control of Colonial Legislation 1813-1865*, (1970) at 78-92; Swinfen, "The Legal Status of Royal Instructions to Colonial Governors", (1968) *Juridical Review* 21; Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 146-149.

27 Campbell, "Crown Land Grants: Form and Validity", (1966) 40 *Australian Law Journal* 35 at 36-38.

Governor had given his assent contrary to the Instructions was valid[28]. Thereafter, it was settled that, if a direction to reserve was found in the Royal Instructions and was disregarded by the Governor, his assent nevertheless was valid by force of s 4 of the Colonial Laws Validity Act[29]. However, the Governor risked the displeasure of the Colonial Office and might be recalled[30]. If the direction to reserve was given by Imperial statute, an assent by the Governor was a nullity and the bill in question did not become law[31].

35 The nature of the Instructions provided to colonial Governors changed over the course of the nineteenth century, particularly with the development in colonies such as those in Australia of representative and responsible government. In 1878, changes were made to the Instructions accompanying the Letters Patent constituting the office of Governor-General of Canada and Higinbotham CJ took up with the Colonial Office the making of changes to the Instructions to the

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28 Swinfen, *Imperial Control of Colonial Legislation 1813-1865*, (1970) at 78.

29 Section 4 provided:

> "No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorizing such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument."

30 In 1845, Governor Fitzroy of New Zealand was recalled after his disobedience to his Instructions: Hight and Bamford, *The Constitutional History and Law of New Zealand*, (1914) at 174-185.

31 Roberts-Wray, *Commonwealth and Colonial Law*, (1966) at 226. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901), contains as a table to §270 details supplied in 1894 of statutes passed by bicameral legislatures and assented to by Governors of colonies possessing responsible government and subsequently disallowed. In addition, the table lists those bills which had been reserved and as to which the Imperial authorities had subsequently advised the Crown to withhold assent.

Governors of the Australian colonies[32]. As a result, redrafted Instructions were adopted in 1892. Paragraph 7 of these Instructions provided that, except in stipulated circumstances, the Governor was not to assent to bills falling within any one of eight classes[33]. These included bills containing provisions to which the Royal Assent had been once refused and bills which had been disallowed; bills affecting the currency of the colony; bills imposing differential duties otherwise than as allowed by the *Australian Colonies Duties Act* 1873 (Imp); bills with provisions apparently inconsistent with obligations imposed upon the Crown by treaty; and bills "of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the Colony, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced". The circumstances in which assent might be given despite the bill falling within one of these classes were those in which the Governor:

> "shall have previously obtained Our Instructions upon such Bill, through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the Colony of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty.

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32 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 394-398; Keith, *Responsible Government in the Dominions*, (1912), vol 1 at 163-172; Bailey, "Self-Government in Australia, 1860-1900", in *The Cambridge History of the British Empire*, (1933), vol 7, Pt 1, 395 at 395-401; Parkinson, "George Higinbotham and Responsible Government in Colonial Victoria", (2001) 25 *Melbourne University Law Review* 181 at 195-210.

33 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 399-400; Parkinson, "George Higinbotham and Responsible Government in Colonial Victoria", (2001) 25 *Melbourne University Law Review* 181 at 215-216. The effect of changes made by ss 7, 10 and 14 of the Australia Act is that the Governor is appointed on advice tendered by the Premier of the State, not on the advice of United Kingdom Ministers, with the result that the occasion for the issuing of Instructions to the Governor on the advice of the British Government no longer can arise.

> But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto."

36 Upon passage of a bill through a colonial legislature, three courses were open to the Governor upon it being presented for the assent of the Crown. First, the Governor might assent in the name of the Sovereign; it was nevertheless the obligation of the Governor to transmit a copy of the statute to the Colonial Office in order that the Imperial authorities might have an opportunity to exercise the power of disallowance, and, as will appear later in these reasons, in some colonies that requirement to transmit a copy was expressly imposed upon Governors by Imperial statute. Secondly, the Governor might withhold the Royal Assent in accordance with his Instructions, but failing such Instructions, the Governor of a self-governing colony exercised the veto only on the advice of the local Ministers. Thirdly, the bill might be reserved for the signification of the pleasure of the Sovereign until that assent was given on British Ministerial advice[34].

37 Categories (i), (ii) and (iii) identified in s 2(a) of the 1890 Imperial Act deal with these three matters of the giving or withholding of assent, reservation, and Instructions and all deal with the position of colonial Governors. With respect to bills to be passed by the new bicameral legislature in Western Australia, s 2(a) did not leave these three matters, nor the procedures in the colony respecting disallowance in the United Kingdom, to those aspects of the general law and the prerogative which regulated them in the absence of legislation. In the Australian colonies, it appears somewhat unusually[35], Imperial laws, in particular the 1842 Act and the 1850 Act, had dealt with these subjects. Imperial law had dealt also with tabling at Westminster, but that was not one of the matters which s 2(a) was concerned to apply to the system of government established by the WA Constitution Act. It perhaps is significant that, whilst the matters identified in s 2(a) were of interest to the executive branch of the British Government, tabling was concerned with the interest of the legislature in colonial affairs. Tabling was apt to stimulate parliamentary scrutiny.

38 We turn further to consider the relevant provisions of the 1842 Act and the 1850 Act.

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34 Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, (1902) at 77-78.

35 Jenkyns, *British Rule and Jurisdiction Beyond the Seas*, (1902) at 113-114.

The 1842 Act and the 1850 Act

39 Reference has been made earlier in these reasons to s 12 of the 1850 Act. One operation of that section was to apply to the new Legislative Council established in 1870 in Western Australia provisions which had dealt with the elections to and procedures of the partly elected Legislative Council established for New South Wales by the 1842 Act. Section 32 of the 1850 Act took the matter further. It conferred upon the new Western Australian Legislative Council power to alter provisions or laws for the time being in force:

> "concerning the Election of the elective Members of such Legislative Councils respectively, the Qualification of Electors and elective Members, or to establish in the said Colonies respectively, instead of the Legislative Council, a Council and a House of Representatives, or other separate Legislative Houses, to consist respectively of such Members to be appointed or elected respectively by such Persons and in such Manner as by such Act or Acts shall be determined, and to vest in such Council and House of Representatives or other separate Legislative Houses the Powers and Functions of the Legislative Council for which the same may be substituted".

40 The power conferred by s 32 of the 1850 Act was subject to two provisos. Neither of these provisos operated as an independent enactment. That is significant for the argument by the appellants, which seeks to give the tabling proviso that very character and to preserve it by operation of par (a) of s 2 of the 1890 Imperial Act. The two provisos to s 32 of the 1850 Act were true provisos. In the words of Aickin J in *Western Australia v Wilsmore*[36], each operated:

> "to except out of the previous enacting part something which but for the proviso would fall within the enacting part".

41 The second proviso, that concerning tabling, was expressed as follows:

> "a Copy of such Bill shall be laid before both Houses of Parliament for the Space of Thirty Days at the least before Her Majesty's Pleasure thereon shall be signified".

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36 (1982) 149 CLR 79 at 90.

This qualified rather than added to the power conferred by s 32 upon Governors and Legislative Councils from time to time to alter laws in force under the 1850 Act or otherwise concerning the subject-matters listed in s 32. The further stipulation, that in the first proviso respecting reservation, also qualified that power. The first proviso stated:

> "every Bill which shall be passed by the Council in any of the said Colonies for any of such Purposes shall be reserved for the Signification of Her Majesty's Pleasure thereon".

42 However, unlike the proviso concerning tabling, that dealing with reservation was given particular content and effect by the enactment in s 33 of the 1850 Act. Section 33 stated:

> "Provided always, and be it enacted, That the Provisions of [the 1842 Act], as explained and amended by [the 1844 Act], concerning Bills reserved for the Signification of Her Majesty's Pleasure thereon, shall be applicable to every Bill so reserved under the Provisions of this Act."

Section 33 of the 1850 Act thus rendered applicable to bills reserved under the 1850 Act the provisions concerning reservation spelled out in the 1842 Act, as explained by the 1844 Act.

43 The true operation of the 1850 Act is of prime importance for the appellants' case. Several points may now be made respecting s 32. First, the effect of s 32, broadly put, was to empower the Legislative Council established in 1870 to alter the laws otherwise providing for (i) the election of the elective members of the Legislative Council and the qualification of electors and elective members; (ii) the establishment of a bicameral legislature; and (iii) the vesting in that bicameral legislature of the powers and functions of the Legislative Council. Secondly, that empowerment would be spent, or the occasion for its exercise would no longer arise, once proviso (b) to s 2 of the 1890 Imperial Act became effective and the new bicameral system was instituted; the repeal of s 32 by s 2 of the 1890 Imperial Act for repugnancy to the WA Constitution Act would then be effective and, as a provision of the 1850 Act relating to "the constitution, appointment, and powers of the Legislative Council of the colony of Western Australia" (the words of proviso (b)), s 32 would no longer "continue in force". Thirdly, that repeal of s 32 necessarily would take with it the proviso respecting tabling. Fourthly, the terms of s 33 respecting reservation, the subject of the other proviso to s 32, indicated that the Imperial legislation had distinguished between the two provisos.

44 What par (a) of s 2 of the 1890 Imperial Act carried over was the same subject-matter in the 1842 Act as had been rendered applicable to the Legislative Council by the use of the same terms in s 12 of the 1850 Act as those later employed in par (a). To these provisions of the 1842 Act we now return.

