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The States and a Commonwealth Republic in Australia

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1 Introduction

1.1 The Background to Republicanism in Australia

Republicanism in Australia, as Professor Winterton notes, has a long history, dating from half a century before Australia was united as a federal nation.[1] Interest in republicanism has, however, been most prominent in recent times. In June 1953, a Morgan Gallup poll recorded that support for the retention of the monarchy in Australia was at 77 per cent, with support for a republic at 15 per cent. Despite a Morgan Gallup poll in February 1973 showing that support for the monarchy had fallen (50 per cent pro-monarchy, 42 per cent pro-republic), a similar opinion poll in the *Bulletin* eleven years later showed that support for the monarchy had returned to 62 per cent (with 30 per cent pro-republic).[2] Yet, over the past decade, public opinion polls have shown a decline in support for the retention of the monarchy from two-thirds in favour, to two-thirds against.[3]

As Labor Prime Minister, Mr Paul Keating appointed a Republic Advisory Committee to investigate the measures necessary for the removal of the Australian monarchy. The Committee published its report in 1993.[4] Five years later, a

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[1] Winterton, ÂAn Australian RepublicÊ (1988) 16 *Melbourne University Law Review* 467, 467; see also Turnbull, *The Reluctant Republic* (1993), 22-26. A more general history of republican sentiment in Australia is given by McKenna, *The Captive Republic: A History of Republicanism in Australia* (1996).
[2] Question asked, in each case: ÂRetain the monarchy or become a republic?Ê. Cited in Winterton, *Monarchy to Republic: Australian Republican Government* (rev.edn. 1994), 13.
[3] *Ibid.*, I-2 & 13. Newspoll (Question asked: „Should Australia become a republic?‰) showed 46 per cent support for a republic in April 1993 and 39 per cent support for a republic in November 1993. Saulwick opinion polling (Question asked: „Should Australia remain a monarchy within the (British) Commonwealth , become a republic within the Commonwealth, or a republic outside the Commonwealth?‰) showed 66 per cent support for a republic in April 1993, and 62 per cent support for a republic in July 1993.
[4] Republic Advisory Committee, *An Australian Republic: The Options* (1993).

Constitutional Convention was held in Canberra, to establish whether Australia ought to become a republic and, if so, to determine the method for the appointment of the Head of State.

1.2 The 1998 Constitutional Convention

The Constitutional Convention arose from the 1996 Federal general election, in which the Liberal-National coalition under the leadership of Mr John Howard, which won that election, proposed the establishment of a People's Convention to 'provide a forum for discussion about whether or not our [Australia's] present constitution should be changed to a republican one',[5] with the Convention to be followed by a referendum before the end of the year 2000. To establish the Convention, the Federal Parliament passed the *Constitutional Convention (Election) Act* 1997 (Cwth). This Act provided for a Convention attended by 152 delegates, half of whom were to be elected, and half appointed.

The 1998 Constitutional Convention met in Canberra during the first two weeks of February 1998 to discuss the question of whether or not Australia should abolish its monarchy, and to recommend a preferred model for the appointment of a Head of State, if Australia were to become a republic. The Convention was charged with deciding three questions in particular:

[5] Mr John Howard, Prime Minister of Australia, speaking at the second reading of the *Constitutional Convention (Election) Bill*, (*Hansard*, House of Representatives, 26 March 1997, 3061).

- whether or not Australia should become a republic;
- which republic model should be put to the electorate to consider against the status quo; and
- when and how any change may be implemented.

The Convention supported, in principle, Australia becoming a republic, and determined that the new Head of State, who would bear the title „President‰ should be appointed according to the „Bipartisan Appointment of the President Model‰ Under this model, a single nomination for the office of President, proposed by the Prime Minister and seconded by the Leader of the Opposition, would be required to receive the approval of a two-thirds majority of a joint sitting of both Houses of the Federal Parliament. The President Åmay be removed at any time by a notice in writing signed by the Prime Minister.Ê[6] The remit of the Convention was to put forward proposals for a change at Commonwealth level, but it did make the following statement with regard to the position of the States under a Federal Republic:

> any move to a republic at the Commonwealth level should not impinge on State Autonomy, and the title, role, powers, appointment and dismissal of State heads should continue to be determined by each State.
>
> While it is desirable that the advent of the republican government occur simultaneously in the Commonwealth and all States, not all States may wish, or be able, to move to a Republic within the timeframe established by the Commonwealth. ⁄ the Government and the Parliament should accordingly consider whether specific provision needs to be made to enable States to retain their current constitutional arrangements.[7]

Following the report of the Constitutional Convention,[8] the Australian Government has pledged to hold a referendum during 1999, most probably in November,[9] to

[6] Report of the Constitutional Convention, *Volume 1: Report of Proceedings* (1998), 42-50.
[7] *Ibid.*, 43.
[8] Report of the Constitutional Convention (1998).

determine whether Australia should become a republic - whether Australia should replace the Queen and her representative the Governor-General with a President appointed by the Commonwealth Parliament in Canberra - and, if so, to alter the Commonwealth Constitution to bring this about.

1.3 The Proposals for a Commonwealth Republic

The „exposure draft‰ of the republic Bill that is, subject to the approval of the Federal Parliament, to be put to referendum during 1999, was published on 5 March 1999.[10] This draft Bill is to give effect to the *Communiqué* of the Constitutional Convention, and includes proposals to remove the monarch from the functioning of the Federal Government. The Bill seeks, through a referendum under section 128 of the Commonwealth Constitution, to establish a republic at Commonwealth level; it does not seek to affect the States' links with the Queen of Australia. Under the republic that the Bill attempts to establish, the Head of State at the Federal level would be a President, appointed by a two-thirds majority of the Federal Parliament. States would continue their present constitutional relationship with the Queen of Australia. It is not necessarily the case that it will be possible to maintain these links, and this is one of the issues explored in this thesis (especially sections 3.3 and 5).

[9] At the time of writing, the date for this referendum has not been set, but the Australian media expect the referendum to take place during November 1999. A referendum called pursuant to section 128 of the Commonwealth Constitution must, under that section, be held no fewer than two months and no more than six months after the passage through the Federal Parliament of the law that is to be put to a vote at the referendum.

[10] The publication of the „exposure draft‰ of the *Constitutional Alteration (Establishment of a Republic) Bill* 1999 came after the first draft of this thesis had been completed. The draft Bill does not invalidate or make irrelevant the legal and political arguments within this thesis; but, where appropriate, references to this draft Bill have been added to the text of this thesis. The draft Bill is, as of March 1999, published online <URL: http://www.dpmc.gov.au/referendum/constalt_index.html>.

1.4 Outline of this Paper

Professor Greg Craven has commented that: “The legal complexities [of converting the Australian Commonwealth from a monarchy into a republic] can scarcely be overestimated; there are virtually no questions in Australian constitutional law and theory more complicated and perplexing than those that surround the process by which the monarchy might be abolished.”[11] Much of the debate about constitutional law in Australia has concentrated on the Federal Constitution, and this is certainly the case with the debate about the establishment of a republic. Both the 1993 Republic Advisory Committee[12] and the 1998 Constitutional Convention paid relatively little attention to the impact of a republic on the States and yet, as Professor Sir Harrison Moore noted, “As the Australian Commonwealth is a Federal Commonwealth, it is impossible to advance a step in the consideration of the Constitution without meeting the States.”[13]

The purpose of this thesis is not to discuss the merits and demerits of the conversion of Australia from a monarchy into a republic. The purpose is, instead, to concentrate on the constitutional concerns that arise from the method of constitutional amendment that is to be pursued in the conversion of Australia to a republic, and the constitutional and political implications of this for the Australian States. This thesis will outline the rôle of the States in the transition to the republic at Commonwealth level; the impact of this change on the States; and the wider implications of this change for the federal compact. In doing so, the following areas will be considered:

[11] Craven, “The Constitutional Minefield of Australian Republicanism” (Spring 1992) *Policy* 33, 33.
[12] *Op.cit.* f.n.4.
[13] Moore, *The Constitution of the Commonwealth of Australia* (2nd Edition 1910), 325.

- the structure of the federal compact and the status of the States; the evolution of, and the nature of, the Australian Crown;
- the legal process of constitutional amendment necessary to achieve the republic;
- the political concerns surrounding the change to a republic; and
- the position of State Governors under a Commonwealth republic.

This thesis was conceived and researched before the publication of the exposure draft of the *Constitution Alteration (Establishment of a Republic) Bill* 1999, and is not, therefore, intended to be a critical analysis of this Bill. Nevertheless, many of the issues discussed herein relate to the Bill and, where appropriate, references to the substance of the Bill have been inserted.

1.5 Definitions

„The States‰

References to „the States‰ in this thesis concern the constituent States of the Commonwealth of Australia, as created in the *Commonwealth of Australia Constitution Act* 1900 (Imp.);[14] namely: New South Wales, Queensland, South AustraliaÊ TasmaniaÊ and Western Australia. The precise status of these States within the federal compact is discussed in section 2.2 (*infra*).

[14] Hereafter referred to as the *Commonwealth Constitution Act*.

„The Commonwealth‰

The word „Commonwealth‰ has several meanings. At no time in this thesis is „Commonwealth‰ intended to mean a republican system of government, as in the Cromwellian „Common-weal‰ in Britain. When the countries of the former British Empire are referred to collectively in this thesis, they are referred to as members of the „Commonwealth of Nations‰. Within Australian politics, „Commonwealth‰ can mean „federal‰, and it can also mean the political community of the whole of Australia. This distinction will be briefly outlined.

The *Commonwealth Constitution Act* does not define the word „Commonwealth‰, except to say that the people of the Australian Colonies Âshall be united in an indissoluble federal Commonwealth under the crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby establishedÊ.[15] The term „Commonwealth‰ may be used legitimately in two senses when referring to the governance of Australia: first, it can be taken to mean the Federal Government; secondly, it can be taken to mean the political community that was established under the 1900 Act.

