



Australian – New Zealand Scrutiny of Legislation Conference

*"Too many cooks?":
Parliament, the Courts and the scrutiny of
delegated legislation*

address

by

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¹ I am indebted to Dr Jeannine Purdy for her assistance in the preparation of this paper. However, responsibility for the opinions expressed and for any errors is mine.

Introduction

I am honoured to have been invited to address this conference attended by representatives of the Parliaments of Australia and New Zealand and other Parliaments in our region. I extend a warm welcome to delegates from other jurisdictions, all of whom have no doubt travelled long distances to be here. I sincerely hope that you enjoy your stay in Perth and that while you are here you make your contribution to reducing our State's economic dependence upon mining and energy.

Acknowledgement of traditional owners

To illustrate some of the points I wish to make in this paper, I tell the sorry history of the scrutiny of legislation repealing a guarantee in the State's Constitution which set aside a percentage of gross revenue for the benefit of its original inhabitants. It is therefore more than usually appropriate for me to commence by acknowledging the traditional owners of the land on which we meet, the Whadjuk people who form part of the great Noongar clan of south-western Australia, to pay my respects to their Elders past and present, and to acknowledge their continuing stewardship of these lands.

Visitors to Perth may not be aware that the Noongar people are the largest single Aboriginal cultural bloc on the continent of Australia.² The river which you will have seen from the terrace as you entered this Parliament, and which we know as the Swan River, is known to the Whadjuk people as *Derbarl Yerrigan*. In common with other waterways on the plains between the sea and the hills which you will also have seen in the distance, it plays a very significant part in the traditions and culture of the Whadjuk. It is one of the homes of the Waugal, a serpentine creature which plays a very significant part in Noongar lore.

This Parliament is almost adjacent to a large area of natural bushland which was set aside and preserved when Perth was planned and developed. That area, which we know as King's Park, includes the scarp which we know as Mount Eliza, from which panoramic views of the city and river can be obtained. That place is known to the Whadjuk as *Mooro Katta* or *Ga-ra-katta*, and has been visited by the Whadjuk for many thousands of years. An area at the foot of the scarp on the banks of the river was the site of regular meetings and gatherings.

² *Constitution Amendment (Recognition of Aboriginal People) Act 2015 (WA)*, Schedule 1.

I would strongly recommend a visit to the park to those who wish to clear their heads of the weighty issues associated with the scrutiny of legislation for a time. It is a short walk from here and the views are well worth the effort. There is an Aboriginal art gallery immediately below the lookout on the top of the scarp, a stone amphitheatre known as *Beedawong*, which means celebration or meeting place, designed by prominent Noongar artist, Richard Walley, and for those who have a little more time, I would recommend the *Boodja Gnarning* walk which is comprehensively signed so as to inform visitors of Noongar people's use of the land and the flora.

The exponential growth of executive power

Many authors have commented upon the exponential growth in the power of the executive branch of government in many parliamentary democracies over the last century or so.³ This growth has been stimulated, at least in part, by the significant growth in services provided by executive government and the demands of maintaining order in larger and more complex industrialised societies. The regulation of human activity is one of the primary mechanisms used by the executive branch to achieve its many objectives. The interesting question of whether regulatory mechanisms are over-used by contemporary governments is beyond the scope of this paper.

The rule of law requires that the executive branch of government can only undertake its regulatory activities with lawful authority. In parliamentary democracies that authority must come from laws passed by the Parliament. However, the sheer scale and magnitude of the regulatory activity undertaken by executive government in the developed world makes it impracticable for Parliaments to promulgate laws which descend to the level of detail required to regulate complex human activities. Parliaments also lack the practical capacity to promptly modify those laws to take account of changed circumstances and practices. Parliamentary delegation of the power to make those laws has been a practical necessity for a long time now. As the Australian Law Reform Commission (ALRC) observed in its recently published paper, many more laws are now made by the executive branch of government under powers delegated by the Parliament than are made by the Parliament itself.⁴ The volume of

³ Of course, the growth in the power of the executive is not limited to parliamentary democracies, but they are the only jurisdictions relevant to this conference.