45 Section 31 of the 1842 Act dealt with the giving or withholding of assent or the reservation of bills by the Governors by stating that bills passed by the local legislature:

> "shall be presented for Her Majesty's Assent to the Governor of the said Colony, and that the Governor shall declare according to his Discretion, but subject nevertheless to the Provisions contained in this Act, and to such Instructions as may from Time to Time be given in that Behalf by Her Majesty, Her Heirs or Successors, that he assents to such Bill in Her Majesty's Name, or that he withholds Her Majesty's Assent, or that he reserves such Bill for the Signification of Her Majesty's Pleasure thereon".

46 The section went on to specify that certain categories of bill were "in every Case" to be reserved. It is here that a further consideration respecting the construction of s 2 of the 1890 Imperial Act appears. The categories of bill for reservation might be summarised as bills (i) altering or affecting the divisions or the extent of the several districts and towns represented in the Legislative Council or establishing new and other divisions thereof; (ii) altering the number of members of the Legislative Council to be chosen by those districts and towns; (iii) increasing the whole of the number of the members of the Legislative Council; (iv) altering the salaries of the Governor or Superintendent; (v) altering the salaries of judges[37]; and (vi) altering or affecting the duties of customs upon imports or exports[38].

47 The 1844 Act dealt further with this question of reservation and Royal Assent. It recited the reference in s 31 of the 1842 Act that certain bills were in every case to be reserved, stated that the intent of the provision had been to ensure that these bills were not to be assented to by the Governor without due consideration and then enacted s 7. This stated:

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37 A requirement repealed by s 13 of the 1850 Act.

38 A requirement repealed by the statute of 1866, 29 & 30 Vict c 74.

> "That it shall not be necessary for the Governor to reserve any such Bill for the Signification of Her Majesty's Pleasure thereon from which in the Exercise of his Discretion, as limited in [the 1842 Act], he shall declare that he withholds Her Majesty's Assent, or to which he shall have previously received Instructions on the Part of Her Majesty to assent, and to which he shall assent accordingly."

The specification in s 31 of the 1842 Act of those bills which in every case required reservation was repugnant to s 73 of the WA Constitution Act, and the amendment and explanation thereof by s 7 of the 1844 Act was likewise repugnant. The 1844 Act had no other relevant operation and was not saved by either proviso to s 2 of the 1890 Imperial Act. That left, within proviso (a), the opening portion of s 31 of the 1842 Act which has been set out above. That proviso also saved and applied to the new structure established by the WA Constitution Act s 32 and s 33 of the 1842 Act as they had been applied by s 12 of the 1850 Act to the Legislative Council.

48 As indicated earlier in these reasons, s 33 of the 1842 Act dealt further with the consequences of the reservation by the Governors of bills for Her Majesty's pleasure; it required proclamation or other announcement in the colony once the bill had been laid before Her Majesty in Council and had received her assent. Section 32 of the 1842 Act contained provisions respecting the transmission by the Governor of a copy of each bill to which the Governor had given the Royal Assent, the disallowance thereof by Her Majesty at any time within two years after receipt by the British authorities, and the annulment of the law upon the promulgation in the colony of the disallowance.

The operation of s 2 of the 1890 Imperial Act
and s 73 of the WA Constitution Act

49 Section 73 of the WA Constitution Act, supported by s 5 of the 1890 Imperial Act, empowered the legislature to be constituted by the WA Constitution Act to repeal or alter any of the provisions of the WA Constitution Act. This was subject to provisos, the second of which used the expression "shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon".

50 What was involved in reservation might have been left for the general law and the prerogative as it affected colonies. However, in the Australian colonies, as indicated by the 1842 Act and the 1850 Act, the practice had been to specify in

legislation the elements of manner and form involved in the process of reservation. The WA Constitution Act itself did not deal with those matters. Nor did it deal with the matters of disallowance or the giving or withholding of assent by Governors and their Instructions. For that, provision was made in proviso (a) to s 2 of the covering legislation, the 1890 Imperial Act.

51 The terms of proviso (a) stated that the relevant provisions of the earlier Imperial legislation "shall apply to Bills to be passed by the Legislative Council and Assembly". To what bills? The exercise of the power vested in the Imperial authorities with respect to disallowance might apply to any legislation passed by the legislature of Western Australia. However, no question of disallowance arose with respect to the 1905 Act. Nor did any question arise respecting the giving or withholding by the Governor of the Royal Assent, or the Instructions concerning that assent. Another method of Imperial control, namely reservation, was specifically attached as a proviso to the power of alteration and repeal conferred by s 73 of the WA Constitution Act. To laws to which s 73 applied, including the 1905 Act, content was given to the obligation of reservation imposed by s 73 by what was to be found in earlier Imperial legislation. This Imperial legislation was that identified in proviso (a) to s 2 of the 1890 Imperial Act.

52 However, there was a threshold difficulty in assimilating to the operation of the system of government instituted by the WA Constitution Act the provisions of the 1842 Act, the 1844 Act and the 1850 Act. For example, the specification in s 31 of the 1842 Act of the categories of bills for which reservation was required differed from that in s 73 of the WA Constitution Act. If s 31 were to be preserved alongside s 73, there would be repugnancy between them. Instances of this were the portion of s 31 of the 1842 Act to which reference has been made, and s 32 of the 1850 Act. The conflict was resolved by the opening words of s 2. This brought about repeal of the earlier laws to the extent of such repugnancy but preserved and excepted from that repeal provisions of the earlier legislation which dealt with the four categories of Imperial control listed in the proviso and supplied manner and form for such methods of Imperial control.

53 The provisions of the earlier legislation thus preserved were to apply to bills to be passed by the Legislative Council and Assembly; in particular the provisions in the 1842 Act (and s 12 and s 33 of the 1850 Act) with respect to reservation were to apply to those bills which s 73 required the Governor to reserve for the signification of Her Majesty's pleasure.

54 Those provisions were complied with with respect to the bill for the 1905 Act. They did not include, because proviso (a) to s 2 did not translate them into the new system, any requirement for tabling drawn from s 32 of the 1850 Act.

55 It follows that the appellants cannot make out the necessary step for the success of their appeal. The appeal must fail and it is unnecessary to consider further submissions put by the respondents in opposition to the appeal.

Steps taken in the United Kingdom

56 We should add that the Court was referred to several opinions tendered by the English Law Officers in the period between the establishment of the Legislative Council in 1870 and the 1905 Act[39]. At the time, the limitations of legislative power in the Australian colonies were regarded as "confusing, and nearly unintelligible"[40]. The Law Officers appear to have taken a cautious view of issues of construction, some of which have arisen in this appeal. That caution may have been understandable and may have suggested compliance with provisions which now appear not to have been mandatory and to have been repealed by s 2 of the 1890 Imperial Act.

57 It also should be noted that the provisions respecting reservation by the Governors of Western Australia and the other Australian colonies gave rise in this period to various difficulties which required remedial action by the Imperial Parliament[41]. The *Colonial Acts Confirmation Act* 1894 (Imp) recited that doubts had arisen as to the validity of some colonial statutes because they had not been reserved for the signification of Her Majesty's pleasure. The statute applied to the Australian colonies and provided (s 2(1)):

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39 Particular reference was made in argument to the Opinions of the Law Officers of 10 August 1878 (reprinted in O'Connell and Riordan, *Opinions on Imperial Constitutional Law*, (1971) at 35-36); of 8 February 1897; and of 30 October 1905 (reprinted in O'Connell and Riordan, *Opinions on Imperial Constitutional Law*, (1971) at 53-55).

40 Keith, *Responsible Government in the Dominions*, (1912), vol 1 at 427.

41 Earlier legislation, before the establishment in 1870 of the Legislative Council in Western Australia, had included *The Australian Constitutions Act* 1862 (Imp) (25 & 26 Vict c 11) and *The Colonial Acts Confirmation Act* 1863 (Imp) (26 & 27 Vict c 84).

> "Any Act passed by the legislature of a colony to which this Act applies, and assented to in Her Majesty's name by the governor of such colony, and not disallowed by Her Majesty before the passing of this Act, shall be deemed to be and to have been, as from the date of such assent, as valid as if the same had been reserved for the signification of Her Majesty's pleasure, and Her Majesty's assent to the Act had been duly given and signified in the colony at the date aforesaid."

Thereafter, further statutes were passed in New South Wales, Queensland and Western Australia, the validity of which was in question because they had not been reserved. Confirmatory legislation was provided by the *Colonial Acts Confirmation Act* 1901 (Imp).

58 Finally, the matter was dealt with by the *Australian States Constitution Act* 1907 (Imp) ("the 1907 Imperial Act")[42]. The effect of s 1(1) was to limit in Western Australia the classes of case requiring reservation under s 73[43].

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42 The 1907 Imperial Act is no longer in force, the need for it having been removed by the Australia Act; see *Sue v Hill* (1999) 199 CLR 462 at 494-495 [72].