Quick and Garran take the latter definition of „Commonwealth‰. They state that ÂThe primary and fundamental meaning of „The Commonwealth‰ is the united political community composed of the people and the antecedent Colonies, now converted into States.Ê[16] The argument of Quick and Garran implies that „The Commonwealth‰ -

[15] *Commonwealth Constitution Act*, preamble.
[16] Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901), 927.

the political community that was created by the 1900 Act - comprises both State Governments and the Federal Government.

The implication of the view of Quick and Garran for the establishment of a Commonwealth republic is that, upon their construction, if a Commonwealth republic is established, then it must be established at Federal and State levels of government at the same time. This point relates to the position of the Crown in Australia and is discussed at some length in section 2.3 (*infra*); however, it is necessary to note at this stage that the Howard government considers the establishment of a „Commonwealth republic‰ to mean the replacement of the Governor-General and the Queen by an Australian President at the level of the Federal government.

„Republic‰

There are differing opinions on the subject of the measures necessary to make Australia a full republic. Indeed, some have gone so far as to say that the model for an Australian republic that is to be put in the forthcoming referendum is not a republican model in the true sense at all.[17] Conversely, Professor Brian Galligan has contended that ÂAustraliaÊs constitutional system is essentially that of a federal republic rather than a parliamentary monarchyÊ.[18] Galligan cites the supreme authority of the Australian people as the principle of the Australian Constitution,[19] although the existence of such as principle is far from certain. The argument for popular

[17] See, for example, Evans, *A Non-republican Republic: the ConventionÊs Compromise*, (unpublished paper presented at University of Queensland Law School ÂSymposium on an Australian RepublicÊ, 11 June 1998).
[18] Galligan, *A Federal Republic: AustraliaÊs Constitutional System of Government* (1995), 12.
[19] *Ibid.*, 14.

sovereignty in Australia rests upon the acquiescence of the Australian people (in referendums) to the federal Constitution contained in the *Commonwealth Constitution Act*. Nevertheless, the constitutional system established in Australia was not agreed to by all people, nor is Australia's constitutionalism limited to that Act. Hence, Blackshield and Williams conclude that 'it may be naïve to assume that the 1900 Act, including the Australian Constitution, is binding because the Australian people acquiesce in it.'[20] Moreover, the Federal Parliament has a status at least co-ordinate with that of the Australian people in the process of constitutional amendment: the power of the Parliament to propose amendments is politically more significant than the power of the Australian people to vote down those amendments.

The *Oxford English Dictionary* defines a Republic as:

> A state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler

This definition suggests that Australia is already a republic, *de facto* if not *de jure*. Certainly, Australia is governed not by a monarch but by its people through their elected representatives. In the language of Bagehot, Australia is a 'disguised republic'. Bagehot 'emphasises that it is a mistake to assume that the Monarchy has lost all its power … . But he is convinced that a wise ruler will not even use the limited power he still possesses'.[21] The powers of the monarch are even more limited in Australia than in the United Kingdom.

[20] Blackshield and Williams, *Australian Constitutional Law and Theory* (2nd Edition 1998), 158.
[21] Crossman, 'Introduction', to Bagehot, *The English Constitution* (1964), 18.

The Queen cannot, or rather *does not*,[22] exercise any of the Governor-General’s constitutional powers, even when she is personally present in Australia. In a letter written in the wake of the dismissal of Mr Gough Whitlam as Prime Minister in 1975, the Queen’s Private Secretary, Sir Martin Charteris, wrote to Mr G.G.D. Scholes, Speaker of the House of Representatives, saying:

> the Australian Constitution firmly places the prerogative powers of the Crown in the hands of the Governor-General … it would not be appropriate for [Her Majesty, as Queen of Australia] to intervene in person in matters which are clearly placed within the jurisdiction of the Governor-General by the Constitution Act.[23]

The principal power remaining to the monarch, when she is absent from Australia, is her theoretical right to refuse a request from a State Premier or from the Prime Minister for the appointment or dismissal of a State Governor or the Governor-General. Yet, this power is not of great importance, since it is unlikely to be used.[24]

The formal presence of the Queen at the apex of the Australian Constitutional system has led the Republic Advisory Committee and others to conclude that Australia is a ‘crowned republic’. The proposals to be put to a referendum during 1999 are seen to constitute, in part, a cosmetic change. The intent of these proposals is to remove the Queen from any involvement, either theoretical or practical, in the government of the Commonwealth of Australia, whilst leaving the processes and practices of responsible government unaffected.

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[22] Whilst the view that the powers of the Queen are excercisable only by the Governor-General or the State Governors and not by Her Majesty is widely held in Australia (see Winterton, *op.cit.* f.n.2, 30), Geoffrey Marshall argues that in Australia, although not in Canada, this is a matter that rests upon convention and not on law (see Marshall, *Constitutional Conventions* ([1984] 1986), 173-177).

[23] 17 November 1975. Reproduced in Kerr, *Matters For Judgement* (1978), 374-5.

[24] Bogdanor and Marshall claim, however, that ‘it can still be argued that compliance with the Prime Minister’s request [to dismiss the Governor-General] would not have been automatically required. If so, the right of the sovereign to dismiss the Governor-General is still a viable prerogative of last resort’. See: Bogdanor and Marshall, ‘Dismissing Governor-Generals’ (1996) *Public Law* 205, 208.

2 The Constitutional Structure of the Commonwealth of Australia

2.1 Constitutional Development

The Commonwealth of Australia came into being on January 1st 1901 pursuant to an Act of the Imperial Parliament at Westminster, the *Commonwealth Constitution Act*. Prior to 1901, the people who inhabited the Colonies of the continent of Australia were governed according to colonial Constitutions. Self-government was granted by the Imperial Parliament at Westminster to New South Wales in 1823, when New South Wales attained the status of a full Colony. As a Colony, New South Wales was permitted to enact its own laws, except that these laws had to conform with the legislation of the Imperial Parliament that extended to the Colony. This restriction on the jurisdiction of the colonial government of New South Wales applied also to the governments of the other Colonies of the continent of Australia: Victoria (which had responsible government from 1851); Tasmania (1856); South Australia (1857); and Western Australia (1890). In 1865, the *Colonial Laws Validity Act* [25] clarified a restriction imposed by some Australian judges which prevented colonial legislatures from passing any law that was „repugnant‰ to English law. However, the Colonies remained bound, under section 2 of the *Colonial Laws Validity Act*, by Acts of the Imperial Parliament Âmade applicable to such Colony by the express Words or necessary IntendmentÊ[26] of the Imperial Act.

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[25] 28 and 29 Vic. c.63.

[26] *Colonial Laws Validity Act* 1965 (Imp.), section 1. Section 2 of this Act stated that Colonial Laws that were repugnant to such Imperial Acts, Âshall, to the extent of the repugnancy / be and remain absolutely void and inoperative.Ê This provision was ended by the *Australia Acts* (Cwth & UK) 1986.

The Colonies that made up the continent of Australia decided to join together as a federation of states under a new Commonwealth of Australia following constitutional conventions and positive outcomes to referenda[27] in each Colony.

Demand for the federation of the Australasian Colonies was generated by the acute problems rendered among them by tariff barriers, desires for a common military defence, control over immigration, and a growing sense of identity as „Australians‰[28] An Australasian Convention met in 1891, producing a draft Bill for enactment by the Imperial Parliament at Westminster; and, with input from the Parliaments of the Colonies, further Constitutional Conventions in 1897 and 1898 revised the draft Bill. A referendum on the Bill in New South Wales failed to receive the statutory minimum affirmative vote. The Premiers of the Colonies agreed minor alterations of the ConventionsÊ draft, and subsequent referendums in all Colonies approved the draft Constitution.[29]

2.2 The Status of the Australian States

The Commonwealth Constitution, contained in clause 9 of the Imperial Act, had the effect of federating the Colonies of the continent and raising their status from Colonies of the British Empire to States of the Commonwealth of Australia; but the Commonwealth Constitution did not replace the State Constitutions that pre-dated

[27] There is some dispute as to the correct plural of „referendum‰ Fowler advises „referendums‰ as the plural of the act of referring to the electorate [*FowlerÊs Modern English Usage* (rev.ed. 1998), 662]. I agree, in that the gerund in Latin has no plural; yet the question that is referred is the gerundive, and therefore the plural „referenda‰ can be used quite correctly.
[28] See: Dawson, ÂThe FoundersÊ VisionÊ, in Craven, ed., *Australian Federalism* (1992); also Parker, ÂAustralian FederationÊ, in Eastwood and Smith, eds., *Historical Studies: Selected Articles* (1964).
[29] Standard histories include: Quick and Garran, *op.cit.* f.n.16, 115-252.

it.[30] As Quick and Garran noted, the constitutions of the States of Australia, originally conferred by the Imperial Parliament, Âhave been confirmed and continued by the Federal Constitution, not created thereby.Ê[31] Whilst the State constitutions are „subject to‰ the Constitution of the Commonwealth,[32] and the Constitution of the Commonwealth does indeed withdraw powers and functions from the States, the Commonwealth Constitution Â*does not abolish or interfere with [the structure of] any of the political institutions* established in the States under their respective Constitutions.Ê[33] That the Commonwealth constitution *does not* interfere with the political institutions in the States does not mean that it *can not* so interfere. The implications of this are discussed in section 4 below.

Independence from most Imperial legislation was formalised in 1942 for the Commonwealth Government and in 1986 for the State Governments.[34] The *Statute of Westminster* 1931 (Imp.), which came into force in Australia following the enactment of the *Statute of Westminster Adoption Act* 1942 (Cwth), removed from the Commonwealth Parliament, but not from the State Parliaments, the restrictions that had been imposed by the *Colonial Laws Validity Act* and by extraterritorial legislation, although the *Statute of Westminster* permitted further Imperial legislation with respect to the Commonwealth of Australia. The States were, therefore, subject to

[30] Lumb, *The Constitutions of the Australian States* (5th Edition 1991), xix.
[31] Quick and Garran, *op.cit.* f.n.16, 928. Contra: Zines, *The High Court and the Constitution* (4th Edition 1997), 341.
[32] Section 106 of the Constitution of the Commonwealth.
[33] Quick and Garran, *op.cit.* f.n.16, 931. Italics added.
[34] Consideration of DiceyÊs principle of the Sovereignty of Parliament might lead to the conclusion that the Westminster Parliament could, in British legal theory, choose to unilaterally amend the *Commonwealth Constitution Act* in order to re-establish direct rule over Australia. However, as a matter of political fact, and legal reality, this idea is one of an action that is no longer credible, even if it ever was. Moreover, British legal theory does allow for sovereign territory to be ceded, and may permit „manner and form‰ restrictions to be placed upon a legislature. Such restrictions upon State legislatures in Australia were upheld in: *Trethowan* (1931) 44CLR394, 425 *per* Dixon J).