⁴ ALRC, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Final Report) (December 2015) [17.14].

delegated legislation has grown in proportion to the growth of the powers of the executive branch of government and appears to be on an exponential trajectory.⁵

The magnitude and scope of the laws made by officials who are neither chosen by nor responsible to any electorate raises issues with respect to the erosion of democratic accountability, which are at the heart of the important issues to be addressed through this conference. These concerns are exacerbated by the increasing practice of passing "framework" legislation, which includes little substantive law but delegates powers to "fill in the gaps".⁶ The delegation of powers which can be used to impinge substantially on individual rights, including by the creation of offences for which substantial punishments can be imposed, is another area of concern.⁷

A brief history

My observations with respect to the exponential growth in the magnitude of delegated legislation over recent times should not be taken to connote that either the delegation of legislative power, or concerns with respect to such delegation are novel phenomena. The Donoughmore Committee⁸ cited an enactment made in 1385 as an early example of the conferral of power upon the executive⁹ (at that time the King). Henry VIII is renowned for some of the most egregious examples of the usurpation of the powers of Parliament, and has provided his name to a clause in an Act which confers power to amend either that Act or another Act by delegated legislation. He was also responsible for the *Statute of Proclamations* of 1539 which empowered the King, with the advice of his Council, to:

set forth Proclamations under such Penalties and Pains as to him and them shall seem necessary, which shall be observed as though they were made by Act of Parliament.¹⁰

⁵ For example, *Odgers' Australian Senate Practice* indicated that between the years 1985-86 to 2009-10, the number of disallowable instruments increased from 855 to 2468 (*Odgers' Australian Senate Practice* (12th ed, 2008) Chapter 15 – Delegated legislation and disallowance; and (2011) Supplement).

⁶ As noted by the Senate Standing Committee for the Scrutiny of Bills in its *Final Report—Inquiry into the Future Role and Direction of the Senate Scrutiny of Bills Committee* (May 2012) 5.1.

⁷ Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Alert Digest* No 4 of 2011, 47, in Note 4 above, [17.39].

⁸ Of which more will be said below.

⁹ See Stephen Bourke, 'Subordinate Rule Making – An Historical Perspective' (1991) *Admin Review* 27:8, 8.

¹⁰ Sir Thomas Edlyne Tomlins, John Raithby, G Eyre and A Strahan, *The Statutes at Large, of England and of Great-Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland 1660-1707* (1811) 276.

Following Parliament's successful assertion of sovereign powers over the monarch in the course of the turbulent 17th century, subsequent English monarchs showed less enthusiasm for the acquisition of power through delegated legislation than Henry VIII. However, the industrial revolution and the associated regulatory needs stimulated renewed enthusiasm for regulation through delegated legislation. That enthusiasm saw delegated legislation flourish during the 19th and 20th centuries.¹¹

"The New Despotism"

The growth of delegated legislation, and its potential to erode parliamentary democracy did not go unnoticed. It prompted the Rt Hon Lord Hewart of Bury, the Lord Chief Justice of England, to publish a collection of articles under the title *The New Despotism* in 1929. In that book he observed:

Writers on the Constitution have for a long time taught that its two leading features are the Sovereignty of Parliament and the Rule of Law. To tamper with either of them was, it might be thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ the one to defeat the other, and to establish a despotism on the ruins of both! It is manifestly easy to point to a superficial contrast between what was done or attempted in the days of our least wise kings, and what is being done or attempted today. In those days the method was to defy Parliament – and it failed. In these days the method is to cajole, to coerce, and to use the Parliament – and it is strangely successful. The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is yet to be defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will, or the caprice, of the Executive unfettered and supreme.¹²

I hope that I might be allowed a short transgression to note the irony in Chief Justice Hewart decrying the evasion of the courts. In 1985 Lord Devlin observed:

Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the 17th century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the 17th and 20th centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever.¹³

Following publication of Hewart's book, the Donoughmore Committee on Ministers' Powers was established by the UK Parliament. Although that

¹¹ Note 9 above, 8, 9.

¹² The Rt Hon Lord Hewart of Bury, *The New Despotism* (1929) 17, quoted in Carol Harlow & Richard Rawlings, *Law and Administration* (2006) 31.

¹³ Lord Patrick Devlin, *Easing the Passing: The Trial of Doctor John Bodkin Adams* (1985), 92, quoted by the Hon J J Spigelman AC, "The Principle of Open Justice: A Comparative Perspective" (2006) *UNSW Law Journal* 29(2): 147, 147.