43 Section 1(1) stated:

> "There shall be reserved, for the signification of His Majesty's pleasure thereon, every Bill passed by the Legislature of any State forming part of the Commonwealth of Australia which –
>
> (a) alters the constitution of the Legislature of the State or of either House thereof; or
>
> (b) affects the salary of the Governor of the State; or
>
> (c) is, under any Act of the Legislature of the State passed after the passing of this Act, or under any provision contained in the Bill itself, required to be reserved;
>
> but, save as aforesaid, it shall not be necessary to so reserve any Bill passed by any such Legislature:
>
> Provided that –

(Footnote continues on next page)

Section 1(3) applied s 33 of the 1842 Act to bills reserved under the 1907 Imperial Act. Sub-section (4) of s 1 removed doubt as to subsequent State legislation (but not previous laws such as the 1905 Act) with respect to reservation and tabling requirements. The sub-section did so by stating:

> "So much of any Act of Parliament or Order in Council as requires any Bill passed by the Legislature of any such State to be reserved for the signification of His Majesty's pleasure thereon, or *to be laid before the Houses of Parliament before His Majesty's pleasure is signified*, and, in particular, the enactments mentioned in the Schedule to this Act, to the extent specified in the third column of that Schedule, shall be repealed both as originally enacted and as incorporated in or applied by any other Act of Parliament or any Order in Council or letters patent." (emphasis added)

59 The Schedule to the 1907 Imperial Act, among other matters, removed, from proviso (a) to s 2 of the 1890 Imperial Act and s 12 of the 1850 Act, category (ii) identified earlier in these reasons, namely that providing for the reservation of bills; removed from s 31 of the 1842 Act the list of bills for which in every case reservation was required, together with the explanatory provisions in the 1844 Act; and repealed s 33 of the 1850 Act and both provisos to s 32 of the 1850 Act.

60 Finally, s 2 of the 1907 Imperial Act confirmed, in general terms, the validity of colonial and State statutes to which the Governor had given the Royal Assent and which had not been disallowed. The validity thus conferred was effective, in the terms of s 2(1), "notwithstanding that [the law in question] ought

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> (a) nothing in this Act shall affect the reservation of Bills in accordance with any instructions given to the Governor of the State by His Majesty; and
>
> (b) it shall not be necessary to reserve a Bill for a temporary law which the Governor expressly declares necessary to be assented to forthwith by reason of some public and pressing emergency; and
>
> (c) it shall not be necessary to reserve any Bill if the Governor declares that he withholds His Majesty's assent, or if he has previously received instructions from His Majesty to assent and does assent accordingly to the Bill."

to have been but was not duly laid before both Houses of Parliament". However, s 2(1) would not have cured any invalidity which otherwise infected the 1905 Act. Section 2 applied only to statutes to which the Governor had given the Royal Assent. The Governor had not given the Royal Assent to the bill for the 1905 Act. Rather, as indicated earlier in these reasons, the bill had been reserved, in accordance with the second proviso to s 73 of the WA Constitution Act.

Conclusion

61 The effect of the decision in this appeal is that the 1905 Act did not miscarry by reason of any requirement preserved or imposed by s 2 of the 1890 Imperial Act. The respondents succeed in their submission that the 1905 Act was effective because there had been no necessity under any Imperial law that the bill for that Act be laid before both Houses of Parliament at Westminster.

62 This result makes it unnecessary to rule upon further submissions made in the concluding paragraphs of the respondents' written outline. It is sufficient to say that each submission appears to be at odds with earlier judgments in this Court.

63 One submission was that the question of compliance with the tabling requirement was "non-justiciable" because it involved an aspect of the procedures of the Parliament at Westminster[44]. However, what is at stake here is the validity of the 1905 Act, a statute of Western Australia, not the United Kingdom. In *Attorney-General (NSW) v Trethowan*[45], both Rich J and Dixon J treated manner and form requirements binding subordinate legislatures as requiring fulfilment of every requirement imposed upon the process of law-making, including the laying of colonial bills before the Houses of the Imperial Parliament.

64 The other submission was that the reference in s 106 of the Constitution to "[t]he Constitution of each State", as applicable to Western Australia, is confined solely to the legislation of that State, to the exclusion of any manner and form

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44 cf *British Railways Board v Pickin* [1974] AC 765; *Manuel v Attorney-General* [1983] Ch 77.

45 (1931) 44 CLR 394 at 418-419, 432-433.

requirement which at the time of the 1905 Act was imposed by Imperial legislation. Acceptance of that submission would require the rejection of what has been said in various decisions, including those most recently referred to by Brennan CJ in *McGinty v Western Australia*[46].

65 The appeal should be dismissed with costs.

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46 (1996) 186 CLR 140 at 171-173.

66 KIRBY J. This appeal[47] presents for decision a contested assertion that the State of Western Australia ("the State") has for a century been in breach of a provision of the State Constitution. The provision in question is said to require the State to pay to the Crown an annual sum "to be appropriated to the welfare of the aboriginal natives [being] an amount equal to one per centum on [the] gross revenue"[48] of the State.

67 There is no contest that the sum has not been paid. However, the State contends that there has been no default because the Parliament of Western Australia, first in colonial times by the *Aborigines Act* 1897 (WA) ("the 1897 Act")[49] and then after federation by the *Aborigines Act* 1905 (WA) ("the 1905 Act")[50], passed valid legislation repealing the provision under which the obligation is said to have arisen. The repealing statutes were certainly enacted[51]. The question is whether one at least of them succeeded or whether they both failed for non-compliance with Imperial legislation[52], argued by the appellants to govern the manner and form of constitutional amendments made by the Parliament of Western Australia.

68 At least for a time a finding in favour of the appellants would obviously cause inconvenience to the revenues of the State and problems for its institutions[53]. This would last until a valid amendment of the State Constitution

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47 From a judgment of the Full Court of the Supreme Court of Western Australia: *Yougarla v Western Australia* (1999) 21 WAR 488.

48 *Constitution Act* 1889 (WA) ("the WA Constitution Act"), s 70. The WA Constitution Act was enacted as the First Schedule to the *Western Australia Constitution Act* 1890 (Imp) (53 & 54 Vict c 26) ("the 1890 Imperial Act"). The full text of s 70 is set out in the reasons of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ ("the joint reasons") at [3], fn 2.

49 Section 2, Schedule.

50 Section 65, First Schedule.

51 There had been an earlier attempt to repeal s 70 in 1894.

52 Notably *Australian Constitutions Act* 1842 (Imp) (5 & 6 Vict c 76), s 33 and *Australian Constitutions Act* 1850 (Imp) (13 & 14 Vict c 59), s 32.

53 The Aborigines Protection Board, mentioned in the WA Constitution Act, s 70, was abolished by the 1897 Act, s 4, which instead conferred a discretion on the Governor to appoint and remove "Protectors of Aborigines". The abolition was noted at the time in the United Kingdom: House of Commons, *Parliamentary Debates* (Hansard), 31 March 1898 at 1496-1497. See also 1905 Act, s 7.

achieved a repeal. Inferentially, success in the appeal would give rise to negotiations on behalf of the Aboriginal inhabitants of Western Australia. Inconvenience is no barrier in constitutional adjudication if a party can establish that relevant constitutional requirements have not been complied with[54].

The facts and common ground

69 The facts of the case were uncontested in this Court. Mr Crow Yougarla and the other appellants are Aboriginal Australians, born and domiciled in Western Australia[55]. Before us, at least, no question was argued as to their standing to bring the proceedings[56]. They sought appointment to represent the Aboriginal inhabitants of Western Australia; a declaration that the purported attempts by the 1897 Act and the 1905 Act to repeal s 70 of the WA Constitution Act were invalid and that s 70 remained part of the State Constitution; and an order that a scheme for the application of the funds payable by the State in accordance with s 70 be settled by the Court.

70 There was no contest by the State (the first respondent) or the Attorney-General of Western Australia (the second respondent) of the facts, found by the primary judge[57], that the 1897 Act was not proclaimed in accordance with s 33 of the *Australian Constitutions Act* 1842 (Imp) ("the 1842 Act") and that the Bill was not tabled in the Imperial Parliament as provided by s 32 of the *Australian Constitutions Act* 1850 (Imp) ("the 1850 Act")[58]. Furthermore, the respondents did not dispute that the Bill for the 1905 Act was not tabled in the United Kingdom Parliament in the manner envisaged by the 1850 Act, but had instead been reserved for the King's pleasure and, after the Royal Assent, proclaimed in Western Australia, in the manner and form envisaged by the 1842 Act[59].

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54 eg *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

55 *Yougarla v Western Australia* (1998) 146 FLR 128 at 148; *Yougarla v Western Australia* (1999) 21 WAR 488 at 509 [78].

56 *Yougarla v Western Australia* (1998) 146 FLR 128 at 148-151; *Yougarla v Western Australia* (1999) 21 WAR 488 at 496-497 [6]-[9], 509 [76]-[78], 529 [164]; see also *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27.

57 (1998) 146 FLR 128 at 136-138, 140 per Murray J.

58 The tabling requirements of s 32 of the 1850 Act are explained in the joint reasons at [22]-[23].

59 (1998) 146 FLR 128 at 141 per Murray J.

71 In this way the critical question presented to this Court is whether the Imperial manner and form provisions[60] applied to one or both of the amending Bills that passed through the Parliament of Western Australia in 1897 and 1905. If such provisions applied, non-compliance with them would suggest that the constitutional amendment of s 70 of the WA Constitution Act effected by the Acts was invalid.

