THE PATH TO INDEPENDENCE:

AUSTRALIA'S CONSTITUTION AND HER BRITISH TIES

ROBERT EVANS*

I INTRODUCTION

The *Australian Constitution* created the Commonwealth of Australia on 1 January 1901. It was written 'at a time of ambivalence about Australia's place in the world, whether it was an independent country or a child of England.'[1] Whilst the framers were seeking greater independence from Britain, the *Constitution*, which itself formed part of an Act of the Imperial Parliament,[2] was a colonial document that assumed the primacy of the 'Mother Country'. At Federation, the legislature, executive and judiciary branches of the Commonwealth and States were all subject to the control of the Imperial Parliament, British Ministers and the Privy Council. Today, Australia is an independent nation, free from British control. However, unlike other nations whose independence is symbolised by a major historical event, Australia's independence was achieved '[n]ot with a bang but a whimper.'[3] The process of severing her British ties occurred through a series of milestones spanning nearly nine decades.

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* Nom de Plume. This essay was submitted for the Venour V Nathan Prize in January 2022. Word count: 7495 words (excluding references and bibliography).

[1] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1997) 157.

[2] References in this essay to the *Commonwealth of Australia Constitution Act* is to the Act of the Imperial Parliament known as the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12. References to the *Constitution* is to the *Constitution* as provided in s 9 of the *Commonwealth of Australia Constitution Act*.

[3] TS Eliot, 'The Hollow Men' in *Poems 1909–1925* (Faber & Faber, 1927) 128.

Because Australia's independence was the 'result of an orderly development — not…the result of revolution',[4] the evolutionary theory does not identify a 'magic date'[5] upon which the evolution was complete. Amidst the uncertainty, Professor Twomey nominates two 'candidates' for the day that Australia became independent:[6] 11 December 1931 — the day that the *Statute of Westminster*[7] received the Royal Assent — and 3 March 1986 — the day that the *Australia Acts*[8] came into effect. This essay argues that the better view is the latter date. Whilst the Commonwealth Parliament gained the *capacity* to exercise full independent powers in 1931, it did not actually exercise that capacity until 1942. Even then, the State Parliaments were excluded from the *Statute of Westminster*; High Court decisions could, and were not infrequently, appealed to the Privy Council in London; and, advice on State matters was formally tendered to the Queen by Her British ministers, not State Premiers. By considering legislative power (Part II), advice to the Queen (Part III) and judicial dependence (Part IV), this essay argues that, whilst the events of 1931 represented a significant step to Australia's independence, it was not until 1986 that Australia achieved complete independence from the United Kingdom at the federal and state level.

II THE SUCCESS AND SHORTCOMINGS OF THE *STATUTE OF WESTMINSTER*

A *The Doctrines of Repugnancy and Extraterritoriality*

Throughout the late 1800s, legislation from the British Parliament established local legislatures in the six colonies of New South Wales, Queensland, Victoria, South Australia, Tasmania and Western

[4] *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246, 261 (Gibbs J), cited in *Sue v Hill* (1999) 199 CLR 462, 503 (Gleeson CJ, Gummow and Hayne JJ).

[5] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 82 (Callinan J).

[6] Anne Twomey, 'Independence Day' (2011) 36(1) *Alternative Law Journal* 2, 2–3 ('Twomey, Independence Day').

[7] *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4 ('*Statute of Westminster*').

[8] *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (collectively, '*Australia Acts*').

Australia.[9] Within the limits provided by the British enactment, the legislatures had 'plenary powers of legislation, as large, and of the same nature, as those of [the Imperial] Parliament itself.'[10] The legislatures were, however, subject to two common law limits. Firstly, the *doctrine of repugnancy* invalidated colonial laws that were inconsistent with British laws because the colonial legislatures were subordinate to the British Parliament.[11] Following a very broad reading of this doctrine by Justice Boothby in South Australia,[12] the British Parliament enacted the *Colonial Laws Validity Act* to clarify that colonial laws would only be invalidated if they were 'repugnant' to British laws that applied to the colony 'by express words or necessary intendment'.[13] Thus, whilst the colonial legislatures were free to repeal or amend Imperial laws they had received from colonisation, the altered doctrine of repugnancy meant they continued to be bound by British statutes of paramount force. Secondly, the *doctrine of extraterritoriality* confined the operation of colonial laws to the colony's territorial boundaries unless there was a necessary connection.[14] This doctrine can be seen in an 1891 Privy Council appeal concerning a man who married his first wife in Sydney and a second wife in the United States.[15] The Privy Council had held that the man could not be prosecuted for bigamy under New South Wales law because the allegedly bigamous second marriage occurred outside the territorial limits of that colony. In addition, various Acts of the British Parliaments and instructions to Governors imposed requirements that laws of the colonies on certain matters be reserved by the Governor for the Monarch's personal assent before coming into effect. In other cases, a law assented by the Governor could still be disallowed by the Monarch. The culmination of these doctrines and colonial arrangements were 'designed to ensure surveillance of colonial legislatures by the Imperial Government'.[16]

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[9] See *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict, c 59.

[10] *R v Burah* (1878) 3 App Cas 889, 904 (Lord Selborne for their Lordships).

[11] *Phillips v Eyre* (1870) LR 6 QC 1, 26–7 (Willes J).

[12] Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 23–5.

[13] *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, ss 2–3 ('*Colonial Laws Validity Act*').

[14] See *Millar v Commissioner of Stamp Duties* (1932) 48 CLR 618.

[15] *Macleod v A-G (NSW)* [1891] AC 455.

[16] *Sue v Hill* (1999) 199 CLR 462, 495–6 (Gleeson CJ, Gummow and Hayne JJ).

The Commonwealth of Australia was created in 1901 by the *Commonwealth of Australia Constitution Act*, which applied to the colonies by paramount force.[17] As the Commonwealth Parliament was thus a creature of a British statute, it too, like the States, was subject the doctrine of repugnancy as set out in the *Colonial Laws Validity Act*. This meant that British law remained supreme on Australian soil. That effect was evident in the *Union Steamship* Case[18] when the High Court invalidated provisions of an Act of the Commonwealth Parliament — the *Navigation Act 1912* (Cth) — because it was repugnant to an Imperial statute — the *Merchant Shipping Act 1894* (Imp). The very fact that British law remained paramount was symbolic of Australia's place in the world. It reinforced the notion that Australia had no identity apart from her membership in the British Empire.

