The States, the Commonwealth and the Crown – The Battle for Sovereignty

By Anne Twomey*

Federation and State Sovereignty

Before the Australian States were even formed, the battle for sovereignty had already begun. Some of the framers wanted a system akin to the Canadian one, where the Governor-General would be the senior British representative in Australia and all communications from the States to the Crown would go through the Governor-General. Others sought to maintain the sovereignty of the States through their direct and independent relationship with the United Kingdom and the Crown. In the end, they prevailed.

Sir Samuel Griffith made it clear that the term ‘Governor’ was used in the Constitution, rather than ‘Lieutenant-Governor’, in order to show that the ‘states are sovereign’¹ and maintained their independent links with the United Kingdom. Unlike the Canadian system, State Governors were to be appointed directly by the Queen, rather than by the Governor-General. The proposal that communications between State Governors and the monarch be passed through the Governor-General was defeated.²

The result was that in the federation established by the Commonwealth of Australia, sovereignty was shared.³ Both the Commonwealth and the States were sovereign within their own spheres. Each had an independent relationship with the Crown through the British Secretary of State for the Colonies. The Commonwealth had no say or involvement in matters such as the appointment or removal of State Governors, the reservation of State Bills or the disallowance of State laws. These were all dealt with by the monarch on the advice of British Ministers. The States preferred this outcome, because they regarded the British as being less politically interested in their affairs than the Commonwealth Government, and therefore more likely to be fair and reasonable in their dealings.

The Commonwealth, however, from the very beginning kept trying to claw back State sovereignty and assert its dominance over the States. If it could not control all State

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³ UK, ‘Report by the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia’, HC 88, *British Parliamentary Papers, 1934-5*, Vol 6, p 613, at para 8; *Broken Hill South Ltd v Commissioner of Taxation (NSW)* (1937) 56 CLR 337, per Evatt J at 378; and *New South Wales v Commonwealth* (1931) 46 CLR 155, per Evatt J at 220-1; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, per McHugh J at 451; *Austin v Commonwealth* (2003) 215 CLR 185, per McHugh J at [207]; and *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [65].
communications to the Crown, it at least wanted copies of them. The British Government agreed that State Governors should, at their discretion, copy their communications to the Governor-General if they concerned federal matters.\textsuperscript{4} This led to constant complaints by Governors-General that they were not receiving copied correspondence. In 1912, A B Keith explained to his masters in the Colonial Office that the ‘truth of course is that the Governor General has comparatively little work to do and therefore is naturally anxious to see as much correspondence as he can otherwise he has little of interest to read.’\textsuperscript{5}

The Statute of Westminster

The relationship between the Crown and its Dominions changed dramatically in the 1920s. The Governor-General ceased to be a representative of the British Government, and Dominion Ministers were permitted to advise the monarch directly on Dominion matters, including the appointment of the Governor-General, the reservation of Bills and the disallowance of laws.\textsuperscript{6} These changes culminated in the enactment of the Statute of Westminster 1931, which freed Dominion legislatures from the application of the Colonial Laws Validity Act 1865, so they were no longer bound by Imperial laws of paramount force, except for those of constitutional status. These changes, however, did not apply to the Australian States.\textsuperscript{7}

The States are often unfairly criticised for not lobbying to be given the legislative freedom granted by the Statute of Westminster. However, they had good reasons for not doing so.

- First, Western Australia, South Australia and Tasmania wanted British legislative protection from Commonwealth abuse of power and to be able to seek British legislation to allow them to secede from the Commonwealth.\textsuperscript{8}
- Secondly, without the application of the Colonial Laws Validity Act, the States would not be able to entrench provisions of their own Constitutions, such as those entrenching the existence or the abolition of an upper House.
- Thirdly, the British Parliament would only relinquish its legislative power over State matters if it no longer had executive responsibility for State matters. As neither the King, nor the British Government, was prepared to let State Ministers advise the King directly about State matters, the only substitute for British Ministers would be Commonwealth Ministers, or the delegation of the King’s powers to the Governor-General, as in Canada. Neither result was acceptable to