The issues

72 There are three issues for decision. Before considering whether s 70 of the WA Constitution Act was validly repealed (and hence the merits of the appellants' claim) there are two "threshold" questions presented by the respondents for this Court to resolve. The three issues are:

(1) *The justiciability issue*: Whether compliance of an Act, which has already received the Royal Assent, with requirements concerning its proclamation or tabling in Parliament is examinable in the courts.

(2) *The federal constitutional issue*: Whether the interposition of the federal Constitution in 1901, the terms of s 106 of that Constitution and the altered status of the Parliament of Western Australia as a Parliament of a State of the Commonwealth, relieved the 1905 Act of any residual "manner and form" requirements of Imperial legislation that were previously applicable to the legislation of the colony.

(3) *The Imperial manner and form issue*: Only if either or both of these threshold issues fail, is it necessary to enter the labyrinth of Imperial legislation and practice to ascertain whether the manner and form obligations for constitutional amendment set out in the 1842 and 1850 Acts survived to govern the proclamation and tabling requirements to be observed in respect of the Bills that became the 1897 and 1905 Acts.

73 The joint reasons in this Court proceed directly to the third issue. They point out how, at the time of enactment of the 1897 and 1905 Acts, the limitations on the legislative powers of the Australian colonies (and by inference, on the Parliament of the State after federation) were regarded as "confusing, and nearly unintelligible"[61]. If those who had responsibility for complying with such

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60 "Manner and Form" is the phrase used in the *Colonial Laws Validity Act* 1865 (Imp) (28 & 29 Vict c 63), s 5.

61 Keith, *Responsible Government in the Dominions* (1912), vol 1 at 427 cited in the joint reasons at [56].

requirements a century ago found that task a daunting one, prone to produce error and often necessitating remedial legislation[62], it is appropriate, in my view, to give initial consideration to the issues of justiciability and the role of s 106 of the federal Constitution. Doing so offers the prospect of a thread of Ariadne (or possibly two) to conduct the judicial Theseus through the labyrinth. Seizing such a thread has an additional attraction of solving the puzzles in this appeal by reference to Australian constitutional norms. So far as possible an Australian court today should, in my opinion, endeavour to find the answers to such puzzles by reference to Australian constitutional provisions, if any such provisions apply.

74 One further point should be made in stating these issues. The approach of the parties appeared to assume that it was sufficient to test the manner and form requirements of Imperial law by reference *either* to the 1897 Act *or* the 1905 Act. Because of the common ground that the 1897 Act had neither been proclaimed in accordance with the requirements of the 1842 Act nor tabled in accordance with the 1850 Act and because, at least, the shortcomings of proclamation were cured by the 1905 Act, once the Royal Assent had been given, an approach has been adopted of concentrating on the effectiveness of the 1905 Act.

75 There are obvious reasons of convenience for addressing the 1905 Act. There are also legal reasons for doing so because of the supervening change of status of Western Australia, with consequential change in the constitutional character of the Parliament of Western Australia[63]. The joint reasons take this course[64]. I am also content to adopt this approach on the basis that, if the later 1905 Act is found to have been valid, no reason remains to consider separately the validity of the 1897 Act. I recognise that, in strict logic, determination of the effectiveness of the earlier 1897 Act comes first. It may be sufficient to assume (as the very passage of the 1905 Act suggests that contemporaries did) that the 1897 Act had indeed failed. Were it otherwise it was unlikely that the legislators in 1905 would have re-enacted the measure and then sent it, as a reserved Bill, to London to enliven Imperial attention which only 15 years earlier had been viewed by many of the settlers in Western Australia as meddlesome and needlessly insistent upon Aboriginal welfare[65].

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62 eg *Colonial Acts Confirmation Act* 1863 (Imp) (26 & 27 Vict c 84); *Colonial Acts Confirmation Act* 1894 (Imp) (56 & 57 Vict c 72); *Colonial Acts Confirmation Act* 1901 (Imp) (1 Edw 7 c 29); *Australian States Constitution Act* 1907 (Imp) (7 Edw 7 c 7); cf the joint reasons at [57].

63 cf Constitution, s 107. See also ss 9, 15, 108, 123, 124.

64 See the joint reasons at [6].

65 See eg *Minutes of Evidence taken before the Select Committee on Western Australia Constitution Bill*, (25 April 1890) at 138 [2311] where Mr Wodehouse

(Footnote continues on next page)

Compliance with the manner and form requirements is justiciable

76 *The respondents' arguments*: The respondents submitted that the appeal failed *in limine* because the question of whether the 1897 and 1905 Acts conformed to procedures as to tabling in both Houses of the Imperial Parliament and proclamation of the Royal Assent in Western Australia was not justiciable. The foundations for this submission were twofold.

77 First, it was argued that a court may not look behind the Royal Assent nor permit investigation of the validity of an Act by reference to suggestions of a technical failure to comply with some aspect of parliamentary procedure, such as a requirement to table a Bill in Parliament or to proclaim it in a particular way, after the Royal Assent is given. This argument was advanced by reference to English authority[66]. It was said that, in part, such an approach rested on the deference to Parliament exhibited by courts in relation to internal parliamentary procedures[67]. In part, such an approach was said also to be founded on the prohibition contained in Art 9 of the *Bill of Rights* (1688) as applied in Western Australia[68]. In part, it was hinted that the rule rested on the separation of the judicial from legislative powers. In part, it had to do with the completely disproportionate inconvenience that might be done by the discovery, years later, of a supposed technical slip said to invalidate the legislation. Citizens would have been entitled to act on the faith of an ostensibly valid law published in the official record of the statutes of Western Australia. A mechanical defect could not undermine such a law.

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reported that the majority of the elected members of the Legislative Council were opposed to the Aborigines Protection Board.

66 *Edinburgh Railway Co v Wauchope* (1842) 8 Cl & Fin 710 [8 ER 279]; *British Railways Board v Pickin* [1974] AC 765; *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 22nd ed (1997) at 572; Bennion, *Statutory Interpretation*, 3rd ed (1997) at 164.

67 *Osborne v The Commonwealth* (1911) 12 CLR 321 at 336, 355; *Clayton v Heffron* (1960) 105 CLR 214 at 234-235, 266; *Egan v Willis* (1998) 195 CLR 424 at 461 [67].

68 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 467; *Egan v Willis* (1998) 195 CLR 424 at 445 [24], 489 [129]; see Law Reform Commission of Western Australia, *Report on United Kingdom Statutes in Force in Western Australia*, Project No 75, (1994), par 1.9.

78 Secondly, the respondents argued that, in this case, there was a particular reason for following the self-restraint of the English courts[69]. This was the fact that, in the present case, exceptionally, scrutiny of the procedure surrounding the 1905 Act was directed to the internal processes of tabling in the Parliament at Westminster, a process extrinsic to the Parliament of Western Australia[70]. If a United Kingdom court would treat as non-justiciable the question of whether a tabling (or proclamation) requirement laid down by a United Kingdom statute had been satisfied in respect of a statute that had received the Royal Assent and was ostensibly valid and in force, an Australian court should (so it was put) follow the same rule of restraint, whatever its own willingness to examine compliance with Australian enactments governing manner and form[71].

79 *Justiciability is established*: I would reject these arguments. Because, in *Egan v Willis*[72], similar submissions as to justiciability were urged upon this Court without success, I will not repeat what I said there. Suffice it to recall that there is a particular reason why the English rule of deference to parliamentary procedures has not been followed in this country[73]:

> "Courts in this country, at least in the scrutiny of the requirements of the Australian Constitution, have generally rejected the notion that they are forbidden by considerations of parliamentary privilege, or of the ancient common law of Parliament, from adjudging the validity of parliamentary conduct where this must be measured against the requirements of the Constitution. … It is the nature of a federal polity that it constantly renders the organs of government, federal and State, accountable to a constitutional standard. State Parliaments in Australia, whatever their historical provenance, are not colonial legislatures. They are provided for in the Australian Constitution. To this extent, at least, they are rendered accountable to the constitutional text."

80 In this case, a question is presented to the courts of the Australian Judicature which necessarily involves a constitutional determination. For example, no issue of constitutional inconsistency for the purposes of s 109 of the Constitution could arise if the "law" in question were not truly a "law of a

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69 This restraint is reflected in a decision of the Privy Council in an appeal from New Zealand: *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

70 cf *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 419.

71 eg *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394.

72 (1998) 195 CLR 424 at 487 [124].

73 *Egan v Willis* (1998) 195 CLR 424 at 492-494 [133] (footnotes omitted).

State"[74]. In this sense, in Australia, whatever may be the position in the United Kingdom, it is impossible, ultimately, to exclude the courts, certainly this Court, from answering the question as to whether what purports to be a "law of a State" is in truth such a "law". That is why Australian courts[75] have held themselves competent, and obliged, to resolve contested questions about the validity of a purported "law". In *Victoria v The Commonwealth*[76], Gibbs J adopted with approval, as I would, the observation of the Privy Council on appeal from the Supreme Court of Ceylon in *Bribery Commissioner v Ranasinghe*[77]:

> "[A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law."