Committee did not find any evidence to support Hewart's allegations of conspiracy to usurp both parliamentary sovereignty and the rule of law, it did recommend that the House of Commons create a standing Committee to consider and report upon each regulation and rule made in the exercise of delegated legislative power and that a procedure be implemented requiring all such rules to be laid before the House. These recommendations were not implemented until 1946.¹⁴ In the meantime, publication of *The New Despotism* had been a touchstone for debate¹⁵ which led to the establishment of the Standing Committee on Regulations and Ordinances by the Senate in Australia and other reforms relating to the scrutiny of legislation by the Commonwealth Parliament in 1932. Similar practices have been adopted in Parliaments in Australia and New Zealand, commencing at different times.¹⁶

Different mechanisms for scrutiny

Different jurisdictions have evolved differing mechanisms in response to the concerns reasonably arising from the growth of delegated legislation. Those mechanisms include the creation of standing committees charged with the responsibility of reviewing delegated legislation (to which I have just referred), and, in some jurisdictions, standing committees charged with the responsibility of reviewing prospective legislation, including standing committees specifically charged with the responsibility of reviewing such legislation from the perspective of the preservation of human rights. The Commonwealth Parliament has adopted a variety of other mechanisms including:

- A requirement that Commonwealth legislative instruments be published on a public register (the Legislative Instrument section of the Federal Register of Legislation);¹⁷
- The automatic repeal of legislation by "sunset" clauses, in the absence of renewal;¹⁸
- Limiting the incorporation of other instruments or writings into the instrument unless expressly permitted by the enabling Act;¹⁹ and

¹⁴ Note 9 above, 9.

¹⁵ See for example Australia, *Parliamentary Debates*, Senate, 4 March 1932, 650; Australia, *Parliamentary Debates*, Representatives, 13 May 1932, 761.

¹⁶ Such a committee was not established in Western Australia until 1987, following the abolition of the statutory committee which had been created by the *Legislative Review and Advisory Committee Act 1976* (WA).

¹⁷ *Legislation Act 2003* (Cth) chapter 2; and see: <https://www.legislation.gov.au/Browse/ByTitle/LegislativeInstruments/InForce/0/0/Principal>.

¹⁸ *Legislation Act 2003* (Cth) chapter 3, part 4.

- The provisions of the *Legislation Act 2003* (Cth) which prevent the remaking of legislative instruments which are "the same in substance" to those disallowed within six months of disallowance.²⁰

Later sessions in this conference will examine each of these mechanisms in considerable detail and it would be fatuous of me to endeavour to replicate analysis of each of those mechanisms at the level of detail which will be provided by those sessions in this short paper. My purpose is more general. I will endeavour to provide an overview of the roles played by the executive, in the form of the monarch (or his or her representative) in council, the Parliament and the Courts in the scrutiny of legislation, using as the vehicle for that analysis, an example drawn from the history of Western Australia which has a certain contemporary resonance.²¹ That analysis will, hopefully, shed some light on the question posed in the title to this paper, which is directed to the question of whether there are too many, or perhaps not enough, mechanisms for the scrutiny of delegated legislation. As I have recently written on the subject of the relationship between Parliaments and the Courts,²² this paper will not be concerned so much with the relationship between the Parliaments and the Courts, but rather upon the combined effect of the mechanisms for review of delegated legislation provided by each.

The scrutiny of laws - a salutary tale from Western Australia

Although rather different to the mass of delegated legislation with which we are familiar today, at times the Australian colonies exercised legislative power delegated to them by the monarch and the Imperial Parliament. So, in Western Australia, the power of the Legislative Council to enact laws enabling representative government by the election of members to that Council and to another house described as a House of Representatives were conferred by an Imperial Act bearing the long title "An Act for the better Government of Her Majesty's *Australian Colonies*" or the short title of the *Australian Constitutions Act 1850* (Imp). That power was eventually exercised in 1889 when the Legislative

¹⁹ *Legislation Act 2003* (Cth) s 14, although as the ALRC notes this is subject to a contrary intention in the enabling Act (Note 4 above, [17.45]).

²⁰ *Legislation Act 2003* (Cth) s 48 and see ***Perrett v Attorney-General of Commonwealth of Australia*** [2015] FCA 834.

²¹ I am greatly indebted to the article published by the late Peter Johnston: "The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust" (1989) *Western Australian Law Review* 19:318 for much of the content of this article.

²² "Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect" (2015) *Australasian Parliamentary Review* 30:2, 80.