The Commonwealth Parliament was also limited by the doctrine of extraterritoriality. This was limited in some respects because the *Constitution* had expressed certain Commonwealth powers as operating extraterritorially. The power to make laws with respect to 'fisheries' was explicitly extended to operate 'beyond territorial limits'.[19] Likewise, the power to make laws for 'trade and commerce with other countries' and 'external affairs' obviously had international reach.[20] However, the doctrine still applied to other Commonwealth powers as evident in the High Court's holding that the legislative power with respect to 'industrial disputes'[21] did not apply to Australian ships outside Australian waters.[22]

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[17] See Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) ch 1.

[18] *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 310.

[19] *Constitution* s 51(x).

[20] Ibid ss 51(i), (xxix).

[21] Ibid s 51(xxxv).

[22] *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association (No 3)* (1920) 28 CLR 495.

B *The* Statute of Westminster

The burden of the doctrines of repugnancy and extraterritoriality on the Commonwealth Parliament's powers was also experienced in other British Dominions. From 1917, Imperial Conferences were held in London where Canada, South Africa and the Irish Free State demanded greater autonomy. The impetus was World War I in which the Dominions had, in their loyalty to the Empire, contributed contingents to the British war effort but had a growing national identity.[23] The result of these conferences was the *Statute of Westminster*, which passed the British Parliament and received Royal Assent on 11 December 1931. Section 2 provided that the *Colonial Laws Validity Act* shall no longer apply and laws made by the Parliament of a Dominion are not 'void or inoperative on the ground that it is repugnant to the law of England'. Section 3 gave the Parliament of a Dominion the 'full power to make laws having extraterritorial operation.' Section 4 provided that UK laws shall not extend to be part of the law of a Dominion unless the Dominion requested and consented to the law. For Australia, a special provision was added to clarify that the request and consent must be from both the Government *and Parliament* of the Commonwealth,[24] recognising the 'constant possibility of differences of opinion between the Senate and government of the day.'[25] The Statute could thus free the Commonwealth Parliament of the shackles of the repugnancy and extraterritoriality doctrines, giving it the power to enact laws inconsistent with British legislation (except the *Commonwealth of Australia Constitution Act*[26]) and to do so free from any territorial limit on its legislative powers.

However, Australia did not rush to embrace the *Statute of Westminster*'s liberating provisions. The recalcitrant Australia and Newfoundland joined New Zealand — whose Prime Minister saw the Statute

[23] Peter Marshall, 'The Balfour Formula and the Evolution of the Commonwealth' (2001) 90 *The Round Table* 541, 542.

[24] *Statute of Westminster* s 9(3).

[25] KH Bailey, 'The Statute of Westminster' (1932) 5 *Australian Law Journal* 362, 366.

[26] *Statute of Westminster* s 8.

as a 'poisonous document'[27] — in resisting the Statute being 'imposed by Downing Street diktat.'[28] The result was section 10, which provided that the Statute shall not extend to any of the three Dominions unless it was 'adopted' by that Parliament. In Australia, lawmakers were largely opposed to the measure, fearing that it would lessen the bonds of the Empire that upheld their country's defence, financial and cultural needs.[29] The strongest sign of Australia's ongoing British ties was in September 1939 when Britain declared war on Germany after the invasion of Poland. The Australian Prime Minister immediately stated that, as Britain was at war, Australia was at war too. In contrast, Canada made its own declaration of war one week after the British declaration of war.

It took a decade, deaths at sea and a High Court case before the Commonwealth Parliament finally adopted the *Statute of Westminster*. In 1942, Stoker John Riley was killed aboard HMAS Australia. A court-martial found two other stokers, Albert Gordon and Edward Elias, guilty of Riley's murder and sentenced the two homosexual men to death. The lawyers for the accused filed an action in the High Court seeking a writ of *habeas corpus* or writ of prohibition to prevent the death sentences from being carried out — the first time such an application had been made in the High Court. Amongst other arguments, the lawyers contended that, under section 98 of the *Defence Act 1903-41* (Cth), a court-martial had no power to sentence an Australian serviceman to death except for mutiny, treason or desertion. The High Court rejected the submissions, finding that the *Naval Discipline Act 1866* (Imp) applied by paramount force and the imposition of the death penalty was within power.[30] As the doctrine of repugnancy continued to bind the Commonwealth, it created the absurd result that British military law, rather than Australia's own enactments, applied to servicemen of the Royal Australian Navy for crimes against Australians on board an Australian ship. An appeal for clemency was made by the

[27] William David McIntyre, *Dominion of New Zealand: Statesmen and Status* (New Zealand Institute of International Affairs, 2007).

[28] Harshan Kumarasingham, 'Independence and identity ignored? New Zealand's reactions to the Statute of Westminster' (2010) 12(2) *National Identities* 147, 151.

[29] See Commonwealth, *Parliamentary Debates*, Senate, 29 July 1931, 4506.

[30] *R v Bevan; Ex parte Elias* (1942) 66 CLR 452.

Commonwealth Government to King George VI, noting that, if the matter had been in the hands of the Governor-General, Australian ministers would have tendered advice to grant clemency. Eventually, the King agreed to commute the death sentences on Gordon and Elias to life imprisonment.[31]

The Cabinet was incensed by the need to apply to the King for the sentences to be commuted under the *Naval Discipline Act*. Dr Herbert Vere Evatt, a former High Court judge who had become both Attorney-General and Minister for External Affairs, contended that the whole issue had only arisen because of a 'red herring' — the Australian Parliament had yet to adopt the *Statute of Westminster*.[32] Evatt, using the death sentences as an 'illustration of the need for this measure', introduced a Bill to adopt the *Statute of Westminster*.[33] The Bill provoked a fiery debate. In the House of Representatives, one member argued that it would weaken the 'silken threads that have bound us to the Mother Country' at a time when 'dissension in our ranks is most undesirable'.[34] Another member alluded to Australia's 'remote situation', arguing that 'our only hope of survival' was in a 'wider alliance with other English speaking peoples' and 'like-minded democracies.'[35] However, Evatt passionately defended the Bill. Sensing that the mood was to retain Australia's ties with Britain, he argued that those ties 'will be firmer and more enduring if it is not based in any way upon outmoded Imperial statutes.'[36] Ultimately, the Bill passed as the *Statute of Westminster Adoption Act 1942* (Cth), adopting the *Statute of Westminster* from 3 September 1939 — the day that World War II began.[37]

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[31] Chris Clark, 'The Statute of Westminster and the murder in HMAS Australia, 1942' (2009) 179 (January) *Australian Defence Force Journal* 18, 20–3.