Imperial restrictions until the passage of the *Australia Acts* 1986 (Cwth & UK). The *Australia Acts* were two Acts of Parliament, almost identical in content, which were passed simultaneously by the Commonwealth Parliament in Canberra and the United Kingdom Parliament in Westminster. The purpose of the *Australia Acts*, which were passed pursuant to paragraph 51(xxxviii) of the Commonwealth Constitution, was to "bring constitutional arrangements affecting the Commonwealth and the States into conformity with the Status of the Commonwealth of Australia as a sovereign, independent and federal nation."[35] The *Australia Acts* removed all colonial restrictions on State Parliaments, and terminated the right of the Imperial Parliament to legislate with regard to Australia.

2.3 The Crown in Australia

In order to remove the monarchy from the government of the Commonwealth, it is first necessary to determine exactly the position of the Monarchy in Australia at both the Federal and State levels of government. There are two questions that are central to the establishment of a republic in Australia at Commonwealth level. First, there is the question of whether there is a separate Queen of the Commonwealth of Australia and Queen of each Australian State, or whether there is one Queen in Australia. The second question is whether the monarchy can be removed from the Constitution of the Commonwealth and, if so, how it may be so removed. These two questions have produced fundamental division within constitutional debate. This section seeks to determine the position and status of the monarch in the Australian political system; the following two sections consider, respectively, the technical-legal questions

[35] *Australia Act* 1986 (Cwth) (long title).

surrounding the process of constitutional change, and the wider concerns of that constitutional alteration.

There is some disagreement amongst constitutional lawyers concerning whether the Commonwealth of Australia and the Australian States have separate Heads of State, or whether Australia has only one monarch, which is shared by the Commonwealth and each State. The question of whether Australia is a monarchy or a heptarchy is central to the determination of the position of the States under moves towards an Australian Republic, and for the constitutional amendment procedure as a whole. It will be argued that „The Commonwealth‰ of Australia is one political community, ruled over by the Federal and State Governments and, as such, there is only one monarch, the Queen of Australia, who is represented by the Governor-General at Commonwealth (Federal) level and in international relations, and at State level by the six State Governors.

Above,[36] two meanings of the words „The Commonwealth‰ were introduced in relation to the Australian political system: the Federal Government, and the political community of Australia, governed in some matters by the Federal Government and in others by respective State Governments. As noted, Quick and Garran considered the primary meaning of „The Commonwealth‰ to be the united political community comprising both Federal and State polities. Furthermore, Professor Lumb has observed that, ÅTogether with the federal polity centred in Canberra, the States and internal Territories make up the Commonwealth of AustraliaÊ.[37] The Imperial

[36] Section 1.5.
[37] Lumb, ÅThe Framework of Constitutional Monarchy in the Australian StatesÊ, in Grainger & Jones, eds., *The Australian Constitutional Monarchy* (1994), 59.

Parliament thus created, in the *Commonwealth Constitution Act*, a new polity, the Commonwealth, which included all citizens of the former Colonies, and in which sovereign political power was distributed between Federal and State levels of government.[38]

The preamble to the Imperial *Constitution Act* noted that the people of the Australian Colonies had agreed to unite ‘under the Crown of the United Kingdom of Great Britain and Ireland’.[39] It is, nevertheless, ‘a commonplace’[40] to refer to Australia’s Head of State as the Queen of Australia,[41] and not Queen of the United Kingdom, despite the fact that they are physically the same person, as required by covering clause 2 of the Constitution.

Professor Greg Craven has written that Australia has not one, but seven Heads of State:

> in Australia we effectively have not one but seven monarchies: a monarchy over Australia as a whole, founded in the Commonwealth of Australia Constitution Act, and six State monarchies, deriving from the different constitutional documents of the States.[42]

This viewpoint is also taken by the Republic Advisory Committee in its report.[43] Nevertheless, the three assertions that Professor Craven makes in this statement - namely that the Australian monarchy dates from the enactment of the *Commonwealth Constitution Act* of 1900; that the States have monarchies that predated federation in

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[38] And also, formally, with the Imperial Parliament until the formal powers of the Imperial Parliament were ended with regard to the Australia by the *Australia Acts* 1986 (Cwth & UK).
[39] *Commonwealth Constitution Act*, preamble.
[40] Winterton, ‘The Evolution of a Separate Australian Crown’ (1993) 19 *Monash University Law Review* 1, 2.
[41] As a consequence of the *Royal Styles and Titles Act* 1973 (Cwth).
[42] Craven, *op.cit.* f.n.11, 35.
[43] *Op.cit.* f.n.4, *Volume 1*, 125.

1901; and that Australia is a heptarchy and not a monarchy - are far from certain. This thesis argues against these three assertions by seeking to establish that, until some time after federation, there was only one Crown in Britain, its Colonies and Dominions: the British Crown. After that time, the Crown was divided in order to allow it to represent each of the Dominions separately, although the Australian States stayed, formally, under the British Crown. It shall further be argued that, with the passage of the *Australia Acts* in 1986, the States were brought under the Australian Crown.

The British Crown was, prior to 1926, held to be ‘one and indivisible throughout the empire’.[44] The doctrine that there is only one monarch and one sovereignty governing the British Empire dated from the colonisation of Newfoundland by Henry VII.[45] The unity of the Commonwealth of Nations (formerly, of the Empire) was maintained through the unity of the Crown, which meant that there was one King acting for the whole Commonwealth of Nations, not one King acting in several capacities (as King of the United Kingdom, King of Canada, King of Australia, &c.): ‘There were several Governments acting in the name of the King, but only one King.’[46]

There is nothing in the *Commonwealth Constitution Act* that purports to establish an Australian monarchy. The only part of the Act that could be taken as establishing an

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[44] *Theodore v Duncan* [1919] AC 696, as 706 (Lord Haldane), quoted in Wade and Bradley, *Constitutional and Administrative Law* (11th Edition 1993 by Bradley and Ewing), 339.
[45] Howell, ‘The Republic: Problems and Perspectives’ (paper to The Samuel Griffith Society Conference, 1996).
[46] Jennings, *Constitutional Laws of the Commonwealth: Volume I, The Monarchies* (1957), 20.

Australian monarchy is covering clause[47] 2, which states that: ÅThe provisions of the Act referring to the Queen shall extend to Her MajestyÊs heirs and successors in the sovereignty of the United Kingdom.Ê This clause does not, however, establish a monarchy, but rather seeks to ensure that there shall be no referential failure upon the death of the Queen. It does this by affirming that references to „the Queen‰ refer to the one Queen, who is Queen of the United Kingdom, her other realms and territories.

Given this fact, and the prominence of the doctrine of the indivisibility of the Crown at the time of federation, it is to be concluded that the Commonwealth of Australia was, in 1901, under the United Kingdom monarchy: federation in 1901 brought about a ÅCommonwealth owning allegiance to the British CrownÊ.[48] By the same reasoning, the Australasian Colonies that preceded federation were governed on behalf of the United Kingdom monarchy. Moore concluded that ÅThe establishment of the Commonwealth [of Australia] in no way [affected] the participation of the Crown in the government of the States; the prerogative communicates powers and duties to the State Governor as it did to the Governor of the ColonyÊ,[49] indicating clearly that the States were also under the Crown of the United Kingdom. Hence, it was neither the case that there was an Australian Crown deriving from the time of federation; nor was there a Crown in each of the States deriving from the constitutional documents of those States.

[47] The „covering clauses‰ of the *Commonwealth Constitution Act* are those clauses, 1-8 inclusive, which precede the Constitution proper, which is contained within covering clause 9.
[48] Turner, *The First Decade of the Australian Commonwealth* (1911), 1.
[49] Moore, *op.cit.* f.n.13, 86.

The doctrine of the indivisibility of the Crown in the Empire was reinforced by the Balfour Declaration of 1926. The declaration, which arose out of the Imperial Conference of the same year, noted that the Dominions were autonomous communities, but maintained that Great Britain and the Dominions were „united by a common allegiance to the Crown.‰ As Jennings notes[50] the title of the King at the time of the Balfour Declaration referred to territories intended to describe the whole Commonwealth of Nations, and not to political entities. Moreover, the preamble to the *Statute of Westminster* 1931 gave provision for the alteration of the Royal style and titles to require the assent of the Parliaments of all Dominions, in addition to the United Kingdom Parliament. The assent of each Australian State Parliament was not required, however. These States continued under the Crown of the United Kingdom until 1986.

The doctrine of the indivisibility of the Crown in the Commonwealth of Nations provided a problem, in that it allowed for the liability of one government for a writ served against another. Hence, it was decided that, though the King was being sued, it was the King acting in a particular capacity that was being sued, and therefore a particular fund must be held liable.[51] There was therefore acknowledged to be a Crown *in right* of a particular jurisdiction. This concept of a Crown *in right* of a jurisdiction is to be distinguished from the traditional conception of the Crown as the source of the sovereign authority of a state. Since *Attorney-General* v. *Great Southern*

[50] Jennings, *op.cit.* f.n.46, 4, 20.

