

**THE PATH TO INDEPENDENCE:  
AUSTRALIA’S CONSTITUTION AND HER BRITISH TIES**

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**ACKNOWLEDGMENTS**

I begin by acknowledging the traditional custodians of the land on which I present this tutorial—the land of the Gadigal of the Eora Nation. I pay respect to their elders past, present and emerging. Whilst my tutorial covers the last 123 years of the history of this land, it is important to acknowledge that First Nations people have had a connection to Country, cared for and maintained Country for over 60,000 years.

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**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.’<sup>1</sup> It is often forgotten that the *Australian Constitution* itself formed part of an Act of the Imperial Parliament<sup>2</sup>—it was a colonial document that assumed the primacy of the ‘Mother Country’. At the time of Federation—123 years ago—the legislative, executive and judicial branches of both the Commonwealth and States were all subject to supervision by the Imperial Parliament, British Ministers and the Privy Council. Today, Australia is an independent nation, free from British control. So this begs the question: when did Australia become independent? This is not an easy question to answer. Unlike other nations where independence is symbolised by a major historical event, Australia’s independence was the ‘result of an orderly development — not...the result of revolution’.<sup>3</sup> There is no single event where Australia dramatically revoked its former Imperial relationship with the United Kingdom and unilaterally established national independence. It was achieved—to use the words of T S Eliot—‘[n]ot with a bang but a whimper.’<sup>4</sup>

Many academics have tried to point to a ‘magic date’.<sup>5</sup> Two common ‘candidates’<sup>6</sup> include 11 December 1931—the day that the Commonwealth Parliament gained the *capacity* to exercise full independent powers after the *Statute of Westminster*<sup>7</sup> received the Royal Assent—and 3 March 1986—

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\* Associate to the Chief Judge in Equity, Supreme Court of New South Wales. This lecture is an amended form of my submission for the Venour V Nathan Prize in January 2022. I have had the benefit of further discussions in revising my own views on this topic. The views expressed are my own and do not necessarily represent those of my employer or the Francis Forbes Society.

<sup>1</sup> Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1997) 157.

<sup>2</sup> References in this paper 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*.

<sup>3</sup> *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).

<sup>4</sup> TS Eliot, ‘The Hollow Men’ in *Poems 1909–1925* (Faber & Faber, 1927) 128.

<sup>5</sup> *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 82 (Callinan J).

<sup>6</sup> Anne Twomey, ‘Independence Day’ (2011) 36(1) *Alternative Law Journal* 2, 2–3 (‘Twomey, Independence Day’).

<sup>7</sup> *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5, c 4 (‘*Statute of Westminster*’).

the day that the *Australia Acts*<sup>8</sup> commenced. But in searching for a magic date, some scholars have focused on the Commonwealth and left the States out of the picture. Other scholars focus primarily on independence of Parliament and the executive government and they give little analysis of Australia’s subservient judicial relationship to Great Britain.

Tonight, I try to give my answer to this complex question by stepping through a series of fascinating stories and milestones of how Australia severed her British ties over nearly nine decades.

At the outset, I want to bring attention to three features of my analysis. The first is the framework by which we consider independence. Historians W J Hudson and M P Sharp put forward a framework in their book, *Australian Independence: Colony to Reluctant Kingdom*, that involved looking at a nation’s executive, legislative, diplomatic and judicial dependence.<sup>9</sup> After looking at these four boxes, in their view, 1931 best meets this criteria. In my respectful view, these historians have paid very little attention to the States.

The framework that I prefer involves looking at these six boxes:

	<b>Legislature</b>	<b>Executive</b>	<b>Judiciary</b>
<b>Commonwealth</b>			
<b>States</b>			

This approach reflects both the separation of powers between the legislature, executive and judiciary, and the division of powers between the Commonwealth and the States. These are two fundamental, bedrock principles are evident in the *Australian Constitution* and in State constitutions too.

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<sup>8</sup> *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (collectively, ‘*Australia Acts*’).

<sup>9</sup> WJ Hudson and MP Sharp, *Australian Independence: Colony to Reluctant Kingdom* (Melbourne University Press, 1988) 138.

The second feature is what is meant by independence. For the purposes of my talk, I consider that Australia has attained independence with respect to a power when the decision is made by an Australian decision-maker without any possibility of interference, control, veto or supervision from a British decision-maker.

