THE REPEALS OF SECTION 70 OF THE WESTERN AUSTRALIAN CONSTITUTION ACT 1889: ABORIGINES AND GOVERNMENTAL BREACH OF TRUST

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The Aboriginal Land Inquiry conducted in Western Australia in 1984 by Paul Seaman QC, covered many matters of social, anthropological, legal, environmental and economic significance.[1] Arguably, it deserves greater recognition from academic commentators than it has received to date. Even if its enlightened recommendations are put to one side, it is an illuminating and informative document reflecting the views of over three thousand witnesses of Aboriginal descent. This article is devoted to one rather special, and at first glance, peripheral matter that was touched upon in submissions made to the Inquiry, namely the repeal, finally in 1905, of section 70 of the Western Australian Constitution Act 1889.[2] In

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It is appropriate that this article should appear during the centennial year of the Constitution Act in an edition of the Law Review honouring the late Professor E K Braybrooke, who taught the writer as a student at this Law School to respect Christian, humanitarian values, to see worth in legal history, and to enjoy the discipline of jurisprudence

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1. Paul Seaman QC Commissioner The Aboriginal Land Inquiry *Discussion Paper* Perth January 1984 ("The *Discussion Paper*"); *Report* Perth September 1984 ("the *Report*"). Page references are to the single volume, typeset version of the Report rather than to the three volume, typed version officially presented to the Minister.
2. In 1889, the Legislative Council of Western Australia (then the sole legislative chamber) passed a Bill intended to become the Constitution Act. It was, however, ultra vires in certain respects touching upon the "waste lands of the Crown". In order to remedy the defect, the Imperial Parliament passed the Western Australia Constitution Act 1890 which authorised Queen Victoria to assent to what was otherwise an invalid measure See R D Lumb *The Constitutions of the Australian States* 4th edn (Brisbane: University of Queensland Press, 1977) 83; I D Killey "Peace, Order and Good Government, A Limitation on Legislative Competence" (1989) 17 Melb U L Rev 24, 28.

broad terms that provision was thought to have guaranteed the expenditure by the government of Western Australia upon Aborigines, of an amount equivalent to one per cent of the Colony's revenue.

In several submissions made as far apart as the Kimberley region in the north to the lower south-west of the State, the issue of the deletion of the one per cent guarantee was raised by Aborigines.[3] It might be thought to be somewhat surprising that after eight decades the event should continue to excite Aboriginal interest and resentment. This interest can perhaps be explained on three levels: the psychological, the political, and the legal. Psychologically, the resentment forms part of the general floating sense of grievance that persists among members of the Aboriginal community. More concretely, at the political level, it is a constitutive basis for present day claims to compensation advanced by Aboriginal groups for past imposition and disadvantage, usually crystallising in claims for land-grants.[4] Legally, as a specific sub-issue of the claim for compensation, the question is raised whether any Aborigines, individually or as a class, could maintain, in these times, a legal action based on notions of a public fraud, or on allegations of unconstitutional repeal of section 70.

Elements of section 70

Section 70 as originally passed, read 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

3. *Discussion Paper* para 2.2, 8; *Report* para 12.21-12.24, 90.
4. That legislative granting of exclusive rights of occupancy over traditional Aboriginal lands, affording redress for past disadvantage and a protective basis for present and future development, can constitute a "special measures" exception to an allegation of racial discrimination under the (Cth) Racial Discrimination Act 1975, was recognised by the High Court in *Gerhardy v Brown* (1985) 159 CLR 70. See D Wood "Positive Discrimination and the High Court" (1986) 16 UWAL Rev 128. Attempts by a State to suppress such claims by statute may be invalid by reason of inconsistency with the Racial Discrimination Act. See *Mabo v Queensland* (1988) 63 ALJR 84.

> 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. (emphasis added)

It can be seen that the provision has two important elements. The first is that it envisages the continued existence of the Aborigines Protection Board established by statute in 1886.[5] This institution was remarkable in that it was not directly responsible in its operations to either the executive government of the Colony or its legislature. Rather it was directly responsible to the Governor himself. This isolation from the executive government had been mitigated however by an astute move by Governor Bedford who had appointed both the Colonial Secretary and the Lands Commissioner to the Board thus providing a link between the body and government.[6]

Secondly, section 70 stipulated that a sum of £5000 or, if greater, one per cent of the colonial revenues, should be set aside for the purposes of the Board. In other words there was to be a standing statutory appropriation, in terms of a minimum amount beyond parliamentary control, so long as section 70 remained unamended.

Both elements ensured that at its conception and during its brief life, section 70 would be the subject of political and legal controversy. However, as indicated above, even after its statutory death, its ghost has yet to be exorcised.

To understand why its inclusion and existence in the Constitution Act was a matter of such bitter recrimination on the part of the colonial parliamentarians, who did not rest until it was removed, one has to understand its unusual origins.

British concern for Aboriginal people

As indicated above, the passage of section 70 was preceded by

5. (WA) Aborigines Protection Act 1886.
6. L Marchant *Aboriginal Administration in Western Australia 1886-1905* (Canberra: Australian Institute of Aboriginal Studies, 1981) 19

the establishment of the Aborigines Protection Board by the Western Australian Aborigines Protection Act 1886. The Board, constituted by five members, was required to prepare an estimate of its expenditure. Annual expenditures were subject to approval by the Governor. The objectives of the Board were to provide for "the better Protection of the Aborigines and the management of Aboriginal Native affairs".[7] The setting up of the Board can be seen as the realisation of policies and philosophies that had influenced British colonial thinking since the mid-1830s. This thinking had a strong Christian evangelical background which expressed itself in concern for the conditions of aboriginal people throughout the various British colonies and it took as its shining exemplar, the efforts of William Wilberforce to abolish slavery.[8] An effective lobby group influencing British political opinion about colonial aboriginal people met at Exeter Hall in London and their effect on official British attitudes can be gleaned from a statement by Mr Henty in the Legislative Assembly on 28 September 1894, when the abolition of section 70 was being debated. He said: "The authorities at home seem to be guided by Exeter Hall clap trap and nothing else, and the opinion seems to be that the colonies are unfit to govern the native races".[9]

The move to responsible government

When, on 18 April 1883, the Legislative Council, then the only House of the Colony's legislature, resolved to enquire of the British authorities under what conditions responsible government could be granted to Western Australia, Sir Frederick Broome, the Governor, was asked to report. Broome's report of April 1884 opened the way for further discussions between Perth and London. By 1887 the Legislative Council was pressing its proposals for responsible

7. Supra n 5 Preamble.
8. This background is outlined in R Butler "The Significance of s.70 of the 1889 Constitution Act for Western Australian Aborigines" (Unpublished Social Science Research Project Report University of Western Australia, 1981) 3-9.
9. Enclosure No 5 Despatch No 29 Governor Sir W Robinson to Marquess of Ripon Secretary of State for the Colonies 3 January 1894, appearing in the collection of papers entitled *Correspondence Relating to the Proposed Abolition of the Aborigines Protection Board of Western Australia,* (London: Eyre and Spottiswood, 1897), authorised to be printed by the House of Commons, ("*Abolition Correspondence*") 110. Likewise, Mr George referred to "the kind of yarns that are served up at Exeter Hall for the delectation of old ladies" *Abolition Correspondence Enclosure* No 2 Despatch 49 4 January 1896 151.

government.[10] Responsible government would entail, among other things, control of Aboriginal affairs by the Colonial Government. With this in mind, Governor Broome, on 12 July of that year, in a despatch to Sir H Holland the Secretary of State for the Colonies stated, somewhat optimistically as it happened:

> In my opinion, and I think the Legislature would agree with me, some special arrangement should be made when self-government is granted, to ensure the protection and good treatment of the northern native population...[11]

He recommended that the appointment of the Aborigines Protection Board under the Aborigines Protection Act, 1886 should be vested, independently of the ministry, in the Governor, at whose disposal a reserved annual sum of £5000 should be placed to be expended for the benefit of the Aboriginal population. This proposal received a favourable response in London. The Secretary of State cabled the Governor on 31 August 1887 indicating acceptance of the proposals for responsible government subject to special provisions for the protection of the "natives".[12] He enlarged on this in a later despatch to Governor Broome.

> ..I concur with you in thinking that some measure would be necessary for placing the aboriginal inhabitants of the Colony under the care of a body

10. In that year, the Legislative Council moved "That in the opinion of this Council the time has arrived when the Executive should be made responsible to the legislature of the Colony..." Western Australian Parliamentary Debates (1887) Vol XII, 121
11. *Correspondence Respecting the Proposed Introduction of Responsible Government in Western Australia* (London: Eyre and Spottiswood, 1889) ("*Correspondence Responsible Government*"), Document No 11 para 14.
The mention of only northern Aborigines reflects a belief current in the colony that members of the "native race" in the Home District, that is the Southern part of the Colony below the Murchison River, were fast disappearing after 50 years of European occupation The "mournful truth" was, according to the *Commission of Inquiry into the Treatment of Aboriginal Native Prisoners*, headed by Sir John Forrest, that it appeared impossible to avert that downward course: *Report* 11 September 1884, 4 and 9. This Report humanely advocated the continued use of Rottnest Island as a native prison because prisoners did not need to wear chains there. The Commission was concerned, however, about the smallness of the cells on the island: *Report* 1884, 6. Perhaps a measure of the progress that has been made in this respect can be found in the fact that just over 100 years later the Commonwealth and State governments still found it necessary to appoint a Royal Commission to inquire into Aboriginal deaths in custody. Letters Patent issued to the Honourable James Muirhead QC, 16 October 1987 and 21 June 1988. The history of Rottnest as an Aboriginal prison continues to haunt the present State Government. See "Work to stop on Rottnest Lodge pool" The West Australian 29 September 1989, concerning an order by the Minister for Aboriginal Affairs preventing construction at the site of the former jail.
12. *Correspondence Responsible Government* Document No 12, 20.