[51] *Attorney-General* v. *Great Southern and Western Railway of Ireland*, [1925] AC 754. Lord Haldane: The Crownÿs ordinary contracts Ÿonly mean that it will pay out of funds which Parliament may or may not supply. In the present case Parliament transferred the duty of producing the fund / to the Irish Parliament.Ÿ

and Western Railway of Ireland, there may be said to have been seven Crowns *in right* of Australia.[52]

Even if there are seven legally distinct Crowns *in right* of the Commonwealth and each of the States, there is only one monarch, which is “shared by both the Commonwealth and the States but belongs exclusively to neither.”[53] Whilst the Separate Crowns in right of the governments of the Commonwealth of Nations were recognised from 1925, the concept of the divisibility of the Crown into separate monarchies was accepted only much later. There remained a formal ‘common allegiance’ to a single crown possibly as late as the Commonwealth [of Nations] Declaration of April 1949. The Declaration acknowledged the intention of the Indian Government for India to become a sovereign independent republic, whilst retaining full membership of the Commonwealth of Nations. On the accession of Queen Elizabeth II, the Queen was given a different title[54] in each of the countries of the Commonwealth of Nations that recognised her as Head of State and not merely as Head of the Commonwealth of Nations.[55] The final report of the Constitutional Commission, presented in 1988, concluded that:

> “It is clear from these events, and recognition by the world community, that at some time between 1926 and the end of World War II Australia had achieved full independence as a sovereign state of the world. The British Government ceased to have any responsibility in relation to matters coming within the area of responsibility of the Federal Government and Parliament.”[56]

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[52] A Crown *in right* of the Commonwealth Government, and a Crown *in right* of each of the six States individually.

[53] Winterton, “The States and the Republic: A Constitutional Accord?” (1995) 6 *Public Law Review* 107, 113.

[54] Although this title can be seen as being legally insignificant: the legal entity of the Crown does not depend upon the style and title of the individual monarch, but rather upon the interpretation by the Courts of references to the monarch.

[55] It should, however, be noted that the separate declarations of war by the governments of the United Kingdom and the Dominions in 1939, and the neutrality of Ireland during the war, indicated that the divisibility of the Crown was a political reality by this time.

[56] *Final Report*, 75. Quoted in: Smith, *But We Already Have an Australian Head of State* (a paper for the 1998 Constitutional Convention), 3.

Hence it appears that the Federal Government in Australia achieved full independence no later than the 1940s,[57] but anyhow later than the Crown *in right* of the Government and Parliament of the Commonwealth of Australia was recognised.

Whilst the British Government had indeed ceased to have any responsibility in relation to the Federal Government in Australia, it still held a formal rôle in relation to State Governments: although State Governors were generally appointed upon the advice of State Premiers,[58] this advice was conveyed through the British Foreign Secretary, and appointment was made by the Queen of the United Kingdom. Indeed, the Australian States, which retained the right of appeal by special leave to the Judicial Committee of the Privy Council, could, until 1986, be regarded as Åself-governing dependencies of the British Crownĺ.[59] That constitutional anomaly was corrected by the *Australia Acts* 1986 (Cwth & UK), which were enacted to bring the constitutional arrangements of the Commonwealth and the States „into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.‰ The Act therefore incorporated the Australian States under the Australian monarchy.

The concept of a divisible Crown in the British Commonwealth of Nations arose from the difficulties posed by the concept of the King being both at war and at peace with

[57] Geoffrey Marshall considers the date to be 1947, or at the very latest 1950 when India became a republic but remained a member of the Commonwealth of Nations. Marshall, *op.cit.* f.n.22, 170.
[58] The Convention debates of the 1890s decided that appointment of State Governors would be by the Queen, and not by the Governor-General (c.f. the Canadian practise). The Commonwealth attempted to interfere with the appointment of some State Governors, see: Anderson, ÅThe Constitutional Frameworkĺ, in Davis, ed., *The Government of the Australian States* (1960), 14. Section 7 of the *Australia Act* 1986 now prevents such interference.
[59] Memorandum by the Foreign and Commonwealth Office to the Foreign Affairs Committee, HC 42 I and II (1981), quoted in Marshall, *op.cit.* f.n.22, 173.

the same country at any one time.[60] In this area of policy - external - relations, the Governments of the United Kingdom and the Dominions had overlapping jurisdictions, and thus the Queen of the United Kingdom acted upon the advice of her Ministers in the United Kingdom Government; the Queen of Canada acted upon the advice of her Canadian Ministers. To define the existence of a separate Crown according to the source of Ministerial advice would seem to support Professor Craven's argument for the existence of seven monarchies, since the duties of the Queen with regard to the Australian States are carried out by the Queen, or her representative the Governor, on the advice of Ministers of the particular State.

However, there is a difference between a comparison of the Queen acting in her different capacities at Federal and State level in Australia and of the Queen acting as both Queen of Australia and Queen of the United Kingdom. First, within Australia, there is opportunity for the governments' competing claims for jurisdiction to be resolved internally by the Courts. Secondly, the fact that Commonwealth legislation may bind the Crown in right of the State[61] indicates that the Commonwealth and State Crowns are not entirely separate: legislation purporting to bind a separate Crown would be inoperative.

It is therefore the case that the united political community of Australia, in the words of Quick and Garran, "The Commonwealth"[62], is headed by the Queen, now recognised

[60] In 1939, this problem was resolved in that Britain declared war against Germany before the other Dominions, except for Eire remained neutral throughout the conflict.
[61] *Jacobsen* v *Rogers* (1995) 182CLR572. In *Bropho* v *Western Australia* (1990) 171CLR1, it was held that State legislation binding the Crown in right of the State may or may not bind the Crown in right of the Commonwealth.
[62] Quick and Garran, *op.cit.* f.n.16, 927: "The primary and fundamental meaning of 'The Commonwealth' is the united political community composed of the people and the antecedent Colonies, now converted into States."

as the „Queen of Australia‰ In respect of some of her functions within the Commonwealth, she acts on the advice of her Ministers in the Commonwealth Government; in respect of her other functions, she acts on the advice of her Ministers in the Governments of individual States.[63] There are seven Crowns *in right* of the seven separate Governments and Parliaments at the Federal and State levels in Australia. There is, however, only one monarchy.

[63] Excepting functions in which she is not required to act upon advice.

3 Issues of Constitutional Amendment

3.1 The Constitutional Change at Commonwealth Level

The view taken by the present Commonwealth Government is that the change to a republic at Commonwealth level would require amendment of the *Commonwealth Constitution Act* pursuant to section 128.[64] The Constitutional amendments necessary to establish a republic at Commonwealth level affect the States in two key ways. First, there is the question of whether such a fundamental Constitutional alteration can take place without the support of voters in each of the six States. Secondly, there is the question of whether a State could choose to retain its links with the Crown in an Australian republic and, if not, whether the Commonwealth could impose a republican system in the States.

This section will discuss the legal arguments concerning the method of altering the Commonwealth Constitution to create a republic at the Commonwealth level. In doing so, the question of whether this change to the Commonwealth Constitution can be made without the approval of either the voters or the Parliaments of all States will be considered. First, the legal arguments that are put in support of and against the imposition of a republican structure on the States by a Commonwealth action will be considered. Secondly, an assessment will be made of the political argument that such a measure by the Commonwealth would be invalid.

[64] Williams, *Realising the Republic: The Government's Perspective* (2 April 1998).

Section 128 of the Commonwealth Constitution provides for the alteration of „this Constitution‰ by means of a referendum supported by both a majority of voters in a majority of States and a majority of voters in the country as a whole. If the High Court accepted the section 128 referendum as sufficient to abolish the monarchy, then the republic could be brought about at the Federal level without the support of each of the States. Some consider that the abolition of the monarchy at the Federal level without unanimous support from the States would not only be undesirable, but would also be constitutionally invalid. There are two issues where the power to bring about the Federal republic through a section 128 referendum with the support of the double majorities is questioned:

(1) The power of section 128 to „alter‰ the constitution might not extend to something so radical as the abolition of the monarchy;

(2) Section 128 may not extend to the alteration of the covering clauses of the Constitution.

Section 128 outlines the mode of „altering‰ the Constitution. Whether the power of „alteration‰ granted under section 128 is sufficient to transform Australia from a constitutional monarchy into a republic has been questioned. In a different context, Craven argued that

> while a power of alteration will authorise quite radical changes, it will not authorise a change which is so fundamental that it destroys the essential nature of the object of that change.[65]

[65] Craven, ÂWould the Abolition of the States be an Alteration of the Constitution Under Section 128?Ê (1989) 18 *Federal Law Review* 85, 104.

That the establishment of an Australian republic is such a fundamental change has been argued by the group Australians for a Constitutional Monarchy (ACM). They have argued that: ÅThe Crown was the tie that bound the peoples of the various Colonies in the union.Ê[66] Moreover, Tony Abbott, when Executive Director of ACM, wrote that Åbecoming a republic would threaten the whole basis of our federation and mean tearing up the whole Constitution.Ê[67] This would seem to indicate that to abolish the monarchy would be a change in the fundamental basis of the Constitution, and would therefore not be achievable, in CravenÊs view, under section 128.[68]

The validity of the assertion that ÅThe Monarchy is the keystone of the system. Remove it and the system must collapseÊ[69] is, however, unclear. Geoffrey Sawer is of the opinion that ÅThe references to an „indissoluble Federal Commonwealth [under the Crown]‰⁄ are merely historical and do not qualify the subsequent powers of amendment.Ê[70] Since Australia is now an independent nation state, it would, indeed, appear that the references to unity of the former Colonies being under the aegis of the Imperial Crown are now merely historical fact. Whilst the unity of the Colonies (States) is a fundamental feature of the Australian Commonwealth, the fact that this unity occurred initially under the Imperial Parliament is not an ongoing fundamental feature of the Commonwealth, and as such the arguments about the ability to amend fundamental constitutional principles do not apply. Moreover, Professor James Crawford has noted that ÅPreambles do not prevail over the substantive language of

[66] Gibbs, ÅThe States and a RepublicÊ, in Stephenson and Turner, eds., *Australia: Republic or Monarchy?* (1994), *Appendix II*, 229.
[67] Abbott, ÅPolitical Impossibility of a Vision Not So SplendidÊ, *Weekend Australian*, 9-10 October 1993, 32; quoted in Winterton, *op.cit.* f.n.2, I-13.
[68] Contra: Winterton, *op.cit* f.n.2, 122-126.
[69] OÊConnell, ÅMonarchy or Republic?Ê, in Dutton, ed., *Republican Australia?* (1977), 23-24.
[70] Sawer in Paton (ed.), *The Commonwealth of Australia: Development of its Laws and Constitution* (1952), 46, quoted in: Marshall, *Parliamentary Sovereignty and the Commonwealth* (1957), 115 fn.1.

an enactment.’[71] A preamble is a statement of intent, not an enactment in its own right.

