QUEEN OF AUSTRALIA

The title, role and legal aspects of the Queen of Australia are not well understood by most Australians including those who advocate a republic and by most of those employed within the media industry.

The purpose of this page is to help Australians get a better understanding of the legal role of the Queen in her capacity as the Queen of Australia. To refer to the Queen of Australia as the the British Queen, the English Queen or the foreign monarch is fallacious when considering the Queen's role as outlined in the Australian Constitution and the several laws of Australia that relate to constitutional matters.

There are several documents that legally confirm the Queen's role as Queen of Australia. Some of those aspects are addressed below.

Constitutional Commission 1988

The following is an extract from Volume 1 of the Final Report of the Constitutional Commission 1988. The report was forwarded to the the then Attorney-General of the Commonwealth of Australia, The Hon Lionel Bowen MP, on 30 June 1988. Authors of the report include Sir Maurice Byers CBE QC, Professor Enid Campbell OBE, The Hon Sir Rupert Hamer KCMG, The Hon E G Whitlam AC QC and Professor Leslie Zines. The Constitutional Commission 1988 report is available at the Mitchell Library in Sydney and should also be available at any other notable library or educational institution.

Title: Final Report of the Constitutional Commission 1988

AGPS cat. no 8827561 (2 vols.)

ISBN 0644068981 (v.2), 0644069015 (set); 0644068973 (v.1)

Effect of independent nationhood

2.129 The sovereign status of Australia resulted in the rejection of earlier colonial restrictions on the interpretation of the powers of the Commonwealth. It has been declared by a number of High Court judges

that the Governor-General, as the Queen's representative, possesses the prerogatives of the Crown relevant to the Federal Government's sphere of responsibility, which includes, for example, all matters relating to external affairs.[102]

2.130 The development of Australian nationhood did not require any change to the Australian Constitution. It involved, in part, the abolition of limitations on constitutional power that were imposed from outside the Constitution, such as the Colonial Laws Validity Act 1865 (Imp) and restricting what otherwise would have been the proper interpretation of the Constitution, by virtue of Australia's status as part of the Empire. When the Empire ended and national status emerged, the external restrictions ceased, and constitutional powers could be given their full scope.

2.131 Sir Garfield Barwick has described the result, in relation to the Framers' purpose in drafting the Constitution as follows:

The Constitution was not devised for the immediate independence of a nation. It was conceived as the Constitution of an autonomous Dominion within the then British Empire. Its founders were not to know of the two world wars which would bring that Empire to an end. But they had national independence in mind. Quite apart from the possible disappearance of the Empire, they could confidently expect not only continuing autonomy but approaching independence. This came within 30 years. They devised a Constitution which would serve an independent nation. It has done so, and still does.[103]

2.132 As a result of federal legislation all appeals to the Privy Council from Australian courts exercising federal jurisdiction were abolished in 1968 (Privy Council (Limitation of Appeals/Act 1968 (Cth)). All appeals from any decision of the High Court (other than those where a certificate might be granted under section 74 of the Constitution) were terminated by the Privy Council (Appeals from the High Court) Act 1975 (Cth).

2.133 The growth to full national status, of course, did not affect the position of the Commonwealth as a community under the Crown. While the preceding events dissolved most of the constitutional links with the British Government, those with the Sovereign remain.

2.134 Indeed the notion of the Crown pervades the Constitution. The preamble recites that the people of the named colonies had agreed to unite in a Federal Commonwealth under the Crown. The Queen is empowered by section 2 of the Constitution to appoint a Governor-General who 'shall be Her Majesty's representative'. Section 61 of the Constitution vests the

executive power of the Commonwealth in the Queen and declares that it is exercisable by the Governor-General as the Queen's representative.

2.135 These powers are, of course, consistent with British constitutional practice, exercised on the advice of Australian Ministers (except in those very rare cases which are said to come within the 'reserve powers' of the Crown). On those occasions when the Queen acts in her own capacity, such as in appointing the Governor-General, she also acts on the advice of Australian Ministers, rather than British ones, in accordance with the principle established at the Imperial Conference of 1926.

2.136 The position of the Queen as the Sovereign of a number of independent realms was recognised at a conference of Prime Ministers and other representatives of the nations of the Commonwealth in December 1952 where it was agreed that each country should adopt a form of Royal title suitable to its own circumstances. As a result, the legislation of each country of the Commonwealth (other than Pakistan which expected to become a republic) included for the first time a reference in its Royal Style and Titles to the particular country which enacted the legislation.