[32] Ibid 23–4.

[33] Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1942, 1335 (Herbert Vere Evatt).

[34] Ibid 1334 (John Prowse).

[35] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 October 1942, 1470 (Grenfell Price).

[36] Ibid 1477 (Herbert Vere Evatt).

[37] *Statute of Westminster Adoption Act 1942* (Cth) s 3.

The *Statute of Westminster* conferred the 'full measure of powers needed to make the Dominion Parliaments wholly independent.'[38] Its effect and operation were evident in the *Copyright Owners Case*.[39] The British *Copyright Act 1911* (UK)[40] had applied to Australia by paramount force. During Australia's infancy, interest in copyright was 'sporadic and generally superficial' and a 'very low priority matter' so recourse to UK enactments were a 'handy short cut'.[41] The 1911 Act was repealed and replaced in the United Kingdom by the *Copyright Act 1956* (UK).[42] The High Court held that the 1956 Act did not extend to Australia because it did not comply with the 'request and consent' requirement in section 4 of the *Statute of Westminster*. The 1911 Act thus remained in force in Australia until its repeal in 1968 by Commonwealth legislation.[43] Therefore, the *Statute of Westminster* gave greater autonomy to the Commonwealth, supporting the growth and development of Australia by allowing it to decide for itself the content and scope of our copyright laws.[44]

C *Shortcomings to Independence*

Hudson and Sharp argue that Australia became independent upon the passage of the *Statute of Westminster* on 11 December 1931.[45] Despite the fact that the Statute was not adopted until a decade later, they argue that '[i]ndependence given is not somehow inferior to independence taken'.[46] However, it is contended that independence had not been achieved in Australia in several crucial respects.

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[38] *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 409 (Brennan J) ('*Kirmani (No 1)*')

[39] *Copyright Owners Reproduction Society Ltd v EMI (Australia) Pty Ltd* (1958) 100 CLR 597, 604 (Dixon CJ), 613 (McTiernan J), 625 (Menzies J) ('*Copyright Owners Case*').

[40] *Copyright Act 1911* (UK) 5 Geo 6, c 46.

[41] Sam Ricketson, 'The Imperial *Copyright Act 1911* in Australia' in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire* (Edward Elgar Publishing, 2013) 52.

[42] *Copyright Act 1956* (UK) 4 & 5 Eliz 2, c 74.

[43] *Copyright Act 1968* (Cth) s 5.

[44] Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987) 6.

[45] WJ Hudson and MP Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne University Press, 1988) 138.

[46] Ibid 137.

Firstly, the *Statute of Westminster* only affected the Commonwealth Parliament. It had no effect on liberating the State Parliaments, who would continue to be restrained by the doctrines of repugnancy and extraterritoriality. The British Parliament retained the power to legislate for the States and the Crown, on the advice of British ministers, had the power to disallow laws passed in the States, to suspend the operation of a duly enacted State law, and to reserve State laws, pending Her Majesty's consent. The preservation of the existing limitations was of the States' choosing. Having no dissatisfaction with their existing legal position, the States decided against sending delegates to the Imperial Conferences. This is in sharp contrast to the liberating effect of the *Statute of Westminster* that extended to the Provinces, and not just the Dominion Parliament, in Canada.[47] It is submitted that any consideration of independence must not ignore the States. This is because, under the Federation, the Commonwealth Parliament's enumerated legislative power is limited and thus State legislation is necessary for a wide range of issues. Therefore, as the States remained 'colonial dependencies under the British Crown', it could not be said that Australia had gained independence in 1931.

Secondly and in any case, there was one further inhibition in the path of full legal independence for the Commonwealth Parliament. Section 4 of the *Statute of Westminster* empowered the British Parliament to make laws for the Commonwealth where there was 'request and consent'. In the *Copyright Owners Case*, the High Court explained that the effect of the Statute was, not that the British Parliament was barred or prevented from enacting laws of paramount force that extended to the Commonwealth, but rather that, as a matter of construction, it could not be interpreted as having intended to do so.[48] Therefore, the grant of independence to Australia was not given a secure legal footing. As alluded to by Justice Deane in 1985, the legal nature of Australia's acquisition of full independence and sovereignty was 'incomplete' because there remained the possibility that the British Parliament could, on its own initiative, purport to repeal the *Commonwealth of Australia Constitution Act*, *Statute of*

[47] *Statute of Westminster* s 7(2).

[48] *Copyright Owners Case* (n 39) 604 (Dixon CJ), 613 (McTiernan J), 625 (Menzies J).

Westminster or otherwise legislate for Australia.[49] Although such an example was 'far-fetched', it is contended that independence was not achieved until the operation of laws, executive actions and judicial decisions of any other country, including the United Kingdom, was precluded and excluded from Australia and from Australian laws.[50]

Therefore, although the *Statute of Westminster* was 'important step in Australian legal independence',[51] it did not bring about independence. Applying the four levels of executive, legislative, judicial and diplomatic dependence that Hudson and Sharp identify had to be overcome before Australia could claim complete autonomy,[52] neither the States nor the Commonwealth had achieved independence. Whilst the Commonwealth had gained diplomatic and executive independence by 1931, it is questionable whether the Commonwealth actually achieved full legislative independence in a legal sense. The States certainly had no legislative or executive independence. As will be explained in Part IV, before and after the *Statute of Westminster*, the British Privy Council continued to hear appeals from Australian courts, which compromised the autonomy of Australian law and Australia's national sovereignty. Thus, even applying Hudson and Sharp's framework, it could not be said that Australia was independent in 1931.

III ADVICE TO THE MONARCH

A *From British Ministers to Australian Advisors*

Before Federation, each colony had a Governor who was appointed by the Monarch of the United Kingdom solely on the advice of British ministers. They acted as a representative of the Monarch but

[49] *Kirmani (No 1)* (n 38) 442 (Deane J).

[50] Ibid.

[51] George Williams, Sean Brennan and Andrew Lynch, *Blackshield and Williams: Australian Constitutional Law and Theory Commentary and Materials* (Federation Press, 7th ed, 2018) 112 [3.50].

