Aspects of State Executive Powers

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This article considers political and constitutional aspects of the foundation and exercise of state executive powers. It also examines one aspect of the interrelationship between the major participants in the state executive.

INTRODUCTION

This topic is of unlimited breadth. I address it by, *first,* making some observations about the 'natures' of executive power, and *secondly,* considering one aspect of executive power under the Western Australian Constitution.

Some Observations about the Natures of Executive Power

The definition of executive power is notoriously elusive, particularly in Westminster derived constitutional arrangements. Some of this complexity results from the absence in Australian constitutional instruments of a definition of executive power.[1] The famously opaque terms of s 61 of the *Commonwealth Constitution* provide some guidance, in respect of executive power of the Commonwealth, by noting that it 'extends' to 'the execution and maintenance of this Constitution, and of the laws of the Commonwealth'. This does not help much.

Discussion, if not definition, of executive power depends of course very much on context. Prior to the interest generated by cases like *Pape v Federal Commissioner of Taxation*[2] and *Williams v Commonwealth*[3] discussion of executive power invariably occurred in the context of what Professor Evans has helpfully identified as 'constitutional powers'; that is, specific powers exercisable by state Governors[4] and the Governor-General for the Commonwealth on the advice of ministers,[5] or

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1 Of course, this silence or opacity is not unique to executive power. The *Commonwealth Constitution* does not, for instance, define judicial power which (whatever it is) is vested in the High Court and in such other federal courts as the Parliament creates or invests with federal jurisdiction: see s 71.

2 (2009) 238 CLR 1.

3 (2012) 288 ALJR 410.

4 The position of the territories is a little different.

5 See generally, Simon Evans 'Continuity and Flexibility: Executive Power in Australia' in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law: Power and Accountability in a Comparative Perspective* (Oxford University Press, 2006) 89.

reserve or prerogative powers. Even then, I would expect that Professor Evans would not include all prerogative powers as constitutional powers.

With all of the recent excitement about *Williams,* it is easy to overlook that in practical terms the most important aspect of executive power is governmental power exercised pursuant to legislation; administering laws enacted by the legislature.[6] This was explained by Latham CJ in *Commonwealth v Grunseit*:[7]

> The provisions of sec. 5 (4) of the *National Security Act* are based upon the proposition that it is possible to distinguish between orders, rules, and by-laws which are of a legislative character and orders, rules and by-laws which are of an executive character. It is not always easy to draw this distinction. Rules and by-laws by their very nature appear to partake of a legislative character, but it is plain that sec. 5 (4) contemplates that they may be executive rather than legislative in character. In the case of orders, some orders would plainly be executive, as, for example, where in pursuance of a power created by legislation a particular person was ordered by another person to do a particular thing. The general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct or a declaration as to power, right or duty, whereas executive authority applies the law in particular cases. Attention has been given in the United States of America to this distinction for the purpose of applying the doctrine which is there accepted of the separation of legislative, executive, and judicial power. My brother Williams referred to the case of *J. W. Hampton Jr. & Co. v. United States*, where it was said: 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law'.—See also *Panama Refining Co. v. Ryan* and *Opp Cotton Mills Inc. v. Administrator of Wage and Hour Division of Department of Labour*.[8]

Following *Williams* many lawyers became aware of a whole other genus of executive power; non-legislative governmental power that had historically, in Australia, been exercised pursuant to legislation. Executive government administrators had known about this for a long time, but I think that it crept up a little on the lawyers. *Williams* involved the National School Chaplaincy Programme, which provided

6 In terms of s 61 of the *Commonwealth Constitution,* this might be thought of as 'execution … of the laws of the Commonwealth'. This is a point that does not seem to have attracted much attention in cases like *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117 and *Bond v R* (2000) 201 CLR 213 that have involved the purported vesting of state executive power in officers of the Commonwealth.

7 *Commonwealth v Grunseit* (1943) 67 CLR 58, 82-3.

8 An interesting aspect of this passage is that it mentions the distinction between things of a 'legislative character' and the same sort of things that are of an 'executive character'. Post-*Boilermakers* separation of powers issues in Australia have been considered within the prism of differentiating judicial power from legislative or, more usually, executive power.

Commonwealth funding for school chaplaincy services, and which was created by and administered pursuant to various guidelines. The programme was neither created by nor administered pursuant to legislation.

Fundamental to any proper understanding of *Williams* is the clear aversion of the majority of the High Court to what French CJ described as 'the increasing use of government contracts for the performance of governmental functions and their use as a regulatory tool'.[9] His Honour contrasted this with the correlative decreasing use of legislation for the performance of governmental functions and regulation. The critical reasoning of Crennan J's judgment, it seems to me, emerges broadly from this underlying concern, and is largely to the same effect as that of French CJ. The centrality of s 96 of the *Constitution*[10] to the reasoning of Gummow and Bell JJ emerges, it seems to me, not only from the observation that the programme at issue in *Williams* operated in an area in which the states had sufficient power, and so the exercise of Commonwealth executive power was not 'necessary or essential'.[11] Underlying this, and critical also, is the understanding that the power under s 96 is for the Commonwealth *Parliament* to make grants on terms and conditions that the *Parliament* thinks fit.

As with French CJ and Crennan J, from Gummow and Bell JJ's judgment emerges a clear reservation about the use of executive power, in effect, in substitution of legislative power or in an area where the *Constitution,* in s 96, provides to the Commonwealth Parliament tools to effect a governmental purpose. It seems to me to follow from their Honours' repeated references to the centrality of s 96 to the division of power between the Commonwealth and the states that their Honours' shared the concern of French CJ and Crennan J about the erosion, undermining and subversion of legislative power, and parliamentary oversight of governmental power, by expansion of executive power.

Perhaps the clearest articulation of these sentiments is to be found in the wide ranging judgment of Hayne J.[12] His Honour, like Gummow and Bell JJ, attached great significance to s 96. For his Honour, the limitations of Commonwealth executive power emerge from a number of fundamental features of the *Constitution*. Foremost is the truism that the *Constitution* divides powers between the Commonwealth and the states. Most clear is the express division of legislative power with the Commonwealth Parliament having limited but prevailing legislative power. For his Honour, it followed that Commonwealth executive

9 (2012) 86 ALJR 713, 739-40 [77].