Council passed the *Constitution Act 1889* (WA) providing for the election of all members in the Council,²³ and for the election of members to another House created and to be known as the Legislative Assembly. As delegated legislation that Act needed to be ratified by the Imperial Parliament at Westminster. However, the Imperial Parliament affirmed the 1889 Act, which it re-enacted as the First Schedule to an imperial statute, the *Western Australia Constitution Act 1890* (Imp).

Section 73 of the 1889 Act provided that the legislature which the Act had created had power to alter or repeal any of the provisions of the Act (subject to a manner and form requirement requiring an absolute majority of the members of each House). However it is clear that the Imperial government wished to retain some control over the constitution of the colony as the same section required that any bill which "shall interfere with the operation of" certain specified sections of the Act "shall be reserved by the Governor for the signification of Her Majesty's pleasure thereon".²⁴

Further, the Imperial Act of 1890 preserved the application of certain manner and form provisions in other Imperial Acts to amendments to the 1889 Act.²⁵ These included section 33 of the *Australian Constitutions Act 1842* (Imp), which provided that any Act reserved "for the signification of Her Majesty's pleasure thereon" required public notification of the Royal Assent in the colony within two years of the legislation being presented to the Sovereign (in the form of the Governor of the relevant colony).²⁶

Having regard to the ultimate power of the Imperial Parliament, it seems clear that the terms of the 1889 Act were the subject of extensive negotiation between the colonists and the executive government at Whitehall prior to its enactment. One aspect of the negotiations, described as "energetic, and not always harmonious",²⁷ concerned the need to provide continuing protection for the indigenous inhabitants of the colony after the creation of representative government.

²³ The *Legislative Council Act 1879* (WA) had provided for 18 members in the Legislative Council, six of them nominated by the governor and 12 elected from ten constituencies (Mathew Trinca, *Launching the Ship: A Constitutional History of Western Australia* (1987), "[Representative Government](#)").

²⁴ *Constitution Act 1889* (WA) s 73.

²⁵ *Western Australia Constitution Act 1890* (Imp) s 2.

²⁶ As extended to Western Australia by s 12 of the *Australian Constitutions Act 1850* (Imp) and see Note 21 above, 331.

²⁷ Per Kirby J in *Yougarla v Western Australia* [2001] HCA 47; 207 CLR 344, [104].

Section 70 of the 1889 Constitution Act

Contemporary documents show that the need for such protections was of interest to the UK Secretary of State for the Colonies, Lord Knutsford,²⁸ and to the Governor of Western Australia, Sir F Napier Broome, who reported to Lord Knutsford. Following an earlier recommendation,²⁹ Governor Broome inserted a provision in the draft bill for the Constitution of Western Australia which became section 70 of the 1889 Act. That section provided that either £5000, or 1% of the gross revenue of the Colony, whichever was greater, was to be set aside and provided to the Aborigines Protection Board for expenditure upon the welfare of Aboriginal people pursuant to the provisions of the *Aborigines Protection Act 1886*. In correspondence with Lord Knutsford, Governor Broome justified that provision on the ground 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.³⁰

The importance attached to this provision in London is apparent from the Second Reading Speech for the Bill that became the *Western Australia Constitution Act 1890* (Imp) Act where the clause was described as a:

clause of great importance. We all know that in connection with our colonies one of our first duties is to protect to the utmost of our power the aboriginal races, and it has always been the endeavour—I hope the successful endeavour—of this House so to protect them... I think this clause not only affords ample protection to the aboriginal natives, but it also affords the ways and means of providing substantially for the relief of any natives who may be destitute, and for the education of those who may need it. I would point out to the House that in no other Australian Constitution Act does this clause exist, and therefore this is a distinct

²⁸ Ibid, [105].

²⁹ In a despatch dated 12 July 1887, Governor Broome first suggested to the former Secretary of State, Sir H Holland, that "some special arrangement should be made when self-government is granted, to ensure the protection and good treatment of the northern native population" including the vesting of funding in the Aboriginal Protection Board independently of the ministry (Note 21 above, 322).

³⁰ Letter of 28 May 1888, received 27 June 1888, reproduced in *British Parliamentary Papers: Colonies Australia* (1889) 31:34, 37-38 as quoted by Kirby J in *Yougarla v Western Australia* [2001] HCA 47; 207 CLR 344, [105].

advance on all other enactments; and I believe the House will regard the provision with special favour.³¹

The importance attached to this provision in England is further demonstrated by the fact that section 70 of the 1889 Act was one of those provisions in respect of which any Bill which "shall interfere" with its operation had to be reserved by the Governor for the signification of Her Majesty's pleasure.