> independent of the Parliament of the day, and the suggestions contained in ... your Despatch appear to be reasonable and well considered.[13]

It was therefore at Broome's personal instigation, received in London in a climate of evangelical and paternalistic regard for indigenous peoples, that a clause soon to become section 70 was inserted in the draft Constitution Bill.[14] The Bill was finally passed by the Legislative Council on 26 April 1889,[15] but when transmitted to London and placed before the House of Commons certain difficulties led to the appointment of a Select Committee to consider it. To assist that committee two delegates, including Mr Stephen Parker, were sent by the Council to London to furnish evidence on the Bill. One of the most contentious issues was that concerning the welfare of Aboriginal natives in the colony and the need for special measures to protect them. It became evident that the inclusion of section 70 was essential to gaining the concurrence of the British Parliament to pass the Bill empowering the Queen to assent to the Constitution Bill. The authorising Bill was passed by the House of Commons on 25 July 1890, was subsequently passed by the House of Lords, and assented to on 15 August 1890.[16]

Moves for repeal

Section 70 should therefore be seen as the price of responsible government for the Colony. With deliberate contempt, colonial

13 Ibid Document No 19 3 January 1888. As an insight into the attitude of the Imperial authorities regarding the importance of the special measure, it is noteworthy that the Secretary of State, when returning the draft Constitution to the Governor on 31 August, 1888 wrote: "Her Majesty's Government do not, however, desire to preclude the Council from altering any details in the bill so long as the main principles are maintained, *especially the protection of the native inhabitants of the Colony*." (emphasis added) Western Australian Parliamentary Debates (1888) Vol XIV, 181.

14. A precedent for section 70 had been included forty years earlier in the instrument governing the Colony of Natal: Marchant supra n 6, 20.

15. During debate on the Bill in the Legislative Council, two aspects of clause 70 were criticised. The first was the fact that as the revenue of the colony increased, the contribution to the natives would also increase proportionately. The second was the then current though erroneous expectation that the native population would diminish, leaving unexpended monies in the hands of the Board. Sir John Forrest, for one, was convinced that the extinguishment of the Aboriginal people was inevitable: supra n 11. For a more complete analysis of Forrest's attitudes, see E Goddard and C T Stannage (eds) "John Forrest and the Aborigines" in R Reece and T Stannage *European-Aboriginal Relations in Western Australia, Studies in Western Australian History, No 8*, (Nedlands: University of WA Press, 1984) 52-59.

16. See supra n 2. The events surrounding the granting of responsible government are related in J S Battye *The Cyclopedia of Western Australia* (Perth: The Cyclopedia Co, 1912) 236.

politicians over the next five years were to refer to this arrangement as the "sordid bargain" or the "compact".[17]

The attitude of the British Government to it is perhaps best summed up in the despatch from the Colonial Secretary, J Chamberlain, to Governor Sir Gerard Smith dated 27 December 1895. Looking at the matter in retrospect he states:

> When in 1887 the Legislative Council of the colony passed a resolution that the time had arrived when the executive should be made responsible to the Legislature of the colony, and that Western Australia should remain one and undivided, Lord Knutsford, while accepting these resolutions in principle, stipulated for special protection for the natives, and, in his Despatch of January 3, 1888, he expressed his concurrence in the opinion of the Governor, Sir F N Broome, that some measure would be necessary for placing the aboriginal inhabitants under the care of a body independent of the Parliament of the day, and stated that he considered the Governor's suggestions which were substantially those afterwards adopted, to be reasonable and well considered.
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> This correspondence was before the Imperial Parliament when considering the Bill, and the provision respecting the Aborigines Protection Board was clearly understood to be one of the conditions of the grant of self government. Mr Parker, the senior delegate from Western Australia, stated before the Select Committee of the House of Commons: "We have accepted respon-

17 Mr Simpson said: " but I do think ... it is time we assumed an attitude which will show the authorities at home that we are determined this stigma shall no longer stain our honour, that we are assembled here ..the trustees of the honour and integrity of the people of this country, and that we will no longer submit to that portion of the Constitution Act which was *bargained for on one side and conceded on the other when responsible government was obtained It was a sordid bargain*, at the best." (emphasis added): Report of debate in Legislative Assembly, 19 October 1896, upon a motion criticising the Imperial authorities over delay in abolishing the Aborigines Protection Board in *Abolition Correspondence* supra n 9 Enclosure No 2 Despatch No 49, Governor Sir G Smith to Mr J Chamberlain 4 December 1896 144-145.
A more moderate view was expressed by the Attorney-General, Mr S Burt Speaking of the Secretary of State, he said ". and we must find it impossible to disagree with his reasoning that the clause in the Constitution Act, which we desire to cancel, was *part of the compact* we entered into when the Imperial Parliament granted to us responsible Government... Mr Chamberlain is doubtless quite right when he says that *this Parliament agreed to that compact*, although the fact is we were forced into it." (emphasis added) *Abolition Correspondence* ibid, 154 and 157.
The Hon S Parker, in the Legislative Council debate, 23 October, 1896, advocating restraint, stated ". I gave evidence before the Select Committee of the House of Commons In answer to inquiries I stated that this Clause 70 was accepted by the Legislature of this colony as *part of the compact* with the Imperial Government...It will be seen that we made a *distinct bargain* with the Imperial Government, and it cannot but damage us very much in the eyes of the British Parliament if we pass the words which are contained in this resolution." (emphasis added) *Abolition Correspondence* supra n 9 Enclosure No 5 Despatch No 49 Governor Sir G Smith to Secretary of State 4 December 1896.

sible government on the special understanding and arrangement that this Aborigines Protection Board...shall continue".[18]

It is equally evident that the colonial politicians regarded their submission to the inclusion of section 70 as the result of coercion: in order to obtain self-government they had no choice but to accept that provision. As Sir John Forrest, speaking as the Colonial Treasurer, was later to explain in justification of the attempt to remove section 70, because the provision had been accepted under pressure, the Western Australian legislature was not prevented in any way from using all "proper and constitutional means for its repeal".[19]

It is not surprising therefore that within a year of attaining responsible government, Sir John Forrest had sought to have section 70 deleted from the Constitution Act and the Aborigines Protection Board abolished.[20]

The attitude of the Western Australian parliamentarians crystallised around three particular issues, one political, one economic and one constitutional, that caused them offence. The first was the fact that the arrangements concerning management of Aboriginal affairs through the Aborigines Protection Board was seen to be "a slur and a stigma resting on every member of the House and on every man, woman and child in the colony".[21] This was because "it was an assertion by the British House of Commons that they could not trust the people of this colony to deal with the aborigines for fear that they would treat the blacks with inhumanity and cruelty".[22] It was a stigma "on the humanity and decency of the people of this country. In no other part of Australia was there tacked onto its Constitution such a condition as this".[23]

18. *Abolition Correspondence* supra n 9 Despatch No 37, 123.
19. Speaking in the debate in the Legislative Assembly on 13 August 1894, on the resolution to bring in a Bill to repeal section 70· *Abolition Correspondence* supra n 9 Enclosure No 3 Despatch No 29 Governor Sir W Robinson to Secretary of State, 104
20. In the Legislative Assembly on 6 September 1894, he mentioned he had requested the Secretary of State in 1891 to agree to the repeal of section 70. There is nothing said to indicate a more precise date for his request: *Abolition Correspondence* supra n 9 Enclosure No 4 Despatch No 29, 106.
21. *Abolition Correspondence* supra n 9 Enclosure No 3 Despatch No 29 Mr Simpson Legislative Assembly Debate, 103.
22. Ibid.
23. Ibid.

Two other factors compounded this resentment of what was perceived to be mistrust by their Imperial masters. The first was a feeling (not confined to the times) that distant authorities are often ignorant of local conditions and lack the understanding with which local inhabitants are blessed. According to the Colonial Treasurer, the fact of the matter was that the people who were dealing with the question knew nothing about it. Perhaps they thought "the natives were a fierce, warlike race, like the natives of New Zealand".[24] The locals, contrary to what might be thought in England, treated the Aborigines with the same regard as the whites. Equal protection was afforded to both. "No white man may commit an offence against a native in this colony unless he is most assuredly brought to justice."[25]

The frustrations of the Western Australian government at what was seen to be the British government's attempts to hamper and impede autonomous control of local Aboriginal affairs was summed up by the Premier, Sir John Forrest:

> [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?[26]

The second factor was that the Aborigines Protection Board as the vehicle for ameliorating the lot of Aborigines suffered another defect: it was considered "absolutely incompetent to carry out its activities".[27] As Biskup points out this criticism was somewhat self-fulfilling. To distribute blankets, rations and clothing, the Board had to rely largely on the administrative machinery of the Govern-

24. Supra n 21, 104. A similar complaint about British ignorance of the specific nature of Western Australian conditions, typical of the time, was made two years later by the Attorney-General: "[I]t seems to me that some persons do not understand what is the condition of the natives in Australia, for they seem to class them with the natives of South Africa, or the natives of India, where the natives are really far more like men than are the natives of this colony.": *Abolition Correspondence* supra n 9 Enclosure No 2 Despatch No 49 Governor Sir G Smith to Secretary of State 4 December 1896, 156
25. *Abolition Correspondence* supra n 9 Enclosure No 5 Despatch No 29 The Colonial Secretary, 110 He did point out however, that occasionally small injustices were done, but that happened wherever a weaker race comes into contact with a stronger.
26. *Abolition Correspondence* supra n 9 Enclosure No 1 Despatch No 12 Letter to Governor Sir G Smith 9 April 1896, 130.
27. Mr Simpson supra n 21.