10 In essence that 'the [Commonwealth] Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

11 (2012) 86 ALJR 713, 751-2 [143]-[148].

12 Crennan J's judgment is (it seems to me) broadly to the same effect as that of French CJ, which is, in the respects here mentioned, similar to that of Gummow and Bell JJ. Kiefel J's judgment is (to my reckoning) to the same effect as that of Hayne J, though without the final paragraph that is re-produced.

power, too, is limited.[13] A further basal proposition evident from the scheme of the constitutional arrangement identified by his Honour is that it is for the Parliament, and not the executive, to control expenditure, and the Parliament

can control expenditure only by legislation.[14] Unlike French CJ, Crennan J and Gummow and Bell JJ (jointly), but like Kiefel J, Hayne J considered the Commonwealth's proposition that the funding agreement and the payments made pursuant to it fell within the hypothetical scope of s 51(xx) or s 51(xxiiiA) of the *Constitution* and were thereby valid. Of course his Honour, with Kiefel J, found that they did not fall within the scope of legislative power and that, accordingly, the funding agreement and payments were not valid exercises of the executive power of the Commonwealth.[15] This was enough to dispose of the matter, but his Honour went on to speculate, but tantalisingly not answer, whether there was a more 'fundamental reason'[16] why the Commonwealth lacked power, and left us with this:

> Sound governmental and administrative practice may well point to the desirability of regulating programs of the kind in issue in this case by legislation. At the least the difficulties that arise from applying tests that require the consideration of a hypothetical as distinct from an actual law made by the Parliament are avoided and the Parliament's control over expenditures is plainly asserted in a manner that is capable of review both within and beyond the Parliament. But to conclude that the *Constitution* requires that the Executive *never* spend money lawfully available for expenditure without legislative authority to do so is to decide a large and complex issue. It is better that it not be decided until it is necessary to do so. The conclusion that the impugned payments could not have been the subject of a valid law of the Parliament suffices to conclude the issues that have been raised.[17]

Williams is a most important decision, turning back a seemingly endless expansion of Commonwealth power. The express and emphatic rejection, by all judges, of a notion of unlimited Commonwealth executive power finally disposed of this heresy. A majority of the Court rejected what many had understood prior to the decision to form the limit of the Commonwealth executive power; that is, that executive power was limited only by the hypothesised scope of Commonwealth legislative power. This was clearly rejected by French CJ, Crennan J and Gummow and Bell JJ and likely also by Hayne and Kiefel JJ, though accepted by Heydon J.

A broad lesson from the majority judgments (if there is one) is that if the Commonwealth wishes, unproblematically, to exercise executive power it should

13 (2012) 86 ALJR 713,772 [251].
14 Ibid 772-3 [252].
15 Ibid 778 [286].
16 Ibid [287].
17 Ibid [288].

first legislate in respect of that matter and exercise executive power pursuant to that legislation – rather in the old fashioned way. It is doubtful whether this is also a lesson for the states. Even if relevant, plenary legislative power, including the power to legislate retrospectively, will deal with any problem for the states.

There are other lessons from *Williams* that outweigh even the thrill for a state Solicitor-General of a Commonwealth loss. The focus, in at least some of the judgments, on the centrality in the constitutional arrangement of s 96 has profound implications for the states. In effect, a majority of the Court determined that s 96 provides the means for the Commonwealth Parliament (and through it the Commonwealth executive) to enter into areas in which it would not otherwise have power. This focus on s 96 limits Commonwealth executive power to initiatives supported by the Commonwealth Parliament and, of course, only if agreed to by the relevant state or states.

The effect of *Williams* on the exercise of Commonwealth power is profound. *Williams* has already had repercussions for the way in which the Commonwealth operates. This can be demonstrated by the recent release by the Commonwealth of an Exposure Draft of the National Disability Insurance Scheme Bill 2012, which deals with 'launch sites' for the National Disability Insurance Scheme and the creation of the National Disability Scheme Launch Transition Agency. It is beyond any sensible doubt that prior to *Williams* the Commonwealth would not have considered launching this 'transitional arrangement' by means of legislation.

As to existing programmes, the immediate response of the Commonwealth to *Williams* was the enactment of the *Financial Framework Legislation Amendment Act (No.3) 2012* (Cth) ('the *FFL Act*'). The *FFL Act* inserts new provisions into the *Financial Management and Accountability Act 1997,* in particular s 32B, which provides that, if, apart from the section:

> (a) … the Commonwealth does not have power to make, vary or administer:
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> (i) an arrangement under which public money is, or may become, payable by the Commonwealth; or
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> (ii) a grant of financial assistance to a State or Territory; or
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> (iii) a grant of financial assistance to a person other than a State or Territory; and
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> (b) the arrangement or grant, as the case may be:
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> (i) is specified in the regulations; or
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> (ii) is included in a class of arrangements or grants, as the case may be, specified in the regulations; or
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> (iii) is for the purposes of a program specified in the regulations;

> the Commonwealth has power to make, vary or administer the arrangement or grant, as the case may be, subject to compliance with this Act, the regulations, Finance Minister's Orders, Special Instructions and any other law.

The regulations list hundreds of programmes and grants. It is doubtful indeed that all fall within a Commonwealth legislative head of power. An example is matter '407.013 - National School Chaplaincy and Student Welfare Programme'! Of course, days before the enactment of the *FFL Act*, Hayne and Kiefel JJ (though Heydon J *contra)* held that the contract entered into and the payments made pursuant to the National School Chaplaincy and Student Welfare Programme did not come within any head of Commonwealth legislative power.

Whether the *FFL Act* will achieve its purpose, or its purpose in all respects, will have to be seen, and will doubtless be considered by the High Court.

Even with the insights offered by the judgments in *Williams*, the definition of 'executive power' is elusive. Perhaps *Williams* further defines or qualifies one aspect of what we had thought it meant, at least for the Commonwealth. But, even so, a definition of executive power, even with an understanding of what is meant by 'constitutional power' and 'legislatively based administrative power', is opaque – and of course, I have deliberately not mentioned 'prerogative power', and the most dangerous of all, 'nationhood power'.