Even if the changes to the Commonwealth Constitution that are necessary to bring about the republic at Federal level can be made under section 128, this may not be sufficient to abolish the monarchy. The covering clauses to the Constitution refer to the Queen and the Crown, most particularly covering clause 2, which states:

> The provisions of this Act referring to the Queen shall extend to Her Majesty’s heirs and successors in the sovereignty of the United Kingdom.

There are two questions arising from the covering clauses. First, whether the establishment of a Commonwealth republic makes necessary the amendment of the covering clauses; secondly, if this is so, whether the covering clauses can be altered by a referendum under section 128.

The provision contained within covering clause 2 would appear to be rendered null and void through referential failure if there were no provisions within the Act, especially within the Constitution of the Commonwealth, which refer to the Queen. Since this clause is not prescriptive, it is arguable that references to the Queen could be removed from the Constitution without amending this provision of the Act. Whilst the 1998 Constitutional Convention resolved that the Constitution should include a new Preamble, noting that the current preamble was outside the present Constitution,[72] there seems no requirement to alter the covering clauses.

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[71] Crawford, ‘Amendment of the Constitution’, in Craven *op.cit.* f.n.28, 186.
[72] *Op.cit.* f.n.6, 46.

It is in no way clear that it is *intra vires* a section 128 referendum to amend the covering clauses of the *Commonwealth Constitution Act*. The Commonwealth Constitution was enacted in 1900 as section 9 of the *Commonwealth Constitution Act*, an Act of the Imperial Parliament at Westminster. The first eight clauses, known as the „covering clauses‰, make several references to the Crown. Lumb and Moens note that ÂSection 128 of the Constitution extends to amendment of „this Constitution‰, which is s.9 only of the *Commonwealth Constitution Act* not the covering clauses and the preamble.Ê[73] This conclusion seems to be self-evident from a reading of the *Commonwealth Constitution Act*, and is supported by most academic commentators, including Sir Robert Garran and Professors Sawer and Moore. Winterton, however, argues that it was the „framersÊ intentions‰[74] to avoid the necessity of petitioning Westminster for any future constitutional amendment, and that this meant that „this Constitution‰ referred to the whole of the *Commonwealth Constitution Act*.

It is surely not „unduly pedantic‰ to define the scope of amendment under section 128 as being limited to section 9 of the *Commonwealth Constitution Act*. The covering clauses refer quite separately to „this Act‰ and „the Constitution of the Commonwealth‰, and the Constitution of the Commonwealth is clearly limited to section 9 of that Act; the Imperial Act is referred to as „this Act‰. Section 9 of the Imperial Act begins: ÂThe Constitution of the Commonwealth shall be as follows: ⁄Ê. Section 128 of the Commonwealth Constitution commences: ÂThis Constitution shall not be altered except in the following manner ⁄Ê. It would therefore appear that „this Constitution‰ is to be differentiated from „this Act‰, the former being capable of

[73] Lumb and Moens, *The Constitution of the Commonwealth of Australian: Annotated* (5th Edition 1995), 571.
[74] Winterton, *op.cit.* f.n.2, 124.

amendment under section 128, but not including the covering clauses or the preamble of the Imperial Act. Moore noted that the Commonwealth could not alter the first eight sections of the Imperial Act, since it is outside the scope of Åthis constitutionÊ;[75] likewise, Sir Robert Garran acknowledged that, ÅWe can alter the Constitution, but we cannot alter the Act in which our Constitution is incorporated.Ê[76] Jennings concurred, arguing that:

> The Constitution is set out as s.9 of the [Constitution] Act. S.128 of the Constitution provides for the amendment of the Constitution. There is nothing in the Act authorizing amendment of parts of the Act other than the Constitution.[77]

Contemporary opinion runs contrary to the orthodox viewpoint of Garran, Moore, Jennings and others; yet their arguments are sound This orthodox viewpoint has, moreover, been reinforced by section 16(1) of the *Australia Act* 1986, which states that Å„the Constitution of the Commonwealth‰ means the Constitution of the Commonwealth set forth in section 9 of the *Commonwealth Constitution Act*, being that Constitution as altered and in force from time to time.Ê

The scope of the amendment permitted by section 128 remained unaltered after the passage of the *Statute of Westminster*. Section 8 of the *Statute of Westminster* provides that:

> Nothing in this Act shall be determined to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia⁄ otherwise than in accordance with the law existing before the commencement of this Act.

[75] Moore, *op.cit.* f.n.13, 603.
[76] Garran, *Minutes of Evidence of the Royal Commission on the Constitution* (1929), 84, quoted in Gageler and Leeming, ÅAn Australian Republic: Is a Referendum Enough?Ê (1996) 7 *Public Law Review* 143, 148.
[77] Jennings, *op.cit.* f.n.46, 266.

The Commonwealth could not, before the commencement of the *Statute of Westminster*, alter the Preamble and covering clauses to its Constitution, and the *Statute of Westminster* conferred no power by which to alter these provisions.

From the above discussion, it would appear that section 128 is sufficient to remove references to the monarch from the Commonwealth Constitution, that is to say from section 9 of the Imperial Act. Section 128 is not sufficient, however, to alter those provisions of the Imperial Act that fall outside of the Commonwealth Constitution, although this would not prevent the Commonwealth Government, through a section 128 referendum, installing a President that possessed the combined powers of the Queen and the Governor-General.

3.2 Constitutional Change and the States

Professor Winterton observed that, "If the issues raised by the abolition of the monarchy at the Commonwealth level appear complex, they fairly pale into insignificance beside those involved in establishing republican government in the States."[78] Two legal questions of constitutional change present themselves: the ability of the Commonwealth Parliament to alter the constitutions of the States; and the extent to which the *Australia Acts* 1986 (Cwth & Imp.) entrench the position of the monarchy in the States.

[78] Winterton, *op.cit.* f.n.2, 132.

3.2(a) Amendment of State Constitutions by the Commonwealth

Even if an Australian republic can be created at Federal level through a section 128 referendum, the establishment, through the same means, of a republican government in the States is highly questionable on legal grounds.

The ability to alter the institutions of the States through a change in the Commonwealth Constitution rests upon the assertion that State Constitutions were incorporated into the Commonwealth Constitution upon federation. Yet, there is some debate concerning whether the constitutions of the former Australian Colonies were so incorporated into the Constitution of the Commonwealth or not: as Professor Craven has noted, Âthe vexed question of the relationship between s.128 and the State Constitutions [is] something that has never been resolved.Ê[79]

Chapter V of the Commonwealth Constitution is concerned with the States. Section 107 of the Commonwealth Constitution affirms that every power of a colonial Parliament shall, Âunless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the CommonwealthÊ. Section 106 states that the Constitution of each State Âshall, subject to this [Commonwealth] Constitution, continue as at the establishment of the Commonwealth ⁄ until altered in accordance with the constitution of the StateÊ. This latter section, making no explicit provision for the subsequent alteration of State Constitutions by the Commonwealth Constitution, might protect the Constitutions of the States from subsequent amendment through

[79] Craven, *op.cit.* f.n.11, 36.

that Constitution. Nevertheless, Section 109 of the Commonwealth Constitution allows for Commonwealth laws to prevail over State laws in the event of an inconsistency, which suggests that the State Constitutions are not free from subsequent amendment by the Commonwealth Constitution.

Moore considers that section 106 of the Commonwealth Constitution "is the first and most significant of a group of sections which recognise the autonomy of the States. ... The principle of State autonomy has been carefully observed."[80] Nevertheless, it is at least arguable that the Constitutions of the States were incorporated into the Commonwealth Constitution, and that they are therefore subject to amendment through that Constitution.

Geoffrey Sawer draws attention to a limitation of the power of section 128 with respect to State Constitutions:

> sections 106 and 107 [of the Commonwealth Constitution] might have been regarded as sufficient to draw into the field of section 128 every aspect of State government. But actually Australia continued its connexion with the United Kingdom, and in particular the States continue their separate relations with the Imperial Crown and Parliament[81]

Sawer notes that both Garran[82] and Moore[83] argue that alteration of the Commonwealth Constitution through section 128 was without limit.[84] Nevertheless, Sawer suggests that an interesting test case of the power of section 128 would be for a

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[80] Moore, *op.cit.* f.n.13, 326-327.
[81] Sawer, "Some Legal Assumptions of Constitutional Change" (1957) 4 *University of Western Australia Law Review* 1, 5.
[82] Quick and Garran, *op.cit.* f.n.16, 989.
[83] Moore, *op.cit.* f.n.13, 602.
[84] c.f. Leslie Zines, who argues that this view "was rejected by the majority of judgements in the High Court". Zines, *The High Court and the Constitution* (3rd Edition, 1992), 293-4.

constitutional amendment conferring power on Parliament to end appeals from State courts to the Privy Council.

The *Australia Acts* 1986 ended these appeals to the Privy Council. The section 128 procedure was not employed. Instead, the Commonwealth Parliament enacted at the request of, and with the consent of, the States, the *Australia (Request and Consent) Act* 1985, which resulted in the *Australia Act* (UK) 1986. This procedure, under section 51(xxxviii) of the Commonwealth Constitution Åwas necessary to preserve the integrity and effectiveness of the process.⁄ Prudence also dictated that the dual acts method should be followed: in the light of the obscurity surrounding s.51(xxxviii), a reliance on that method alone might jeopardise the goal.Ê[85] Hence, SawerÊs test has been carried out, and the consent of a State has been found desirable where the amendment of the Constitution of that State is concerned.