ment. It was therefore useless under a hostile government.[28]

The economic issue was the perception that, as the colony's economic position improved, the statutorily fixed appropriation of revenue would increase proportionately. This would produce a larger amount to be spent on a possibly diminishing group of "natives". It was this consideration that led Sir John Forrest, among others, to criticise the unconditional one per cent allocation to the Board. Whilst conceding that initially, the amount of £5000 might not be too large a sum to entrust to the Board, it would be a very different matter when, with steadily increasing revenue, the Board would have £20,000 at its disposal.[29]

The third, and arguably the most fundamental objection to section 70 was constitutional. It flowed from the fact that expenditure by the Board was beyond parliamentary direction. As stated by the Colonial Treasurer, who was concerned that the Board would have a growing portion of revenue handed over to them, such a situation was "altogether foreign to our institutions. It was thoroughly unconstitutional that any body of men should be entrusted with the expenditure of public money outside the supervision and control of parliament".[30]

The principal criticisms of section 70 were, therefore, that it was seen as an indignity and humiliation reflecting on the capacity of the colonists to manage Aboriginal affairs,[31] that the appropriation

28 P Biskup *Not Slaves, Not Citizens The Aboriginal Problem in Western Australia* 1892-1954 (Brisbane University of Queensland Press, 1973) 25.

29 *Abolition Correspondence* supra n 9 Enclosure No 3 Despatch No 43 Letter to Governor Sir G Smith 13 April 1896, 131.

30. Colonial Treasurer supra n 21, 105 The President of the Legislative Council and the Speaker of the Legislative Assembly also called for the total repeal of section 70 ("this exceptional legislation") on the ground that the board was not responsible to Parliament, there being "no precedent in any of the self-governing British Colonies" for such an exception: *Abolition Correspondence*, supra n 9 Enclosure No 1 Despatch No 35 Letter from the President of the Legislative Council and the Speaker of the Legislative Assembly to the Administrator Sir A Onslow 8 October 1895, 120.

31. That the local politicians were convinced of their suitability to discharge their responsibilities towards the Aborigines is evident from some of the self-assured remarks of the time See, eg the comments of the Colonial Treasurer, who could not see how the Aborigines would suffer by the abolition of the Board: *Abolition Correspondence* supra n 9 Enclosure No 4 Despatch No 29, 106. Mr Connor observed· "Members were not in the House as enemies to the aborigines. They were there . to protect them": ibid, 108 Mr Randall expressed the view that everyone knew the Aborigines were always treated well by every government they had in the colony: ibid, 109. These comments are somewhat at variance with the evidence collected and published by J B Gribble *Dark Deeds in the Sunny Land*: or *Blacks and Whites in North-West Australia*, (Perth: Stirling Bros Steam Press, 1886).

was too rigid, it having no necessary relation to Aboriginal numbers or needs, and that the Governor and the Board were not accountable, as conventional constitutional law would require, to the Parliament. The desired solution to these inherent flaws in the Aborigines Protection Board and the undesirability of the standing appropriation in section 70 lay, on the one hand, in the abolition of the Board, and transfer of its jurisdiction to the Parliament and Government of Western Australia, and, on the other, in the repeal of the section.

The 1897 repeal

The period from 1894, following the passage in the colonial Parliament of the Bill to repeal section 70,[32] to 1897, when the British Government acquiesced in the repeal, was punctuated by an acrimonious exchange of views between the authorities in London and the politicians in Perth, with successive Governors enduring the role of medium through which the contending views were communicated. In the meantime, the Bill passed by the local legislature lay in limbo in Downing Street awaiting royal assent. Chamberlain, having regard to the obdurate attitude of the West Australians, was the first to propose a compromise involving a modification to, rather than outright repeal of, section 70. On 16 August 1895 he telegraphed to the Acting Governor, Sir A C Onslow:

> I am anxious to meet the views of Colonial Government as far as possible. I am prepared to approve Reserved Bill, omitting from Section 70 as much as places expenditure under the care of independent unofficial Board, so that while permanent appropriation of 5,000L secures requirements of natives, your responsible advisers would advise Governor as to management of fund, same way as other expenditure.[33]

He followed this with a despatch[34] in which he first drew attention to the fact that his predecessor (the Marquess of Ripon) had pointed out in the preceding year, the difficulty that might be experienced in justifying the total abandonment, after so short a time, and without sufficient change of conditions, of an arrangement without which the passage of the Constitution Act might not

32. Supra n 19.
33. *Abolition Correspondence* supra n 9, 116.
34. *Abolition Correspondence* supra n 9 Despatch No 33 Chamberlain to Acting Governor Sir A C Onslow 20 August 1895, 116-117.

have passed. He then went on to say, in a masterpiece of diplomatic backtracking:

> I am nevertheless prepared . . . to meet the wishes of your Ministers in what I hope will be regarded as a practical manner. The view has been admitted that *the provisions of Section 70 were not intended to be of a permanent character.* Some years have now elapsed since the system of Responsible Government came into force, and during that period the Government and the Parliament of the colony have certainly given no reason to suppose that they would be less just and alert in questions relating to the natives than they have shown themselves to be in general administration.[35] (emphasis added)

He explained the effect of the proposed limited amendment to be that whilst a minimum amount for the benefit of the Aborigines would be secured, Ministers would have the right to advise the Governor as to its management.[36]

The response of the legislature, in a memorial to Her Majesty's Secretary of State for the Colonies dated 8 October 1895, was to express its concern at his hesitation in advising Her Majesty to assent, and his suggestion that section 70 should be modified rather than repealed. The memorial continued:

> In this suggestion the Legislature regrets it cannot concur, as the feeling of the people of this Colony is so strong in regard to this exceptional legislation, that nothing less than its repeal will ever be considered satisfactory.[37]

Chamberlain, for the time being, dug in. His attitude at the rejection of his proposed solution is evident in his comments to Governor Sir G Smith in his Despatch of 27 December 1895.

> In offering this compromise I hoped to satisfy the aspirations of the colonial Government and Legislature to obtain control over this department of affairs, without essentially impairing the arrangement which the Imperial Parliament insisted on less than six years ago, and looking to what passed on the subject both while the Constitution Bill was under consideration in the colony and while it was before the Imperial Parliament, I cannot but regret that in the interests of the colony it was not accepted.[38]

However, he concluded by referring to the view of his predecessor, the Marquess of Ripon, about the temporary nature of the arrangements. This, in retrospect, can be seen to be the crucial shift in interpretation of "the bargain" which opened the way to a Lon-

35. Ibid, 117
35 Ibid, 117
36. Ibid.
37. *Abolition Correspondence* supra n 9 Enclosure No 1 Despatch No 35, 120
38 *Abolition Correspondence* supra n 9 Despatch No 37, 122-123.

don back-down.[39]

Sir John Forrest pressed on obstinately, and in reply to Chamberlain's contention that as the colony had accepted responsible government subject to section 70, it was not reasonable to ask for its repeal, said:

> [T]he colony does not wish to repudiate any of its engagements, but having tried to conform to them, they are found utterly useless and unworkable...and in that case Parliament is justified in asking for its repeal.[40]

Having regard to the colonists' sensitivity to any suggestion of bad faith, the Governor, Sir G Smith, counselled caution:

> I attribute the Premier's disregard of this aspect of the case to a feeling which I largely share, that having regard to Lord Ripon's admission of the temporary nature of the arrangements now in force, an admission endorsed by yourself in principle, and in view of your own offer to transfer the control of the expenditure to the Colonial Government, the discussion of this question has, in a measure, passed beyond the stage at which it is profitable to consider whether, in their desire to repeal a provision always unpalatable but rendered necessary by the then surrounding circumstances of the case, the Western Australian Government and Parliament are properly open to a charge of an attempted breach of faith with the Imperial Government.[41]

Chamberlain, by now obviously seeking some resolution of the dispute referred, in his Despatch of 21 August 1896, to his "anxiety to meet the wishes" of the local Ministers. He asked Sir Gerald to inform Sir John Forrest that, after further consideration, he was prepared, if Sir John would state what arrangements he proposed to make for fixing definitely the responsibility for distributing the funds provided by the Legislature for the Aborigines' requirements, to lay the correspondence before Parliament with a view to ascertaining the views of the House of Commons on the matter.[42]

39. "My predecessor, indeed, stated that he considered the provision was of a *temporary nature*, and I do not wish to be understood to differ from him in principle on that point, but Ministers and Members of the Legislature will, I trust, see on reconsideration that without further directions from the Imperial Parliament I should not be justified in advising Her Majesty to assent to a measure which would sweep away entirely the reservation which it made on behalf of the natives at so recent a date." (emphasis added) ibid, 123.
40. *Abolition Correspondence* supra n 9 Enclosure No 1 Despatch No 42 Governor Sir G Smith to Secretary of State 22 July 1896, 129.
41. *Abolition Correspondence* supra n 9 Despatch No 42, 126. Sir Humphrey Appleby in the contemporary TV show "Yes, Prime Minister" would have been pleased with the last sentence.
42. *Abolition Correspondence* supra n 9 Despatch No 44, 138.