We should not, though, be too much disheartened by this ingenious vagueness. It is an important feature of our pragmatic colonial and constitutional gift. We are also I think befuddled by the contemporary notion of the *distinctness* of *separate* legislative, executive and judicial power. That contemporary notions can be distorting brings to mind the apt observation of Christina Thompson in a paper some years ago in the *Australian Review of Books:*

> A lot of people view the past as if it were an extension backwards of the present. But this is not true. The past was different. [18]

We have forgotten that this ideal of separation of power was not always so. As Laurie Marquet observed:

> What we tend to overlook or forget is that the English Constitution derives its genius from a *fusion* and not a *separation* of powers.[19]

It is important to recall that at the time of the enactment of Australian colonial constitutional legislation by the United Kingdom Parliament, and indeed at the

18 Christina Thompson, 'The Borrowers', The Australian's Review of Books, July 1999, 3.

19 L B Marquet, 'The Separation of Powers Doctrine and the Constitution of Western Australia' (1990) 20 *University of Western Australia Law Review* 445, 448 (emphasis in original).

time of federation, the United Kingdom did not, as part of its municipal law, have a constitutional arrangement in which the demarcation between legislative, executive and judicial power was crisp or, indeed, in which it was conceived that there were necessarily demarcations. Famously, a single individual, the Lord Chancellor, sat as the head of the judiciary, a senior member of Cabinet, a Minister administering a department[20] and the presiding officer of one of the houses of Parliament.

It can assuredly be said that the Third Marquess of Salisbury,[21] Prime Minister for most of the period 1885-1902, would have been bemused about such discussions, and, in particular, at an attempt to define executive power. It might be suspected that if asked to define executive power Lord Salisbury would have responded in the way that Justice Robertson did when asked to define federal jurisdiction:

> I, myself, have never been unduly troubled by identifying it. I have proceeded on the robust basis that if I was in a case then it was very likely to be in federal jurisdiction.[22]

Although droll, this observation also discloses another truth about identification of executive power; often it is simply understood as that which is done by the executive. But again, this is not a complete description and is certainly not 'confining'.

Salisbury was, of course, the last British Prime Minister without a seat in the House of Commons. Certainly in later years, he appeared to run the executive via the fiat of his nephew Balfour[23] and appointed judges, with the connivance of Lord Halsbury, largely on the basis of appointees' devotion and loyalty to the Tory Party.[24] He viewed legislation as an impediment to good government. It was from this milieu that Australian colonial administration and constitutional government emerged and evolved, but with added twists. However fused was the United Kingdom municipal arrangement, in the colonies, the position was, if anything, less separate.

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20 The complexity of this task can be seen in the recent biography of Sir Claude Schuster, the legendary head of the Lord Chancellor's Department; see Jean Hall and Douglas F. Martin, *Yes, Lord Chancellor – a Biography of Lord Schuster* (Barry Rose Law Publishers, 2003).

21 See generally, Andrew Roberts, *Salisbury – Victorian Titan* (Orion Publishing, 1999).

22 Address at the welcome to Robertson J. www.fedcourt.gov.au/_data/assets/rtf_file/0200/21566/Robertson-J-20110418.

23 Whose elevation was due to the patronage of his uncle, who prior to inheriting the Marquisate of Salisbury was known simply as Robert Arthur Talbot Gascoyne-Cecil, the Viscount Cranborne; and hence the common observation, to explain Balfour's rise – 'Well - Bob's your uncle'. Salisbury's later Cabinet also included a son and a son in law, while another son was in the outer ministry and another a member of the House of Commons; see generally, Kenneth Rose, *The Later Cecils* (Harper & Row, 1975).

24 See R F V Heuston, *Lives of the Lord Chancellors 1885-1940* (Clarendon Press, 1964) 34-5, 40-63. The letter of Salisbury to Halsbury reproduced at 57 refers (to the modern reader hilariously) to judicial appointments as follows: 'The judicial salad requires both legal oil and political vinegar, but disastrous effects will follow if due proportion is not followed.'

In this respect, the observation of Professor Pitt Cobbett is apt:[25]

> In England the prerogative powers of the Crown were at one time personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament. In Australia, however, these powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King; and yet they loom here larger than in the country of their origin. The explanation would seem to be that, in the scheme of colonial government, the powers of the Crown and the Prerogative really represent, - not any personal powers on the part of the Sovereign, - but those paramount powers which would naturally belong to a parent State in relation to the government of its dependencies; although owing to the failure of the common law to recognise the personality of the British 'State' these powers had to be asserted in the name and through the medium of the Crown. This, too, may serve to explain the distinction, subsequently referred to, between the 'general' prerogative of the Crown, which is still wielded by Ministers who represent the British State, and who are responsible to the British Parliament, – and what we may call the 'colonial' prerogative of the Crown, which, although consisting originally of powers reserved to the parent State, has with the evolution
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> of responsible government, been gradually converted to the use of the local executive, and so brought under the control of the local Legislature, except on some few points where the Governor is still required to act not as a local constitutional Sovereign but as an imperial officer and subject to an immediate responsibility to his imperial masters.[26]

Australian colonial constitutions, which imparted a degree of representative government, were initially meagre and were enacted as, and derived their force as, legislation of the constitutionally superior United Kingdom Parliament. This was explained by Dixon J with characteristic clarity in *Attorney-General (NSW) v Trethowan*,[27] though of course contemporary views are different[28] as Australia's non-colonial status has emerged and evolved.

The history of Western Australian constitutional legislation is illustrative of the confounding of executive, legislative and judicial power. The first constitutional

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25 And expressed to be so by Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill* (1999) 199 CLR 462, 499-500 [88].

26 Pitt Cobbett, 'The Crown as Representing the State' (1904) 1 *Commonwealth Law Review* 145, 146-7.

27 (1931) 44 CLR 394, 425-6. See also *A-G (WA) v Marquet* (2003) 217 CLR 545, 569-70 [65] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

28 Perhaps subject only to one matter discussed below.

instrument received the Royal Assent on 14 May 1829.[29] Pursuant to it, the Crown could authorise any three or more people to make laws for the colony. By an 1830 Order in Council, the Legislative Council was created. It comprised the Governor and four others appointed by the Governor. By Instructions sent at the same time, the same Governor and four others also comprised the Executive Council; and so there was a precise correlation between colonial legislative and executive power. Colonial legislation could only be proposed by the Governor, was required to be laid before the Houses of the United Kingdom Parliament and was subject to disallowance[30].