Even if the State Constitutions were incorporated into the Commonwealth Constitution upon federation, that Constitution does not provide the legal basis for the existence of the States: that lies in StatesÊ own Constitutions, which derive from the relevant Imperial legislation.[86] Moreover, the principle of federation requires that there are some areas of the Constitutions of the States that cannot be changed by the Commonwealth Parliament.[87] The section 128 referendum procedure can be seen as an act of the Commonwealth Parliament, with the Parliament redefined to include, effectively, an additional chamber (the electorate), the approval of which must be

[85] Lumb, *op.cit.* f.n.30, 110.
[86] Craven, *op.cit.* f.n.65, 90.
[87] See *Melbourne Corporation* (1947) 74CLR31. This doctrine, known as the „intergovernmental immunities doctrine‰ has yet to be tested in its application to a constitutional amendment.

sought. It is thus at least arguable that it is not possible to amend the Constitutions of the States directly, against the wishes of those States, through a section 128 referendum. In order to avoid this conclusion, it would be necessary to define the alteration of the Constitution of a State as affecting the „limits‰ of the State concerned. This point is considered briefly in section 4.1 (*infra*).

3.2(b) Entrenchment of the Monarchy in the States: the Australia Acts

One legal argument against the imposition of a republic on the States lies in the entrenchment of the monarchy at State level through the *Australia Acts* 1986. Section 7 provides:

> 7. (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.

Lumb has argued that section 7 of the *Australia Acts* probably entrenches the monarchy at State level because of its references to Her Majesty. Others[88] have argued that section 7 does not entrench the relationship between the State Governor and the Crown. They argue that section 7 assumes the existence of the monarchy only in the manner that the Commonwealth Constitution assumes the existence of the

[88] Including Winterton: *op.cit.* f.n.1, 479; *op.cit.* f.n.51, 121. The former Acting Solicitor-General, Mr Dennis Rose, is of the same opinion in *op.cit.* f.n.4, *Volume 2.*

monarchy at the Commonwealth level. Even if the monarchy was assumed to exist by section 7, the monarchy could not be made null and void through the abolition of the post of Governor, as has been suggested. Assuming that there must be, in the governmental systems in the States, some administration, section 16 of the *Australia Acts* ensures that the head of the administration must be regarded as the representative of the Queen in the State, regardless of the title of the holder of this office.[89] In this way, section 7, read with section 16, entrenches the position of the monarchy at State level.

It would therefore be necessary to amend the *Australia Acts* in order to achieve the republic in the States. This could not be achieved directly under a section 128 referendum. Section 15 of the *Australia Act* provides for the method of repeal or amendment of that Act, or of the *Statute of Westminster*. It is worth quoting in full:

> 15. (1) This Act or the Statute of Westminster 1931, as amended and in force from time to time, in so far as it is part of the law of the Commonwealth, of a State or of a Territory, may be repealed or amended by an Act of the Parliament of the Commonwealth passed at the request or with the concurrence of the Parliaments of all the States and, subject to subsection (3) below, only in that manner.
>
> (2) For the purposes of subsection (1) above, an Act of Parliament of the Commonwealth that is repugnant to this Act or the Statute of Westminster 1931, as amended and in force from time to time, or to any provision of this Act or of that Statute as so amended and in force, shall, to the extent of the repugnancy, be deemed an Act to repeal or amend the Act, Statute or provision to which it is repugnant.
>
> (3) Nothing in subsection (1) above limits or prevents the exercise by the Parliament of the Commonwealth of any powers that may be conferred upon that Parliament by any alteration to the Constitution of the Commonwealth made in accordance with section 128 of the Constitution of the Commonwealth after the commencement of this Act.

[89] Section 16(1) of the *Australia Act* 1986 defines „Governor‰ in relation to a State, as including Âany person for the time being administering the government of the StateÊ.

Section 15(1), therefore, provides that the alteration of the *Australia Act* or of the *Statute of Westminster* 1931 requires the consent of all of the States. This is similar to the provisions of section 51(xxxviii) of the Commonwealth Constitution, save that section 15(1) of the *Australia Act* is not expressly subject to the Commonwealth Constitution itself.

In the event of one or more States objecting to the amendment proposed under section 15(1), Mr Dennis Rose, as the Acting Commonwealth Solicitor-General in 1993, identified an alternative mode of altering the *Australia Act* through section 15(3) of that Act:

> In my opinion, section 15(3) allows the Parliament, if given power pursuant to a referendum under section 128 of the Constitution, to do anything that can be done by the alternative procedure under section 15(1) read with section 15(2).[90]

Nevertheless, one reading of subsection 15(3) is that it is not a provision which itself confers the power to amend the *Australia Act* and, furthermore, that whilst that section did not prevent or limit the powers of section 128, an amendment to the Commonwealth Constitution under section 128 would not permit the amendment of the *Australia Acts*. It is arguable that section 7 of the *Australia Act* 1986 (Cwth) can be altered pursuant to section 128 of the Commonwealth Constitution since it was enacted pursuant to section 51(xxxviii) of the Constitution, which is Âsubject to this ConstitutionÊ. However, the amendment of the relevant sections of the *Australia Act* 1986 (UK) would also be necessary. The alteration of these measures could not be achieved under the section 128 procedure.

[90] *Op.cit.* f.n.4, *Volume 2*, Appendix 8, paragraph 20.

The *Australia Act* 1986 (UK) and the *Statute of Westminster* 1931 (Imp.), as British legislation applying to Australia by paramount force, were not subject to amendment under section 128 of the Commonwealth Constitution before 1986,[91] and remain beyond the power of that section. It is only the Commonwealth Constitution, and the provisions that are subject to it, that can be amended under section 128.[92] The *Australia Act* (UK) is not such a provision.

3.3 Republican Commonwealth, Monarchical States?

The above discussion of the legal issues of constitutional amendment has shown that it is legally questionable whether the Commonwealth can impose a republican system upon the States. It is therefore necessary to consider how the position of the Queen in relation to the States would be affected by the Commonwealth republic. The proposals for a Commonwealth republic do not actually abolish the Australian monarchy: since the Commonwealth Constitution did not create the Australian monarchy, removing all references to the Queen and the Governor-General from the Commonwealth Constitution does not abolish that monarchy.

Professor Winterton did propose a draft constitution[93] that would have abolished the Australian monarchy, but this would been questionable on legal grounds, since it attempted to remove the monarch from both Commonwealth and State Constitutions through a section 128 referendum, even if, as in this case, provision was made for the

[91] For the same reasons that the covering clauses of the *Commonwealth Constitution Act* were beyond the power of a section 128 amendment (*supra*, section 3.1).
[92] *Supra*, 30-32.
[93] Winterton, ÌA Constitution for an Australian RepublicÎ, *Independent Monthly* (June 1993).

Queen to become Head of any State that wanted this. Once the monarchy had been abolished in Winterton’s model, the Queen would have to agree to become the Head of individual Australian States, and it is unlikely that she would so agree. Hence, Winterton’s model would force a republican system upon all States. The proposals of the 1998 Constitutional Convention would not, however, abolish the monarchy, and therefore the Queen could not refuse to be monarch of Australia.[94] Since there have been few moves towards the establishment of State republics, the possibility of a republican Commonwealth co-existing with monarchical States is a very real one, and ought to be considered.

Given the questionable legality of the imposition of a republican structure upon the States by the Commonwealth, it is an important question whether it would be necessary for all States to republicanise their constitutions at the same time as the Commonwealth became a republic. The Constitutional Convention clearly did not believe this to be necessary;[95] nor does Professor Winterton, amongst others, although he accepts that such a situation may be anomalous.[96] Whilst a former Chief Justice of the High Court has referred to the possibility of monarchical States co-existing with a republican Commonwealth as ‘simply absurd’,[97] a similar situation has occurred in the past: the situation prior to 1986, where the Queen of the United Kingdom appointed the Governors of States in Australia, which was to all intents and purposes a sovereign and independent country, was similarly anomalous. Moreover, Gerard

[94] The only course of action open to the monarch would be to abdicate. Not only would this not solve the problem, since her heir would simply become King of Australia, but it would also, most probably, entail her abdication as her position as Head of State in her other realms and territories also.
[95] *Op.cit.* fn.6.
[96] See (amongst others): Winterton, *op.cit.* f.n.2, 103-105; Williams, ‘The Australian States and an Australian Republic’ (1996) 70 *The Australian Law Journal* 890, 892.
[97] Gibbs, *op.cit.* f.n.66, 298.

Carney,[98] is correct in his rejection of the opinion of D.P. O'Connell that the co-existence of a republican Commonwealth and monarchical States would be 'impossible'.

Even if it is possible for monarchical States to co-exist alongside a republican Commonwealth, the advent of a republic at Commonwealth level is likely to stir interest in the republican debate at State level, which has been of little or no importance to date, when compared to the debate about the Commonwealth republic. For this reason, and given that for the Commonwealth to force changes upon the States is legally questionable, it is valuable to consider the changes necessary for the States to republicanise their Constitutions.

3.4 State Constitutions' Manner and Form Requirements

The 1998 Constitutional Convention considered that the States should be free to choose whether or not they made the transition from monarchy to republic, and the plans of the Government for the Commonwealth republic are not intended to extend to the States. If States are to be left to amend their own Constitutions, through either legal considerations (as outlined in the previous subsection) or because of political concerns (see section 4, *infra*), then it is necessary to determine the measures required to achieve republican government in the States.

From 1865 until 1986, the Parliaments of the States were constrained in the scope of their legislative power by the *Colonial Laws Validity Act* 1865. This restriction was

[98] Carney, 'Republicanism and State Constitutions', in Stephenson and Turner, eds., *op.cit.* f.n.66, 205.

removed by the *Australia Acts*. [99] Nevertheless, section 6 of the *Australia Acts* provides for the entrenchment of the manner and form provisions included in State Constitutions:

> A law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers of procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may be from time to time required by a law made by that Parliament whether made before or after the commencement of this Act.[100]

This Âmanner and formÊ entrenchment means that Bills allowing for the removal of the monarchy from the Constitutions of some States will require a special majority in the State Parliament or approval at a referendum. Table 1 outlines briefly the measures necessary for the removal of the monarchy in each State:

Table 1: *Amendment of State Constitutions necessary to achieve a republic.*[101]

State	Monarchy Entrenched?	Referendum Required?[102]	Special Majority in Parliament?
New South Wales	Indirectly. Constitution assumes monarchy.	Arguably not, but preferable.	No.
Queensland	Yes, directly.	Yes.	No.
South Australia	Yes, indirectly.	Yes	No.
Tasmania	No.[103]	No.	No.
Victoria	Yes, directly.	No.	Absolute majority of all Members of each House.
Western Australia	Yes, directly.	Yes.	Absolute majority of of both Houses.