The last feature is the principle that '[i]ndependence given is not somehow inferior to independence taken'.<sup>10</sup> What this means is that independence is achieved at the point when one has the *capacity* to exercise their powers independently, not when one actually does exercise them. To use an example given by Professor Anne Twomey: 'It is a bit like the situation of the twenty-something who continues to live at home with his or her parents — independent in theory but still reliant on Mum's cooking and washing.' So the date that independence was achieved across the various branches and levels of government is the day when it gained the capacity to be independent, rather than when it actually exercised that independence.

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

I begin with the legislative branch.

### *The Doctrines of Repugnancy and Extraterritoriality*

Throughout the late 19<sup>th</sup> century, the British Parliament established legislative bodies in the six colonies of New South Wales, Queensland, Victoria, South Australia, Tasmania and Western Australia.<sup>11</sup> These legislatures had 'plenary powers of legislation, as large, and of the same nature, as those of [the Imperial] Parliament itself',<sup>12</sup> subject to limits contained in British enactments and two derived from the common

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<sup>10</sup> Ibid 137.

<sup>11</sup> See *Australian Constitutions Act 1850* (Imp) 13 & 14 Vict, c 59.

<sup>12</sup> *R v Burah* (1878) 3 App Cas 889, 904 (Lord Selborne for their Lordships).

law. First, the *doctrine of repugnancy* invalidated colonial laws that were inconsistent with British laws because the colonial legislatures were subordinate to the British Parliament.<sup>13</sup> Following a very broad approach to this doctrine by Boothby J in South Australia,<sup>14</sup> the British Parliament passed 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’.<sup>15</sup> This meant that the colonial legislatures were bound by British statutes of paramount force but otherwise were free to repeal or amend Imperial laws they had received from colonisation. Secondly, the *doctrine of extraterritoriality* confined the operation of colonial laws to the colony’s territorial boundaries unless there was a necessary connection.<sup>16</sup> 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 Missouri, United States.<sup>17</sup> The Privy Council had held that the man could not be prosecuted for bigamy under a New South Wales law because the allegedly bigamous second marriage occurred outside the territorial limits of that colony.

In addition to these common law limits, various Acts of the British Parliaments and instructions to Governors imposed requirements that laws of the colonies on certain subjects must 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, as described by the plurality in *Sue v Hill*, ‘designed to ensure surveillance of colonial legislatures by the Imperial Government’.<sup>18</sup>

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<sup>13</sup> *Phillips v Eyre* (1870) LR 6 QC 1, 26–7 (Willes J).

<sup>14</sup> Alex Castles, ‘The Reception and Status of English Law in Australia’ (1963) 2 *Adelaide Law Review* 1, 23–5.

<sup>15</sup> *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, ss 2–3 (‘*Colonial Laws Validity Act*’).

<sup>16</sup> See *Millar v Commissioner of Stamp Duties* (1932) 48 CLR 618.

<sup>17</sup> *Macleod v A-G (NSW)* [1891] AC 455.

<sup>18</sup> *Sue v Hill* (1999) 199 CLR 462, 495–6 (Gleeson CJ, Gummow and Hayne JJ).

The common law limits and requirements that legislation on certain matters be reserved for the Monarch's assent applied to the Commonwealth Parliament too when it was established in 1901. As a dominion, the doctrine of repugnancy under the *Colonial Laws Validity Act* applied and this meant that British law reigned supreme on Australian soil.<sup>19</sup> In the *Union Steamship Case*,<sup>20</sup> the High Court held that provisions of an Act of the Commonwealth Parliament — the *Navigation Act 1912* (Cth) — was inoperative 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 in s 51(x) power to make laws with respect to 'fisheries' was explicitly extended to operate 'beyond territorial limits'.<sup>21</sup> Likewise, the power to make laws for 'trade and commerce with other countries' and 'external affairs' obviously had international reach.<sup>22</sup> But 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'<sup>23</sup> did not apply to Australian ships outside Australian waters.<sup>24</sup>

#### *The Statute of Westminster*

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<sup>19</sup> See Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011) ch 1.

<sup>20</sup> *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 310.

<sup>21</sup> *Constitution* s 51(x).

<sup>22</sup> *Ibid* ss 51(i), (xxix).

<sup>23</sup> *Ibid* s 51(xxxv).

<sup>24</sup> *Merchant Service Guild of Australasia v Commonwealth Steamship Owners' Association (No 3)* (1920) 28 CLR 495.