\textsuperscript{4} Despatch by the Colonial Secretary, Mr Chamberlain, to the Governor of South Australia, 11 March 1901.
\textsuperscript{5} Minute by A B Keith, Colonial Office, to Mr Davis, January 1912.
\textsuperscript{6} See the Imperial Conferences of 1926 and 1930.
\textsuperscript{7} The position was different in Canada, as it was the Canadian Governor-General who dealt with matters such as the appointment and removal of provincial Lieutenant-Governors and the reservation of provincial Bills or the disallowance of provincial laws. As the British Government and the monarch had no involvement in these matters, there was no issue of change. There was also no problem with giving provincial legislatures the same legislative freedom under the Statute of Westminster, as there was no need for British legislative power to support any executive responsibility with respect to the Provinces.
\textsuperscript{8} See, for example: Memorandum by WA Attorney-General to WA Premier, 1 October 1931; Letters by SA Agent-General, Sir H Barwell, to the SA Treasurer, 16 April 1931 and 14 May 1931; and Letter by Tasmanian Premier to Mr Lyons, Commonwealth Opposition Leader, 7 August 1931.
the States, as it would subordinate them to the Commonwealth and they would lose their sovereign status.

So the States remained under the British Crown, leaving all these arguments to arise again in the negotiation of the *Australia Acts* half a century later.

The States continued to take comfort in the belief that the British Government, being so far away and disinterested in their affairs, would act as a trustee, to protect their interests but not to interfere in them. As Australia gained its independence, this belief became treated as convention. Australian history books, politics books and constitutional law books all stated that the British Government merely acted as a ‘channel of communication’ in putting State advice to the monarch about State matters, and that it would be a breach of ‘convention’ for it to act independently or in its own interests in doing so.\(^9\)

In the United Kingdom a completely different view was taken. British Ministers considered that if they advised the monarch on a matter, including an Australian State matter, they were responsible to the Westminster Parliament for that advice and were therefore under an obligation to give their own independent advice and to take into account the interests of the British Government. As long as State matters remained uncontroversial, this difference of view was not apparent. In the 1970s, however, with the election of the Whitlam Government, matters became very controversial indeed and the cracks in convention became chasms.

**The Whitlam Government**

The Whitlam Government, upon its election, faced an interesting dilemma. On the one hand, it wanted to sweep away all colonial relics. On the other hand, it wanted to subordinate the States. This led to a piecemeal approach, with the Whitlam Government first seeking the termination of Privy Council appeals and references from the States.

**The Colonial Laws Validity Act**

The British Government did not appreciate this fragmented approach. It wanted all matters dealt with together. The Lord Chancellor put this directly to Gough Whitlam

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when they met in London on 24 April 1973. Lord Hailsham asked him why he would not ‘do a job of it’ and ‘cut the painter’. The formal UK record of the meeting states:

Mr Whitlam said that in some respects his government did not mind the Australian States having a residual colonial status since this helped to make clear that they were not fully sovereign. For this reason he did not at present want to press for the abolition of the application to the States of the *Colonial Laws Validity Act* since to do so might seem to increase the claim of the States to sovereignty.

The British Prime Minister, Edward Heath, noted in his personal record of a meeting with Whitlam on the same day:

I then asked him about Section 2 of the Colonial Laws Validity Act, to which he replied that he did not wish to have this repealed, certainly not before they had been able to consider legislation in Canberra to take its place. If the United Kingdom Parliament were to repeal Section 2 of the Colonial Laws Validity Act, it would only increase the actual powers of the states and this he strongly opposed. It was only when his Government had been able to take the powers away from the states that he would wish Section 2 of the Colonial Laws Validity Act to be repealed in respect of the states. I refrained from commenting on this desire to retain legislation which was not only colonial in aspect but colonial in title.

*The channel of communication*

The Whitlam Government also pressed for all vice-regal communications between the States and the United Kingdom to be made through the Governor-General. The next British Prime Minister, Harold Wilson, gave this proposal short shrift, replying that as long as the British Government remained responsible for advising the Queen on State matters, State communications on these matters had to go through it, rather than the Governor-General. The British Government was not prepared to change its constitutional relationship with the States without their agreement. The Whitlam Government had not realised that British Ministers played a substantive role in State affairs, and had mistakenly regarded their role as a mere formality.