[52] Hudson and Sharp (n 45) 138.

the British Government could instruct them through their commission or royal instructions.[53] In 1901, the colonies federated as the Commonwealth of Australia 'under the Crown of the United Kingdom of Great Britain and Ireland'.[54] The Crown was represented by the Governor-General,[55] who too was appointed by the Queen on the advice of Her British ministers and acted as a representative and agent of the British Government.[56]

In the first steps towards independence, the Imperial Conferences gradually began to confer power to the governments of the Dominions. At the 1923 Imperial Conference, the Commonwealth acquired the right to conduct its own international trade negotiations independently of Britain.[57] At the 1926 Imperial Conference, it was declared that the Dominions of the British Empire, including Australia, are 'autonomous Communities … equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs'.[58] This equality of status led to two major changes. Firstly, it was declared that the Governor-General was no longer the 'representative or agent' of British Government. Secondly and more consequentially, the conference recognised that it is the 'right' of the Government of each Dominion to advise the Crown 'in all matters relating to its own affairs.' This was reinforced by the firm statement that 'it would not be in accordance with constitutional practice' for advice to be tendered to the Monarch by the British Government.[59]

The evolution of Australia and the British Empire to a new phase of its history can be seen in the appointment of Sir Isaac Isaacs as Governor-General in 1931. Before 1931, the Governor-General was

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[53] Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 13–15 ('Twomey, *The Chameleon Crown*').

[54] *Commonwealth of Australia Constitution Act*, Preamble.

[55] *Constitution* s 2.

[56] Leslie Finlay Crisp, *Australian National Government* (Longman Cheshire, 5th ed, 1983) 398.

[57] *Summary of Proceedings*, Imperial Conference 1923 (November 1923) 8–9 [IX].

[58] Inter-Imperial Relations Committee, *Report, Proceedings and Memoranda*, Imperial Conference 1926 (November 1926) 2.

[59] Ibid 4.

a distinguished citizen of the United Kingdom appointed by the King, often known to Him personally, on the advice of His British ministers. The nomination of Isaacs — a 'local man', elderly in his seventies and personally unknown to the King — attracted strident criticism from conservative elements.[60] It was said that his appointment would weaken the bonds of the Empire. The King was opposed to the appointment for similar reasons and also because he was not consulted before Prime Minister, James Scullin, announced his intention to recommend Isaacs.[61] While the 1926 Imperial Conference had precluded the tendering of advice by the British Government, it was constitutionally unclear whether the source of advice for appointment was the Prime Minister of the relevant Dominion.[62] This ambiguity was resolved in the 1930 Imperial Conference when it was clarified that such appointments should be made by the government of the Dominion but after informally consulting the Monarch. On 29 November 1930, the King wrote in his diary:

> Received Mr. Scullin, and he told me he wished to appoint Sir Isaac Isaacs as the new Governor-General of Australia. He argued with me for some time – and with great reluctance I had to approve of the appointment. I should think it would be very unpopular in Australia.[63]

Isaacs' appointment highlighted the moving forces towards independence. In 30 years since Federation, the Commonwealth received both diplomatic and executive independence — free from any British control to conduct its own foreign affairs and gaining the ability to advise the Governor-General and Monarch in the exercise of their powers.

[60] Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, 1967) 191–9.

[61] Michael Kirby, 'Sir Isaac Isaacs - a sesquicentenary reflection' (2005) 29(3) *Melbourne University Law Review* 880, 898.

[62] Ibid.

[63] Max Gordon, *Sir Isaac Isaacs: A Life of Service* (Heinemann, 1963) 155.

B *States Remained as Crown Dependencies*

However, the powers conferred from the Imperial Conferences did not extend to the States, who remained as dependencies to the British Crown. Therefore, advice to appoint the State Governor, disallow State laws and assent to Bills reserved for the Monarch was formally tendered by the British Government.

The States believed that the British Government, at least since the 1930's, was mere 'channels of communication' to put advice to the Monarch on State matters and it would be a 'breach of convention' for it to act independently.[64] However, to their great surprise in the 1970's, the British Government saw their role very differently. As they would be responsible to the Westminster Parliament for their advice to the Monarch, even on an Australian state matter, they believed they were under an obligation to give independent advice and consider the interests of the United Kingdom.[65]

In 1976, the British Government rejected the advice of Queensland Premier, Joh Bjelke-Petersen, to renew the term of the Queensland Governor, Sir Colin Hannah. Hannah had been criticised for involving himself in domestic politics by criticising the Whitlam Government and the British Government had even contemplated dismissing Hannah at the time.[66] Bjelke-Petersen, who until then had fiercely defended the States' British ties and maintaining Privy Council appeals, later confessed that it surprised him to learn that the Queen received independent advice from the British Government and not the State Premier.[67]

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[64] Alex Castles, 'Limitations on the Autonomy of the Australian States' [1962] *Public Law* 175, 176

[65] Anne Twomey, 'The States, the Commonwealth and the Crown—the Battle for Sovereignty' (Papers on Parliament No 48, January 2008) ('Twomey, Battle for Sovereignty').

[66] Twomey, *The Chameleon Crown* (n 53) 62–8.

[67] Ibid.

In 1979, the Wran Government in New South Wales moved to sever its British ties by introducing two Bills — one to terminate appeals to the Privy Council and another to require the Queen to act on the advice of State ministers in appointing the Governor. The British Foreign Secretary, Lord Carrington, threatened to advise the Queen to refuse Royal Assent to both Bills if they were reserved because he viewed them as 'unconstitutional'.[68] It was feared that, if the States could advise the Queen directly, she would become Queen of each State and thus place each State on equal footing with the Commonwealth. By the time that Lord Carrington's views were received, both Houses of Parliament had already passed the Privy Council Appeals Abolition Bill. The Wran Government 'balked' at the prospect that its Bill would be refused assent so it was left in the Governor's desk drawer and never sent to Britain.[69] The other Bill did not proceed.

These events made it abundantly clear that the Australian States retained residual constitutional links with the United Kingdom such that British officials had independent functions in the management and governance of the States through their power to advise the Queen. These outdated links made the States beholden to the British Government, highlighting that independence had not been completed or achieved.

IV THE PRIVY COUNCIL

A *The Constitutional Compromise*

Before Federation, appeals from the Supreme Courts of the six colonies could be heard by the Judicial Committee of the Privy Council in London. Appeals to the Privy Council occupied a great part of the debate at the Melbourne Session of the 1898 Convention. On the one hand, some delegates saw the

[68] Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018) 656.

[69] Twomey, Battle for Sovereignty (n 65). The Bill was annulled by s 3 of the *Constitutional Legislation (Repeal) Act 1985* (NSW).