2.137 The Royal Style and Titles Act 1953 (Cth), therefore, for the first time referred to the Queen as 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. As a result of amendments made in 1973 (Royal Style and Titles Act 1973) the present Royal Style and Titles in Australia are 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.'

2.138 The disappearance of the British Empire has therefore meant that the Queen is now Sovereign of a number of separate countries such as the United Kingdom, Canada, Australia, New Zealand and Papua New Guinea, amongst others. As Queen of Australia she holds an entirely distinct and different position from that which she holds as Queen of the United Kingdom or Canada. The separation of these 'Crowns' is underlined by the comment of Gibbs CJ in Pochi v Macphee[104] that 'The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia.'

Notes:

(Click on note number to go back to that paragraph)

[102] eg Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J); Victoria v Commonwealth and Hayden (1975) 134 CLR 338, 406 (Jacobs J); New South Wales v Commonwealth (1975) 135 CLR 337.373 (Barwick C J).

[103] PH Lane, The Australian Constitution (1986) viii.

[104] (1982) 151 CLR 101,109.

Royal Style and Titles Act 1953

(The Royal Style and Titles Act 1953 was repealed
by the Statute Law Revision Act 1973 (No. 216, 1973)
vide the enactment of the Royal Style and Titles Act 1973)

Royal Style and Titles Act 1953

No. 32 of 1953.

An Act relating to the Royal Style and Titles

[Reserved for Her Majesty's pleasure, 18th March, 1953.]

[Queen's Assent, 3rd April, 1953.] [Queen's Assent proclaimed, 7th May, 1953,]

Preamble

WHEREAS it was recited in the preamble to the Statute of Westminster, 1931 that it would be in accord with the established constitutional position of all the members of the British Commonwealth of Nations in relation to one another that any alteration in the law touching the Royal Style and Titles should, after the enactment of that Act, "require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom":

AND WHEREAS the Style and Titles appertaining to the Crown at the time of the enactment of the Statute of Westminster, 1931 had been declared by His then Majesty King George V in a Proclamation in pursuance of the Royal and Parliamentary Titles Act, 1927 of the United Kingdom, and were, in consequence of the establishment of the Republic of India, subsequently altered with the assent as well of the Parliaments of Canada, Australia, New Zealand and the Union of South Africa as of the Parliament of the United Kingdom:

AND WHEREAS it was agreed between the Prime Ministers and other representatives of Her Majesty's Governments in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon assembled in London in the month of December, One thousand nine hundred and fifty-two, that the Style and Titles at present appertaining to the Crown are not in accord with current constitutional relationships within the British Commonwealth and that there is a need for a new form which would, in particular, "reflect the special position of the Sovereign as Head of the Commonwealth":

AND WHEREAS it was concluded by the Prime Ministers and other representatives that, in the present stage of development of the British Commonwealth relationship it would be in accord with the established constitutional position that each member country should use for its own purposes a form of the Royal Style and Titles which suits its own particular circumstances but retains a substantial element which is common to all:

AND WHEREAS it was further agreed by the Prime Ministers and other representatives that the various forms of the Royal Style and Titles should, in addition to the appropriate territorial designation, have as their common element the description of the Sovereign as "Queen of Her other Realms and Territories and Head of the Commonwealth":

AND WHEREAS it was further agreed by the Prime Ministers and other representatives that the procedure of prior consultation between all Governments of the British Commonwealth should be followed in future if occasion arose to propose a change in the form of the Royal Style and Titles used in any country of the British Commonwealth:

Be it therefore enacted by the Queen's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia as follows:-

Short title

1. This Act may be cited as the Royal Style and Titles Act 1953.

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.

Definition

3. In this Act, "the United Kingdom" means the United Kingdom of Great Britain and Northern Ireland.

Assent to adoption of Royal Style and Titles in relation to Australia

4.
(1.) The assent of the Parliament is hereby given to the adoption by Her Majesty, for use in relation to the Commonwealth of Australia and its Territories, in lieu of the Style and Titles at present appertaining to the Crown, of the Style and Titles set forth in the Schedule to this Act, and to

the issue for that purpose by Her Majesty of Her Royal Proclamation under such seal as Her Majesty by Warrant appoints.