Minor changes were made until the 1829 Act was repealed in 1850. One of the founding and core instruments of Australian colonial government and history was the Act often referred to as the *Australian Constitutions Act 1842* (Imp).[31] By s 40 of this Act, the colonial governors of the colonies of New South Wales and Van Diemen's Land were obliged to act in accordance with instructions given to them by the United Kingdom executive government. Provisions of the *Australian Constitutions Act 1842* were extended to the colonies of Victoria, South Australia, and Western Australia by s 12 of (what is popularly referred to as) the *Australian Constitutions Act 1850* (Imp).[32] In particular, s 12 of the *Australian Constitutions Act 1850* extended to Victoria, South Australia, and Western Australia:

> all the Provisions [of the *Australian Constitutions Act 1842*]… concerning the giving and withholding of Her Majesty's Assent to Bills, and the Reservation of Bills for the Signification of Her Majesty's Pleasure thereon, and the Bills so reserved; the Instructions to be conveyed to the Governor for his Guidance in relation to the Matters aforesaid; and the Disallowance of Bills by Her Majesty.

So, not only were Australian colonial governors required to be 'guided' by Imperial instructions, there were extensive provisions dealing with the reservation of particular colonial bills for Royal Assent by the Imperial Crown, upon the advice of Imperial (that is, United Kingdom) ministers.[33]

Pursuant to s 12 of the *Australian Constitutions Act 1850, inter alia*, ss 31 and 32

29 10 Geo IV c 22.

30 See R D Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 4th ed, 1977) 37.

31 *An Act for the Better Government of New South Wales and Van Diemen's Land*, 5 & 6 Vict c.76.

32 *An Act for the Better Government of Her Majesty's Australian Colonies*, 13 & 14 Vict c.59. The 1842 Act was the first Constitution of an Australian Colony to provide for (a type of) representative government. See generally, A C V Melbourne and R B Joyce, *Early Constitutional Development in Australia* (University of Queensland Press, 1963) 269; Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910) 4-6.

33 One category of such reserved Bills was considered in *Yougarla v Western Australia* (1999) 21 WAR 488. See also, *Yougarla v Western Australia* (2001) 207 CLR 344.

of *Australian Constitutions Act 1842,* were picked up by and applied to Western Australia. Section 31 provided that the Governor could reserve any Bill for the 'Signification of Her Majesty's Pleasure thereon', and the Governor was required to reserve Bills relating to particular subject matters. Section 32 provided that Bills concerning the election of members of the Legislative Council, the qualifications of electors and elective members, the establishment of a bicameral legislature and the definition of the respective powers and functions of each House, were required to be reserved by the Governor and had no force or effect unless Her Majesty's Assent was given within two years of reservation.

Section 9 of the *Australian Constitutions Act 1850* provided that one-third of the members of the Council were to be appointed by the Crown and the rest 'elected by the Inhabitants of the Colony'. It was not until 1870 that a representative, in the sense of not predominantly appointed, Legislative Council was created in Western Australia, pursuant to the terms of the *Australian Constitutions Act 1850*.

In the meantime, in 1865, the United Kingdom Parliament enacted the *Colonial Laws Validity Act 1865* (Imp), a key component of the Australian constitutional arrangement until 1986.[34] The *Colonial Laws Validity Act 1865* provided that colonial legislation repugnant to an 'Act of Parliament, order, or regulation'[35] of the United Kingdom Parliament was and had always been void. Section 2[36] responded to the extravagant notions of Boothby J of the South Australian Supreme Court, who held, in a series of decisions, that colonial legislation inconsistent with the common law was void.[37] This heresy was remedied by ss 2 and 3 of the *Colonial Laws Validity Act 1865*,[38] though these provisions left the United

34 Section 3(1) of the *Australia Act 1986* (Cth) provided that the *Colonial Laws Validity Act 1865* 'shall not apply to any law made after the commencement of this Act by the Parliament of a State'. By s 2(1) of the *Statute of Westminster 1931* (UK), adopted by the *Statute of Westminster Adoption Act 1942* (Cth), the *Colonial Laws Validity Act 1865* did not 'apply to' any law made after 9 October 1942 by the Commonwealth Parliament.

35 See *Colonial Laws Validity Act 1865* (Imp), s 3.

36 Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

37 Boothby J was the last appointment to the South Australian bench made by the Colonial Office. His Honour ruled that the *Real Property Act* of 1857, which introduced the Torrens system of land registration to South Australia, was invalid. The enactment of the *Colonial Laws Validity Act 1865* (Imp) did not much alter his views. In 1861 both Houses of the South Australian Parliament separately passed addresses calling for his removal and he was ultimately removed on 29 July 1867. He appealed to the Privy Council but died before the appeal was heard.

38 Section 2 provided: 'Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative'. Section 3 provided: 'No colonial law shall be or be deemed

Kingdom executive with many tools to control 'errant' colonial legislatures. Of particular relevance was of course the power of reservation of Bills to London and the giving of instructions as to royal assent by London.

Section 4 of the *Colonial Laws Validity Act 1865* has often been misunderstood. It provided that:

> No colonial law, passed with the concurrence of or assented to by the Governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorising such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last mentioned instrument.

It should not be thought that this provision was intended to loosen the control of colonial administration from London. The provision was designed to, and did little more than, confirm the non-justiciability of instructions to colonial governors.[39]

As will come to be discussed, instructions to state Governors by or on behalf of Her Majesty by letters patent still form a central part of the Western Australian constitutional arrangement.

The story of the agitation in Western Australia following the 1870 reconstitution of the Legislative Council into a largely elective House up until the enactment of the two core Western Australian constitutional instruments, the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899*, has been told in many places, and succinctly by Quick and Garran.[40] The *Constitution Act 1889* derived its force and effect from the *Western Australian Constitution Act 1890* (Imp).[41] By s 2 'so much and such parts of' the *Australian Constitutions Act 1842* and the *Australian Constitutions Act 1850* 'as relate[d] to the colony of Western Australia' and were 'repugnant' to the *Constitution Act 1889* were repealed.[42] Even with this, validating legislation was enacted by the UK Parliament in 1907[43] which

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to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid'.

39 See the discussion in B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 157-60.

40 Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 69-71.

41 53 and 54 Vict. c 26.