81 I would also reject the argument that these Australian and federal considerations can be ignored in the present case because the tabling in issue, and the Royal Assent whose validity is questioned, occurred in the United Kingdom. This argument has no merit, at least in respect of the 1905 Act upon which attention is focussed. The validity of that amending Act is challenged. It is an Act of a Parliament of a State of the Commonwealth. The fact that, as the appellants assert, reservation, tabling and proclamation involved governmental authorities in the United Kingdom, cannot alter the ultimate question. This is not whether a United Kingdom Act is valid. It is whether a Western Australian Act is valid. Where it is said that the conditions of law-making have not been complied with, an Australian court may not abdicate its duty of scrutinising the purported statute to answer the question whether, for the purposes of the Constitution, it is truly "a law of a State" or not.

82 The first threshold objection of the respondents to the appellants' case is therefore rejected. Although I reach this conclusion by reference to the validity of the 1905 Act, no different conclusion would follow if attention were directed solely to the 1897 Act. The habit of mind which federalism produces in the approach to such questions would, I believe, result in rejection of the justiciability issue in respect of either amending Act.

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74 *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 515-517 [70]-[75]; 177 ALR 436 at 456-458.

75 *Cormack v Cope* (1974) 131 CLR 432 at 452, 462, 467, 472; *Victoria v The Commonwealth* (1975) 134 CLR 81 at 118-119, 163-164, 180, 181-183; *Egan v Willis* (1998) 195 CLR 424 at 494 [134]; see also *Egan v Chadwick* (1999) 46 NSWLR 563 at 568 [17]-[19].

76 (1975) 134 CLR 81 at 164; see also at 119 per Barwick CJ, 181 per Mason J.

77 [1965] AC 172 at 197.

The Constitution, s 106 and "manner and form" requirements

83 *The respondents' arguments*: In their second threshold argument, the respondents submitted that the passage of the federal Constitution automatically repealed any residual Imperial manner and form provisions and that s 106 of that Constitution expressly permitted any alterations to the Constitution of Western Australia that accorded with the manner and form requirements of the WA Constitution Act[78], and it alone. After 1901 a purported "law of a State", such as the 1905 Act, derived its validity from the federal Constitution whose ultimate source of authority was not the fact that it had been enacted as a schedule to a statute of the Imperial Parliament but the fact that it had been accepted by the people of Australia who initially approved the Constitution and, thereafter, may be taken to consent to its authority[79].

84 Section 106 of the Constitution provides:

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

85 The federal Constitution makes no mention of the manner and form requirements of earlier Imperial enactments. Instead, in compliance with s 106, alteration could be achieved simply "in accordance with the Constitution of the State". The respondents argued that a recognition of the new legal paradigm was necessary both to give effect to the language of s 106 of the Constitution and to recognise the creation of an autochthonous procedure for local amendment of State constitutions, freed from earlier Imperial requirements and respectful of the new dignity and status enjoyed by the "people of the Commonwealth"[80] and

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78 eg WA Constitution Act, s 73.

79 *Kirmani v Captain Cook Cruises Pty Ltd [No 2]* (1985) 159 CLR 461 at 464; *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 516 [75]; 177 ALR 436 at 457 referring to *McGinty v Western Australia* (1996) 186 CLR 140 at 230 and Kirby, "Deakin: Popular Sovereignty and the true foundation of the Australian Constitution", (1996) 3 *Deakin Law Review* 129.

80 Constitution, s 24. See also Constitution, covering cl 3, where provision was made for Western Australia to join the new Commonwealth only once the Queen was "satisfied that the people of Western Australia have agreed thereto".

"electors"[81] who had adopted the new Constitution and who enjoyed exclusive privileges to alter its terms[82].

86 It was on this footing that the respondents submitted that compliance with Imperial manner and form provisions, such as the requirement of tabling of the 1905 Act in the Imperial Parliament[83], had no continuing application to constitutional amendments in Western Australia. It was immaterial to the validity of the Act, although that fact had not been realised at the time. There being no provision in the "Constitution of the State"[84] necessitating otherwise, the giving of the Royal Assent cured the defects (if any) that had remained after the attempted amendment of the WA Constitution Act by the 1897 Act. The failure to see the significance of the Australian federal Constitution, and even the possibility that in 1905 a different answer might have been given by this Court in respect of that significance, did not alter the meaning of s 106 of the Constitution, read with today's eyes[85].

87 *The Constitution of the State*: It is implicit in the foregoing argument that the reference in s 106 of the federal Constitution to alteration of State constitutional law "in accordance with the Constitution of the State" means in accordance with the Constitution Act of that State, and it alone[86]. There are some considerations that support this narrow interpretation of s 106. For example, it would recognise the undoubted change that came over the States of the new Commonwealth after the commencement of the federal Constitution. It would also lay emphasis upon the autonomy of the States and "people of the State"[87]

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81 Constitution, s 128.

82 Constitution, s 128.

83 1890 Imperial Act, s 2. Namely that the provisions of the 1842 Act and 1850 Act "which relate to … the reservation of Bills for the signification of Her Majesty's pleasure thereon … shall apply to Bills to be passed by the Legislative Council and Assembly constituted under the scheduled Bill and this Act".

84 Constitution, s 106.

85 *Ex parte Professional Engineers' Association* (1959) 107 CLR 208 at 267 per Windeyer J; *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 per Windeyer J; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 552-553 [43]-[46], 599-600 [186].

86 cf *Sue v Hill* (1999) 199 CLR 462 at 495 [73]; *Durham Holdings Pty Ltd v New South Wales* (2001) 75 ALJR 501 at 512 [54], 516-517 [74]-[75]; 177 ALR 436 at 451, 457-458.

87 Constitution, s 7.

within Australia to make, or unmake, their constitutional law in accordance with Australian, and not pre-federal Imperial, norms. Had it been intended, after federation, to impose duties of subordination of State constitutions to Imperial regulation, this could have been expressly stated, as was done for federal law. Thus, in respect of the Royal Assent to federal Bills, the Constitution makes express provision for the withholding of the Royal Assent by the Governor-General or the reservation of such law for the Queen's pleasure[88]; the transmission of recommended amendments by the Governor-General to the Parliament[89]; disallowance by the Queen within one year of the Governor-General's signification of assent to a law[90]; and signification of the Queen's pleasure upon Bills reserved for the ascertainment thereof[91]. Such provisions are now obsolete, save for certain laws of symbolic significance[92]. Nevertheless, they appear as express provisions in the federal Constitution in respect of federal law. No mention is made of any such matters in respect of the laws of the States.

88 The question is thus presented whether the foregoing specificity means that laws amending a State constitution were automatically released from earlier Imperial regulation, save for any still provided by s 106 of the federal Constitution itself. The opposing interpretation would hold that the constitutions of the several States of the new Commonwealth were no more than a collection of Imperial laws and prerogative instruments that had formerly governed the States when they were colonies.

89 *Imperial manner and form requirements continued*: Whilst there is ambiguity, and a degree of uncertainty, as to what precisely the expression "the Constitution of the State" in s 106 means, the better view is that the phrase is not confined to the respective Constitution Acts of the States as such Acts existed in 1900, freed from all requirements of Imperial legislation that governed them before federation. This was the construction urged on the Court by the Attorney-General of the Commonwealth. He intervened, in this respect, to

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88 Constitution, s 58.

89 Constitution, s 58.

90 Constitution, s 59.

91 Constitution, s 60.

92 eg *Royal Style and Titles Act* 1973 (Cth), assented to by the Queen when in Australia. The last Bill so reserved was that for the *Privy Council (Appeals from the High Court) Act* 1975 (Cth): Barlin (ed), *House of Representatives Practice*, 3rd ed (1997) at 444, 811.

support the appellants. They adopted the Commonwealth's submissions on this question.

90 First, there is the textual indication provided by the contested phrase itself. It does not refer to the Constitution Act of the State in question, as it might have done[93]. Instead, it uses the generic word "Constitution".

91 Secondly, it is obvious that the phrase "Constitution of the State" (and "Constitution of each State"), appearing in s 106, must be capable of consistent application to each of the six States of the Commonwealth to which s 106 was to apply after the federal Constitution came into force. This is a reason for rejecting as irrelevant, the appeal of the respondents to the peculiarities of the "Western Australian context". Whilst, on the coming into force of the federal Constitution, each State of the Commonwealth possessed an enactment titled the "Constitution Act" of the State[94], such enactments differed significantly in their content. Thus, the Constitution Act of Tasmania relies on an external Act to specify the content of the legislative powers of the Parliament of that State. The 1850 Act has therefore been described as the source[95] both of the general power of law-making in Tasmania and of the power of constitutional alteration in that State.

92 Thirdly, the disputed phrase must be viewed in the context of a reference to a legislature which, within its own sphere before federation, reflected some of the features of the uncontrolled powers of the Imperial Parliament from which it had derived its authority. Just as no "Constitution Act" could define exhaustively the "Constitution of" the United Kingdom, so the reference to "Constitution of the State" in s 106 of the Australian federal Constitution did not refer only to the several Constitution Acts of the former colonies[96]. As with their source, the statutory basis of constitutional law was disparate and complex, not particular and contained in a single document.

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93 cf Constitution, s 108.

94 *New South Wales Constitution Act* 1855 (Imp) (18 & 19 Vict c 54) and Scheduled Bill; *Victoria Constitution Act* 1855 (Imp) (18 & 19 Vict c 55) and Scheduled Bill; *Constitution Act* 1855-1856 (SA); *Constitution Act* 1854 (Tas) (18 Vict No 17); *Constitution Act* 1867 (Q) (31 Vict No 38); *Constitution Act* 1889 (WA).