This concession was taken up somewhat grudgingly by the Legislature which, whilst pressing the view that the continued reservation of the Bill was "not calculated to inspire confidence in the Imperial recognition of the principle of colonial self-government", indicated that Aboriginal welfare would be placed under a subdepartment of State under the control of a responsible Minister of the Crown, and that a sum of at least £5,000 should be provided for the use of the Department.[43] Following a visit to London by Sir John Forrest in 1897, at which agreement on this basis was concluded, Chamberlain sent a cablegram to Western Australia: "I have fully discussed with the Premier the question of the Aborigines Board and have agreed to assent to the [1894] Bill."[44]

At this juncture however, an element of farce, not for the last time, entered the situation. Before the reserved Bill could be presented to the Queen-in-Council for her assent, it was discovered that an earlier legislative provision, originally made applicable to the colony of New South Wales[45] but extending to Western Australia after 1850,[46] required certain reserved bills to be presented for assent within two years of reservation. More than two years having elapsed whilst the protracted negotiations had dragged on, the Bill had lapsed!

The first record of this embarrassing discovery is found in an internal Colonial Office minute dated 30 July 1897, from one John

43. *Abolition Correspondence* supra n 9 Despatch No 49 Governor Sir G Smith to Secretary of State 4 January 1897, 141.
44. Western Australian Parliamentary Debates (1905) Vol 28, 137.
45. Section 33 of the Australian Constitutions Act 1842 (an Act for the Government of NSW and Van Dieman's Land) ("the 1842 Act"), which reads: "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."
46. By virtue of section 12 of the Australian Constitutions Act No 2 1850 (an Act for the Better Government of Her Majesty's Australian Colonies) ("the 1850 Act").

Anderson to his superior, Sir John Bramston.[47] He reports that on looking up the provisions of the 1842 and 1850 Acts he had found that by reason of section 33 of the 1842 Act, the Bill could not now be assented to. In bureaucratic self-justification he continued: "Fresh legislation is therefore necessary, *and it is perhaps just as well as the Bill was very unsatisfactory*", (emphasis added) because it merely repealed section 70 of the Constitution Act without terminating the Board by amending the Aborigines Protection Act, hence leaving the Board in existence.[48] Bramston, for his part, commented that it was "curious that both here and in the Colony the provision of s 33 of the Act of 1842 has been overlooked".[49]

In the result, Chamberlain, in his Despatch of 6 August 1897,[50] advised Governor Smith that in the course of taking the necessary steps for submitting the 1894 Bill to the Queen-in-Council, his attention had been drawn to a point concerning the need for assent within two years that had been "unfortunately overlooked", and that a fresh Bill would have to be passed before effect could be given to the "settlement" at which he had arrived with Sir John Forrest.

47. *Colonial Office Records* (Public Records Office, Kew, England) ("CO") Vol 18/223, 157-158. B K de Garis "The Colonial Office and the Commonwealth Constitution Bill" in A W Martin (ed) *Essays in Australian Federation* (Melbourne: Melbourne University Press, 1969) 94 and 96 identifies Bramston as the Assistant Under Secretary in charge of Australasian affairs

48 CO ibid. The Minute recommended telegraphing Western Australia and advising that new legislation would be necessary and it was desirable that it should fully comprehend the compromise previously reached. Chamberlain, in his note at the foot of the Minute, indicated his agreement but observed that "telegraphic communication is liable to misapprehension" so that a despatch should be sent fully explaining the position.

49. CO supra n 47 Vol 18/223 No 36, 186-191. In fairness to all concerned, it is perhaps not surprising that the requirement for presentation within two years was not readily appreciated, tucked away as it was in a rather obscure backwater of colonial legislation The connecting links to the Constitution Act 1889 have to be further traced by reference to section 73 of that Act, which required that Bills interfering with the operation of section 70 should be reserved for the signification of Her Majesty's pleasure, and section 76 of that Act which provided that the provisions of the Constitution Act should have no effect until such provisions of various specified Imperial Acts, including the 1842 and 1850 Acts, as were repugnant, had been repealed. To complete the mosaic, section 2(a) of the Imperial covering Act of 1890 repealed the various Acts specified in the Second Schedule thereto except for the provisions of the 1842 and 1850 Acts relating to reservation and signification of assent. These were to continue to apply. In passing, one can query whether section 76 of the 1889 Act contemplating, ostensibly, full repeal of the repugnant provisions of the 1842 and 1850 Acts as a precondition to the operation of the Constitution Act, was satisfied by the partial repeal effected by section 2(a) and the Second Schedule of the 1890 Act

50. CO ibid.

He took occasion to suggest that as a new Bill was inevitable it should embody more comprehensively the compromise relating to the establishment of a sub-department of State to administer a statutory appropriation of £5,000 to be supplemented as necessary. He pointed out that the lapsed Bill would not have given effect to the wish of the Colonial Legislature to abolish the Board. Underlining the need to reserve the new Bill by reason of section 10 of the Aborigines Protection Act, and section 73 of the Constitution Act, he gave his assurance that the proper steps would be taken to obtain Her Majesty's assent "on its receipt".

The requisite action was taken in the colony. A Bill was introduced into Parliament. In speaking to it on 11 November 1897, Forrest recounted to the Legislative Assembly his "amicable" meeting with Chamberlain earlier in the year, in which he had only been with the Secretary of State half an hour before the latter decided the colony should have complete control over the Aborigines,[51] and how Chamberlain had found a simple way of meeting the views of the Western Australian Government, namely the laying before the House of Commons of a blue book containing the correspondence. No-one having espoused the Aboriginal cause, the way was open to proceed. Blaming the administrators in London for having held up the Bill for so long, Forrest explained it was necessary to pass a new one. Claiming victory over the administrators of Downing Street, Forrest assured the House that no time would be lost in presenting the Bill for assent once passed.[52] The only questioning voice was that of Mr Connor, the member for East Kimberley, who noted that the Bill as presented did not provide any relief for the settlers from the depredations and dangers they suffered at the hands of the Aborigines. He asked if they could be removed to an island off the coast and there supplied with all they required.[53]

51. Western Australian Parliamentary Debates (1897) Vol 11, 395. Forrest may not have been so charitable had he known that in anticipation of the meeting, Sir G Smith had sent a detailed Secret Despatch, dated 7 May 1897, to the Secretary of State commenting on the Premier's personal features and character (including a reference to his corpulent size), and the issues to be discussed.
52. Ibid, 395-396.
53. Ibid 397.

The Premier's bonhomie was replicated by the Governor, who, in his Despatch sending the reserved Bill "home", thanked Her Majesty's Government "for the generous manner" in which the wishes of the Colony had been met, and assured Chamberlain that his action would not only result in good to the Aborigines, but also give satisfaction to the Government and people of the Colony.[54]

The Bill was assented to on 26 February 1897,[55] and became the Western Australian Aborigines Act 1897. It was proclaimed, purportedly in accordance with section 13 thereof, to come into effect on 28 March 1898.[56]

For the time being, at least, the colonists seemed to have triumphed in removing the burden and stigma of the constitutional requirement that one per cent of Crown revenue be set aside for the benefit of its Aboriginal population.

Challenge to 1897 repeal

The fact that the 1897 Act had not been proclaimed in accordance with section 33 of the 1842 Act went unnoticed until it came to the attention of a rather remarkable person, F Lyon Weiss. His correspondence shows that he had a deep concern for Aboriginal welfare. He commenced his campaign on 28 July 1905 by writing to the Clerk of the Parliament enquiring whether there was any record, by way of entry in the journals of Parliament, of the reserved 1897 Bill having received the Royal Assent. This obviously had regard to the terms of section 33 of the 1842 Act.[57] In like measure he wrote to the Registrar of the Supreme Court, the Government Printer and the Chief Protector of Aborigines. Each replied that they had no such record,[58] the Government Printer

54. CO supra n 47 Vol 18/224 No 57 17 December 1897, 23.
55. A copy of the Order in Council is recorded at CO supra n 47 Vol 18/224, 264.
56. Western Australian Government Gazette No 17 1 April 1898. In the light of later events more regard should have been paid to the ominous date. The Bill was described as a Bill "to further amend the Constitution Act of 1889, and for the better protection of the Aboriginal Race of Western Australia." As the Honourable John Toohey has commented, ironically, one may doubt how far the Bill was intended to so operate, the benefits to Aborigines being by no means apparent!: J Toohey "The One Per Cent Solution" Public Law and Public Administration Discussion Group Australian National University, Canberra 2 December 1987, 6-7
57. For the text of section 33 see n 45.
58. Letters dated 1 August 1905 (Clerk of the Legislative Council) 31 July 1905 (Registrar of Supreme Court) 3 August 1905 (Government Printer) date unclear (Chief Protector) Battye Library Perth.

adding that he knew nothing beyond the proclamation that had been made pursuant to the Aborigines Act itself.

On 10 August 1905 Lyon Weiss wrote to the Governor, Sir F Bedford, seeking to inspect the copy of the Order-in-Council by which Queen Victoria had assented to the 1897 Bill, and the copy of the parliamentary speech, message or proclamation by which the Governor had proclaimed the Queen's assent. Drawing attention to several relevant statutes, including the 1842 Act, he asked whether their requirements had been complied with. His objective is disclosed at the end of the letter: namely, that of "having the pitiable Aborigines treated with justice and humanity".