42 See the general discussion in *Yougarla v Western Australia* (2001) 207 CLR 344, 354-8 [16]-[30] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

43 *Australian States Constitution Act 1907* (Imp) 7 Edw. c 7.

prospectively repealed provisions of the *Australian Constitutions Act 1842* and the *Australian Constitutions Act 1850*[44] and retrospectively validated certain Acts in respect of which there was some doubt.[45]

To add further complication was the federal inheritance. Professor Harrison Moore reminds us[46] that in the 1890s there was considerable agitation – which all came to nothing - to have the *Commonwealth Constitution* provide that all communications between state Governors and the monarch were to be through the Governor-General. Happily enough, this centralising notion was discarded, though until 1986, the monarch took advice from United Kingdom ministers on a range of matters, including the appointment of state Governors. This ceased with the enactment of the *Australia Acts 1986* and United Kingdom ministers ceased then to have any role in advising the monarch on state matters.[47]

Section 8 of the *Australia Acts 1986* also dealt with provisions of state constitutions relating to reservation and disallowance of state legislation:

> An Act of the Parliament of a State that has been assented to by the Governor of the State shall not, after the commencement of this Act, be subject to disallowance by Her Majesty, nor shall its operation be suspended pending the signification of Her Majesty's pleasure thereon.

Section 9 of the *Australia Acts 1986* provides:

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

These sections operate clearly enough. There is, however, a bit of interest in others.

Section 14(2) of the *Australia Acts 1986* provides that:

44 See Ibid, s 1(4) and the Schedule.

45 Ibid, s 2.

46 Harrison Moore, *The Constitution of the Commonwealth of Australia* (CF Maxwell, 1902) 287-8.

47 *Australia Acts 1986*, s 7(5): 'The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State'. *Australia Acts 1986*, s 10: 'After the commencement of this Act Her Majesty's Government in the United Kingdom shall have no responsibility for the government of any State'.

> Section 50 of the [*Constitution Act 1889* (WA)] is amended in subsection (3):
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> (a) by omitting from paragraph (a):
>
> (i) 'and Signet'; and
>
> (ii) 'constituted under Letters Patent under the Great Seal of the United Kingdom';
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> (b) by omitting from paragraph (b):
>
> (i) 'and Signet'; and
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> (ii) 'whenever and so long as the office of Governor is vacant or the Governor is incapable of discharging the duties of administration or has departed from Western Australia'; and
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> (c) by omitting from paragraph (c):
>
> (i) 'under the Great Seal of the United Kingdom'; and
>
> (ii) 'during a temporary absence of the Governor for a short period from the seat of Government or from the State'.

Section 14(3) of the *Australia Act 1986* makes other relatively minor changes to s 51 of the *Constitution Act 1889* (WA). So what – you ask? Well; it will be recalled that s 73(2) of the *Constitution Act 1889* famously provides for a stringent manner and form. It provides that:

> A Bill that —
> …
> (e) expressly or impliedly in any way affects any of the following sections of this Act, namely — sections 2, 3, 4, 50, 51 and 73,
>
> shall not be presented for assent by or in the name of the Queen unless —
>
> (f) the second and third readings of the Bill shall have been passed with the concurrence of an absolute majority of the whole number of the members for the time being of the Legislative Council and the Legislative Assembly, respectively; and
>
> (g) the Bill has also prior to such presentation been approved by the electors in accordance with this section, and a Bill assented to

> consequent upon its presentation in contravention of this subsection shall be of no effect as an Act.

Section 14 of the *Australia Acts 1986,* which amended ss 50 and 51 of the *Constitution Act 1889* (WA), was not subjected to the manner and form of s 73(2).

Of course, the *Australia Act 1986* (Cth) is a Commonwealth Act, and so s 109 applies; but the Commonwealth Act derives its validity from s 51(xxxviii) of the *Commonwealth Constitution* and so its validity is dependent upon a request, in this case from the Parliament of Western Australia – the *Australia Acts (Request) Act 1985* (WA). Any request to amend ss 50 or 51 of the *Constitution Act 1889* (WA) might be thought, in terms of s 73(2) of the *Constitution Act 1889* (WA), to 'expressly or impliedly in any way affect' ss 50 or 51.[48]

We now know, as a result of the outstanding scholarship, and intrepid snooping of Professor Twomey, that these issues were to the forefront of the minds of various legal advisers to government prior to the enactment of the *Australia Acts 1986.*[49] No point is served in me paraphrasing the product of the prodigious research of Professor Twomey, other than to state that the solution lies in the *Australia Act 1986* (UK). It is only the United Kingdom Act, passed when it was by a legislature superior to that created by the *Constitution Act 1889* (WA), that could have amended ss 50 and 51 without resort to s 73(2).[50]

It follows that the observation of Gleeson CJ, Gummow and Hayne JJ in *Sue v Hill*[51] that '…apparently out of a perceived need for abundant caution, legislation of the Westminster Parliament was sought and passed as the 1986 UK Act' is too broadly stated. Of course, their Honours were not making this observation in the context of s 14 of the *Australia Acts*, but too often, commentators and others construe *Sue v Hill* as determining that the United Kingdom Act is or was of no force or effect. It plainly is.

An Aspect of Executive Power in Western Australia

All Australian state constitutions contain intriguing inter-relationships between 'major participants' in the exercise of (some) executive power.

The Governor is of course referred to in the various Western Australian constitutional instruments; centrally in the *Constitution Act 1889*, which provides in s 50(1) that the Queen's representative in Western Australia is the Governor

48 See the discussion, in the Queensland context, in *Sharples v Arnison* [2002] 2 Qd R 444, 458 [25] McPherson JA (McMurdo P and Davies JA agreeing).

49 See Anne Twomey, *The Australia Acts 1986: Australia's Statutes of Independence* (Federation Press, 2010) 310-20 – which read like the breathless concluding pages of a first rate detective novel.

50 Compare the discussion in *Sharples v Arnison*, [2002] 2 Qd R 444, 458 [25].

51 *Sue v Hill* (1999) 199 CLR 462, 490-1 [61].

who shall hold office during Her Majesty's pleasure. As noted above, important provisions of s 50 were repealed by s 14 of the *Australia Acts 1986.* Many of these repealed provisions were reformulated in Letters Patent.