However, it is clear that the colonists were not nearly so enthusiastic about section 70, and that they only acquiesced to its enactment in order to secure representative government for the colony, as part of the negotiations with Whitehall. The Colonial Secretary of Western Australia (the Hon S H Parker) later recounted:

When the old Legislative Council was in existence I remember full well how difficult it was to obtain the assent of members to section 70 of the Constitution Act, and I know it was only agreed to because it was put to us that unless we gave way we should not get our Constitution; and I have not the slightest doubt that the fact of the Act containing that clause greatly facilitated its passage through the House of Commons. When I was at Home before the select committee, some members made the most anxious inquiries about the natives of this colony. They asked about their reserves and generally about their well-being, and one member went so far as to ask how it was no provision was made for aboriginals voting at elections; and he seemed indignant because there was none. Hon Members will thus see that the presence of this clause in the Bill did facilitate its passage through the Imperial Parliament.³²

Within a year of attaining responsible government, the colonists sought to repudiate the deal which had secured its passage and in 1891, the then Premier, Sir John Forrest (after whom the impressive foyer in which we meet is named), requested the Secretary of State to agree to the repeal of section 70, and the abolition of the Aborigines Protection Board.³³ In later correspondence to the Governor, Sir John Forrest sought to justify his position in the following terms:

³¹ United Kingdom, *Parliamentary Debates*, House of Commons, 27 February 1890, vol 341 cc 1353-97 (Barron H De Worms, Under Secretary of the State for the Colonies).

³² Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 September 1893, 881-812 (Hon S H Parker). Legislation enacted by the newly self-governed colony in 1893 expressly excluded Aboriginal people from the franchise unless they met one of the most stringent grounds for eligibility (being the owner of freehold land with a net value of £100 (*The Constitution Act Amendment Act 1893* (WA), ss 12(a), 21 proviso (1)) and in 1907 Aboriginal people were excluded from the right to vote altogether (*Electoral Act 1907* (WA) s 18(d)).

³³ Note 21 above, 325. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 September 1894, 512.

[T]he Parliament of Western Australia is more likely to look after the interest of the aborigines than the Imperial Government. I am not aware that the Imperial Government has ever done much for the aborigines of Western Australia, nor do I know of any special efforts being made for their welfare by the people of the United Kingdom. That being so, why all this outward show of sympathy for the aborigines and, at the same time, want of confidence in the colonists of Western Australia, who have alone done whatever has been done for their welfare?³⁴

The repugnance of section 70 of the 1889 Constitution Act to the colonists resulted in a series of attempts to repeal it which the late Peter Johnston has described as having been characterised by "an element of farce".³⁵ Sir John Forrest justified those attempts on the ground that the legislature of Western Australia was not prevented in any way from using all "proper and constitutional means" for the repeal of the section because pressure had been applied by the Imperial government to enforce its acceptance.³⁶

The first attempt to repeal section 70 commenced in January 1892 when legislation was introduced into the Legislative Assembly, which was then only one year old. That legislation was enacted in 1894, but lapsed because Royal Assent had not been notified within two years after presentation of the Bill to the Governor of the Colony, as required by section 33 of the *Australian Constitutions Act 1842*.³⁷ More than two years had elapsed while protracted negotiations took place between Perth and Whitehall. Those negotiations had, however, made some progress, and with encouragement from the Secretary of State, another Bill for the repeal of section 70 was introduced in the Legislative Assembly in 1897. The Bill was passed, received the assent of the Governor, transmitted to Whitehall and purportedly proclaimed into effect on 28 March 1898.

However, all was not as it seemed. In 1905, Mr F Lyon Weiss, described by Johnston as "a rather remarkable person ... (whose) correspondence shows that he had a deep concern for Aboriginal welfare"³⁸ wrote to the Clerk of the WA Parliament inquiring whether there was any record by way of entry in the journals of the Parliament of the 1897 Bill having received the Royal Assent, as required by section 33 of the 1842 Act. He also wrote to other officials who might have such a record. Despite various attempts to fob him off, he pursued his campaign, and ultimately the Governor was required to seek the advice of the Secretary of

³⁴ Letter to Governor Sir G Smith, 9 April 1896 quoted in Note 21 above, 326.

³⁵ Note 21 above, 331.

³⁶ Note 21 above, 325.