(2.) The Proclamation referred to in the last preceding sub-section shall be published in the Gazette and shall have effect from the date upon which it is so published.

Assent to adoption of Royal Style and Titles in relation to other countries of British Commonwealth

5. The assent of the Parliament is hereby given to the adoption by Her Majesty, for use in relation to Her other Realms and Territories, in lieu of the Style and Titles at present appertaining to the Crown, of such Style and Titles as Her Majesty thinks fit, in accordance with the principles that were formulated by the Prime Ministers and other representatives of British Commonwealth Countries assembled in London, as recited in the Preamble to Act.

THE SCHEDULE

The Royal Style and Titles

Elizabeth the Second, by the Grace of God of the United Kingdom, Australia
and Her other Realms and Territories Queen,
Head of the Commonwealth, Defender of the Faith.

High Court of Australia Decision
Sue V Hill

The following is an extract of the High Court decision (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ - Sue v Hill [1999] HCA 30 - 23 June 1999 - S179/1998 and B49/1998) relating to the Henry (Nai Leung) Sue - Petitioner and Heather Hill & ANOR Respondents case in which Heather Hill lost her right to take her place in the Senate post the 1998 Federal election.

The High Court confirmed that the Queen of Australia does not act as a foreign Queen. One of the main arguments that was raised by Heather Hill was that the Queen of Australia is the same person as the Queen of the United Kingdom and Northern Ireland. Therefore swearing allegiance to the Queen of Australia was the same as swearing allegiance to the Queen of the United Kingdom and Northern Ireland. This argument was rejected by the Court on the basis that whilst physically it is the same person (Queen

Elizabeth II) they are "independent and distinct" legal personalities. This notion is known as the divisibility of the Crown which Justice Gaudron found to be "implicit in the Constitution."

The full report on this decision can be located via the High Court Website.

Sue v Hill Extract

74. We turn now to the position of the Crown in relation to the government of the Commonwealth. Section 2 of the Constitution states:

"A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution , such powers and functions of the Queen as Her Majesty may be pleased to assign to him." (emphasis added)

It has been accepted, at least since the time of the appointment of Sir Isaac Isaacs in 1931, that in making the appointment of a Governor-General the monarch acts on the advice of the Australian Prime Minister [91]. The same is true of the exercise of the power vested by s4 of the Constitution in the monarch to appoint a person to administer the government of the Commonwealth and the power given to the monarch by s126 to authorise the Governor-General to appoint deputies within any part of the Commonwealth.

75. Section 58 makes provision for the Governor-General to reserve a "proposed law passed by both Houses of the Parliament" for the Queen's pleasure, in which event the law shall not have any force unless and until, in the manner prescribed by s60, the Governor-General makes known the receipt of the Queen's assent. Further, s59 provides for disallowance by the Queen of any law within one year of the Governor-General's assent. The text of the Constitution is silent as to the identity of the Ministers upon whose advice the monarch is to act in these respects.

76. As indicated when dealing earlier in these reasons with the former position of the States, provisions in colonial constitutional arrangements for reservation and disallowance had been designed to ensure surveillance of colonial legislatures by the Imperial Government. The convention in 1900 was that the monarch, in relation to such matters, would act on the advice of a British Minister. That advice frequently was given after consultation between the Colonial Office and the Ministry in the colony in question[92]. With respect to the Commonwealth, the whole convention, like that

respecting the appointment of Governors-General, changed after the Imperial Conference of 1926[93].

77. As early as 1929, it was stated in the Report of the Royal Commission on the Constitution[94] with reference to the provisions of ss 58 and 59 of the Constitution that "in virtue of the equality of status which, from a constitutional as distinct from a legal point of view, now exists between Great Britain and the self-governing Dominions as members of the British Commonwealth of Nations, and on the principles which are set out in the Report submitted by the Inter-Imperial Relations Committee to the Imperial Conference in 1926", for "British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter appertaining to the affairs of the Commonwealth" would "not be in accordance with constitutional practice".

78. Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments. Hence the statement by Gibbs J in Southern Centre of Theosophy Inc v South Australia[95], with reference to the Royal Style and Titles Act I973 (Cth), that:

"[i]t is right to say that this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia".