95 See eg "Preliminary Note to the Constitution", in *The Public General Acts of Tasmania* (1826-1936), vol 1 at 823-824; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 61.

96 Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) at 286; cf Gilbert, "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts", (1978) 9 *Federal Law Review* 348 at 352.

93 Fourthly, examination of the Constitution Acts of the States, even apart from that of Tasmania, quickly discloses that they by no means pretend to cover all of the considerations proper to a constitution of a polity such as the Australian colonies had become by 1900 and such as it was expected that the States of the Commonwealth would be. In several decisions of this Court views have been expressed that, after 1900, the constitutions of the States continued to include not only the Constitution Acts in force at that time but also those elements of Imperial legislation, of continuing operation within the States, that expanded or elaborated such Constitution Acts[97].

94 At the very least, according to notions of constitutional law already current in 1900, the courts of each State would ordinarily be regarded as being part of the "Constitution of the State". The continuing role of the State courts within the Judicature provided for by Ch III of the federal Constitution (and specifically of the Supreme Courts of the States[98]) makes it unlikely that the respective Constitution Acts of the States exhausted the phrase appearing in s 106. None of the Constitution Acts establishes the Supreme Court of the State or regulates to any significant extent the composition and functions of State courts. Such considerations are, and have since federation been, regulated by a mix of Imperial, colonial and State legislation and, in the case of some States, Royal Charters.

95 In *Re Tracey; Ex parte Ryan*[99] it was held, unsurprisingly, that State courts are part of the government of a State and are protected from federal regulation and control by s 106. As a matter of principle, it is obviously undesirable that the words of s 106 should be given a narrow construction. To the extent that this is done, it would detract from the constitutional status accorded, in particular, to State courts and most especially such courts other than Supreme Courts (which are specifically mentioned elsewhere in the federal Constitution[100]).

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97 *The Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69 at 101-102, where Isaacs and Rich JJ said that the *Australian Courts Act* 1828 (Imp) (9 Geo 4 c 83) and the *Colonial Laws Validity Act* 1865 (Imp) were part of the Constitution of New South Wales; cf *Western Australia v Wilsmore* (1982) 149 CLR 79 at 93 where Wilson J accurately described the WA Constitution Act as the "keystone of the present constitution of Western Australia". Obviously, it is not the entire arch.

98 Constitution, s 73(ii).

99 (1989) 166 CLR 518 at 547, 575; see also *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 at 229.

100 Constitution, s 73(ii).

96 Fifthly, contextual considerations affirm the wide ambit of the words in question. When s 106 is read with ss 107 and 108 it appears clear that the object of the federal Constitution was to continue in force the powers of the Parliaments of, and every law in force in, the Australian colonies that became the States of the Commonwealth. This consideration reinforces the conclusion that the "Constitution", referred to in s 106, carried from the colonial period the institutional arrangements proper to the governance of the former colonies, now States. Yet if these features, relevant to governmental *powers*, are carried forward, it becomes impossible, as a matter of construction, to reject pre-existing Imperial *limitations* on the exercise of such powers[101]. These include the Imperial manner and form provisions which would otherwise answer to the description of part of the "Constitution of the State".

97 Sixthly, to the extent that it is useful to construe a constitutional phrase by reference to what the founders in 1900 expected the phrase to mean[102], there is no doubt that the word "Constitution" in s 106 was expected to have a larger denotation than simply the Constitution Acts of the colonies, then in force. This much is shown by the drafting history of the clause[103]. It is confirmed by the way in which, after federation, provisions of the *Colonial Laws Validity Act* 1865 (Imp) were invoked to prevent constitutional alteration which did not comply with its manner and form requirement[104].

98 *Conclusions*: For these reasons I would reject the submission of the respondents that s 106 of the federal Constitution expelled any residual manner and form provisions of Imperial legislation applicable to the alteration of the WA Constitution Act and, after 1901, permitted such alteration so long as it was in accordance with the WA Constitution Act and it alone.

99 It follows that the manner and form provisions referred to in the 1890 Imperial Act formed part of the Constitution of Western Australia for the purpose of s 106 of the federal Constitution. In this way, the appellants were entitled to

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101 See eg *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 182; *McGinty v Western Australia* (1996) 186 CLR 140 at 172.

102 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 551-554 [40]-[49], 599-600 [186]; *Grain Pool of Western Australia v The Commonwealth* (2000) 74 ALJR 648 at 669-671 [110]-[118]; 170 ALR 111 at 139-142.

103 *Official Record of the Proceedings and Debates of the National Australasian Convention*, (Sydney), 8 April 1891 at 418; *Official Report of the National Australasian Convention Debates*, (Adelaide), 20 April 1897 at 991-992.

104 *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 419-420, 426; *Victoria v The Commonwealth* (1975) 134 CLR 81 at 118-119, 163-164, 181-183.

argue that, as part of the Constitution of Western Australia, s 33 of the 1842 Act and s 32 of the 1850 Act were picked up and applied to the Constitution of the State, to the extent that, by their several terms, they attached to the provision in question.

100 The result of this analysis is that the merits of the appellants' primary argument must be determined.

The Imperial manner and form requirements

101 *The question for decision*: The foregoing conclusion brings me back to the labyrinth of Imperial law. There is no easy way through it. Nor is the way that I propose absolutely sure. Numerous steps need to be negotiated. They must be taken in sequence. Ultimately they yield the solution to the puzzle that appears to be the correct, or at least the preferable, one.

102 At the outset it is as well to remember that the search, in respect of the 1905 Act, is not for an Imperial legislative provision requiring reservation of the repeal of s 70 of the WA Constitution Act for the King's pleasure or for proclamation, as it was agreed that each of these preconditions (to the extent applicable) was properly fulfilled. The question is rather whether a requirement of laying the Bill for the 1905 Act before both Houses of the Imperial Parliament was applicable, as part of the Constitution of Western Australia "in accordance with" which that Constitution might alone have been altered in 1905.

103 *The historical context*: The starting point for analysis is an appreciation that the provisions of s 70 of the WA Constitution Act were unusual. The section had no counterpart in any other Australian colony or State. Its terms can only be understood against the background of the tensions that had arisen in colonial times between the Imperial authorities and the settlers concerning the indigenous peoples[105].

104 Generally speaking, for most of the nineteenth century the Imperial authorities were insistent about protection of the interests of the indigenous peoples. The settlers and, to some extent, colonial authorities often resisted that pressure. The provision obliging an annual guaranteed payment from the gross revenues of Western Australia for the welfare of the Aboriginal natives was the product of energetic, and not always harmonious, negotiations between the

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105 see *Wik Peoples v Queensland* (1996) 187 CLR 1 at 227-228. Concern about indigenous peoples and perception of them as an "Imperial interest" or responsibility of the United Kingdom government was reinforced after the tabling of a critical parliamentary report: *Report from the Select Committee on Aborigines (British Settlements)*, (1837).

Imperial authorities and the Governor of Western Australia. The Governor, in turn, was subject to pressure from the local inhabitants. However, the voices that were normally heard by the Governor were those of the settlers, impatient to achieve full representative and responsible government. For obvious reasons, the voices of the local "aboriginal natives" were often not heard at all and certainly not to the same extent as the settlers.

105 Contemporary documents show that the disadvantages suffered by the Aboriginal people in Western Australia were very much in the mind of the Secretary of State for the Colonies in the United Kingdom, Lord Knutsford. Indeed, as full self-government approached, they were also of concern to the Governor of Western Australia, Sir F Napier Broome. In 1888, the Governor wrote to Lord Knutsford[106]:

> "I think no one who considers the circumstances of this Colony can arrive at the conclusion that [the formula proposed] is at all too large a sum to set aside as an annual reserve for Native purposes. The claims of the aboriginal Natives upon this Government are increasing year by year, and common justice requires that beneficial action, which practically means the expenditure of public money in their interest, should take a larger scope than it has hitherto done. Nor do I suppose that the Legislative Council would object to the monetary provision mentioned, which I have inserted in the Draft Constitution Bill. …
>
> I do full justice to the kind treatment which the Natives receive from the great majority of settlers even in the remote districts, but I have always maintained that unceasing vigilance is required to protect the Aborigines from ill-usage by those evil-disposed persons who are to be found in every community, and it appears to me, looking to the great extent and special circumstances of this Colony, in which the settlers are ever coming into new contact with the Natives at numerous points in a million square miles of territory, that it is absolutely necessary, when party Government shall be introduced, that some permanent body, independent of the political life of the day, shall be specially charged to watch over the Aboriginal population."

106 In earlier colonial times the interests of the Aboriginal people could be protected, to some degree, by the autocratic rule of the Governor. He was constantly answerable to the Imperial authorities in London. The global interests and perspectives of those authorities demanded that minimum standards should, as far as possible, be met. However, with the proposed advent of full

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106 Letter of 28 May 1888 received 27 June 1888, reproduced in *British Parliamentary Papers: Colonies Australia*, (1889), vol 31, 34 at 37-38.

representative and responsible government in Western Australia in 1890, in the form of a bicameral Parliament elected by the settlers[107], the prospect had to be faced that many of the previous restraints and controls on legislation, protective of the Aboriginal people, would be lost. So much was realised both by the Governor and by his Imperial masters. Lord Knutsford and the officials who worked for him were part of the Executive Government of the United Kingdom. They were, in turn, responsible to the Imperial Parliament. It had its own general interest in the governance of the Empire, and the protection of Imperial economic interests and of the rights of senior resident officials such as the Governor and judges. However, its interests also extended, to some extent, to the protection of the indigenous peoples from "evil-disposed" settlers.