Following the *Australia Acts 1986,* Her Majesty issued *Letters Patent Relating to the Office of Governor of the State of Western Australia*. Indeed, the preamble to the Letters Patent recites that they arose as a result of the *Australia Acts 1986.* The Letters Patent (by clause I) revoked and replaced the Letters Patent and Instructions to the Governor that were then operative and which had operated since 29 October 1900. The Letters Patent are referred to in s 50(3)(c) of the *Constitution Act 1889*.[52]

Clause II of the Letters Patent also helpfully provides[53] that:

> There shall be a Governor of the State of Western Australia who shall be Our representative in the State.

This is all assisted by s 7 of the *Australia Acts 1986* which provides that:

> (1) Her Majesty's representative in each State shall be the Governor.
>
> (2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.
>
> (3) Subsection (2) above does not apply in relation to the power to appoint, and the power to terminate the appointment of, the Governor of a State.
>
> (4) While Her Majesty is personally present in a State, Her Majesty is not precluded from exercising any of Her powers and functions in respect of the State that are the subject of subsection (2) above.
>
> (5) The advice to Her Majesty in relation to the exercise of the powers and functions of Her Majesty in respect of a State shall be tendered by the Premier of the State.

The Governor is appointed by a commission issued by Her Majesty. This is reflected in s 50(3)(a) of the *Constitution Act 1889:*

> (3) In this Act and in every other Act a reference to the Governor shall

52 'In this Act and in every other Act a reference to the Governor shall be taken … to also include any other person exercising, by virtue of an appointment by the Governor in accordance with Letters Patent, any powers and authorities of the Governor'.

53 Though duplicates s 50(1) of the *Constitution Act 1889.*

be taken —

(a) to be a reference to the person appointed for the time being by the Queen by Commission under Her Majesty's Royal Sign Manual to the office of Governor of the State of Western Australia;

This is also reflected in clause V of the Letters Patent:

> The appointment of a person to the office of Governor shall be during Our Pleasure by Commission under Our Sign Manual.

In appointing the Governor, Her Majesty can only take the advice of the Premier,[54] and cannot be advised by 'Her Majesty's Government in the United Kingdom'.[55]

As will be discussed, it is an oddity of s 51 of the *Constitution Act 1889* that, although it is headed 'Instructions to Governor', it has nothing to do with instructions to the Governor. It substantively provides:

> In section 50 the expression 'Royal Sign Manual' means the signature or royal hand of the Sovereign.

The oath to be taken by the Governor is provided for in clause XVII of the Letters Patent, and the commission issued to the Governor is required by clause XXI of the Letters Patent to be published in the Government Gazette.

So far so good.

What though of the position of Lieutenant-Governor? Here the plot thickens.

The position of Lieutenant-Governor has an odd constitutional basis. Clause X of the Letters Patent provides that a Lieutenant-Governor may be appointed by Her Majesty, but such an appointment is not essential or necessary, and the position is not referred to in either the *Constitution Act 1889* or the *Constitution Acts Amendment Act 1899* or the *Australia Acts 1986*.

The position of Lieutenant-Governor cannot be understood without understanding two other positions; that of Administrator and of 'deputy of the Governor'.

It will be recalled that s 50(3) of the *Constitution Act 1889* provides that:

> (3) In this Act and in every other Act a reference to the Governor shall be taken —
>
> (a) to be a reference to the person appointed for the time being by the Queen by Commission under Her Majesty's Royal Sign Manual to the office of Governor of the State of

54 *Australia Acts 1986,* s 7(5).
55 Ibid s 10.

Western Australia; and

(b) to include any other person appointed by dormant or other Commission under the Royal Sign Manual to administer the Government of the State of Western Australia; and

(c) to also include any other person exercising, by virtue of an appointment by the Governor in accordance with Letters Patent, any powers and authorities of the Governor.

The positions of Lieutenant-Governor, Administrator and 'deputy of the Governor' are all referred to in the Letters Patent. By clause XVI, the Governor, with the consent of the Executive Council, can appoint a person to be deputy of the Governor for a period not exceeding six weeks. So, when the Governor is absent for a period of up to six weeks, a deputy is appointed. Clause XVI provides that the Governor 'may appoint' the Lieutenant-Governor to be the deputy of the Governor or if there is no Lieutenant-Governor, or if the Lieutenant-Governor is unable to act or is absent from the State, then the Chief Justice of Western Australia or the next most senior Judge present in the State and able to act. The appointment of deputy may be at large or be limited to certain powers only.

In addition to the Letters Patent, there exists a *Deputy Governor's Powers Act 1911* (WA). A similar Act was passed in South Australia in 1910 and the same Act passed in New Zealand in 1912. The history behind this is unknown to me, I regret to say. Hints are provided by the preamble to the *Deputy Governor's Powers Act 1911*[56] and from s 5 of the Act, which makes its provisions retrospective. The substantive provisions of the *Deputy Governor's Powers Act 1911* are broadly to the same effect as clause XVI of the Letters Patent, though the Act refers to 'temporary absence of the Governor from the seat of Government or from the State' without specifying a maximum period of temporary absence. Although the Act is entitled the *Deputy Governor's Powers Act 1911* there is in fact no position of 'Deputy Governor'. The position is expressed in the Act properly, as it is in the Letters Patent, as 'deputy of the Governor'.

The 'deputy of the Governor' is a position which falls within the description in s 50(3)(c) of the *Constitution Act 1889* of 'a person exercising, by virtue of an appointment by the Governor in accordance with Letters Patent, any powers and authorities of the Governor'.

The position of Administrator is different. It is provided for in clause XI of the Letters Patent:

An Administrator shall administer the government of the State if and

56 Which refers to '… doubts hav[ing] arisen as to the extent of the powers and authorities which any such Deputy if and when appointed may exercise, and it is desirable to set such doubts at rest'.

> so long as there is a vacancy in the office of Governor or the Governor is administering the government of the Commonwealth of Australia or, not having appointed a deputy under Clause XVI, is unable to act as Governor or is on leave or is absent from the State.

This appointment, too, likely falls within the description in s 50(3)(c) of the *Constitution Act 1889*; that is, it also includes a person 'exercising, by virtue of an appointment by the Governor in accordance with Letters Patent, any powers and authorities of the Governor'.