The burden of the doctrines of repugnancy and extraterritoriality was not unique to the Commonwealth and the States. It also applied to 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.<sup>25</sup> 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,<sup>26</sup> recognising the ‘constant possibility of differences of opinion between the Senate and government of the day.’<sup>27</sup> The Statute had the ability to free the Commonwealth Parliament of the shackles of the repugnancy and extraterritoriality doctrines, giving it the power to enact laws free from any territorial limit and without any worry about inconsistency with British legislation (except the *Commonwealth of Australia Constitution Act*<sup>28</sup>).

However, despite these liberating provisions, Australia did not rush to embrace the *Statute of Westminster*. Australia and Newfoundland joined New Zealand — whose Prime Minister described the Statute as a ‘poisonous document’<sup>29</sup> — in resisting the Statute being ‘imposed by Downing Street

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<sup>25</sup> Peter Marshall, ‘The Balfour Formula and the Evolution of the Commonwealth’ (2001) 90 *The Round Table* 541, 542.

<sup>26</sup> *Statute of Westminster* s 9(3).

<sup>27</sup> KH Bailey, ‘The Statute of Westminster’ (1932) 5 *Australian Law Journal* 362, 366.

<sup>28</sup> *Statute of Westminster* s 8.

<sup>29</sup> William David McIntyre, *Dominion of New Zealand: Statesmen and Status* (New Zealand Institute of International Affairs, 2007).

diktat.<sup>30</sup> The result was the inclusion of 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.<sup>31</sup> The strongest sign of Australia’s ongoing British ties was in September 1939 when Britain declared war on Germany after the invasion of Poland. Prime Minister Robert Menzies 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 Britain declared 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 — 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.<sup>32</sup> 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 Australian servicemen of the Royal Australian Navy for crimes against Australians on board an Australian ship. An appeal for clemency was made by the Commonwealth Government to King George VI, noting that, if the matter had been in the hands of the Governor-General,

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<sup>30</sup> Harshan Kumarasingham, ‘Independence and identity ignored? New Zealand’s reactions to the Statute of Westminster’ (2010) 12(2) *National Identities* 147, 151.

<sup>31</sup> See Commonwealth, *Parliamentary Debates*, Senate, 29 July 1931, 4506.

<sup>32</sup> *R v Bevan; Ex parte Elias* (1942) 66 CLR 452.

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.<sup>33</sup>

But it didn't end there. The Cabinet was furious that they needed to apply to the King for the sentences to be commuted. Dr Herbert Vere Evatt, a former High Court judge and who had become both Attorney-General and Minister for External Affairs (and would later serve as Chief Justice of New South Wales), believed that the whole issue had only arisen because of a 'red herring'—the Australian Parliament had yet to adopt the *Statute of Westminster*.<sup>34</sup> Evatt, using the death sentences as an 'illustration of the need for this measure', introduced a Bill to adopt the *Statute of Westminster*.<sup>35</sup> This 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'.<sup>36</sup> 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'.<sup>37</sup> But Evatt strategically and 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'.<sup>38</sup> 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.<sup>39</sup>

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<sup>33</sup> Chris Clark, 'The Statute of Westminster and the murder in HMAS Australia, 1942' (2009) 179 (January) *Australian Defence Force Journal* 18, 20–3.

<sup>34</sup> *Ibid* 23–4.

<sup>35</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1942, 1335 (Herbert Vere Evatt).

<sup>36</sup> *Ibid* 1334 (John Prowse).

<sup>37</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 7 October 1942, 1470 (Grenfell Price).

<sup>38</sup> *Ibid* 1477 (Herbert Vere Evatt).

<sup>39</sup> *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.’<sup>40</sup> Its effect and operation became evident in the *Copyright Owners Case*.<sup>41</sup> The British *Copyright Act 1911* (UK)<sup>42</sup> had applied to Australia by paramount force before the Statute was adopted. This was appropriate during Australia’s infancy because interest in copyright was ‘sporadic and generally superficial’ and a ‘very low priority matter’ so recourse to UK enactments were a ‘handy short cut’.<sup>43</sup> The 1911 Act was repealed and replaced in the United Kingdom by the *Copyright Act 1956* (UK).<sup>44</sup> 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.<sup>45</sup> Therefore, whilst there were some hiccups and teething issues, the *Statute of Westminster* gave greater autonomy to the Commonwealth.<sup>46</sup>

#### *Shortcomings to Independence*

The passage of the Statute did not make Australia fully independent. First, the *Statute of Westminster* only affected the Commonwealth Parliament. It had no effect on liberating the State Parliaments, who continued to be restrained by the doctrines of repugnancy and extraterritoriality. The British Parliament retained the power to legislate for the States. The Crown, on the advice of British ministers, had the power to disallow laws passed by the States. The preservation of the existing limitations was of the States’ choosing. The States simply decided against sending delegates to the Imperial Conferences. This

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<sup>40</sup> *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 409 (Brennan J) (‘*Kirmani (No 1)*’)

<sup>41</sup> *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*’).