79. It remains to consider the provision in s 122 of the Constitution whereby the Parliament may make laws, among other things, "for the government of any territory ... placed by the Queen under the authority of and accepted by the Commonwealth". The requirement of acceptance by the Commonwealth and, earlier in s 122, the reference to the surrender of territory by a State and the acceptance thereof by the Commonwealth serve to confirm the placement "by the Queen" of a territory under the authority of the Commonwealth as being a dispositive act by the Crown acting on other than Australian advice.

80. For example, what had been the Crown Colony of British New Guinea was by Imperial instruments placed under the authority of the Commonwealth after the Senate and the House had passed resolutions authorising the acceptance of British New Guinea as a territory of the Commonwealth[96]. The procedures adopted for the acquisition of Christmas Island and the Cocos (Keeling) Islands reflected the Statute Of

Westminster Adoption Act 1942 (Cth). They involved, as a first step, the passage of the Christmas Island (Request and Consent) Act 1957 (Cth) and the Cocos (Keeling) Islands (Request and Consent) Act 1954 (Cth). The Parliament of the Commonwealth thereby requested and consented to an enactment by the Parliament of the United Kingdom enabling the Queen to place the respective islands under the authority of the Commonwealth. There followed the passage of the Cocos Islands Act 1955 (UK) and the Christmas Island Act 1958 (UK)[97].

81. The point is that the reference to "the Queen" in s122 to distinguish the sovereign from "the Commonwealth" indicates within the structure of the Constitution itself a recognition of the involvement of the Crown in distinct bodies politic.

82. Nevertheless, it is submitted for Mrs Hill that the reference in the preamble to the Constitution Act to unification "in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established" and the identification in covering cl 2 to the heirs and successors of Queen Victoria in the sovereignty of the United Kingdom have a special and immutable significance for the construction of s44(i) of the Constitution. This is said to be so notwithstanding, as we have indicated, that in the regal capacities for which provision is made by the constitutions of the Commonwealth and the States, the sovereign acts on Australian ministerial advice.

The meaning of "the Crown" in constitutional theory

83. Accordingly, it is necessary to say a little as to the senses in which the expression "the Crown" is used in constitutional theory derived from the United Kingdom. In its oldest and most specific meaning, "the Crown" is part of the regalia which is "necessary to support the splendour and dignity of the Sovereign for the time being", is not devisable and descends from one sovereign to the next [98]. The writings of constitutional lawyers at the time show that it was well understood in 1900, at the time of the adoption of the Constitution, that the term "the Crown" was used in several metaphorical senses. "We all know", Lord Penzance had said in 1876, "that the Crown is an abstraction" [99], and Maitland, Harrison Moore, Inglis Clark and Pitt Cobbett, amongst many distinguished constitutional lawyers, took up the point.

84. The first use of the expression "the Crown" was to identify the body politic. Writing in 1903, Professor Pitt Cobbett[100] identified this as involving a "defective conception" which was "the outcome of an attempt on the part of English law to dispense with the recognition of the State as a juristic person, and to make the Crown do service in its stead". The

Constitution, in identifying the new body politic which it established, did not use the term "the Crown" in this way. After considering earlier usages of the term in England and in the former American colonies, Maitland rejoiced in the return of the term "the Commonwealth" to the statute book. He wrote in 1901[101]:

"There is no cause for despair when 'the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland'. We may miss the old words that were used of Connecticut and Rhode Island: 'one body corporate and politic in fact and name'; but 'united in a Federal Commonwealth under the name of the Commonwealth of Australia' seems amply to fill their place. And a body politic may be a member of another body politic."

85. The second usage of "the Crown" is related to the first and identifies that office, the holder of which for the time being is the incarnation of the international personality of a body politic, by whom and to whom diplomatic representatives are accredited and by whom and with whom treaties are concluded. The Commonwealth of Australia, as such, had assumed international personality at some date well before the enactment of the Australia Act. Differing views have been expressed as to the identification of that date[102] but nothing turns upon the question for present purposes. Since 1987, the Executive branch of the Australian Government has applied s61 of the Constitution (which extends to the maintenance of the Constitution) consistently with the views of Inglis Clark expressed over 80 years before[103] and the Governor-General has exercised the prerogative powers of the Queen in regard to the appointment and acceptance, or recall, of diplomatic representatives and the execution of all instruments relating thereto[104].