At a meeting between Prime Ministers Whitlam and Wilson on 20 December 1974, Whitlam suggested that the Governor-General could be a ‘post-box’ for State recommendations to the Queen. The British Foreign Secretary, James Callaghan, pointed out that only Ministers could advise the Queen, so the consequence of this proposal

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10 UK note of meeting on 24 April 1973, between Mr Whitlam, Sir A Douglas-Home, Lord Hailsham, Sir Peter Rawlinson QC, and various officers.
11 *Ibid*.
12 Memorandum by Mr Heath on his meeting with Mr Whitlam, 24 April 1973.
13 Letter by Mr Whitlam to Mr Wilson, 6 June 1974.
14 Letter by Mr Wilson to Mr Whitlam, 1 August 1974.
would be that State Ministers would be advising the Queen, increasing their power and sovereignty.\textsuperscript{15} This thought disconcerted Whitlam, who then suggested that the Governor-General take on all the powers of the British Government with respect to the States, making him a Viceroy. He said that he was happy to vest such an important power in his trusted Governor-General, Sir John Kerr, whose appointment, he noted, had been roundly ‘applauded’.\textsuperscript{16}

**The seabed petitions**

The British were not prepared to change the status of the States without their agreement. That status was of a colonial dependency of the British Crown. This was confirmed during the seabed controversy. In 1973 Queensland and Tasmania petitioned the Queen to refer to the Privy Council, for an advisory opinion, the question of who owned the seabed adjacent to the States. The States claimed that they were petitioning the Queen as Queen of Tasmania and Queen of Queensland. The Whitlam Government claimed that it was an Australian matter, so the ‘Queen of Australia’ should decide it and she could only be advised by Commonwealth Ministers.

The Queen referred the petition to her British Ministers for advice. The British Cabinet concluded that Her Majesty was not Queen of each State, as State Ministers could not directly advise her. It also concluded that the Australian States remained dependencies of the British Crown and that it was the Queen of the United Kingdom who performed functions with respect to the States, on the advice of British Ministers. The ‘Queen of Australia’ only had powers with respect to Commonwealth matters, not State matters. Finally, it concluded that Commonwealth Ministers also had a right to advise her in her capacity as Queen of Australia, because the Commonwealth also claimed ownership of the seabed and therefore had an interest in the matter.\textsuperscript{17}

In making its decision on how to advise the Queen, the British Cabinet also accepted that the British Government’s own political and strategic interests should be taken into account. These included not upsetting political relations with the Commonwealth, and avoiding the application to itself of any Privy Council opinion on the law concerning the ownership of the seabed.\textsuperscript{18} It did not regard itself as a mere ‘channel of communication’ for State issues. Nor did it consider that it was under an obligation to act in the best interests of the States without regard to its own interests.

The British Foreign Secretary advised the Queen not to refer the petition to the Privy Council, as did Commonwealth Ministers. The Queen accepted the advice of both sets of

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\textsuperscript{15} UK record of meeting between Mr Wilson and Mr Whitlam, 20 December 1974.
\textsuperscript{16} Australian note of meeting between Mr Whitlam and Mr Wilson, 20 December 1974.
\textsuperscript{17} Record of meeting of the UK Defence and Overseas Policy Cabinet Committee, 30 July 1973.
\textsuperscript{18} Opinion of the UK Attorney-General, Sir P Rawlinson, 27 July 1973; and Cabinet Minute, DOP(73) 77, 17 December 1973.
Ministers, effectively rejecting the argument of Commonwealth Ministers that they alone had the right to advise her on the matter.\textsuperscript{19}

Nonetheless the Commonwealth tried hard to ‘spin’ the impression that the Queen had accepted the argument that only Commonwealth Ministers could advise her on Australian matters, including State matters. It even tried to get the Queen to do so by inserting a reference to her acceptance of Australian advice in her speech on the opening of the Commonwealth Parliament. It was changed by the Queen’s Private Secretary ‘for the sake of truth’.\textsuperscript{20}

**Other controversies**

There were other incidents that showed the States that the British Government gave independent advice to the Queen on State matters. The British Government rejected Joh Bjelke-Petersen’s advice to extend the term of the Queensland Governor, Sir Colin Hannah, in 1976,\textsuperscript{21} and seriously considered sacking Sir Colin for involving himself in local politics by criticising the Whitlam Government. It was only the dismissal of the Whitlam Government that saved him, because British officials considered that it would be hard to sack Hannah when Sir John Kerr had involved himself far more spectacularly in local politics.\textsuperscript{22} Bjelke-Petersen later confessed to a Premiers’ Conference that until that point he had always believed that he was the one advising the Queen about such matters, and it was a surprise to learn that the British Government gave its own independent advice to the Queen.\textsuperscript{23}