³⁷ By virtue of s 12 of the *Australian Constitutions Act 1850* (Imp) and s 2 of the *Western Australia Constitution Act 1890* (Imp).

³⁸ Note 21 above, 334.

State for the Colonies with respect to the validity of the 1897 Act. That advice was to the effect that because of failure to obtain and publish Royal Assent within two years of the presentation of the Bill, it had not been validly proclaimed. The Secretary recommended that another Bill should be passed by the legislature of Western Australia as soon as possible validating everything done since 1897. That advice was taken and the Parliament quickly passed the *Aborigines Act 1905* which, by section 65, again attempted to repeal section 70 of the 1889 Constitution Act and, on this occasion, to deem it to have been repealed from 1 April 1898.³⁹

But the story does not end there. Eighty-eight years after the 1905 Act was enacted, in 1993, proceedings were commenced in the Supreme Court of Western Australia challenging the validity of the purported repeal of section 70 of the 1889 Constitution Act by the 1905 Act. The first hurdle which the plaintiffs faced was the argument that the limitation period for the commencement of proceedings challenging the efficacy of the 1905 Act had expired six years after the Act was proclaimed. That argument found favour at first instance⁴⁰ and also on appeal in the Supreme Court.⁴¹ However, an appeal to the High Court of Australia was successful and the litigation was remitted to the Supreme Court on the basis that the plaintiffs could seek a declaration as to the legality of the repeal of section 70, but no other substantive remedy.⁴²

Standing to sue

But limitation was not the last procedural obstacle placed in the path of those who sought to challenge the validity of the purported repeal of section 70 of the 1889 Constitution Act. When the proceedings recommenced in 1998, the State argued that the plaintiffs lacked standing as they had no special interest in the expenditure of funds standing to the credit of the Aborigines Protection Board, which could spend those funds in any way it wished (within the scope of the relevant legislation). The challenge to the plaintiffs' standing was upheld at first instance,⁴³ and again on appeal to the Full Court of the Supreme Court,⁴⁴ on

³⁹ Other provisions of the 1905 legislation which are utterly repugnant to contemporary eyes are beyond the scope of this paper.

⁴⁰ *Judamia v Western Australia* (Unreported, WASC, Library No 950137, 23 January 1995).

⁴¹ *Judamia v Western Australia* (Unreported, WASCA, Library No 960114, 1 March 1996).

⁴² *Judamia & Ors v State of Western Australia* P14/1996 [1996] HCA Trans 306.

⁴³ *Yougarla v Western Australia* [1998] WASC 221, 38.

⁴⁴ *Yougarla v Western Australia* [1999] WASCA 248; 21 WAR 488, [12], [15], [80].

somewhat different grounds - namely, the lack of any evidence that Aboriginal people had been detrimentally affected by the repeal of section 70 given that other funds had been allocated for Aboriginal welfare. However, when the High Court again granted special leave to appeal, the State did not pursue the issue of the plaintiffs' standing in that court.⁴⁵

The High Court was required to consider the arcane structures created by the colonial legislation to which I have referred, complicated by other historic legislation to which I have not referred. Recounting the passage taken by the Court through that labyrinthine legislation is a mammoth task beyond the scope of this paper. It is sufficient to observe that the Court unanimously concluded that by 1905, the requirement of section 32 of the 1850 *Australian Constitutions Act* (Imp) was no longer in force, with the result that it had not been necessary to table the 1905 Act in the Houses of the Parliament at Westminster. After referring to various aspects of colonial history, Kirby J observed that the significance of the 1905 Act:

might well have justified not only scrutiny by officials of 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. 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.⁴⁶

In the result, the appeal to the High Court was dismissed and it must now be taken that the 1905 Act validly repealed section 70 of the 1889 Constitution Act with effect from 1898.

More recent Western Australia legislation

Before turning to the lessons which might be drawn from this regrettable period of Western Australian history, I must say something of the recent actions of the Western Australian Parliament, in the interests of balance. I do so in a context in which, in my respectful view, there can be no doubt of the deplorable history of legislation in Western Australia relating to Aboriginal people, of which the legislation to which I have referred was a part. That history includes not just the 1905 Act to which I have referred, but the amendment of that Act in 1911 which

⁴⁵ *Yougarla v Western Australia* [2001] HCA 47; 207 CLR 34, [69].