In practice, an Administrator is appointed where there is a vacancy in the office of Governor, or where the Governor is administering the Commonwealth pursuant to s 4 of the *Commonwealth Constitution*[57] or where the Governor is absent from Western Australia for longer than six weeks. If absence is for less than six weeks, a deputy of the Governor is appointed.

Again, the Letters Patent[58] provide that the Lieutenant-Governor shall be the Administrator, but if there is no Lieutenant-Governor, or if the Lieutenant-Governor is unable to act as Administrator or is absent from the State, then the Chief Justice of Western Australia, or the next most senior Judge present in the State and able to act, shall be the Administrator. Unlike a deputy of the Governor, an Administrator is required to have and be able to exercise the whole of the Governor's powers.

As noted above, there is reference in s 50(3)(b) of the *Constitution Act 1889,* where referring to the Governor, to 'any person appointed by dormant or other Commission under the Royal Sign Manual to administer the Government of the State of Western Australia'. The Royal Sign Manual is, as provided for in s 51 of the *Constitution Act 1889*, 'the signature or royal hand of the Sovereign'.

As it happens, there is a Dormant Commission in Western Australia. It revoked an earlier Dormant Commission dated 17 February 1920, was issued under the Royal Sign Manual on 4 August 1998 and gazetted on 20 November 1998.

It is issued to the Chief Justice of Western Australia for the time being or the next most senior Judge present in the State and able to act. By the Dormant Commission, the Chief Justice, or if he/she is unable to act, the next most senior Judge, is appointed to be the Administrator if the Governor has not appointed a deputy and there is a vacancy in the office of Governor, or the Governor is administering the Commonwealth pursuant to s 4 of the *Commonwealth Constitution*[59] or the Governor is absent from Western Australia on leave.

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57 Read with clause III of the Letters Patent Relating to the Office of Governor-General.
58 Clause XIII.
59 Read with clause III of the Letters Patent Relating to the Office of Governor-General.

Although the Dormant Commission exists, it has been the practice in Western Australia to appoint a deputy of the Governor or an Administrator when required, rather than to rely upon the Dormant Commission.

The Letters Patent and the Dormant Commission, in the terms that I have described, sideline the question of the desirability of the Chief Justice or any other judicial officer performing the functions of Governor. Pursuant to the Letters Patent and the Dormant Commission, the Chief Justice and other judges of the Supreme Court are required to act in certain circumstances. As such, and unless it is contended that either the Letters Patent or the Dormant Commission are invalid in some way, no purpose is served by me considering the (otherwise interesting question of the) desirability or propriety of judicial officers exercising these powers in Western Australia.

The Aspect of the Interrelationship between the Exercisers of Certain Executive Powers

I will deal with one specific issue; the appointment of Ministers, during the term of a government. Because this paper was prepared and will be published in the 'lead up' to a Western Australian state election, I will not detail here the position in respect of the forming of governments after elections. It is different, and more complicated.

Section 74 of the *Constitution Act 1889* (WA) provides, relevantly, that:

> The appointment to all public offices under the Government … shall be vested in the Governor in Council, with the exception of the appointments of officers liable to retire from office on political grounds, which appointments shall be vested in the Governor alone.

Ministers are 'officers liable to retire from office on political grounds'. This is confirmed by s 43 of the *Constitution Acts Amendment Act 1899* (WA) which provides:

> (1) There may be 17 principal executive offices of the Government liable to be vacated on political grounds, and no more.
>
> (2) The offices shall be such 17 offices as shall be designated and declared by the Governor in Council, from time to time, to be the 17 principal executive offices of the Government for the purposes of this Act.

Otherwise, the Constitution of Western Australia is obtuse as to the processes of appointment of Ministers. As regards the *Constitution Act 1889* and the *Constitution Acts Amendment Act 1899,* s 74 of the *Constitution Act 1889* (re-

produced above) deals most directly with the matter.

Clause III of the Letters Patent provides that:

> The Governor shall have and may exercise all the powers and functions which belong to the office of Governor or are to be performed by the Governor whether conferred by these Our Letters Patent, a law in force in the State or otherwise, including the power to constitute and appoint such Ministers, Judges, Magistrates, justices of the Peace and other necessary officers as may be lawfully constituted or appointed by Us.

The power exercisable in respect of Ministers is to constitute and appoint, and is to be understood as referring to the not more than 17 principal executive offices of the Government referred to in s 43 of the *Constitution Acts Amendment Act 1899.*

It has been the practice in Western Australia, upon changes in the Ministry during the term of a government, for the Premier to advise the Governor that a departing Minister has resigned and for the Governor, upon the advice of Executive Council, to appoint a new Minister. Immediately thereafter, pursuant to s 43 of the *Constitution Acts Amendment Act 1899,* the Governor then, on the advice of the Executive Council, designates and declares the new Ministry.

It is notable that s 74 of the *Constitution Act 1889* draws a distinction between 'appointment to all public offices under the Government' which is invested in the Governor in Council, and 'appointments of officers liable to retire from office on political grounds', which are vested in 'the Governor alone'. This sort of provision and distinction is common in Australian state constitutions and uniform in older constitutions.[60] Its meaning has received limited attention.

In 1977 the provision of the *Constitution Act 1867* (Qld) that was materially the same as s 74 of the *Constitution Act 1889* was amended. Like s 74, s 14 of the then Queensland *Constitution Act* provided (*inter alia*) that appointment of officers liable to retire from office on political grounds was vested in 'the Governor alone'. This provision was changed in 1977 to add a s 14(2), to the effect that officers liable to retire from office on political grounds were to hold office at the pleasure of the Governor who, in the exercise of his power to appoint (and dismiss) was not subject to direction by any person whatsoever nor limited as to his sources of advice[61].

60 This provision no longer exists in New South Wales, though it did until 1987; see, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 683; *Stewart v Ronalds* (2009) 259 ALR 86.

61 Professor Twomey traces the history of the 1977 Queensland constitutional amendments in a chapter entitled 'The Entrenchment of the Queen and Governor in the Queensland Constitution' in Michael White and Aladin Rahemtula (eds), *Queensland's Constitution: Past, Present and Future* (Supreme Court of Queensland Library, 2010) 185. At 199, Professor Twomey states that s 14(2) was a response to three separate concerns:

A former Governor of Queensland, Sir Walter Campbell, observed, with a degree of understatement, that:[62]

> It appears that there has not been any legislation enacted in the other Australian states corresponding to this 1977 Queensland provision as to the Governor not being subject to direction and not being limited as to his sources of advice.