86. In State Authorities Superannuation Board v Commissioner of State Taxation (WA) , McHugh and Gummow JJ said[105]:

"Questions of foreign state immunity and of whether an Australian law, upon its true construction, purports to bind a foreign state now should be approached no differently as regards those foreign states which share the same head of state than it is for those foreign states which do not[106]. This is consistent with the reasoning and outcome in Nolan v Minister for Immigration and Ethnic Affairs [107]."

87. Thirdly, the term "the Crown" identifies what Lord Penzance in Dixon called "the Government"[108], being the executive as distinct from the legislative branch of government, represented by the Ministry and the

administrative bureaucracy which attends to its business. As has been indicated, under the Constitution the executive functions bestowed upon "the Queen" are exercised upon Australian advice.

88. The fourth use of the term "the Crown" arose during the course of colonial development in the nineteenth century. It identified the paramount powers of the United Kingdom, the parent state, in relation to its dependencies. At the time of the establishment of the Commonwealth, the matter was explained as follows by Professor Pitt Cobbett in a passage which, given the arguments presented in the present matters, merits full repetition[109]:

"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 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[110] 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.[111]"

89. What Isaacs J called the "Home Government" ceased before 1850 to contribute to the expenses of the colonial government of New South Wales[112]. On the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a proprietary nature, became vested "in the Crown in right of the colony", as Jacobs J put it in New South Wales v The Commonwealth[113]. Debts might be payable to the exchequer of one government but not to that of another and questions of

disputed priority could arise[114]. Harrison Moore, writing in 1904, observed[115]:

"So far as concerns the public debts of the several parts of the King's dominions, they are incurred in a manner which indicates the revenues out of which alone they are payable, generally the Consolidated Revenue of the borrowing government; and the several Colonial Statutes dealing with suits against the government generally limit the jurisdiction of the Court to 'claims against the Colonial Government,' or to such claims as are payable out of the revenue of the colony concerned ..."

Section 105 of the Constitution provided for the Parliament to take over from the States their public debts "as existing at the establishment of the Commonwealth"[116].

90. The expression "the Crown in right of ..." the government in question was used to identify these newly created and evolving political units[117]. With the formation of federations in Canada and Australia it became more difficult to continue to press "the Crown" into service to describe complex political structures. Harrison Moore identified "the doctrine of unity and indivisibility of the Crown" as something "not persisted in to the extent of ignoring that the several parts of the Empire are distinct entities"[118]. He pointed to the "inconvenience and mischief" which would follow from rigid adherence to any such doctrine where there were federal structures and continued[119]:

"The Constitutions themselves speak plainly enough on the subject. Both the British North America Act and the Commonwealth of Australia Constitution Act recognize that 'Canada' and the 'Provinces' in the first case, the 'Commonwealth' and the 'States' in the second, are capable of the ownership of property, of enjoying rights and incurring obligations, of suing and being sued; and this not merely as between the government and private persons, but by each government as distinguished from and as against the other this in fact is the phase of their personality with which the Constitutions are principally concerned. Parliament has unquestionably treated these entities as distinct persons, and it is only by going behind the Constitution that any confusion of personalities arises."

91. It may be thought that in this passage lies the seed of the doctrine later propounded by Dixon J in Bank of New South Wales v The Commonwealth[120], and applied in authorities including Crouch v Commissioner for Railways (Q)[121] and Deputy Commissioner of Taxation v State Bank (NSW)[122], that the Constitution treats the Commonwealth and the States as organisations or institutions of government possessing distinct individuality. Whilst formally they may not be juristic persons, they

are conceived as politically organised bodies having mutual legal relations and are amenable to the jurisdiction of courts exercising federal jurisdiction. The employment of the term "the Crown" to describe the relationships inter se between the United Kingdom, the Commonwealth and the States was described by Latham CJ in 1944[123] as involving "verbally impressive mysticism". It is of no assistance in determining today whether, for the purposes of the present litigation, the United Kingdom is a "foreign power" within the meaning of s 44(i) of the Constitution.

92. Nearly a century ago, Harrison Moore said that it was likely that Australian draftsmen would be likely to avoid use of the term "Crown" and use instead the terms "Commonwealth" and "State"[124]. Such optimism has proved misplaced. That difficulties can arise from continued use of the term "the Crown" in State legislation is illustrated by The Commonwealth v Western Australia[125]. However, no such difficulties need arise in the construction of the Constitution.