On 11 August 1905, in response to the Governor's request for information, the Premier, Mr H Daglish, avoided the issue by simply stating that "the proclamation whereby the Act was brought into force was published in the Government Gazette on April 1st 1898." By now Lyon Weiss was warming to his task. On 12 August 1905 he wrote again to the Governor giving details of insults and obstruction he had encountered from government officials. He followed this, on 14 August 1905, with a request that the Governor transmit to the Secretary of State for the Colonies various submissions that he had prepared.[59] These alleged a breach of the "constitutional compact" enacted with respect to Western Australia and then went on to suggest that a failure to comply with section 33 of the 1842 Imperial Act was a fatal omission so that, in the result, the Aborigines Act was not in force.[60] The consequence of this would be that section 70 had not been effectively repealed. Before forwarding the correspondence to London the Governor sought legal advice from the Acting Attorney-General through the Premier.[61] The Premier forwarded a Memorandum from the Acting Attorney-General on 19 August 1905 to the effect that the royal assent had been duly given and the 1897 Act had been proclaimed in accordance with the requirements of section 13 of that Act.

Apparently uncertain that his communications would be con-

59. Annexed to letter to Secretary of State dated 14 August 1905.
60. He also contended that on the basis of information supplied to him by the Government Statistician, the Aborigines had been "hypocritically defrauded of more than £150,000"
61 Letter to Premier dated 15 August 1905.

veyed to London, Lyon Weiss on 28 August 1905, wrote directly to the Right Honourable Alfred Lyttelton, the Secretary of State for the Colonies, advising him that he was furnishing various materials in support of his contentions. The interchange of correspondence was obviously an annoyance to the State government. In reply to a query by the Governor concerning further allegations made by Lyon Weiss that he was being hampered by various State departments,[62] it was stated: "I am desired by the Honourable The Premier to state that he is not aware that Mr Weiss has any reasonable grounds for complaint against the previous government..."[63]

The upshot of this protracted correspondence was a somewhat dramatic telegram received by the Governor from the Secretary of State for the Colonies on 5 November 1905. It read:

> With reference to your Despatch No 28 of 21st August last Law Officers advise that Aborigines Act 1887 legally invalid as assent of the Crown has not been signified in accordance with 5 & 6 Vict Cap 76 Sec 33. Proclamation of (sic) under Section 13 Aborigines Act is not such as required by Imperial Act quoted above.
>
> Bill should be passed by Legislature of Western Australia as soon as possible validating all done since 1897 and re-enact provisions of Aborigines Act. Bill must be reserved for signification of His Majesty's pleasure.

That the arguments of Lyon Weiss had been completely sustained is evident from the opinion of the Law Officers, Sir R B Finlay KC, the Attorney-General, and Sir Edward Carson KC, the Solicitor-General whose advice had been sought, in London, by the Colonial Office. So far as relevant, it reads:

> LAW OFFICERS' DEPARTMENT
> ROYAL COURTS OF JUSTICE
>
> 30th October 1905
>
> The Right Honorable Alfred Lyttelton MP
> Sir
>
> We were honoured with your commands signified in Mr H Bertram Cox's letter of the 10th instant stating that he was directed by you to lay before us a despatch dated the 21st of August last from the Governor of Western Australia transmitting a communication from Mr F Lyon Weiss question-

62. Letter of Lyon Weiss to the Governor dated 1 September 1905. In a letter to the Governor dated 9 September 1905, Lyon Weiss alleged that the opponents of justice and humanity had refused to supply him with information, or, in the case of the Crown Law Department, had "taken the incredible course...of refusing to reply to correspondence!" These were, of course, in pre-Ombudsman days.
63. Letter to the Governor's Clerk dated 4 September 1905

ing the validity of the Aborigines Act 1897 of Western Australia, together with a report by the Acting Attorney General on the subject.

That Mr Bertram Cox was to direct our attention to the following enactments viz 5 & 6 Vict Cap 76 sec 33, 13 & 14 Vict Cap 59 sec 12, and 53 & 54 Vict Cap 26 section 2(a) upon which Mr Weiss based his contention that the Aborigines Act 1897 had never had any force or authority in Western Australia, the Governor never having signified either by speech or message to the Legislature or by Proclamation, as required by 5 & 6 Vict Cap 76 sec 33, that the Bill had been laid before the late Majesty in Council and that the Majesty had been pleased to assent to the same.....

That it would be observed that the Acting Attorney General, in his Report, *avoided* any attempt to set up that 5 & 6 Vict Cap 76 sec 33, no longer applied to Western Australia (whether on the grounds suggested in paragraph 3 of Mr Cox's letter to us or on any other grounds) and, in fact, ignored the provisions of the Imperial Acts cited above, altogether, contenting himself with stating in paragraph 10 of his Report that a Proclamation of the Act was published in the Gazette for 1st April 1898 in accordance with section 13 thereof. *That even this observation was far from accurate* as Mr Weiss showed upon annexure E (containing the text of the Proclamation) to his letter.

That the Proclamation of 28th March 1898 *was couched in inaccurate and misleading terms*, and that it could not, in your opinion, be contended that in view of the actual provisions of section 13 of the Act, the mere issue of the Proclamation amounted, by necessary implication, to a signification of the Royal Assent, although, if section 13 had been correctly recited in the preamble to the Proclamation so as to contain a mention of the Royal Assent, the Proclamation might have been held sufficient to satisfy 5 & 6 Vict Cap 76 sec 33, and also sufficient evidence of the Royal Assent, within section 6 of the Colonial Laws Validity Act 1865 to prevent any question as to the validity of the Colonial Act arising.

That Mr Bertram Cox was to say that, in view of the fact that the Aborigines Act 1897 was deliberately approved by the then Secretary of State and assented to by Her Majesty in Council, you were strongly of opinion that its effects should not be allowed to be undone by a technical informality with regard to the signification of the Royal Assent in the Colony.

That Mr Bertram Cox was, therefore, to request us to take his letter and its enclosures into our consideration and to report:—

1. Whether the provisions of 5 & 6 Vict Cap 76 sec 33 as to the signification by the Governor of the Royal Assent to a reserved Bill were applied to Bills passed by the present Legislature of Western Australia by 53 & 54 Vict Cap 26 sec 2(a)...
2. Whether the Aborigines Act 1897 is legally in operation in Western Australia, and, if not, upon what grounds it is invalid.
3. If it is invalid what steps should be taken to bring it into operation with retrospective effect to 3rd February 1898 when it received the assent of Her late Majesty in Council.
4. Generally.

We have taken the matter into our consideration, and in obedience to your commands, have the honour to Report:

(1) *That* in our opinion the provisions of the 5th & 6th Victoria Chapter 76 section 33 as to the signification of the Royal Assent to Reserved Bills apply to Bills passed by the present Legislature of Western

Australia.....

(2) We do not think the Aborigines Act 1897 is legally valid as the assent of Her Majesty has not been signified in accordance with the terms of 5 & 6 Victoria Chapter 76 section 33. The Proclamation under section 13 of the Aborigines Act 1897 is not a Proclamation such as is required by section 33 of 5 & 6 Victoria Chapter 76.

(3) We think an act should be passed by the Legislature of Western Australia validating all that has been done since 1897 and re-enacting the provisions of the Act of that year.

(4) We have nothing to add.

We have the honour to be, Sir, your most obedient humble servants,
R.B. Finlay
Edward Carson (Emphasis added)[64]

The consternation that ensued in London is evident from the internal Colonial Office minutes that followed receipt of the Law Officers' opinion. Mr H E Dale, a junior officer, wrote to his immediate superior, Mr Risley: "I think we had better telegraph the substance of this to Western Australia at once so that the Government may, if possible, get a Bill through this session." He queried whether the validating Bill had to be reserved for His Majesty's "consent" (sic), proposing instead that it might be possible to authorise the Governor to assent on the ground of urgency. The urgency was due to the fact that "Mr Leon Weiss talks of initiating an action in the Courts which...might lead to the greatest practical inconvenience to the State Government".[65] Risley in turn expressed strong doubts about whether the Governor could himself assent, suggesting that it would be neither correct nor safe to treat the matter in that way. He concluded: "Consequently, in my opinion, the validating Bill must be reserved and assented to by Order in Council", adding: "(and the Royal Assent must this time be properly proclaimed in the State!)"[66]

After the substance of the Law Officers' advice had been conveyed by telegram the Secretary of State wrote more expansively to the Governor,[67] indicating that the validating Act would require

64. The opinion is recorded in CO supra n 47 Vol 418/43, 67-73. What the officers of the Colonial Office thought of the Western Australian legal advice is also disclosed in the opinion. The emphasised phrases could hardly be regarded as complimentary of the Western Australian Government.