Privy Council as composed of 'men of great learning and great experience', allowing litigants to have their matter heard by 'members of a bar which is unquestionably the greatest the world has ever seen.'[70] The Chief Justice of South Australia, Sir Samuel Way, believed that a federal Supreme Court — later to be the High Court — 'was no more needed than the fifth wheel to a coach'.[71] On the other hand, the Privy Council was disfavoured because of the great expense to bring an appeal.[72] This was forcefully highlighted in the following exchange between Henry Higgins and Richard O'Connor — two future High Court judges.

> Higgins: The poor man never goes to the Privy Council.
>
> O'Connor: A man is generally a poor man when he leaves it.[73]

The delegates also believed that a High Court was 'absolutely essential' so that judges had 'a knowledge of colonial ideas, conditions, and surroundings', which they worried was not understood in London.[74] In particular, there was a concern that the proposed 'Washminster' constitutional model and federalism 'was a subject entirely unfamiliar to English lawyers'.[75] In the first Parliament, Richard O'Connor — who would become one of the inaugural Justices of the High Court — described the Privy Council as 'altogether an unsuitable body to interpret our Constitution' and as 'a most unsatisfactory tribunal'.[76] This criticism was rooted in the Privy Council's interpretation of the Canadian framework in the *British North America Act 1867* (Imp), which 'had not given widespread satisfaction'.[77] Even proponents for

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[70] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2290–1 (Sir Joseph Abbott).

[71] 'Sir Samuel Way – The legal man', *University of Adelaide* (Web Page) <https://www.adelaide.edu.au/library/special/stories/way/legal/>.

[72] Enid Campbell, 'The Decline of the Jurisdiction of the Judicial Committee of the Privy Council' (1959) 33 *Australian Law Journal* 196, 204.

[73] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 325 (Henry Higgins and Richard O'Connor).

[74] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2306 (Josiah Symon).

[75] *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1111–12 (Griffith CJ) ('*Baxter*').

[76] Commonwealth, *Parliamentary Debates*, Senate, 29 July 1903, 2697–8 (Richard O'Connor).

[77] *Baxter* (n 75) 1111–12 (Griffith CJ).

retaining Privy Council appeals favoured an Australian court for constitutional matters, even if that meant the High Court would be a part-time 'scratch court' composed of State Chief Justices.[78]

The Colonial Secretary, Joseph Chamberlain, insisted that maintaining the link to the Privy Council was important to preserve a symbolic tie to Britain. In the Bill introduced to the Imperial Parliament, the Colonial Office sought to make clear that the *Constitution* 'preserv[ed] the prerogative of appeal with respect to all decisions of the High Court and of the Supreme Courts of the States.' This change represented a fundamental departure from the hard-fought compromise reached by the convention delegates. Following protests by the Australian representatives, the judicial provisions were redrafted and subsequently approved by the colonial governments in Australia. As enacted, section 73 provides that the judgment of the High Court is 'final and conclusive'. Section 74 provides that appeals are not permitted to the Privy Council as to 'the limits inter se of the Constitutional powers of the Commonwealth and those or any State or States, or as to the limits inter se of the Constitutional powers of two or more States' ('inter se' matters) unless the High Court certifies that, by some 'special reason', the question 'ought' be determined by the Privy Council. But in all other matters, appeals from the High Court to the Privy Council may be made by 'special leave to appeal'. The Parliament could limit which matters leave may be granted provided that such laws are to be 'reserved by the Governor-General for Her Majesty's pleasure.' Edmund Barton, Australia's first Prime Minister and later a High Court judge, explained to the first Parliament that these provisions were there 'only as the price that had to be paid to prevent more drastic amendments to the *Constitution*'.[79]

B *The High Court and Privy Council in Conflict*

[78] Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 193.

[79] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 June 1903, 802 (Edmund Barton).

The requirement of a certificate for 'inter se' matters was intended to give the High Court some control over the extent that matters concerning the federal distribution of powers might go to the Privy Council. Only one 'inter se' certificate was ever given in 1913 because the Court was evenly divided.[80] However, it turned out that that requirement was largely ineffective because an 'inter se' question could still reach the Privy Council without a High Court certificate if it was appealed directly from a State Supreme Court, either by leave of that Court or the Privy Council.

This led to early tensions between the High Court and Privy Council. In *Deakin v Webb*,[81] the High Court held that the salaries of Commonwealth officers were immune from State income taxation. When counsel for Victoria, Isaac Isaacs, applied for an 'inter se' certificate, the High Court found no 'special reason' and refused the application.[82] Three months later, Isaacs, still representing Victoria, brought another case concerning State taxation of Commonwealth officers in the Supreme Court of Victoria.[83] Isaacs conceded that the Supreme Court was bound by *Deakin v Webb* but stated that the proceedings 'had been instituted in order that an appeal might be taken to the Privy Council against the decision of the [High] Court.'[84] The Supreme Court granted leave to appeal directly to the Privy Council.[85] In *Webb v Outrim*, a decision described as of 'dubious value',[86] the Privy Council held that 'no authority exists by which [a State law's] validity can be questioned or impeached.'[87] The Privy Council, relying on the intention of the British Parliament when it passed the *Commonwealth of Australia Constitution Act*

[80] *Colonial Sugar Refining Co Ltd v Commonwealth* (1913) 15 CLR 182. The Privy Council's decision, *A-G (Cth) v Colonial Sugar Refining Co Ltd* [1914] AC 237, was 'generally regarded as disastrous'. The Chief Justice of the High Court, Sir Isaac Isaacs, said that the Privy Council was 'as unable to interpret the meaning of our statutes as if they were living on ... Mars': Deborah Gare, 'Dating Australia's Independence: National Sovereignty and the 1986 Australia Acts' (1999) 29 *Australian Historical Studies* 251, 261 n 49.

[81] (1904) 1 CLR 585.

[82] Ibid 619–31.

[83] *Re Income Tax Acts* [1905] VLR 463 ('*Re Income Tax Acts*').

[84] Williams, Brennan and Lynch (n 51) 120–1 [3.81].

[85] *Re Income Tax Acts* (n 83).

[86] FR Beasley, 'Appeals to the Judicial Committee: The Case for Abolition' [1957] *Res Judicae* 399, 407.

[87] *Webb v Outrim* [1907] AC 81 (*Webb v Outrim*).

instead of the intention of the Australians who framed the *Constitution*, concluded that Australia had not followed the United States in 'erect[ing] a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional'.[88] Not only was the decision 'flawed by an elementary misconception of the Australian Constitution',[89] it confirmed the fears of the convention delegates about the dangers of allowing constitutional matters to be determined by the Privy Council. Worse, the aggressive tactics by Isaacs (who, in 1906, was appointed to the High Court) in having this matter reach the Privy Council exposed a loophole in section 74 that allows an aggrieved party to effectively bypass the High Court's refusal of an 'inter se' certificate.