In 1979, the British Foreign Secretary also threatened to advise the Queen to refuse royal assent to two New South Wales Bills if they were reserved.\textsuperscript{24} One concerned the termination of appeals to the Privy Council from State courts. The other proposed Bill required that the Queen act on the advice of State Ministers in appointing the State Governor. British officials were concerned that if the States could advise the Queen directly, she would become Queen of each State and each State would become a Realm of the Crown on an equal footing with the Commonwealth.\textsuperscript{25} It was argued that this


\textsuperscript{20} Letter by Sir M Charteris, Buckingham Palace, to Mr Wright, No 10 Downing St, 27 December 1974.

\textsuperscript{21} Letter by the UK Foreign Secretary, Mr Callaghan, to Sir C Hannah, 16 January 1976.


\textsuperscript{23} Transcript of the Premiers’ Conference, 24 June 1982, p 44. See also his previous assertion that the Queen appointed State Governors on the Premier’s advice: Qld, *Parliamentary Debates*, Legislative Assembly, 28 October 1975, p 1520

\textsuperscript{24} Letter by Lord Carrington to Sir R Cutler, 19 November 1979.

\textsuperscript{25} Memorandum by Mr Whomersley, Legal Adviser, FCO, to Mr Britten, FCO, 20 September 1978. See also: NSW, ‘Minute of Meeting with UK Officers re Abolition of Privy Council Appeals and Appointment of Governor’, 27 September 1979, p 5; and Memorandum by Mr Upton, FCO, to Dr Hay, Research Dept, FCO, 12 March 1980.
would unbalance the federal structure and that such action could not be taken without Commonwealth agreement.  

Unfortunately, the Governor, Sir Roden Cutler, received this despatch from the British Foreign Secretary on the same day that the *Privy Council Appeals Abolition Bill*, which had already passed both Houses, was sent to him for assent. The Wran Government balked at the idea of its Bill being refused assent, so it did not provide the necessary certificate needed for the assent process to proceed. The Bill was left in legislative limbo in the Governor’s desk drawer. Nervous British officials waited for the Bill to arrive, checking to see if there were any postal strikes, but it never came.  

British diplomats in Australia later boasted that they were pursuing a ‘policy of masterly inactivity’ on the matter.  

After many more diplomatic skirmishes and a bit of provocation on the part of the NSW Government, its proposal to require the Queen to act on the advice of State Ministers was eventually dropped. One British official concluded that:

> New South Wales authorities, who had clearly been trying to pull a fast one, and were not really very surprised to be caught, simply gave in.

In the many discussions between New South Wales and British officials on the issue, it was made abundantly clear that the British Government would give independent advice to the Queen on reserved State Bills, and that if it regarded them as ‘unconstitutional’, it would not advise her to assent.  

**The *Australia Acts* 1986 and sovereignty – a battle won**

These events spurred the States to reach agreement on the *Australia Acts* to terminate the United Kingdom’s role with regard to the States. However, this raised the same dilemma that arose during the enactment of the *Statute of Westminster*. If British Ministers were no longer to advise the Queen upon State issues, who would replace them? The Fraser Government argued that Commonwealth Ministers should replace them. This was not acceptable to the States.

Later, the Hawke Government suggested that the Prime Minister act as a ‘post-box’ in passing on State recommendations to the Queen. This proposal was subsequently scotched by the Department of the Prime Minister and Cabinet, on the ground that the Prime Minister would remain politically responsible for unpalatable State advice.  

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26 Telegram by Sir D Murray, FCO, to Sir D Tebbit, UK High Commissioner, Canberra, 16 November 1979.  
27 It was eventually annulled by the *Constitutional Legislation (Repeal) Act* 1985 (NSW). See the more detailed account in A Twomey, *The Chameleon Crown – The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), Ch 14.  
28 Memorandum by Mr Spire, UK Consulate, Sydney, to Mr Baylis, FCO, 6 March 1980.  
29 Minute by Mr Upton, FCO, 7 February 1983.  
was told that if the Queensland Government wanted Sir John Kerr to be appointed as its next Governor, Hawke would have to make the formal recommendation and defend it in the Parliament. This was a bridge too far for Hawke and the end of the post-box solution.