65. CO supra n 47 387 Vol 79 minute dated 2 November 1905.

66 Ibid minute dated 3 November 1905.

67. The amended draft of the despatch to the Governor is also found in CO supra n 65.

the signification of the King's assent by Order-in-Council. He continued:

> I informed you to the above effect in my telegram...in order that your Ministers might take action without delay... I have to request that unless your Ministers wish to delay any communication with Mr Weiss, you will cause that gentleman to be informed that I have read his letters, that I am of opinion that he is right in his contention that the Act is, *through an accidental infirmity*, legally invalid, that steps are being taken to repair the invalidity, and that *His Majesty's Government are not prepared to take advantage of a technical defect to fetter the powers of the Parliament and Government of a self-governing State in dealing with the aborigines committed to its care...* (emphasis added)

Sequel to the Lyon Weiss challenge

In consequence of the advice it had received, the Parliament passed the Western Australian Aborigines Act 1905, section 65 of which dealt with the problem of the previous attempts to repeal section 70 of the Constitution Act. Since the preamble is itself illuminating, the whole section warrants repetition:

> 65. Whereas a Bill intituled "An Act to further amend the Constitution Act of 1889, and for the better protection of the Aboriginal Race of Western Australia" having been duly passed by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia was, on the eleventh day of December, One thousand eight hundred and ninety-seven, reserved by the Governor for the signification of the pleasure of Her late Majesty thereon, and received the assent of Her late Majesty in Council on the third day of February, One thousand eight hundred and ninety-eight, and was proclaimed in Western Australia on the first day of April, One thousand eight hundred and ninety-eight, but the Royal assent was not signified by such proclamation as required by the Statute made and passed in the fifth and sixth years of the reign of Her late Majesty, and intituled "An Act for the Government of New South Wales and Van Diemen's Land".
>
> And whereas the said Bill appears in the Statute Book of Western Australia as of the sixty-first year of Her late Majesty Queen Victoria, and purports to repeal the Act and parts of Acts mentioned in the First Schedule hereto, and to provide *inter alia* for the abolition of the Aborigines Protection Board, and for the establishment of the Aborigines Department which should discharge the duties of the said Board so purported to be abolished, and for the annual appropriation of Five thousand pounds to be applied to the purposes of the said Department: And whereas, after the Proclamation in Western Australia of the said Bill (hereinafter called an Act) as a Statute, the said Aborigines Protection Board was in fact abolished, and the said Department was established. And whereas it is desirable to validate such abolition of the said Aborigines Protection Board and the establishment of the said Department and such repeal: Be it therefore further enacted as follows:—
>
> The Act and parts of Acts mentioned in the First Schedule shall be deemed to have been repealed, the Aborigines Protection Board shall be deemed

> to have been abolished, and the Aborigines Department shall be deemed to have been lawfully established on and from the date upon which the said Act intituled "An Act to further amend the Constitution Act of 1889, and for the better protection of the Aboriginal Race of Western Australia" was proclaimed as aforesaid; and all appointments made, and all acts and things done or purporting to have been done by the apparent sanction of the said Act by the Governor, the Minister appointed to administer the same, the Colonial Treasurer, the Aborigines Department, Protectors of Aborigines, and other officers respectively, are hereby validated and confirmed for all purposes whatsoever.

In short section 65 of the 1905 Act did two things: it deemed Part I of the Aborigines Protection Act and section 70 of the Constitution Act to have been repealed from 1 April 1898, and it validated and confirmed appointments made and acts done under the Aborigines Act 1897.[68] The resurrection of the 1897 Act was, however, short lived: having been revived by section 65 it was promptly repealed by section 66.

Even the endeavours of the Western Australian Government to bring this Act into force were not devoid of some little farce and embarrassment. Consistently with the legislative history of the matter, the Act had to be proclaimed three times: first on Friday 20 April 1906, then on Saturday 21 April 1906, and finally on Friday 27 April 1906.[69] The first and second gazettals, which were in virtually identical terms, might have involved a misunderstanding as to which member of the Government was responsible for the administration of the Act, the Colonial Secretary, Walter Kingsmill,

68. Even though Lyon Weiss had been substantially vindicated, the State Government maintained an attitude of obdurate disrespect towards him. Lyon Weiss continued to make representations to the British Government about the plight of Aborigines. In response to a request by the Governor for a report on matters raised by Lyon Weiss, the Premier, Mr C H Rason replied on 13 March 1906: "I would respectfully add that it seems little short of a waste of time to pay serious attention to anything emanating from this gentleman in connection with this matter." There is, also, an element of duplicity in the manner in which the matter was dealt with in the Western Australian Parliament. In the second reading speech on the Bill, the Minister for Commerce and Labour, stated "This Bill passed both Houses and went home, and the royal assent was given to it; but when the assent was notified to this State of Western Australia, instead of proclaiming it in the *Gazette as they should have done* as an Order of the Sovereign-in-Council that the Act had been assented to, *they simply gazetted* that the Act had been assented to", appearing to suggest it had been the fault of the British Government. Western Australian Parliamentary Debates (1905) Vol 28, 308.

69. Western Australian *Government Gazette* ("*Gazette*") 1906 Vol 1 Nos 27, 28 and 29, 1221, 1261 and 1263 respectively. It would perhaps have been appropriately ironic had the original gazettal been a week earlier, ie Friday 13 April 1906, were it not for the fact that that day was also Good Friday.

being the signatory on the Friday, and J Sydney Hicks, the Minister for Commerce and Labour, the following day. As Toohey has noted,[70] both Gazettes gave 23 April as the date on which the Act was to commence operation, but neither mentioned in which year. Hicks apparently triumphed in the bureaucratic dispute for he was the signatory the next week. A comparison between the two Hicks' gazettals discloses another reason, besides the fiasco over the incomplete date, why republication was necessary. Whereas in the earlier, the Governor alone purported to fix the date when the Act was to come into operation, in the latter he adopted the correct formula by doing so as the Governor "in Council".[71]

Consequential matters were attended to with the appointment of H C Princep as Chief Protector of Aborigines on 4 May 1906, he having occupied that office under the previous Act, and on 18 May 1906 all Government Residents, Police Inspectors and Sub-Inspectors were appointed to be Protectors of Aborigines within their districts.[72]

For all intents and purposes, the guarantee of one per cent of State revenue for Aborigines provided by section 70 appeared to have been dead and buried.

Later legislative history

A vestige of section 70 did, however, survive. As if written over the palimpset of that provision, section 5 of the 1905 Act required the Colonial Treasurer to place at least £10,000 each year at the disposal of the Aborigines Department. Though that Act[73] was effectively repealed by section 3(3) of the Western Australian Native

70 Supra n 56

71. The substantive part of the gazettal reads: "Whereas a Bill for an Act intituled 'An Act to make provision for the better protection and care of the Aboriginal Inhabitants of Western Australia' was duly passed by the Legislative Council and Legislative Assembly, and was on the 23rd day of December, 1905, reserved by me for the signification of His Majesty's pleasure thereon NOW THEREFORE I, the said Governor, do by this Proclamation signify that the said Bill was duly laid before His Majesty in Council, and that His Majesty on the 4th day of April, 1906, was pleased to assent to the same; and I *the Governor, with the advice of the Executive Council*, hereby fix the 30th day of April, 1906 as the day on which the said Act shall come into operation" (emphasis added)

72. The *Gazette* 1906, 1324 and 1441

73. Revised and renamed the (WA) Native Administration Act 1905 by virtue of the (WA) Aborigines Act Amendment Act 1936.

Welfare Act 1963, section 6(1) of the latter continued the statutory appropriation in the following terms:

> The Treasurer of the State shall in every year place at the disposal of the Department [of Native Welfare] a sum of ten thousand pounds out of the Consolidated Revenue Fund, and such further monies as may be provided by Parliament, to be applied to the purposes of the Department.[74]

In 1972 even this pale reflection of the original section 70 was erased when, by virtue of section 6(1) of the Western Australian Aboriginal Affairs Planning Authority Act passed that year, the Native Welfare Act was repealed. Section 43(1)(a) of the 1972 Act terminated the minimum requirement and provided that the funds for the Aboriginal Affairs Planning Authority should consist of monies appropriated by Parliament.

Although section 70 of the Constitution Act was never the subject of any legal challenge, an action was brought to test the extent to which section 6(1) of the 1963 Act required the State to provide for the maintenance of individual Aborigines. In *Narrier v Gare*,[75] maintenance orders were sought against Narrier, an Aboriginal worker, for the support of his children. Section 7(1)(c) of the 1963 Act provided that it was the duty of the Department of Native Welfare to provide for the maintenance and education of the children of Aborigines. Narrier denied liability, alleging that *by virtue* of section 7(1)(c), the State of Western Australia was obliged to maintain his dependents. D'Arcy J held that no duty was cast upon the State to provide maintenance for specific individual Aborigines. His Honour had regard to the fact that if, *pursuant to section 6*, no more than the minimum amount of £10,000 were appropriated, it would be inadequate to support the large number of potential Aboriginal claimants. Accordingly, he reasoned, Parliament could not have intended section 7 to relieve Aborigines in the position of the defendant of their legal responsibilities to provide for their families.

History revisited: the resurrection of section 70 in recent and contemporary Aboriginal culture

It may seem somewhat strange that Narrier, the Aboriginal litigant just mentioned, should have raised an issue of the State's

74. Interestingly, the sum of £10,000 was not increased during the period from 1906 to 1972.
75. (Unreported) D'Arcy J Supreme Court of Western Australia 3 April 1968. The details come from the personal recollection of the writer who was junior counsel with R D Wilson QC for the State.

special responsibility to Aborigines, indirectly related to section 70, out of the blue and unaided in 1968.[76] Whether he had knowledge of the earlier history of the provision must remain a matter of speculation. It may not be coincidental, however, that he was an itinerant shearer and therefore would probably have come into contact with Aborigines in the Pilbara in his employment. It was in the Pilbara that section 70 came to prominence in the post-World War II era through the agency of a second remarkable character, Mr D W McLeod. Don McLeod has had a unique involvement with the advancement of Aboriginal interests stretching over a period of more than fifty years, much of which is recounted in his recent autobiography *How the West was Lost.*[77] For present purposes it is sufficient to note his promotion of section 70 as an issue.