93. The phrases "under the Crown" in the preamble to the Constitution Act and "heirs and successors in the sovereignty of the United Kingdom" in covering cl 2 involve the use of the expression "the Crown" and cognate terms in what is the fifth sense. This identifies the term "the Queen" used in the provisions of the Constitution itself, to which we have referred, as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom. The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s1 of the Australia Act would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.

94. There is no precise analogy between this state of affairs and the earlier development of the law respecting the monarchy in England, Scotland and Great Britain. It has been suggested[126]:

"The Queen as monarch of the United Kingdom, Canada, Australia and New Zealand is in a position resembling that of the King of Scotland and of England between 1603 and 1707 when two independent countries had a common sovereign."

But it was established that a person born in Scotland after the accession of King James I to the English throne in 1603 was not an alien and thus was not disqualified from holding lands in England. That was the outcome of Calvin's Case[127]. Nor does the relationship between Britain and Hanover between 1714 and 1837 present a precise analogy, if only because there was lacking the link of a common law of succession[128].

IV CONCLUSIONS

95. Almost a century has passed since the enactment of the Constitution Act in the last year of the reign of Queen Victoria. In 1922, the Lord Chancellor[129] observed that doctrines respecting the Crown often represented the results of a constitutional struggle in past centuries, rather than statements of a legal doctrine. The state of affairs identified in Section III of these reasons is to the contrary. It is, as Gibbs J put it[130], "the result of an orderly development - not ... the result of a revolution". Further, the development culminating in the enactment of the Australia Act (the operation of which commenced on 3 March 1986[131]) has followed paths understood by constitutional scholars writing at the time of the establishment of the Commonwealth.

96. The point of immediate significance is that the circumstance that the same monarch exercises regal functions under the constitutional arrangements in the United Kingdom and Australia does not deny the proposition that the United Kingdom is a foreign power within the meaning of s 44(i) of the Constitution. Australia and the United Kingdom have their own laws as to nationality[132] so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercises of sovereignty, for example in entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome[133], themselves have no legal consequences for this country. Nor, as we have sought to demonstrate in Section III, does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.

97. As indicated earlier in these reasons, we would give an affirmative answer to the question in each stated case which asks whether Mrs Hill, at the date of her nomination, was a subject or citizen of a foreign power within the meaning of s 44(i) of the Constitution. [Back to Menu]

Justice Gaudron Extract

164. The first consideration which tells against the United Kingdom not being permanently excluded from the concept of "a foreign power" in s 44.(i) of the Constitution is that the Constitution, itself, acknowledges the possibility of change in the relationship between the United Kingdom, on the one hand, and the Commonwealth of Australia and the Australian States, on the other. Thus, for example, s34 acknowledges that Parliament may alter the qualifications for election so as to eliminate the requirement that candidates be subjects of the Queen. Of greater significance is that, by s5l(xxxviii) of the Constitution, the Commonwealth has power to legislate with respect to "the exercise within the Commonwealth, at the request or

with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia". It was pursuant to s51.(xxxviii) that the Parliament of the Commonwealth enacted the Australia Act 1986 (Cth), to which further reference will shortly be made.

165. The second consideration is that, It is implicit in the existence of the States as separate bodies politic with separate legal personality, distinct from the body politic of the Commonwealth with its own legal personality. The separate existence and the separate legal identity of the several States and of the Commonwealth is recognised throughout the Constitution, particularly in Ch III[203].

166. Once it is accepted that the divisibility of the Crown is implicit in the Constitution and that the Constitution acknowledges the possibility of change in the relationship between the United Kingdom and the Commonwealth, it is impossible to treat the United Kingdom as permanently excluded from the concept of "foreign power" in s 44(i) of the Constitution. That being so, the phrase is to be construed as having its natural and ordinary meaning. [Back] [Back to Menu]

Notes:

(Click on note number to go back to that paragraph)

[91] Cunneen, King's Men - Australia's Governors-General from Hopetoun to Isaacs , (1983) at 173-182.

[92] Inglis Clark, Studies in Australian Constitutional Law , (1901) at 323.

[93] Final Report of the Constitutional Commission , (1988), vol 1, pars 2.122-2.123.

[94] at 70.

[95] (1979) 14.5 CLR 246 at 261.