107 I mention these matters of history for two reasons. First, they support the contention, obvious enough on its face, that s 70 of the WA Constitution Act was intended for the benefit and protection of the Aboriginal people of Western Australia. Against the background disclosed by the contemporaneous documents, it would not have been wholly surprising for the Imperial authorities to have effected their purposes by "entrenching" such provisions, as far as they could, against what might be viewed in London as unjustifiable amendment or repeal of such constitutional provisions.

108 Secondly, relatively simple means of ensuring effective Imperial supervision of such "entrenched" protections would include the requirement that all local amendments should be reserved by the Governor for the Queen's pleasure[108]. Effectively, this would ensure that the Queen would be advised by her relevant Minister of State in the United Kingdom on whether to grant or withhold the Royal Assent. It would interpose the judgment of officials in London, distant from local pressures and alert to any larger Imperial interests involved.

109 A further means of reinforcing protection of these interests would be by a requirement that proposed change of a section such as s 70 should be tabled in both Houses of the United Kingdom Parliament prior to securing the Royal Assent[109]. This would signal a double determination of the Imperial authorities to ensure the scrutiny of any repeal or amendment by the members of the Imperial Parliament to whom, ultimately, the ministers and officials were

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107 *McGinty v Western Australia* (1996) 186 CLR 140 at 171-172; cf Lumb, *The Constitutions of the Australian States*, 5th ed (1991) at 37; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 68-69.

108 See WA Constitution Act, s 73.

109 cf *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 at 432.

themselves accountable. On the face of things, therefore, there would have been nothing unusual in the imposition of the dual requirements expressed in the 1850 Act. The only question, then, is whether, by their terms, they applied.

110 *Analysis of the legislation*: The critical requirement in issue is the one which is said to require the tabling of an amendment to the WA Constitution Act in both Houses of the Imperial Parliament. That requirement appears in s 32 of the 1850 Act in the following terms:

> "[A] Copy of such Bill shall be laid before both Houses of Parliament for the Space of Thirty Days at the least before Her Majesty's Pleasure thereon shall be signified."

111 The Bill for the 1905 Act undoubtedly set out to amend s 70 of the WA Constitution Act. The WA Constitution Act had conferred a new Constitution on Western Australia[110]. It envisaged the transition to a bicameral Parliament comprising a Legislative Council and Legislative Assembly[111]. When it was eventually enacted, it derived its legal validity from the fact that it was included in the first schedule to an Act of the Imperial Parliament[112]. The 1890 Imperial Act envisaged that the bicameral legislature provided in the WA Constitution Act could itself alter or repeal provisions of the WA Constitution Act[113]:

> "in the same manner as any other laws for the good government of that colony, subject, however, to the conditions imposed by the [WA Constitution Act] on the alteration of the provisions thereof in certain particulars".

112 One of the "certain particulars" concerned the alteration or repeal of s 70 of the WA Constitution Act. Such laws were subject to the "conditions imposed" by s 73 of the WA Constitution Act. That section afforded to the legislature of Western Australia "full power and authority from time to time by any Act to repeal or alter any of the provisions of [the WA Constitution Act]", subject to two provisos. The second of these provisos is relevant. It included a requirement that, relevantly, "every Bill which shall interfere with the operation

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110 WA Constitution Act, short title.

111 WA Constitution Act, s 2.

112 The WA Constitution Act was passed by the Parliament of Western Australia in 1899 and reserved. The 1890 Imperial Act, s 1, rendered it lawful for the Queen to assent to the Bill, "notwithstanding anything contained [in the 1842 and 1850 Acts]".

113 1890 Imperial Act, s 5.

of [s 70 or Sched C] shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon"[114].

113 As with s 70, Sched C contained reference to the dedicated sum of £5,000 "[f]or promoting the welfare of aboriginal natives" and a cross-reference to "the provision in section 70 when the revenue exceeds 500,000*l*". On the face of things, therefore, an express, special and limited proviso was imposed on alteration of the WA Constitution Act in the relevant respect. But it was one which merely required reservation of a Bill to amend s 70 of that Act for signification of the royal pleasure, a step that was undoubtedly taken both in 1897 and 1905. The WA Constitution Act said nothing about any requirement to lay such an amending Bill before both Houses of the Imperial Parliament.

114 To answer the question whether, apart from this particular provision, earlier Imperial legislation continued to apply to amendments of the WA Constitution Act, it is necessary to look to whether, expressly or by necessary implication, the 1890 Imperial Act remained in force, and incorporated the tabling requirements contained in s 32 of the 1850 Act.

115 The first step to the answer to this question may be found in the general provisions of s 2 of the 1890 Imperial Act. That section is described in its marginal note as a section for the "[r]epeal of certain provisions in Acts of Parliament relating to Western Australia". By this section, from the day of its proclamation in Western Australia "so much and such parts of the several Acts mentioned in the Second Schedule to this Act as relate to the colony of Western Australia and are repugnant to the [WA Constitution Act] shall be repealed". The Second Schedule refers explicitly to, amongst other Imperial legislation, the 1850 Act, s 32 of which contained the critical tabling requirement. Accordingly, if such provisions were "repugnant to" the WA Constitution Act, the obligations of s 32 of the 1850 Act had, by s 2 of the 1890 Imperial Act, been repealed.

116 The notion of "repugnancy" is an imprecise one[115]. On the face of things, the WA Constitution Act, by making particular provision in relation to alteration and repeal of any of its own provisions, might be taken as having replaced earlier Imperial legislation that overlapped that provision to some extent (for example, by separately requiring reservation for the royal pleasure) or which went beyond the new remit (for example, by requiring tabling in the Imperial Parliament).

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114 For the full text of the second proviso to s 73, see the joint reasons at [10].

115 The word is generally interchangeable with "inconsistency": *Union Steamship Co of New Zealand Ltd v The Commonwealth* (1925) 36 CLR 130 at 148; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 463; *Northern Territory v GPAO* (1999) 196 CLR 553 at 579-580 [51].

Such a view of repugnancy would not be an unnatural one. Indeed, it was properly conceded for the appellants that it was a possible one although (as it was put) one which would not be preferred by this Court.

117 The dropping of the express provision for tabling could have been justified at the time by the introduction into Western Australia, in accordance with the WA Constitution Act, of a bicameral representative legislature by which the colony attained the fullest form of self-government then available in the British Empire. The previous requirement, under s 32 of the 1850 Act, envisaging tabling in both Houses of the United Kingdom Parliament, was arguably apt to ensure (amongst other things) that legislation made other than by a legislature wholly elected by, and accountable to, British subjects would pass under the notice of members of a Parliament that was so elected and accountable. Having regard to the enlargement of electoral democracy in Western Australia envisaged by the WA Constitution Act (and the 1890 Imperial Act giving it effect), such extra scrutiny might, arguably, no longer have been seen as necessary. At the least, this development in parliamentary government of Western Australia provided a rational explanation for deleting the necessity of tabling the amending Bill in the Imperial Parliament, as envisaged by s 32 of the 1850 Act.

118 However that may be, the answer to the continuing operation of s 32 of the 1850 Act is not, in my view, to be found in the contentious notion of repugnancy or in disputable interpretations of what the Imperial and Western Australian governments regarded as their proper respective functions at the relevant times. The provisions of s 2 of the 1890 Imperial Act allowing for the repeal of the 1850 Act, are themselves subject to two express provisos. Relevantly, proviso (a) preserved "the provisions of the [1842 Act and 1850 Act] which *relate to* the giving or withholding of Her Majesty's assent to Bills, and the reservation of Bills for the signification of Her Majesty's pleasure thereon"[116]. Such "provisions" are, by proviso (a), to "apply to Bills to be passed by the Legislative Council and Assembly constituted under the [WA Constitution Act]".

119 Accepting that the phrase "relate to" is extremely broad and that, on one reading, the provisions of the 1850 Act obliging future amendments to the Western Australian Constitution to be laid before both Houses of the Imperial Parliament could be viewed as "relating to" the machinery for the signification of the Royal Assent in the United Kingdom, proviso (a) to s 2 of the 1890 Imperial Act could arguably be read, in its terms, as breathing continuing life into the tabling requirement of s 32 of the 1850 Act and applying that obligation to amendments to the WA Constitution Act and thus to a repeal of s 70.

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116 Emphasis added. For the full text of the first proviso to s 2, see the joint reasons at [21].

120 Yet any such "life" depends, ultimately, upon what precisely is preserved by the proviso. When its language is examined, all that is preserved are the "provisions of the Acts", relevantly the 1850 Act, of a given description. It is therefore necessary to return to the 1850 Act in order to discover what, in terms, it provided so that, whatever the resulting provision might be, it can be measured for repugnancy against the repeal and amendment provisions of the WA Constitution Act, as s 2 of the 1890 Imperial Act envisaged.