The States insisted that they should advise the Queen directly on State matters. This was not acceptable to Buckingham Palace, which was concerned about the Queen receiving conflicting advice from Commonwealth and State Ministers. The Palace also argued that it would be “unconstitutional” for the Queen to receive advice from persons who were not Ministers of an independent country.\textsuperscript{31}

The British Crown Law Officers responded that ‘independence’ was not relevant, as the Dominions had first started advising the monarch directly before they became completely independent. Moreover, the Crown Law Officers pointed out that in a federation, sovereignty is shared, and that the State of Victoria had been treated by the British courts as an independent state for the purposes of a claim of Crown immunity.\textsuperscript{32}

Sir Antony Acland, the Permanent Head of the Foreign Office, wrote to the Queen’s Private Secretary explaining that in a true federation, State Ministers can just as much be Ministers of the country as Federal Ministers. The States were not inferior in status to the Commonwealth and State Ministers were not necessarily disqualified from advising the Crown on matters within their exclusive competence. He concluded:

As we see it, the relationship of Her Majesty with the Government (or Governments) of a country of which she is Queen is a matter of that country’s domestic affairs. Australia as a whole is independent. When the United Kingdom bows out, the Government of that independent country will comprise all Australia’s Governments (Commonwealth and State) – in other words ‘independence’ and ‘sovereignty’ will not be the prerogative solely of Commonwealth Ministers.\textsuperscript{33}

After years of argument and negotiation, this view was reached in Australia as well. The Commonwealth Government agreed that the States should advise the Queen directly about State matters. Senator Evans, in trying to convince the Palace that this was an acceptable proposal, explained that:

The States are jealous of their sovereignty, and the Commonwealth has no wish to impinge upon it. The States are not prepared to solve one offence by committing themselves to another – that is by handing to the Australian Prime Minister the right to recommend or block appointments of State Governors who, in the States,

\textsuperscript{31} Letter by Sir P Moore, Buckingham Palace, to Sir A Acland, Permanent Under-Secretary, FCO, 2 March 1984.
\textsuperscript{32} Brief to the UK Attorney-General, 22 March 1984. See also the Memorandum by Mr Chick, FCO, to Mr Boyd, FCO, 14 September 1984, where he observed that the sovereignty argument would ‘strike an Australian as showing an inability to understand a federation where sovereignty is divided between the States and the Commonwealth’.
\textsuperscript{33} Letter by Sir A Acland, Permanent Under-Secretary, FCO, to Sir P Moore, Buckingham Palace, 14 February 1984.
exercise significant constitutional authority. Any such solution would run counter to the nature and history of federation in Australia as shown by the express provisions of the Commonwealth Constitution continuing the constitutions and residual sovereign powers of each State.\textsuperscript{34}

The formal advice to the Queen from Prime Minister Hawke also stressed the nature of the federal system and recognised the importance of maintaining the ‘sovereign identities and powers’ of the States within their constitutional limits. He concluded that it was therefore necessary for the States to advise the Queen directly.\textsuperscript{35}

Section 7 of the Australia Acts now gives the States the power to advise the Queen directly on State matters – the same power that was regarded by Whitlam as dangerously increasing the status of the States and was regarded by the British Government as establishing independent Realms and Crowns.

The States not only had a victory in maintaining their own sovereign status and independent relationship with the Crown. More important was s 15 of the Australia Acts 1986, which secured their place in Australian sovereignty. The original source of the Commonwealth Constitution was the sovereignty of the Westminster Parliament. The Commonwealth Constitution was legally binding because it was a British law of paramount force. British legislative supremacy over Australia was diminished by the Statute of Westminster, but was terminated by the Australia Acts.

The power to amend or repeal those fundamental statutes that form our Constitution, the Commonwealth of Australia Constitution Act 1900, the Statute of Westminster 1931, and the Australia Acts 1986 was transferred by s 15 of the Australia Act 1986 (UK) not to the Commonwealth but collectively to the Commonwealth and all the State Parliaments. If all the State Parliaments request the Commonwealth Parliament to do so, it can now amend or repeal these foundational constitutional provisions. This is the ultimate recognition that no matter how much our federal system is trammelled and distorted by Commonwealth laws or High Court decisions, sovereignty in Australia remains vested collectively in the Commonwealth and the States.

\textsuperscript{34} Commonwealth Government, ‘Aide-Memoire’ provided by Senator Evans to Sir P Moore, February 1985.

\textsuperscript{35} Letter by Mr Hawke, to Her Majesty, 31 July 1985.