Australia was furious about the decision of *Webb v Outrim*. In a 'rather pugnacious judgment',[90] the High Court refused to be bound by *Webb v Outrim*.[91] A majority held that decisions of the Privy Council on 'inter se' questions are not binding because the purpose of section 74 was to allow the High Court to be the exclusive arbiter of such questions. The majority also affirmed its earlier decision in *Deakin v Webb* and held, in direct contradiction to the Privy Council, given the similarities between the judicial power provisions of the *Commonwealth Constitution* and *US Constitution*, that Commonwealth and State legislation are not immune to constitutional challenge.[92] The Parliament also acted by giving the High Court exclusive power over determining 'inter se' questions, which prevented State courts from deciding such questions and practically eliminated the loophole of direct appeal from State Supreme Courts.[93]

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[88] Ibid.

[89] Williams, Brennan and Lynch (n 51) 121 [3.82].

[90] Murray Gleeson, 'The Privy Council – An Australian Perspective' (Speech, The Anglo-Australasian Lawyers Society, The Commercial Bar Association and The Chancery Bar Association, 18 June 2008) 5.

[91] *Baxter* (n 75).

[92] Ibid.

[93] *Judiciary Act 1907* (Cth).

Outside of constitutional law, Privy Council decisions were highly respected by Australian courts. However, the presence of Privy Council appeals meant that 'Australian jurisprudence was inescapable hitched to the star of the English legal system'.[94] This was evidenced by the fact that, even though the House of Lords was not formally authoritative in the Australian judicial hierarchy, the common membership of the House of Lords and Privy Council meant that the High Court showed great respect to English decisions. In *Piro's Case*,[95] the High Court overruled its earlier decision[96] out of deference to the House of Lords. Indeed, Chief Justice Latham said that lower courts should consider themselves bound by the House of Lords and should even prefer House of Lords decisions to conflicting High Court authority.[97] The strong adherence and loyal following by Australian judges to a court outside the judicial hierarchy on the mere basis of shared membership to the Privy Council demonstrates the remarkable influence that British judges had in shaping Australian law and handicapping the authority of the High Court to develop Australia's own common law.[98]

C *The Tussle for Abolishing Appeals*

The anger over *Webb v Outrim* was short-lived. Although opposition to Privy Council appeals was adopted as party policy for the Labor Party in 1908, little action occurred, predominantly because Labor did not control the Senate. It was not until 1968 that the Commonwealth Parliament enacted the first substantive restriction of Privy Council appeals in the *Privy Council (Limitation of Appeals) Act 1968* (Cth). That Act limited appeals from decisions of the High Court to those that did not involve 'federal jurisdiction'.[99] Thus, decisions of the High Court on the *Constitution* and Commonwealth laws could

[94] Michael Kirby, 'Permanent Appellate Courts – the New South Wales Court of Appeal 20 Years On' (1987) 61 *Australian Law Journal* 391, 392.

[95] *Piro v W Foster & Co* (1943) 68 CLR 313 ('*Piro's Case*').

[96] *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354.

[97] *Piro's Case* (n 95) 320 (Latham CJ).

[98] See Kirby (n 94) 392.

[99] *Privy Council (Limitation of Appeals) Act 1968* (Cth) s 3.

no longer be appealed to the Privy Council. However, the Act did not affect appeals on State and common law matters.

Reforms to Privy Council appeals garnered steam upon the election of the Whitlam Government in 1972. Prime Minister Gough Whitlam, an ardent opponent of the Privy Council, made contact with British Prime Minister, Edward Heath, within days of his swearing-in. Heath explained that the British Government had no wish to insist on maintaining the relics of the past but was well aware of the controversy of Whitlam's proposal. In the British Parliament, members had raised concerns about Whitlam's proposal. Lord Clifford noted that States were 'anxious' that they would lose the ability to 'appeal to some outside body' if there is a constitutional struggle between the States and Commonwealth governments.[100] Baroness Tweedsmuir also alluded to the role of the Privy Council to hear appeals from States, stating that if there is any application to change British law 'we hope that it would have the united support of the States within the Commonwealth of Australia.'[101] In effect, the British Parliament signalled their reluctance to carry out Whitlam's proposal unless it had the concurrence of all the States. This aspect proved difficult for Whitlam. The States were alarmed that it would amount to an 'erosion of state rights'.[102] Sir Murray Porter, the Agent-General for Victoria in London, notified the British Government that the state of Victoria was opposed to abolishing appeals to the Privy Council. The communication, which Porter attempted to make directly to the Foreign Secretary, was that the Victorian government was prepared to fight back 'if that interest was endangered'.[103]

[100] United Kingdom, *Parliamentary Debates*, House of Lords, 9 May 1973, vol 342, col 469 (Lord Clifford).

[101] Ibid col 496 (Baroness Tweedsmuir).

[102] Geoffrey Bolton, 'The United Kingdom', in WJ Hudson (ed), *Australia in World Affairs, 1971-75* (George Allen & Unwin, 1980) 221.

[103] Changwei Chen, '"To Dust Off the Cobwebs": The Whitlam Government's Failure to Completely Abolish Appeals From Australian Courts to the Privy Council' (2021) 49(1) *Journal of Imperial and Commonwealth History* 178, 184.

The Whitlam Government introduced two Bills to Parliament. The first, the Privy Council (Appeals from the High Court) Bill, would abolish appeals from the High Court to the Privy Council. This could be done under section 74 of the *Constitution* and did not require British legislation. The second, the Privy Council Appeals Abolition Bill, would 'request and consent' to the enactment of British legislation under the terms of the *Statute of Westminster* to abolish all appeals from Australian courts, except from the High Court to the Privy Council. In the Premier's Conference and meeting of the Standing Committee of Attorneys-General in 1973, Whitlam tried to persuade the States to agree to the latter. A positive response was forthcoming from Western Australia and Tasmania — they were content with the Bill but Tasmania sought for it to be tied with a 'Statute of Westminster for the States'. However, Queensland met Whitlam's proposal with great hostility. On the initiative of Bjelke-Peterson, Queensland enacted the *Appeals and Special Reference Act 1973* (Qld), which provided for appeals directly from the Queensland Supreme Court to the Privy Council and for the referral of questions to the Privy Council for advisory opinions. As there was no consensus from all States to introduce support and consent legislation, the Whitlam Government did not proceed with the Bills when Parliament was prorogued in 1974.