As recounted by himself[78] and by Butler,[79] McLeod's first encounter with the one per cent guarantee preceded an historic meeting in the Pilbara in 1942 in which many of the traditional senior Aboriginal law men came together from an area covering many thousands of square miles. McLeod, who was respected by Aborigines because of his prior contacts with them through his mining activities, was asked to advise them and to act for them in raising various issues with government. He already had discovered whilst visiting Perth, the 1897 House of Commons Blue Paper,[80] the device used by Chamberlain to justify, surreptitiously, the removal of section 70 from the Constitution Act. On raising that at the 1942 meeting, he was instructed to work for the reinstatement of section 70, it being seen in the context of the overall economic, social and cultural injury visited on the Aboriginal community. Whilst its significance was overshadowed by other more volatile and contentious aspects, such as industrial conditions, the issue of compensation for the lost one per cent guarantee formed part of the

76 In the Married Women's Court, at first instance, he was unrepresented.

77 D W McLeod *How the West was Lost — The Native Question in the Development of Western Australia* (Perth. Nomads Charitable and Educational Foundation, 1984). Chapter 1 is devoted to the history of section 70.

78. Ibid, 140-141 and 148-150.

79. Supra n 8, 28-38. Butler, in n 58 of his thesis, attributes his information to personal communications with McLeod

80. *Abolition Correspondence* supra n 9.

background to the bitter pastoral strike in the Pilbara in 1946.[81] More recently, following the 1967 referendum which amended section 51(xxvi) of the Commonwealth Constitution,[82] and the consequent grant of power to the Commonwealth to make "special laws" for Aborigines, McLeod, supported by an organisation known as the Nomads Group made,[83] and continues to make,[84] representations to Federal governments about the matter. In 1977, McLeod visited London in an unsuccessful attempt to secure the support of the British Government. Whilst there he sought constitutional advice from English counsel, Mr John Macdonald QC. The opinion he received indicated that the 1905 repeal was lawful. Counsel further commented:

> In my opinion in 1897 the British Government was under a clear governmental duty to protect the Aborigines. I think Mr McLeod is right in saying that if Section 70 of the 1889 Act had not been repealed, much of the hardship and misery which the Aboriginal people have suffered would have been avoided. The 1905 Aborigines Act did provide for the sum of £10,000 a year to be spent for the relief of Aborigines, but this was a poor substitute for the 1% of the Gross State Revenue which the Imperial Parliament had originally insisted upon. I have carefully considered the contemporary correspondence and it is clear that the Secretary of State reached his decision without any consultation with the Aboriginal people and in my opinion his decision was a breach of the duty which the British Government owed

81 McLeod's account of the strike is to be found in *How the West was Lost* supra n 77 For a judicial description of the bitterness that the strike aroused see *Mitchell v Australian Broadcasting Commission and Middleton* (1958) 60 WALR 38 Jackson J, 43-45 The activities of McLeod and his associates were the subject of controversial litigation resulting in the High Court, in *Hodge v Needle* (1947) 20 ALJR 499, overturning a conviction for an offence of being found within 100 yards of an Aboriginal camp contrary to section 39 of the Aboriginal Administration Act 1905. McLeod was also involved in litigation with Detective G R Richards of the Western Australian Police Force which culminated in an unsuccessful application by McLeod for leave to appeal to the High Court (*McLeod v Richards* (1947) 73 CLR 665). Richards, a fervant anti-Communist, who doubtless regarded McLeod as a dangerous and subversive influence, later achieved some notoriety in connection with his involvement in 'turning' the Russian defector Vladimar Petrov in 1954 see N Whitlam and G Stubbs *A Nest of Traitors — The Petrov Affair* revised ed (Brisbane Queensland University Press, 1985) 71-72, 136-137, 139-142.

82 Curiously, the 1967 amendment did not confer power in terms of a positive grant: it did so negatively. Section 51(xxvi) when originally enacted as part of the Constitution read "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to...the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws." (emphasis added). The amendment removed the proviso excluding Aborigines from the range of federal power.

83. Eg *The Submission by the Nomads Group of Aborigines to the Federal Cabinet, Commonwealth of Australia*, Strelley Community, 1972.

84. The writer has been advised of current representations to that Government.

to the Aboriginal people. I think there was also a breach of duty by the Government of Western Australia.

I have, however, reluctantly come to the conclusion that these breaches of duty are not ones which can be enforced in the Courts. See: *Tito v Attorney General* (1977), 2 WLR 496.[85]

Perhaps most spectacularly so far as contemporary history is concerned, the issue of section 70 figured as part of the grievances agitated in the course of the series of incidents between 1978 and 1981 that were associated with Noonkanbah Station on the Fitzroy River in the Kimberley region.[86] Purporting to repossess their land and titles, a group calling itself the Beneficial Owners, of whom McLeod was the spokesperson, issued a proclamation at Noonkanbah on 10 August 1980. Concerning section 70, the proclamation read:

The whiteman has never understood our Law nor taken it seriously. Whereas in 1889 limited sovereign powers were transferred to the state of Western Australia, this transference of power was subject to conditions pertaining to the maintenance of our welfare. These conditions were that a sum amounting to one per cent of the annual gross revenue of the state of Western Australia be placed in a fund beyond the reach of Parliament.

This fund was for our welfare, namely, to educate us in order to bring us quickly to equality with the Europeans; to feed and clothe us when we might otherwise be destitute; to promote our general well-being and preservation. This fund was to be expended by a Protector of Natives responsible to the Governor, provision for which was also made within the Constitution of 1889.

85. Opinion "Re: The Nomads Group of Aborigines and Section 70 of the Constitution Act, 1889 (Western Australia)" 15 July 1977 Lincoln's Inn Macdonald had been counsel for the Banaban plaintiffs in *Tito v Waddell* (No 2) infra n 93.

86. The main confrontation between Aborigines and the State Government was over a decision by the Government to permit exploratory drilling for oil by an American company upon land designated as a "site of special significance" under the (WA) Aboriginal Heritage Act 1972. The permission to drill was effected by relevant Ministers, on two occasions, directing the Trustees of the Western Australian Museum, who have control of such sites, to consent to the drilling. A legal challenge to the Ministers' powers to direct was dismissed by Brinsden J. *Noonkanbah Pastoral Co Pty Ltd v Amax Iron Ore Corporation* (unreported) Supreme Court of Western Australia 27 June 1979 A further challenge was made the following year raising new issues, alleging that the Minister's decision was unconstitutional by reason of inconsistency between the Aboriginal Heritage Act and the (Cth) Racial Discrimination Act 1975 Wallace J dissolved an interlocutory injunction having regard to the balance of convenience which weighed in favour of not impeding the expensive drilling programme. See *Yungoora Community Inc v Amax Iron Ore Corporation* (unreported) Supreme Court of Western Australia 27 March 1980. Ironically similar arguments were upheld by the High Court two years later in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168. McLeod's involvement in the Noonkanbah saga, including the raising of section 70, is recounted by S Hawke and M Gallagher in *Noonkanbah — Whose Land, Whose Law* (Fremantle: Fremantle Arts Centre Press, 1989) 230-231 and 275-276.

> Thus were legally defined the duties of the state of Western Australia towards ourselves. Yet we, the Beneficial Owners, were given no opportunity to influence the spending of this fund nor to select our own trustee, for almost immediately the state attempted to delete certain sections of the Constitution; but being in breach of its original agreement this attempt failed to gain the Queen's consent. Thus it was that what has been called the Native Question was born, the same persisting to the present.
>
> Whereas in 1897, the parliament of Western Australia, without consulting those legal entities most directly concerned, passed an Act of Native Affairs, we claim this to be illegal. The setting up of a department and the placing of funds meant for the purpose of promoting our welfare, in the hands of a government minister, was contrary to the terms and intent of the 1889 agreement and therefore we deem it unlawful.
>
> From that time, we, the Beneficial Owners, have been enslaved. In 1905, the Seventieth Section was again removed from the Constitution of Western Australia; the Act of Native Affairs was passed and proclaimed; and an Enabling Bill passed in order to make legal the illegalities proceeding from 1897, at which time the funds were markedly reduced. Thus the state placed itself further in breach of its original agreement pertaining to our welfare.

A copy of the proclamation was forwarded to the Administrator (the Hon J M Lavan, acting in the absence of the Governor). The Official Secretary, Government House, replied on 29 October 1980 advising that the contents of the correspondence had been noted and referred to the Administrator's "advisers" (that is the government) for "any appropriate action."[87] The response of the advisers took the form of a letter dated 3 November 1980 from the then Premier, Sir Charles Court, to McLeod.[88] In it he stated, among other things:

> The land of Western Australia does not belong to the Aborigines. The idea that Aborigines, because of their having lived in this land before the days of white settlement, have some prior title to the land which gives them a perpetual right to demand tribute of all others who may inhabit it, is not consistent with any idea of fairness or common humanity. In fact, it is as crudely selfish and racist a notion as one can imagine. Nor is it an idea which has ever accorded with the law of this nation — a nation of which every Aborigine is now a full member, and with precisely the same rights as others to benefit accordingly.

Regarding section 70, he said:

> Your assertion that Section 70 of the Constitution Act of 1889 was not properly repealed by the Aborigines Act of 1905 has no validity of any kind. The fact is that, today, Aborigines benefit much more from the public revenue than was ever the case before.

87 Butler supra n 8, Appendix
88. Ibid.

Possibility of legal challenge today

The evidence presented to the Seaman Aboriginal Land Inquiry bears witness to the smouldering sense of deprivation that members of the Aboriginal community still feel about the loss of the one per cent guarantee. The question therefore arises whether there is any legal basis on which the purported repeals of section 70 in 1897 and 1905 could still be the subject of legal challenge. It is not intended in this article to come to any concluded position on that issue. It is appropriate, however, to address possible arguments that could be advanced in support of a claim for compensation, possibly in the order of $700 million,[89] or a declaration of invalidity. The difficulties lying in the way of success can also be identified.