One matter that emerges from the Queensland experience is that a provision which stated that a particular decision was vested in 'the Governor alone' does not mean (or, at least, necessarily mean), by the Governor in the absence of advice.

In *Stewart v Ronalds*, Allsop P, citing Professor Twomey, suggested that powers vested in the 'Governor alone' were actually exercised on the advice of the Premier, rather than on the advice of the Executive Council.[63] The cited passage from Professor Twomey relates to the meaning of this term in the context of the appointment of Ministers after an election where there has been a change of government. In this context, Professor Twomey suggests that advice cannot come from Executive Council because there will be a 'new' Executive Council. What emerges from Professor Twomey's analysis, which is common to the situations of appointment of Ministers after an election where there has been a change of government, appointment of Ministers after an election where the same party remains in government and appointment of Ministers during the term of a government, is that provisions to the effect that a particular decision is vested in 'the Governor alone' do not mean by the Governor in the absence of advice.

That this is so is confirmed I think by a few other snippets.

Versions of colonial Letters Patent, even after the attainment of responsible and representative government, granted express power to Australian colonial governors to reject advice from Executive Council. An example is referred to in *Toy v Musgrave*[64] where Victorian Letters Patent of 1879 expressly empowered the Governor to act 'in opposition to the advice given to him by the members of

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'The first was that the reserve power to dismiss a Government might be denied by the courts or abolished by legislation. Secondly, there was a concern that the Queen's powers might be assigned to the Governor-General who could then instruct a Governor to dismiss a Minister or the entire Government. The intention was to deny any attempts to direct the Governor. Thirdly, it was a response to the November 1975 crisis and criticism of Sir John Kerr for seeking the advice of the Chief Justice of the High Court. Sub-section 14(2) ensured that in a similar crisis in Queensland, the Governor could seek informal advice from any person although this would not amount to "responsible advice" for constitutional purposes'.

62 See Sir Walter Campbell, *Role of a State Governor* (15 October 2012) Australians for Constitutional Monarchy: Toowoomba Branch <www.ourconstitution.org/raipa_qld.php?pid=4>.

63 *Stewart v Ronalds* (2009) 259 ALR 86, 97 [37] citing Twomey, *The Constitution of New South Wales*, above n 60, 637.

64 *Toy v Musgrave* (1888) 14 VLR 349, 388 (Higginbotham CJ).

the Executive Council'. Such provisions no longer exist in Letters Patent and this omission is important. A further snippet is s 60 of the *Interpretation Act 1984* (WA) and provisions like it in other states. Section 60 provides:

> Where in a written law the Governor is authorised or required to do any act, matter, or thing, it shall be taken to mean that such act, matter, or thing may or shall be done by the Governor with the advice and consent of the Executive Council.

Section 60, and provisions like it are, of course, a little unclear – the formulation '*may or shall* be done … with the *advice and consent* of' leaves open a number of logical possibilities. One, that powers 'vested in the Governor alone' are exercisable only on the advice of Executive Council, has been arrived at by Professor Carney.[65] As noted, in the context of the appointment of Ministers after an election where there has been a change of government, the Governor is not advised by the former Executive Council. I should also note that there is a long standing, and I think unresolved, issue as to whether provisions such as s 60 of the *Interpretation Act 1984* (WA) have abolished certain reserve powers.[66] Of course, such provisions do not apply where 'the intent and object of the Act or something in the subject or context of the Act is inconsistent with such application', and so s 60 is not a complete answer in all contexts.

The power of appointment of Ministers during the term of a government, though expressed in s 74 of the *Constitution Act 1889* as being 'vested in the Governor alone', is exercisable by the Governor upon the advice of Executive Council.

If this is so, why then does s 74 of the *Constitution Act 1889* draw a distinction between appointments to 'public offices under the Government' that vest 'in the Governor in Council' and Ministers whose appointment 'vest in the Governor alone'? This difference in wording, derives, it seems to me, from brevity in dealing with an issue of timing, which is to be understood as follows. Of course, the Executive Council comprises Ministers. By clause VII of the Letters Patent, members of the Executive Council hold office during the Governor's pleasure. Upon changes in the Ministry during the term of a government, the Premier advises the Governor that a departing Minister has resigned. The Governor, upon the advice of Executive Council, then appoints a new Minister, and immediately thereafter the Governor, on the advice of Executive Council, designates and declares the new Ministry.[67] After an election, at which a government is not

65 Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 275 n 133.

66 See Twomey, *The Constitution of New South Wales*, above n 60, 223-4; George Winterton, 'The Constitutional Position of Australian State Governors' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book, 1992) 274, 291.

67 In 2012, this practice was not followed when a Minister did not resign. When a Minister resigns, the *Government Gazette* records that the Governor, acting on the Premier's advice, has received and accepted the resignation of the named Ministers, from a particular date. It

returned, to constitute the Ministry, being 'the officers liable to retire from office on political grounds', the Governor does not take the advice of Executive Council, because the new Ministers have not been appointed as members of the Executive Council, and so they cannot advise the Governor.

In such a circumstance, the practice in Western Australia has been unwavering; the Governor takes the advice of the outgoing Premier, who advises on the appointment of a new Premier, who then advises on the new Ministry.

Although the provision of improper advice is theoretically possible, adherence to principle has been a characteristic of Western Australian government and, no doubt, were it to occur, the Governor would seek the appropriate advice elsewhere.

Conclusion

In this article, I have sought to deal with the broad topic with a number of narrower specifics. I trust that these short analyses illustrate the ongoing interest and complexity of aspects of state executive power.

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then records that the Governor, in Executive Council, under section 43 of the *Constitution Acts Amendment Act 1899* has designated and declared that there shall be (from a particular date) not more than 17 principal executive offices of the government, and name these offices. It then records that the Governor has appointed named persons as Ministers and identified their Ministries and then identifies the whole of the Ministry and their portfolios. In the circumstance in 2012, the *Government Gazette* recorded that the former Minister had been removed from office by the Governor upon the advice of Executive Council and thereafter followed the usual form.