When Harold Wilson succeeded Heath as British Prime Minister, he took a tougher position than his predecessor. He made it clear that the British would not commit to introduce a Bill to abolish Privy Council appeals, at least until the legislation had firstly been enacted and successfully litigated in Australia. Without agreement of the States, the Whitlam Government was left with no other options. It re-introduced the two Bills. The first Bill passed both Houses of Parliament and became the *Privy Council (Appeals from the High Court) 1975*, which abolished all appeals from the High Court to the Privy Council unless a certificate was granted for an 'inter se' question. However, the Privy Council Appeals Abolition Bill passed the House of Representatives on two occasions but was rejected in the Senate on both occasions. Before any further progress could be made, the Whitlam Government was dismissed. Abolishing appeals to the Privy Council was not accorded the same priority for the new Prime Minister, Malcolm Fraser, as it had been under Whitlam. In hindsight, Whitlam's failure to pass

the second Bill was because '[he] offered Australia new national goals with which many Australians could not identify'.[104]

The 1975 Act was significant. Although Privy Council appeals could still be heard from State courts, the Act made the High Court a truly 'final' court even if that role was shared with the Privy Council. Shortly after its passage, the High Court unanimously declared in *Viro v The Queen* that it was no longer bound by decisions of the Privy Council.[105] This displaced the previous rule that Privy Council decisions were 'strictly binding' on the High Court, except on 'inter se' questions.[106] It was explained that this was because there is no circumstance in which a decision of the High Court could be the subject of an appeal to the Privy Council, thereby removing the 'essential basis' for the latter's decisions to be binding.

However, this created a complication for State courts. The question was: as both 'final' courts could hear appeals from State courts, which body are State courts bound by when decisions of the High Court and Privy Council conflict? In New South Wales, the Court of Appeal held in *Waind (No 2)* that '[i]t seems … that the State courts must make their own decision on this matter.'[107] The Court of Appeal laid down a rule for New South Wales courts[108] that decisions of the High Court are preferred except when the High Court decision was 'of some antiquity' and the Privy Council decision was more recent.[109] However, if the older High Court decision has stood without being departed from by the High

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[104] Geoffrey Bolton, *The Oxford History of Australia, Volume 5, 1942-1988: The Middle Way* (Oxford University Press, 1990) 243.

[105] *Viro v The Queen* (1978) 141 CLR 88, 93 (Barwick CJ), 120 (Gibbs J), 129 (Stephen J), 135 (Mason J), 150–1 (Jacobs J), 166 (Murphy J), 172–3 (Aickin J).

[106] Robert S Geddes, 'The Authority of Privy Council Decisions in Australian Courts' (1978) 9 *Federal Law Review* 427, 428.

[107] *National Employers' Mutual General Insurance Association Ltd v Waind (No 2)* [1978] 1 NSWLR 466, 474A (Moffitt P, Reynolds JA agreeing at 477C, Hutley JA agreeing at 477D, Glass JA agreeing at 477D, Samuels JA agreeing at 477D) ('*Waind (No 2)*').

[108] Ibid 474B.

[109] Ibid 474C, 475C.

Court, whilst the Privy Council decision was given after 1975, the High Court decision should be followed.[110] The Supreme Court of South Australia also took a similar view.[111]

Even after the 1975 Act, the Privy Council still had an outsized influence over Australian law. As the Privy Council shared the 'apex' of the Australian judicial system with the High Court, final decisions on the interpretation and application of Australian law could still be made by a body of another nation.[112] Although the High Court departed from following House of Lords decisions in 1963 in *R v Parker*,[113] Australian courts still considered themselves bound by decisions of the House of Lords unless there were contrary Australian authorities.[114] As late as 1983, the New South Wales Court of Appeal said the Court was bound by the House of Lords unless there were inconsistent decisions of the High Court or Privy Council.[115] As the common law remained on the whole under the jurisdiction of the States of which there could be appeals to the Privy Council, Australia had not achieved judicial autonomy.

V THE FINAL BREAKTHROUGH: THE *AUSTRALIA ACTS*

A *The Pre-1986 Mess*

By 1985, the Commonwealth and the States were left in a curious position. On legislative power and the power to advise the Queen after the *Statute of Westminster*, Australia was in a situation 'infinitely

[110] Ibid 475D.

[111] *Australian Government Workers' Association v Armstrong* (1980) 25 SASR 441, 447–8 (Mitchell J, Zelling J agreeing at 448).

[112] See Gare (n 80).

[113] *R v Parker* (1963) 111 CLR 610, 625 (Dixon CJ).

[114] In *Brisbane v Cross* [1978] VR 49, Young CJ took the view that, absent contrary Australian authority, he should 'unquestionably follow' a decision of the House of Lords: at 51.

[115] *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431, 433 (Hutley JA, Glass JA agreeing).

stranger than fiction'.[116] As Coper argues, Australia simultaneously had a Commonwealth government that had largely 'shaken off its colonial shackles and was fully sovereign within its own sphere of competence' but six regional polities that 'were subjected to laws which were made by a foreign power and which the regional units were powerless to displace.'[117]

To complicate matters further, following the 1975 Act, there were two 'final' courts for State matters, which occasionally had conflicting decisions. The situation following *Waind (No 2)* was described by the Commonwealth Attorney-General as 'unsatisfactory'.[118] That may well be an understatement — it was quite bizarre. The notion that each of the six State Supreme Court could make its own rules as to which 'final' court they preferred was chaotic. The fact that a litigant intent on appeal from a State Supreme Court could choose the appellate court most likely to favour their cause is plainly unfair. And State courts faced with conflicting precedents from the High Court and Privy Council had difficulty resolving them.

As Professor Twomey starkly observed, the convoluted system 'is not something that anyone in their right mind would ever propose, but it just evolved that way for various political reasons' that highlighted the ongoing reluctance of Australians to sever British ties.[119]

B *The* Australia Acts

The final breakthrough came in the *Australia Acts*, which were identically passed in by both the Commonwealth and UK Parliaments, and personally assented by the Queen in Canberra in 1986.

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[116] Coper (n 44) 6.

[117] Ibid.

[118] Peter Durack, 'Abolition of Residual Constitutional Links with Britain other than the Crown' (July 1982) 53(1) *Australian Foreign Affairs Record* 466.