[96] Strachan v The Commonwealth (1906) 4 (Pt 1) CLR 455 at 461-463, 464-465. See also the recitals to the Papua Act 1905 (Cth).

[97] See the recitals to the Christmas Island Act 1958 (Cth) and the Cocos (Keeling) Islands Act 1955 (Cth).

[98] Chitty, Prerogatives of the Crown , (1820), Ch XI, Section III.

[99] Dixon v London Small Arms Company (1876) 1 App Cas 632 at 652.

[100] "'The Crown' as Representing 'the State'", (1903) 1 Commonwealth Law Review 23 at 30. See also Hogg, Liability of the Crown , 2nd ed (1989) at 9-13; Law Reform Commission of Canada, The Legal Status of the Federal Administration , Working Paper 40, (1985) at 24-28.

[101] "The Crown as Corporation", (1901) 17 Law Quarterly Review 131 at 144 (footnote omitted).

[102] Victoria v The Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 at 477-478.

[103] Inglis Clark, Studies in Australian Constitutional Law , (1901) at 65-66.

[104] Instrument dated 1 December 1987, Commonwealth of Australia Gazette , $270, c_)

September 1988; see Starke, "Another residual constitutional link with the United Kingdom terminated; diplomatic letters of credence now signed by Governor-General", (1989) 63 Australian Law Journal 149.
[105] (1996) 189 CLR 253 at 289.
[106] See, generally, Foreign states Immunities Act 1985 (Cth), ss 9-22.
[107] (1988) 165 CLP, 178 at 183-186.
[108] (1876) 1 App Cas 632 at 651.
[109] "The Crown as Representing the State", (1904) 1 Commonwealth Law Review 145 at 146-147.
[110] Who, legally [represented] the King, but really [represented] the British 'State'.
[111] As with regard to the reservation of Bills and the exercise of the power of pardon in matters affecting imperial interests.
[112] Williams v Attorney-General for New South Wales (1913) 16 CLR 404 at 448.
[113] (1975) 135 CLR 337 at 494.
[114] Federal Commissioner of Taxation v Official Liquidator of E 0 Farley Ltd (1940) 63 CLR 278 at 302-303.
[115] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 357.
[116]Words of limitation omitted in 1910, after a successful referendum: Constitution Alteration (State Debts) Act 1909 (Cth).
[117] Evatt, The Royal Prerogative , (1987) at 63.
[118] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 358. See also Harrison Moore, "Law and Government", (1906) 3 Commonwealth Law Review 205 at 207.
[119] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 359.
[120] (1948) 76 CLR I at 363.
[121] (1985) 159 CLR 22 at 28-29, 39.
[122] (1992)174 CLR 219 at 230-231.
[123] Minister for Works (WA) v Gulson (1944) 69 CLR 338 at 350-351.
[124] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 362.
[125] (1999) 73 ALJR 345 at 352-353, 359, 364-368, 387-390; 160 ALR, 638 at 647-649, 656-657, 663-669, 695-700.
[126] Zines, The High Court and the Constitution , 4th ed (1997) at 314.
[127] (1606) 7 Co Rep la [77 ER 377]. Coke's report of the litigation was "a massive achievement of ponderous learning": Tanner, English Constitutional Conflicts in the Seventeenth Century 1603-1689 , (1957) at 269.
[128] Nolan v Minister for Immigration and Ethnic Affairs (1988) t 65 CLR 178 at 192-193; In re The Stepney Election Petition; Isaacson v Durant (1886) 17 QBD 54 at 59-60.
[129] Viscount Birkenhead LC in Viscountess Rhondda's Claim [1922] 2 AC 339 at 353.
[130] Southern Centre of Theosophy Inc v South Australia (1979) 145 CLR 246 at 261.
[131] Commonwealth of Australia Gazette , s85, 2 March 1986 at 1.
[132] Nolan v Minister for Immigration and Ethnic Affairs (1988) 165 CLR 178.
[133] See European Communities Act 1972 (UK), European Communities (Amendment) Act 1986 (UK), European Communities (Amendment) Act 1993 (UK) and R v Secretary of State for Transport; Ex parte Factortame Ltd [1990] 2 AC 85; R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Rees-Mogg [1994] QB 552; R v Employment Secretary; Ex parte Equal Opportunities Commission [1995] 1 AC 1.
[203] See especially ss 75(iii), (iv) and 78.