⁴⁶ *Ibid*, [130].

extended the legal guardianship the Chief Protector of Aborigines had over every "aboriginal and half caste child" so that it was "to the exclusion of the rights of the mother of an illegitimate half-caste child", the *Native Administration Amendment Act 1941* (WA) which restricted the right of Aboriginal people to move from north to south of the 20th parallel of latitude, the *Native (Citizenship Rights) Act 1944* which enabled Aboriginal people to acquire "citizenship" and "be deemed to no longer be a native or aborigine" by, among other things, renouncing all ties to extended family and Aboriginal friends and their Aboriginal culture, and the *Native Welfare Act Amendment Act 1960* which referred to "quadroons".

However, I am very pleased to note that over the last two years the Parliament of Western Australia has enacted legislation, with bipartisan support, which reflects a completely different attitude to the first inhabitants of this State and I would respectfully suggest, reflects great credit on the members of that Parliament.

The Constitution Amendment (Recognition of Aboriginal People) Act 2015

The *Constitution Amendment (Recognition of Aboriginal People) Act 2015* (WA) began as a private member's Bill introduced by Ms Josie Farrer MLA, Member for the Kimberley, who describes herself as "a traditional Gidja woman; that is to say, my values, customs and practices are based on the same values and traditions my ancestors have passed down through thousands of generations to me".⁴⁷ The Act amended the 1889 Constitution Act by inserting recognition of the Aboriginal people as the first people of Western Australia and the traditional custodians of the land, and the desire of the Parliament to effect a reconciliation with the Aboriginal people of Western Australia into the preamble of that Act. The Act also repealed section 42 of the 1889 Constitution Act, which conditioned part of its operation upon the population of the Colony having attained "60,000 souls", "exclusive of aboriginal natives". The Act also amended section 75 of the Constitution Act by repealing the definition of the Aborigines Protection Board, which was a residual vestige of section 70.

Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016

Earlier this year, the Parliament of Western Australia passed the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). It is, with respect, an enlightened piece of legislation which could provide helpful

⁴⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, (Inaugural speech).

guidance to Parliaments in other Australian jurisdictions. It is the first Act of the WA Parliament which has been partly written in Aboriginal language. Its preamble extensively acknowledges the Noongar people as the traditional inhabitants of the south-west of the State "[s]ince time immemorial".

By section 5 of the Act the Parliament acknowledges and honours the Noongar people as the traditional owners of the Noongar lands and recognises the living cultural, spiritual, familial and social relationships that the Noongar people have with those lands and the significant and unique contribution that the Noongar people have made, are making and will continue to make, to the heritage, cultural identity, community and economy of the State. The Act also contains, as schedule 1, a description provided by the Noongar people of their relationship to their *Boodja* (land).

Lessons to be drawn from the saga of the repeal of section 70 of the 1889 Constitution Act

There are a number of lessons properly drawn from the saga relating to the repeal of section 70 of the 1889 Constitution Act. Some are specific to the particular legislation, whereas others are of more general application.

Lessons drawn specifically from the subject matter of the legislation include the fact that, despite its best intentions and avowed commitment to the protection of the interests of the Aboriginal inhabitants of Western Australia, the Imperial Parliament did not have the opportunity to consider or review the actions of the Parliament of Western Australia on any of the three occasions upon which that Parliament purported to repeal section 70 of the 1889 Constitution Act.

Further, the justification advanced by the members of the WA Parliament at the time cannot be reconciled with historical facts. In particular, the proposition that the WA Parliament was the most reliable protector of the indigenous inhabitants of this State is impossible to reconcile with the subsequent legislation which authorised dispossession, discrimination and the forceful removal of Aboriginal children from their families. The proposition that fundamental democratic principle authorised the Parliament of Western Australia to repeal section 70 cannot be reconciled with the fact that the Aboriginal inhabitants of this State were disenfranchised and unable to vote until 1962.⁴⁸

⁴⁸ *Electoral Act Amendment Act 1962* (WA).

Lessons of more general application include the proposition that mechanisms for the review of the exercise of delegated legislative powers cannot depend upon form and technicality if they are to be effective. Similarly, the efficacy of mechanisms for review depend upon the commitment, vigour and determination of those empowered to undertake the review (in the example I have used, the executive government in Whitehall ultimately abandoned its principles). Whether or not the vulnerability of mechanisms for review to political compromise is a good or a bad thing is a topic upon which reasonable minds may differ, and may well be addressed in later sessions of this conference.