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[99] *Australia Act* 1986 (Cwth), section 3.
[100] *Australia Act* (UK) 1986, Section 6.
[101] For a more detailed account of the necessary changes to the State see: Williams, *op.cit.* f.n.96, 895-898.
[102] The Attorney-General notes that Âas a political matter, each State might think it necessary to seek the views of its people at referendum before removing the monarchy from its constitutional framework.Ê Williams, *op.cit.* f.n.64, 17.
[103] Section 23 of the *Constitution Act* 1934 (Tas) provides for the dissolution of the Assembly by the Governor. Section 41(a) requires the support of two-thirds of the members of the Assembly for the

The measures necessary for the establishment of republican government in the States therefore vary from the passage of normal legislation in Tasmania to a referendum and absolute majority in Parliament in Western Australia. It should be noted, however, that, for the States to make the transition to republican government, it would be necessary, upon the above reading of the *Australia Acts*, and in any case to maintain certainty in the constitutionality of the reforms, to repeal sections 7 and 16 of the *Australia Acts*.[104] This would most probably require, as argued in section 3.2(b) above, the consent of all the States.

amendment. However, section 41(a) is not, itself, entrenched, and so could be amended by a simple majority. See Williams, *op.cit.* f.n.96.

[104] See, e.g., Williams, *op.cit.* f.n.96, 894.

4 Wider Issues of Constitutional Change

Winterton argues categorically that the abolition of the monarchy at the State level is akin to a normal Constitutional amendment:

> The monarchy can be abolished at both Commonwealth and State level pursuant to section 128 of the Commonwealth Constitution.[105]

This thesis has argued that the validity of this statement is questionable on legal grounds. It shall further be argued that it is invalidated by wider political concerns.

The Victorian Premier, Mr Jeff Kennett, has commented that, whether or not it is legally possible to introduce a republic at Federal level without the support of all six States, Åit is politically delinquent and morally repugnant not to seek the agreement of all six States to a change which so dramatically affects the Federation they engineered, and in which they operate.Ê[106] Even if it is not necessary in law for the change to the Commonwealth republic to meet with State support, the support of the States is politically necessary because of the need to secure the approval of the republic referendum under section 128 of the Commonwealth Constitution. The history of constitutional referendums in Australia shows that, for a referendum to achieve the „double majorities‰ necessary in order to be carried, it must receive support from politicians and activists at State level as well as at Commonwealth level.

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[105] Winterton, *op.cit.* f.n.2, I-17. Winterton does, however, admit that ÅState participation would bring incalculable political benefitsÊ: *op.cit.* f.n.53, 124.
[106] Kennett, ÅThe Crown and the StatesÊ (paper to The Samuel Griffith Society Conference 1993).

4.1 State Support and Commonwealth Referendums

The Australian Constitution may be amended according to the referendum procedure set out in section 128 of the Constitution. Only the Commonwealth Parliament can initiate referendums under section 128, and proposals to hold a referendum must be passed either by both Houses of the Commonwealth Parliament, or twice by one of the Houses. A „double majority‰- a majority of voters in a majority of States, and a majority of voters in the nation as a whole - is required in a referendum in support of a proposal to alter the constitution, except that:

> No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.[107]

The establishment of a Commonwealth republic does not, however, affect „the limits‰ of the State, which are taken, on the better view, to be the physical territorial limits of the State.[108] Thus, a majority of voters in a majority of States, and a majority of voters in the country as a whole, will be required for the 1999 republic referendum to be carried.

As the current Commonwealth Attorney-General has observed: ÅThe history of constitutional reform in Australia is littered with failed attempts.Ê[109] Eight out of forty-

[107] *Constitution of the Commonwealth of Australia*, section 128.
[108] Sir Harry Gibbs, formerly Chief Justice of the High Court, takes a wider reading of the „limits‰ of the State [Gibbs, ÅThe Australian Constitution and Australian Constitutional MonarchyÊ, in Stephenson and Turner, eds., *op.cit.* f.n.66, 11]. For a discussion of this point, see: Twomey, ÅState Constitutions in an Australian RepublicÊ (1997) 23 *Monash University Law Review* 312, 320-322. This issue remains unresolved: in *McGinty* v *Western Australia* (1996) 186CLR140 at 275, Gummow J states that the „limits‰ of the State envisage a referendum Å„in any manner‰ affecting the provisions of the Constitution in relation to a State.Ê
[109] Williams, *op.cit.* f.n.64, 5.

two proposals to amend the Commonwealth Constitution through a section 128 referendum have been carried. This has led to claims that, Âconstitutionally speaking, Australia is the frozen continentÊ.[110]

It would appear that those referenda which are successful are those that have had both bipartisan support, and support at State as well as Federal level. Of the eight referenda that have passed, only one, which was voted on in 1910 and concerned State debts, passed without the support every State (New South Wales voted against). A further five referenda failed because, whilst they were approved by a majority of voters nationally, they received a majority of votes in two States (aviation, 1936; simultaneous elections, 1984), or in three States (marketing, 1946; industrial unemployment, 1946; simultaneous elections, 1977).

State politicians can exert crucial influence upon the outcome of referenda voted upon under section 128 of the Commonwealth Constitution. Galligan cites research by R.S. Parker showing that the third most important influence upon voting behaviour in a referendum, after ignorance and apathy, and partisanship, was the influence of Âthe State political party towards which [voters] are favourably disposed at the momentÊ.[111] Furthermore, through a systematic analysis of State voting patterns, Campbell Sharman has shown that Âthere are patterns of state voting in referendums which are congruent with a model of state voting behaviour based on varying perceptions of State interestÊ.[112] The prominent trend for a referendum held under section 128 to satisfy the „dual majority‰ requirement only if it is supported by State

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[110] Sawer, cited in Galligan, *op.cit.* f.n.18, 110.
[111] Parker, quoted in Galligan, *ibid.*, 130.
[112] Sharman, quoted in Galligan, *ibid.*, 130.

politicians and parties and if it is seen as being in the interest of the State means that an important political requirement, if not a legal necessity, is for the „yes‰campaign at the referendum to gain the support of State politicians.

Despite the fact that most referenda that have been carried have been supported by a majority of electors in all States, this is not certain to happen in the forthcoming referendum on the Commonwealth republic. A poll for the *Sydney Morning Herald* in February 1998, immediately following the Constitutional Convention, showed support for the republic varying from 48 per cent in Victoria to 37 per cent in South Australia.[113] These figures may increase after a referendum campaign, but even with an increase it is not fanciful to consider the situation where a referendum satisfies the double majority condition, but fails to win majority support in all States.

The history of section 128 referendums suggests that, for the 1999 republic referendum to be carried, the support of the State politicians will be of immense importance. For this reason, the views of Mr Kennett and others are central to the approval of the Commonwealth republic. The principal means of alienating the support of State politicians for the Commonwealth republic would have been for the Commonwealth Government to attempt, through the referendum, to force a republican structure upon the States at the same time.

[113] Michael Millett, ÂRepublican change fails test runÊ, *Sydney Morning Herald*, 16 February 1998. Support for the republic was: Victoria 48 per cent, Western Australia 45, NSW 42, Queensland 41, South Australia 37.

4.2 The States and the republic: a Principle of Self-determination

The imposition of a republican structure on State Constitutions would break the promises of both the present Prime Minister, Mr John Howard, and his predecessor, Mr Paul Keating. Moreover, it would contravene the recommendations of the 1998 Constitutional Convention. Mr Keating said that Âit is not our intention that the governmentÊs proposals [to remove the monarchy from the Commonwealth Constitution] should affect the Constitutions of the Australian States.Ê[114] Mr Howard, when setting up the Constitutional Convention, promised to implement the conclusions of that Convention.

The Convention concluded that Âany move to a republic at the Commonwealth level should not impinge on State Autonomy, and the title, role, powers, appointment and dismissal of State heads should continue to be determined by each State.Ê[115] Moreover, the Republic Advisory Committee acknowledged that to attempt to force a State to republicanise its constitution against its will would Âraise issues of State rights that went well beyond the question of monarchy or republicÊ.[116] Hence, whilst the transition from monarchy to republic simultaneously at Commonwealth and State levels might be preferable, the absence of a Commonwealth-State constitutional accord should not prevent the right of each governmental system to determine its own constitutional arrangements. It is quite unclear what legitimate interest the

[114] Keating, *An Australian Republic: The Way Forward* (7 June 1995), 13
[115] *Op.cit.* f.n.6.
[116] *Op.cit.* f.n.4 *Volume 1*, 128.

Commonwealth could have in imposing a republican structure upon an unwilling State.[117]

[117] Craven, *op.cit.* f.n.11, 36.

5 The position of the Governor in a State Republic

Prior to the *Australia Acts* 1986, the State Governor was appointed by Her Majesty[118] upon the advice of United Kingdom Ministers, who were, themselves, in receipt of the advice of State Ministers. After 1986, State Governors were appointed by the Queen of Australia upon the advice of the relevant State Premier. This appointment of State Governors in Australia is to be contrasted with the appointment of Lieutenant-Governors in the Canadian Provinces, who are appointed by the Governor-General upon the advice of Federal Ministers. State Governors in Australia are, therefore, in a position of independence from the Federal Government.

The powers which, in Britain, are exercised by Her Majesty are, in the Australian States, exercised by the State Governors who are Her Majesty's representatives.[119] In addition to these powers, Her Majesty has the power to appoint and dismiss the State Governor, although this is normally exercisable[120] upon the advice of the State Premier.