[119] Twomey, Independence Day (n 6) 2–3.

Section 1 of the *Australia Acts* ended the power of the British Parliament to legislate for Australia. The Act also repealed the 'request and consent' provision in section 4 of the *Statute of Westminster* for the British Parliament to make laws for the Commonwealth.[120] The High Court has confirmed that these provisions combined had the effect of removing all legislative dependence on the United Kingdom for both the Commonwealth and States. The Court stated that 'whatever effect the courts of the United Kingdom may give to an amendment or repeal to the 1986 UK [version of the *Australia Act*], Australian courts would be obliged to give their obedience to [section] 1 of the [Australian version of the *Australia Act*]'.[121] Although Australia's legislative independence had been a 'political reality' in 1986, the *Australia Acts* thus ensured that 'this was also a reality legally and constitutionally.'[122]

Sections 2 and 3 ended the doctrines of extraterritoriality and repugnancy and the application of the *Colonial Laws Validity Act* for the State Parliaments. Sections 8 and 9 ended the Queen's powers to disallow a State law and no longer required assent to be withheld on any State Bill for the Queen's pleasure. Combined, the 'apron strings were finally and formally untied' by severing the residual colonial legislative limitations on the States.[123] The only limitation that survived the *Colonial Laws Validity Act* was a requirement that laws respecting the 'constitution, powers or procedure' of the Parliament of the State shall be of no effect unless it met 'manner and form' requirements in State laws.[124] The States had not wanted this limitation removed to ensure that entrenched constitutional provisions, such as clauses preventing the abolition of Upper Houses without a referendum,[125] remained effective.

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[120] *Australia Acts* s 12.

[121] *Sue v Hill* (1999) 199 CLR 462, 492 (Gleeson CJ, Gummow and Hayne JJ).

[122] Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 5th ed, 2013) 178 [6.130].

[123] Ibid.

[124] *Australia Acts* s 6.

[125] See, eg, *Constitution Act 1902* (NSW) s 7A.

Section 7 gives the States the power to advise the Queen directly on State matters — the same power that was curiously regarded by Lord Carrington as establishing independent realms and Crowns. Although the Palace was initially reluctant to accept this change, they were assured by the British Foreign Office and later the Commonwealth that it was compatible with federation and necessary for maintaining the 'sovereign identities and powers' of the States.[126] To avoid the risk that the Sovereign receives conflicting advice from their Commonwealth and State ministers, section 7 provides that all of the Queen's powers and functions are exercisable 'only' by the Governor of a State, except the power to appoint and dismiss the Governor. It did not preclude the Queen for exercising Her powers and functions when personally present in a State although it was noted that such advice will be tendered 'only with mutual and prior agreement between Her Majesty and the Premier.'[127] Thus, the States had a victory in, not only maintaining their own sovereign status and independent relationship with the Crown, but gaining the power to directly advise the Queen without British or Commonwealth supervision.

Section 11 ended appeals to the Privy Council from an 'Australian court' and repealed British statutes that had provided for advisory opinions. The definition of 'Australian court' extended to all Commonwealth, State and Territory courts other than the High Court.[128] Although the *Privy Council (Appeals from the High Court) Act 1975* continues to prevent appeals from the High Court to Privy Council, neither the *Australia Acts* or any other statute closes the High Court's power to issue a certificate for an 'inter se' question. Nevertheless, that power appears to have been closed by the Court itself, declaring that the jurisdiction for granting a certificate 'has long since been spent.' The Court explained that the 'march of events' and 'legislative changes' have 'made the jurisdiction obsolete.'[129]

[126] Twomey, Battle for Sovereignty (n 65).

[127] Explanatory Memorandum, Australia (Request and Consent) Bill 1985 (Cth) 6 [15].

[128] *Australia Acts* s 16(1) (definition of 'Australian court').

[129] *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461, 465 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

Therefore, any avenue to appeal to the Privy Council had now been closed, ending British control over Australian law and making the High Court truly 'final and conclusive' on all questions of law.

Section 15 transferred the power to amend or repeal fundamental British statutes that form Australia's constitution — the *Commonwealth of Australia Constitution Act*, *Statute of Westminster* and *Australia Acts* — to the Commonwealth and all the State Parliaments collectively. If all the State Parliaments request the Commonwealth Parliament to do so, it can now amend or repeal these foundational constitutional documents. Professor Twomey described that this section 'is the ultimate recognition that no matter how much our federal system is trammelled and distorted by Commonwealth laws or High Court decisions, sovereignty in Australia remains vested collectively in the Commonwealth and the states.'[130]

V CONCLUSION

Under today's understanding of the *Constitution*, the United Kingdom is a 'foreign power' and a British citizen that is not otherwise an Australian citizen is, despite sharing the same Monarch, not a 'subject of the Queen' but instead an 'alien'.[131] When the people[132] in the colonies of New South Wales, Victoria, Queensland, South Australia, Tasmania and Western Australia voted to approve the *Constitution* in 1899 and 1900, they would have thought that understanding was utterly absurd.

Australia's evolutionary independence tells a history of restraint motivated by links to the Mother Country against a growing sentiment of Australia's own national identity. Of the two candidates

[130] Twomey, Battle for Sovereignty (n 65).

[131] See *Sue v Hill* (1999) 199 CLR 462; *Palmer v Western Australia* [2021] HCA 31, [6]; *Singh v Commonwealth* (2004) 222 CLR 322.

[132] It would be remiss to fail to acknowledge that the conception of 'the people' at the time of Federation, regretfully, excluded women (other than in South Australia and Western Australia) and many First Nations peoples: George Williams, 'The High Court and the People' in Hugh Selby (ed), *Tomorrow's Law* (Federation Press, 1995) 271, 286–7.

nominated by Twomey for the date of Australia's independence, it should be clear that 3 March 1986 is the better date. Whilst the *Statute of Westminster* was significant in diminishing British legislative supremacy over Australia, the long road to independence was far from complete. Many colonial ties remained in 1931, including the States who were subject to an essentially colonial relationship. Furthermore, no change to the relationship between Australian courts and the Privy Council had been effected in 1931. The independence of the Australian judiciary was not complete whilst a British court remained a final court of appeal.

It was not until 1986 that all legal ties were terminated by the *Australia Acts*. The passage of these Acts denied the British Parliament, Government and Privy Council all power with respect to Australia. Thus, it was on 3 March 1986 that the Commonwealth and States were completely constitutionally independent of the United Kingdom.[133]

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