Another general lesson properly learnt from the saga I have related concerns the importance of public scrutiny of the delegated legislative process. The invalidity of the 1897 Act would not have come to light but for the intrepid persistence of Mr F Lyon Weiss. Regrettably, in this case, those efforts were not crowned with ultimate success. However, his interim success illustrates the importance of mechanisms of transparency which enable all members of a community affected by delegated legislation to assess its validity. Happily, the internet provides a ready mechanism by which this may occur (although in reality the practical benefits of such access can be limited by the complexity or obscurity of legislation).

Of particular interest to me are the conclusions properly drawn from this saga with respect to the relative impotence of the courts when it comes to mechanisms for the review of delegated legislation. There can be no doubt that the courts have the power to determine whether the boundaries of the legislative power delegated have been exceeded by any particular legislative instrument, and in particular, whether manner and form requirements apply and if so, whether they have been satisfied.⁴⁹ However, as Kirby J observed in *Yougarla*, the courts have no jurisdiction to make any determination with respect to the merits or otherwise of the exercise of delegated legislative power.⁵⁰ In this respect, the courts have shown much greater deference to the exercise of delegated legislative power than has been shown to the exercise of administrative power conferred by the legislature. The vigorous development of the grounds for judicial review of the exercise of administrative powers on the basis of jurisdictional error, including on the ground of unreasonableness, have inevitably had the practical

⁴⁹ See for example, *Attorney General (WA) v Marquet* [2003] HCA 67; 217 CLR 545.

⁵⁰ *Yougarla v Western Australia* [2001] HCA 47; 207 CLR 344, [130].

effect of blurring the line dividing review of administrative action on the merits from review on the ground of excess of jurisdiction.

Having regard to the much broader ambit of judicial review of administrative action than the very limited ambit of judicial review of the exercise of delegated legislative powers, it is perhaps ironic that a recent challenge to the validity of instruments purporting to exempt various persons from the operation of the *Fish Resources Management Act 1994* (WA), on the ground that they had not been published in the *Government Gazette* as required by the *Interpretation Act 1984* (WA), failed because the exemption instruments were found to have been issued in the exercise of administrative rather than legislative powers.⁵¹

The procedural obstacles placed in the path of those who sought to challenge the validity of the 1905 Act in the courts illustrate other significant inhibitions upon the efficacy of the judicial review of delegated legislation as a mechanism for scrutiny. If a delegated law has been in place for some time, a person whose interests are affected by that delegated law is vulnerable to the argument that his or her claim should be dismissed because it is out of time. If the law is of general application, a person seeking to challenge its validity in court is vulnerable to the argument that their claim should be dismissed on the ground that they lack the requisite standing.

Further, the general barriers of cost, legal complexity and delay further inhibit the efficacy of judicial review of delegated legislation. As the *Sea Shepherd* case illustrates, a case may be lost as a result of the somewhat esoteric and imprecise distinction between the exercise of administrative power and the exercise of legislative power. The litigation challenging the validity of the 1905 Act took eight years to resolve and, in addition to the tenaciousness of the Aboriginal applicants, could only be pursued through the generous assistance provided by lawyers acting pro bono.⁵²

Too many cooks?

I turn now to apply the conclusions I have drawn to attempt to answer the rhetorical question posed in the title to this paper. The answer I would give to that question is I think, pellucidly clear from the conclusions I have drawn. The saga I have related shows that, despite the best and most laudable intentions,

⁵¹ *Sea Shepherd Australia Ltd v The State of Western Australia* [2014] WASC 66.

⁵² Including the late Peter Johnston.

parliamentary scrutiny of delegated legislation can be ineffective and has a number of areas of vulnerability, including the efficacy of the mechanisms of review adopted, the practical obscurity of much delegated legislation, the sheer magnitude of the legislation to be reviewed, and the risk of political compromise. The importance of taking all available steps to enhance mechanisms for parliamentary scrutiny of the exercise of the legislative powers delegated by the Parliament is reinforced by the conclusions I have drawn with respect to the relative impotence of the courts in the area of the review of delegated legislation, and the many barriers, both practical and legal, which lie in the path of those driven to the courts as a last resort.

So there are not too many cooks and those that are in the kitchen must be well resourced and assiduous in the performance of their responsibilities if we are to minimise the erosion in democratic accountability which accompanies the exponential growth of delegated legislation. I am confident that the remaining sessions in this conference will be focused upon the achievement of that vital objective and will identify ways in which those charged with this important responsibility can improve the quality of the structures for the governance of our community.