121 I have previously set out the provisions in s 32 of the 1850 Act requiring that a copy of a Bill be laid before both Houses of the Imperial Parliament. It is now critical to notice the words in that section "such Bill". Only a Bill of the specified kind was required by s 32 of the 1850 Act to conform with the obligation of tabling. To find what "such Bill" was, it is essential to look back to the text of s 32 of the 1850 Act. When this is done, it is clear that the requirement of the tabling of "such Bill" is not contained in a general section applicable to *all* amendments of the written constitutional law of Western Australia. Instead, the requirement of tabling is contained, together with the requirement of reservation for the royal pleasure, in two provisos to s 32. These provisos have no work to perform save as they modify the substantive provisions of that section.

122 When s 32 of the 1850 Act is examined, it can be seen that it is addressed, unsurprisingly, to the situation of governance that existed (relevantly) in Western Australia at the time of its enactment. At that time, in Western Australia, the mode of government fell far short of the system of representative and responsible government later envisaged under the WA Constitution Act and the 1890 Imperial Act. In short, it was a system of government by the Governor advised by a Legislative Council. That Council was originally wholly appointed by the Governor. It was not elected[117]. Section 32 of the 1850 Act envisaged that, in the case of the Australian colonies mentioned (including relevantly Western Australia), moves would in the future be made to create elected legislatures comprising two Houses. It was only in respect of the vesting of legislative powers and functions in such a bicameral legislature, in substitution for the powers and functions of "the Legislative Council" in existence in 1850, that the "Bill … for any of such Purposes" or "such Bill" had to be enacted in the manner and form laid down. Only *such* Bills were therefore subject to the dual requirements of the two provisos to s 32 of the 1850 Act. Once *such* a Bill had been enacted, the dual requirements contemplated by s 32 of the 1850 Act were spent.

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117 The *Swan River Act* 1829 (Imp) (10 Geo 4 c 22) made the original provision for the government of the colonial settlements in Western Australia.

123 In 1870 the Governor of Western Australia, Sir Frederick Weld, "caused a Bill to be prepared in exact accordance with the provisions of [the 1850 Act]"[118]. This followed the Governor's ascertainment of the fact that the Imperial authorities had no objection to his "according to the people of this Colony that modified form of Representative Government provided by" the said Act. In accordance with s 32 of the 1850 Act, the Governor therefore despatched the Bill to London to await the Queen's pleasure. On 30 September 1870, Lord Kimberley, for the Colonial Office, conveyed to the Governor "Her Majesty's Confirmation and allowance" of the Bill then described as "the new Constitution Act"[119]. It is not clear whether that Bill had been laid on the table of both Houses of the Imperial Parliament as s 32 of the 1850 Act contemplated. But, in any event, it was certainly proclaimed in Western Australia[120]. It commenced to operate. The Legislative Council provided for in it took office and began to function. The validity of none of these steps is challenged in this appeal.

124 Against the background of these events, the proviso requirements to s 32 of the 1850 Act were fulfilled at the latest by what occurred in 1870. Whether those requirements were complied with strictly or not, the events envisaged by the 1850 Act were then concluded. In their terms, the words of s 32 of that Act had no further application to later events. The constitutional caravan had moved on. The only way that a different conclusion might be reached would be if a view were taken that the 1890 Imperial Act, by its language, had reignited, in some fashion, the manner and form requirements of s 32 of the 1850 Act, seemingly discharged by the events of 1870.

125 When, however, the actual words of the provisos to s 32 of the 1850 Act are examined, it is clear that the section was intended to be read in the context (then fresh in mind) of the successive laws for the constitutions of the Australian colonies, most notably, and relevantly, the 1842 Act. By s 31 of the 1842 Act, the Governor had been empowered to reserve certain Bills for the signification of the Queen's pleasure, specifically those which would (a) effect electoral change; (b) alter the salaries of the Governor, superintendent or judges[121]; or (c) alter customs duties. By the terms of s 33 of the 1842 Act, the manner and form requirements laid down by that Act applied only to Bills "so reserved" and thus

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118 Despatch No 77, Sir Frederick Weld, Governor of Western Australia, to the Secretary of State for the Colonial Office, 21 June 1870, enclosing the Ordinance under the 1850 Act.

119 Despatch No 62, Lord Kimberley to Governor Weld, 30 September 1870.

120 *The Western Australian Government Gazette*, No 47, 22 November 1870.

121 The requirement of reservation for Bills altering the salaries of the judges of a colony was removed by s 13 of the 1850 Act.

to Bills for the specified purposes. This interpretation is consistent with the language and structure of ss 31, 32 and 33 of the 1842 Act read with the 1850 Act.

126 Similarly, the Bills which required reservation and tabling by virtue of s 32 of the 1850 Act were not expressed to be at large. They were only Bills for "such Purposes" as stated in s 32, which related to Bills concerning (a) the election or qualification of elected members of Parliament; (b) the qualification of electors; or (c) substitution of other Legislative Houses for the Legislative Council. Assuming that the purpose of s 33 of the 1850 Act was to apply the requirements of s 33 of the 1842 Act to Bills reserved for the Queen's pleasure under s 32 of the 1850 Act, by joint operation of the 1842 and 1850 Acts[122], the only Bills requiring compliance with the several manner and form provisions were those for the "purposes" there specifically identified.

127 None of those "purposes" applies to a Bill for the repeal or alteration of s 70 of the WA Constitution Act. In respect of that provision, assuming s 32 of the 1850 Act did have continuing operation, it was therefore sufficient simply to rely on the particular obligation of reservation for the Queen's pleasure contained in s 73 of the WA Constitution Act itself. That obligation was effectively entrenched by s 2 of the 1890 Imperial Act[123]. This conclusion still left work for s 2(a) of the 1890 Imperial Act to perform. It picked up and applied s 33 of the 1850 Act as a provision continuing to govern the Constitution of Western Australia.

The constitutional requirements for amendment were satisfied

128 The result of this analysis is that, for the repeal of the critical provisions of s 70 of the WA Constitution Act, the combined operation of that Act and of

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122 Preserved by the 1890 Imperial Act, s 2 proviso (a).

123 In the United Kingdom, the law officers advised that the Bill for the 1897 Act did not need to be laid before both Houses of the Imperial Parliament: Colonial Office Minute (4 December 1897); Minute from Mr Risley to Mr Cox of the Colonial Office, London (13 March 1906). This advice is to be contrasted with the advice given, and action taken, in relation to the Bill for the *Electoral Act* 1899 (WA) which was tabled in both Houses of the Imperial Parliament. The contemporary concern about the validity of the 1897 Act related not to the suggested default in its tabling but to the suggested omission to proclaim the Act in Western Australia in the manner required by the Imperial enactments. That was a defect cured once the 1905 Act was given the Royal Assent. It does not appear that any opinion was expressed, by the law officers of the United Kingdom, in or after 1905, concerning any obligation to table the Bill for the 1905 Act in the Imperial Parliament.

applicable Imperial legislation required nothing more than reservation of a Bill for that purpose for the royal pleasure. There was no obligation to table such a Bill in both Houses of the Imperial Parliament. For such repeal or amendment, a more limited Imperial scrutiny sufficed. That was the scrutiny by the officers of the Colonial Office advising the Executive Government of the United Kingdom, who in turn advised the monarch. That scrutiny was discharged in respect of the Bill for the 1905 Act.

129 Whether this result was by conscious design or by a slip of drafting unnoticed as the successive constitutional legislation affecting Western Australia passed through the Imperial Parliament cannot now be said with complete confidence. The foregoing analysis demonstrates how easy it would be to make slips in complying with the disputable or uncertain requirements of Imperial legislation.

130 The appellants' arguments are not defeated by the historical merits, as such. They only fail when measured against the actual text of the manner and form requirements upon which they relied. Given the colonial history to which I have referred, the merits might well have justified not only scrutiny by officials and the Executive Government of the United Kingdom but also an opportunity for scrutiny by both Houses of the Imperial Parliament. Attention to the Bill in those Houses in 1905 might have enlivened a more sensitive defence of the Imperial interest in protecting indigenous peoples in Western Australia[124]. But it might not. The settlers, after all, would be more likely to have had access to the members of the Imperial Parliament at the time than the Aboriginal people or their supporters. We shall never know what might have occurred because the Bill for the 1905 Act was not tabled in both Houses at Westminster. And there was no requirement of Australian or Imperial law to require that it should have been.

131 No defect is therefore shown in the amendment of the Constitution of the State of Western Australia in accordance with the requirements of the WA Constitution Act and such Imperial law of continuing force as was part of the "Constitution of the State". Accordingly, the requirements for amendment of the State Constitution by the 1905 Act conformed to s 106 of the federal Constitution. The amendment was therefore valid and effective. Section 70 of the WA Constitution Act was duly repealed.

132 I do not regard the *Australian States Constitution Act* 1907 (Imp)[125] as relevant to the validity of the 1905 Act. There is enough confusion in the labyrinth and I will restrain myself from adding more, unnecessarily.

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124 Keith, *Responsible Government in the Dominions* (1912), vol 2 at 1054.

125 The terms of which are referred to in the joint reasons at [58].

133 In the light of these conclusions I do not have to consider the alternative arguments kept in reserve by the respondents as to the consequence of non-compliance with the tabling requirements if that had been shown. Nor need I consider problems such as would have been presented by the effective abolition in 1897 of the Aborigines Protection Board, contemplated by s 70 as the repository of the dedicated revenues.

Orders

134 The appeal must be dismissed with costs.