There are two issues for State Governors that arise from the moves towards a Commonwealth republic in Australia. First, there is the need to maintain the independence of the State Governor from Commonwealth influence; and, secondly, there are the rôles that State Governors perform on behalf of the Federal system of government.

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[118] Acting, as has been argued in section 2.3 *supra*, in her capacity as Queen of the United Kingdom.
[119] *Australia Acts* 1986 (Cwth & UK), section 7.
[120] Sir Walter Campbell, sometime Governor of Queensland, states that Her Majesty always acts upon ministerial advice: Campbell, *Comments on the Role of a State Governor with Particular Reference to Queensland* (1988 Endowed Lecture). Extending the argument of Bogdanor and Marshall (*op.cit.* f.n.24) to the States, the Queen might not be required to take the advice of her State Ministers.

5.1 The Independence of State Governors

The independence of State Governors from the Federal Government is a hard-won concession[121] which must be maintained if the States are to support the Commonwealth republic. The Commonwealth Constitution omitted proposals from the draft Bill of 1891 that determined provisions for the State Governor and another clause that was to route through the Governor-General all correspondence between the State Governor and the monarch.[122] Indeed, Lord Crewe, when at the UK Colonial Office, observed that evidence of State independence was Âsecured by making the appointment of the Governor in the same manner and on the same terms as prior to federation.Ê[123] Considerable effort was made to ensure that the independence of State Governors was secured at the time of federation, and this independence, as a matter of federal theory, ought to remain under a Commonwealth republic.

5.2 State Governors and the Republic

5.2(a) State Governors and the Commonwealth Presidency

There are two rôles performed by State Governors on behalf of the Federal Government. The first duty is in relation to Senate elections: under section 12 of the Commonwealth Constitution, the State Governor Âmay cause writs to be issued for

[121] See f.n.58, *supra*.
[122] Moore, *op.cit.* f.n.13, 327.
[123] October 9th, 1908, quoted in *ibid., 327.*

elections of senators for the State.�[This matter is merely procedural and should not be affected by the Commonwealth republic, even if the State concerned was to retain links with the monarchy. More substantial questions arise from the second Federal rôle of a State Governor: to act as an Acting Governor-General.

In the event of the absence, incapacity, or dismissal of the Governor-General, the current provision is for the appointment of the most senior State Governor as Acting Governor-General.[124] This practice is to be extended to the Commonwealth republic, although the Commonwealth Parliament could subsequently legislate to exclude „monarchical‰ Governors from the line of succession to the post of Acting President.[125] State Governors have, therefore, the potential to perform a central rôle in a Commonwealth constitutional crisis, following the dismissal of the President by the Prime Minister, even though that State Governor might have been appointed as State Governor by the Queen. The prospect of the Head of State of a republican Commonwealth being appointed, albeit indirectly, by the Queen is an irony that contradicts the principles of republican government.

5.2(b) State Governors and State Republics

The questions that arise concerning the position of the Governor in a State republic correspond broadly to those that have been raised concerning the position of the President in a Commonwealth republic. These questions have been documented

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[124] Formally, Her Majesty issues the State Governors with dormant commissions to be Acting Governor-General. If an Acting Governor-General is required, the State Governor with the oldest dormant commission is appointed to that position.

[125] *Constitution Alteration (Establishment of a Republic) Bill* 1999 (exposure draft), schedule 1, proposed new section 63 of the Commonwealth Constitution.

elsewhere.[126] The precise natures of the issues that arise about the power and function of a State Governor in a State Republic do, however, depend largely upon the republican model adopted in a particular State. Little debate surrounding these models has occurred to date, and it is not possible to assess the powers and rôle of a State Governor under a State republic in the absence of such a model. This thesis therefore does not consider these issues.

[126] E.g.: O'Farrell, 'The role of a State Governor in an Australian Republic', in Winterton, ed., *We The People* (1994); Patmore and Whyte, 'Imagining Constitutional Crises: Power and (Mis)Behaviour in Republican Australia', 25 *Federal Law Review* 1997, 181.

6 Conclusions

The fundamental issues involved in the change to a republic are disputed, and it is possible for one to argue any of several points of view whilst being able to cite several prominent authorities in support of oneÊs argument. The above discussion has considered the position of the States in the proposed establishment of a republic at Commonwealth level and, in so doing, some of these issues have been examined and resolved. The constitutional structure of the Commonwealth has been examined, with especial reference to the position and status of the States within that structure, and the nature of the Australian Crown.

The method by which the necessary constitutional changes might be brought about was then outlined, with consideration of the rôle and influence of the individual States in this change, and the question of whether the States could be forced to republicanise their own Constitutions. Having investigated the legal and political questions that arise from the proposed republic, the position of State Governors under the Commonwealth republic was briefly considered. Many of these questions are of a complex legal nature, and no attempt has been made to unduly simplify the legal arguments contained within this thesis.

Australia can, at the time of writing, already be described as a „republic‰ sovereign power rests in the people, or their elected representatives, and not in a single ruler, although constitutional theory may still be used to argue that the monarchy acts as the embodiment of the sovereign power in the nation of Australia. In the language of

Bagehot, Australia is a Ådisguised republicÊ; in the words of Professor Galligan, Australia resembles Åa federal republic rather than a constitutional monarchy.Ê

At the beginning of this thesis, a particular conception of „the Commonwealth‰ was argued for. The definition of „the Commonwealth‰ distinguished between „the Commonwealth‰ as a way of referring to the federal governmental system, arguing that there was, in the conception of Quick and Garran, a unified political community created in the act of federation. It is this political entity that is sovereign in Australia; it collectively controls the sum of political power within the systems of government in Australia as a whole. The sovereign power that belongs to this „Commonwealth‰ is exercised at the Federal (often referred to as „Commonwealth‰) level by the Parliament in Canberra; the remainder of the sovereignty is exercised by parallel Parliaments in each of the six State capitals, and by the people under section 128 of the Commonwealth Constitution. The embodiment, albeit a fictive one, of the sovereign power that belongs to „the Commonwealth‰ as a single entity is the monarch, who is now the Queen of Australia. She is represented at Commonwealth level by the Governor-General and in the States by the six State Governors.

At the time of federation, there was only one monarch within the empire - the United Kingdom monarch. Over a period of time, the concept of the divisibility of the Crown within the British Commonwealth of Nations was recognised, and a separate Australian Crown came into being at some time between 1926 and 1953. Finally, the States, which had remained under the United Kingdom Crown, were brought under the Australian Crown by the *Australia Acts* 1986. Hence, there is only one Queen in the polity that is the Commonwealth of Australia in its wider sense.

There are, however, seven Crowns *in right* of Australia. There exists one Crown *in right* of each of the six State Governments, and a Crown *in right* of the Federal Government. To accept that there are seven Crowns *in right* of Australia is not, however, to accept Professor Craven's doctrine of Australia as a heptarchy; these Crowns were established before the concept of the divisibility of the Crown became accepted, probably before federation[127] and certainly by 1925.

Since there is only one monarchy in Australia, it would seem that to abolish that monarchy from the Commonwealth level would entail its consequent abolition at the level of the States. Yet, the *Communiqué* of the 1998 Constitutional Convention, to which the Howard Government is pledged to adhere, stated that the change to the republic at Federal level should not require a similar change at State level. This is to be achieved by alterations to the Commonwealth Constitution that do not seek to proclaim the abolition of the Australian monarchy, but rather seek to eradicate the references to the monarchy from the Commonwealth Constitution. Since the Commonwealth Constitution did not create the monarchy, eradicating these references does not abolish the monarchy; what it does is to remove the monarchy from its (already very limited) rôle in the Federal system of government. There will, therefore, still be a Queen of Australia, even if the 1999 republic referendum is carried by the requisite majorities.

Through an examination of the legal arguments surrounding constitutional change at the Commonwealth level, this thesis has argued that the Australian monarchy

[127] Wade and Bradley, *op.cit.* f.n.44, 339.

could not be eradicated directly through a section 128 referendum that satisfied the „double majority‰ requirement. Whilst taking into account the argument of Professor Winterton that the monarchy could be abolished at both Commonwealth and State level pursuant to section 128,[128] it is nevertheless arguable on legal and political grounds that this is not the case. The need to amend the *Australia Act* 1986 (UK) and the uncertain meaning of section 15(3) of that Act indicate that, to honour a tradition of constitutional amendment that comprises both thoroughness and caution, it is advisable to alter the Act with the consent of all of the States. Furthermore in order to preserve the principle of the autonomy of State institutional arrangements that can be inferred from federalism, it is highly desirable that the States are allowed to alter their own constitutions in the manner and form set out within them.

Section 5 considered the position of a State Governor under the Commonwealth republic. Independence from the influence of the Commonwealth Parliament has been a characteristic of State Governors that has been jealously guarded from the time of federation, and there is no indication that this will be jeopardised under a Commonwealth republic. It will be for each State to decide if and when to republicanise the procedure for the appointment and dismissal of its own Governor.[129] A paradoxical situation that might arise under the Commonwealth republic is where the Governor of a monarchical State was appointed to be Acting President of the Commonwealth. This situation, whilst somewhat ironic, would not

[128] Winterton, *op.cit.* f.n.2, ch.8.
[129] This is to be compared with the Canadian system, where the Lieutenant-Governors are appointed by the Governor-General and would, under a Federal republic, presumably be appointed by the President, although it should be noted that, in Canada, the establishment of a Federal republic would require the approval of every province.

itself precipitate a constitutional crisis and would, in any case, be a temporary measure.

The proposed Commonwealth republic in Australia will not significantly affect the autonomy of the States or the position of the State Governors; but it will do this by leaving the Australian monarchy intact. It is unlikely that all States will choose to, or be able to, convert to republican government immediately, in the event of the 1999 Commonwealth referendum being carried; indeed, the *Australia Act* 1986 (UK) will need to be amended prior to any such moves. The co-existence of monarchical states and a Commonwealth republic, whilst anomalous, will not, as some have feared, be unworkable. The method of constitutional change, and the model for that constitutional change, which have been adopted in relation to the proposed Commonwealth republic ensure that the State Governments and Parliaments will continue to function as they do at the present time.

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