Two main lines of attack have been indicated. The first is to proceed by way of an allegation of breach of governmental trust, that is, of constitutional fraud. This would be directed principally at the 1897 repeal which the 1905 ratification sought to confirm. The second approach would be to put in question the 1905 ratification by the State Parliament on the basis of non-compliance with the manner and form requirements of section 33 of the 1842 Imperial Act, the provision that has proven so troublesome in the past. A variation of this latter approach would be to assume that in itself the Aborigines Act 1905 was effective to repeal section 70, but not to validly effect a retroactive repeal of that provision back-dated to 1897.

Whichever approach be adopted there are two threshold difficulties that would have to be overcome before a court would even enter into an exploration of the substantive issues. These are the *standing* of any Aboriginal plaintiffs to sue, and the question whether the issues are *justiciable*, that is, capable of judicial determination.

89. D Carbon "Blacks could claim $690 million" The West Australian 26 December 1987 The journalist's basis for calculation is not disclosed. Against the accumulated annual payments of 1%, one would have to off-set State revenue expended on Aborigines Nevertheless one commentator has said: "The removal of section 70 of the Constitution pauperised Western Australia's Aborigines and made them beggars in their own land. Had the 1 per cent of the revenue contribution continued to the present, it is likely that the social problems of the Aboriginal population of the state would be considerably reduced and there would now be less agitation for Aboriginal rights." N Green "Aborigines and White Settlers" in C T Stannage (ed) *A New History of Western Australia* (Perth University of Western Australia Press, 1979), 110; written for the Sesquicentenary of the State

Particularly if a claim for compensation were based simply on the allegation that between 1897 and 1905 the one per cent requirement had not been paid according to law, a fundamental objection could be taken that any present day Aborigine could not establish a sufficient beneficial interest or entitlement in the amount outstanding. Even with the assistance of *Onus v Alcoa of Australia Ltd*,[90] in which the High Court accorded a more generous recognition to certain traditional representatives of the Aboriginal community, one would still have to show specific and special interest in the matter over and above mere membership of the Aboriginal community. In other words, probably only Aborigines now around 90 years of age could claim. Similarly, any plaintiff in an action claiming that section 70 was still operative would have to show special interest distinct from other Aborigines.

Furthermore, it is doubtful whether any single members or groups of the Aboriginal community could assert a right to what is, in effect, a matter of general appropriation, that is, the global setting aside of public revenue in an inchoate way, prior to specific expenditures. The case of *Victoria v The Commonwealth and Hayden* ("the AAP case")[91] would suggest that such an issue could well be regarded as non-justiciable.

Turning to the merits of any claim, one would have to respect the opinion of Macdonald QC mentioned above[92] to the effect that however morally questionable, the actions of the Imperial Government in collaborating with that of Western Australia in 1897 would be unlikely to be regarded as grounding a claim for breach of any kind of trust, nor of a fiduciary duty towards the Aboriginal people of the colony. Macdonald's view finds support in the deci-

90. (1981) 149 CLR 27 Traditional guardians of sacred relics, recognised by the relevant Aboriginal groups, were held to have sufficient standing to seek an injunction against the destruction of those relics. However, even there, the plaintiffs' interest was located in a matter that was given *specific statutory* recognition in Victorian legislation protecting such relics.

91 (1975) 134 CLR 338 McTiernan J, 370 Mason J, 394 Jacobs J, 410 and probably Murphy J, 418, all raise objections to the notion that judicial remedies can be granted in respect of matters of appropriation. This would seem to apply in the context under discussion as it would have been the Aborigines Protection Board to which the monies should have been paid, so that particular expenditures would have been dependent on the exercise of *its* discretion.

92. See supra n 85

sion of Megarry VC in *Tito v Waddell (No 2)*[93] which he cites. There, Banaban islanders, whose island in the Pacific had been extensively mined for phosphate deposits, claimed that the British authorities controlling the island had been in breach of trust in providing inadequate royalties under delegated legislation. The claim was dismissed on the basis that the governmental arrangements were not intended to give rise to any obligation in the nature of an enforceable trust. At best all that was held to arise in that case was a political trust. Although *Tito v Waddell* has been distinguished in later Canadian cases[94] where breach by governmental authorities of fiduciary relations has been recognised as a possible cause of action, it is unlikely that the sovereign acts of the Imperial government in respect of the one per cent affair could be successfully pursued on such a basis.[95]

As to the ratification in 1905 of the 1897 repeal, retrospective ratification or validation is not of itself unconstitutional. However in the case of *Metwally v University of Wollongong*[96] the High Court, by a majority, held that Commonwealth legislation, seeking to cure State legislation that was invalid by virtue of section 109 of the Commonwealth Constitution because of conflict with other Commonwealth legislation, was itself ineffective. The Court held that where it had itself declared legislation to be invalid because it had identified an intention in the Commonwealth Racial Discrimination Act 1974 to cover the field of racial discrimination, the Commonwealth Parliament could not retrospectively alter that situation, giving rise to consistency with the State law, simply by deeming the Commonwealth Parliament's legislative intent to be other than it had been.

93 [1977] 3 All ER 129.

94. In *Guerin* v *the Queen* (1984) 13 DLR (4th) 321 misleading action by governmental officials under the (Can) Indian Act 1952 which led to an Indian band surrendering valuable land for an inadequate rent was held to be actionable. In *Kruger v the Queen* (1985) 17 DLR (4th) 591 a claim based on fiduciary breach was dismissed for failure to establish equitable fraud, though fiduciary breach was assumed to provide a basis for claim.

95 Both the Canadian cases relied in part on action pursuant to statute. The actions of the British government in 1897 are therefore distinguishable. Also, as sovereign acts, they probably would be non-justiciable. See *Manuel v Attorney-General* [1982] 3 All ER 786 (Megarry VC); affirmed [1982] 3 All ER 822 (CA); *Coe v the Commonwealth* (1979) 24 ALR 118 Gibbs J, 128 Aickin J, 138

96 (1985) 158 CLR 447.

Could the same reasoning be extended, by analogy, to the 1905 repeal of section 70? It is suggested that there is no necessary parallel between the two situations. *Metwally's* case dealt with a very specific case of *substantive* invalidity because the nature and content of two laws, one State, one Commonwealth, could not operate compatibly. However the defect alleged against the Aborigines Act 1905 arose from *procedural* invalidity, that is, a failure to observe "manner and form" requirements. This would result in the Act having no continuing substantive operation during the period of its assumed "non-operation".

Whether there is any scope for a "manner and form" action relying on section 33 of the 1842 Act is also debateable. In these days, such requirements would probably not receive favourable consideration by the High Court.[97] So far as the publication requirements of section 33 are concerned, despite the two earlier botched attempts, the third gazettal in 1906 would seem to satisfy those requirements. That leaves open the possibility that there may not have been compliance with the public record provisions of section 33 requiring an entry of the proclamation of the King's assent to be made in the journals of the Legislative Council and a duplicate, duly attested, to be delivered to the Registrar of the Supreme Court or other proper officer to be kept among the records of the State.[98] That failure to observe these elements was regarded by Mr Lyon Weiss as a possible ground of invalidity in relation to the 1897 repeal is evident from his correspondence.[99] In response to a query by the writer in relation to the 1906 proclamation of assent, the present President of the Legislative Council stated:

> Proclamations have never been entered in the Journals of the Council, however, the Records Office does keep a book which records the date of Proclamation of various Acts for easy reference...
> Standing Order No 7 of the Joint Standing Rules and Orders says in part '...one of the fair prints of the assented Bills shall be deposited by the Clerk of the Legislative Council in the Registry of the Supreme Court, with the Private Secretary of the Governor and the third copy shall be retained in the Office of the Chief Secretary.' The Librarian of the Supreme Court in-

97. In *Western Australia v Wilsmore* (1982) 40 ALR 213, section 73 of the Constitution Act 1889 was read restrictively so as to have minimal impact on the State Parliament's legislative powers to amend the State's constitutional system.
98. See supra n 45.
99 See supra n 58

> forms me the only records retained at the Supreme Court are the fair prints of the assented Bills as required under the Standing Orders.[100]

There are obviously some questions of interpretation involved in determining whether the formalities set forth in section 33 have been complied with, including what form the attestation should take, who is a proper officer, and what respository can constitute the records of the government. It is probable that a court of law would take a generous view of these requirements, and the gazettal itself could be taken as partial compliance. Of course, there is a prior question of the force to be accorded to the middle part of section 33 dealing with these matters of record. The first part of the section dealing with proclamation of assent, and the last part dealing with the need for assent within two years, have been regarded as mandatory rather than directory, in relation to the repeal of section 70. Should not the middle part also?[101]

An enquiry directed to the present Attorney-General asking whether these formalities had been observed in respect of the 1905 repeal produced the following reply:

> I am advised that the Aborigines Protection (sic) Act 1905 was duly assented to by Her Majesty, and that assent was signified by proclamation within the statutory period. Proof of compliance with those formalities may be sighted in the Government Gazette of 20 April 1906, pages 1221 and 1261, and Government Gazette of 27 April 1906, page 1263.[102]
>
> I am also advised that proclamation of Her Majesty's assent is the only statutory formality which goes to the validity of the legislation.

This response is the latest in a number of similar definitive responses by State Government officers over the years. Given the history of section 70, one wonders if it is the last testament.

100. Letter dated 8 December 1987, from the Hon Clive Griffiths.

101. An alternative is to ask whether substantial, rather than strict, compliance would suffice to satisfy these "requirements". But see *Hunter Resources Ltd v Melville* (1988) 62 ALJR 88 regarding dispensation from statutory requirements.

102. The inconsistencies in the triple publication seem to have eluded the Attorney-General.