<sup>42</sup> *Copyright Act 1911* (UK) 5 Geo 6, c 46.

<sup>43</sup> Sam Ricketson, ‘The Imperial *Copyright Act 1911* in Australia’ in Uma Suthersanen and Ysolde Gendreau (eds), *A Shifting Empire* (Edward Elgar Publishing, 2013) 52.

<sup>44</sup> *Copyright Act 1956* (UK) 4 & 5 Eliz 2, c 74.

<sup>45</sup> *Copyright Act 1968* (Cth) s 5.

<sup>46</sup> Michael Coper, *Encounters with the Australian Constitution* (CCH, 1987) 6.

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.<sup>47</sup> 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.<sup>48</sup> Therefore, the grant of independence to Australia was not given a secure legal footing. As Justice Deane would explain in *Kirmani (No 1)*, 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 Westminster* or otherwise legislate for Australia.<sup>49</sup> His Honour did describe this example as ‘far-fetched’ but nonetheless possible.<sup>50</sup>

I argue that the *Statute of Westminster* was ‘important step in Australian legal independence’<sup>51</sup> but it did not bring about full independence. At most, the Statute gave the Commonwealth Parliament the *capacity* to be independent because ‘[i]ndependence given is not somehow inferior to independence taken’.<sup>52</sup>

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<sup>47</sup> *Statute of Westminster* s 7(2).

<sup>48</sup> *Copyright Owners Case* (n 41) 604 (Dixon CJ), 613 (McTiernan J), 625 (Menzies J).

<sup>49</sup> *Kirmani (No 1)* (n 40) 442 (Deane J).

<sup>50</sup> *Ibid.*

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

<sup>52</sup> Hudson and Sharp (n 9) 137.

## ADVICE TO THE MONARCH

Turning next to the executive branch and the power of Commonwealth and State ministers to advise the Monarch.

### *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 the British Government could instruct them through their commission or royal instructions.<sup>53</sup> In 1901, the colonies federated as the Commonwealth of Australia ‘under the Crown of the United Kingdom of Great Britain and Ireland’.<sup>54</sup> The Crown was represented by the Governor-General,<sup>55</sup> 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.<sup>56</sup>

In the first steps towards independence, the Imperial Conferences gradually began to confer power to the governments of the Dominions. At the 1923 Conference, the Commonwealth acquired the right to conduct its own international trade negotiations independently of Britain.<sup>57</sup> At the 1926 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

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<sup>53</sup> Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Federation Press, 2006) 13–15 (‘Twomey, *The Chameleon Crown*’).

<sup>54</sup> *Commonwealth of Australia Constitution Act*, Preamble.

<sup>55</sup> *Constitution* s 2.

<sup>56</sup> Leslie Finlay Crisp, *Australian National Government* (Longman Cheshire, 5<sup>th</sup> ed, 1983) 398.

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

or external affairs’.<sup>58</sup> This equality of status led to two major changes. First, 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, in those circumstances, ‘it would not be in accordance with constitutional practice’ for advice to be tendered to the Monarch by the British Government.<sup>59</sup> So by 1926, Commonwealth ministers gained the power to advise the Monarch and the Governor-General about Commonwealth matters—the British government stopped playing a role.

There was a catch to this, which was the appointment of the Governor-General. Before 1931, the Governor-General was typically a decorated and distinguished citizen of the United Kingdom appointed by the King, often known to Him personally, on the advice of His British ministers. But in 1931, Prime Minister James Scullion wanted to appoint the Chief Justice of the High Court, Sir Isaac Isaacs, to fill this position. The nomination of Isaacs — a ‘local man’, elderly in his seventies and personally unknown to the King — attracted strident criticism from conservative elements.<sup>60</sup> The King himself was opposed to the appointment for similar reasons and also because he was not consulted before Scullin announced his intention to recommend Isaacs.<sup>61</sup> 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.<sup>62</sup> This ambiguity was resolved in the 1930 Imperial Conference, which concluded on 14 November 1930, when it was clarified that the appointment of the Governor-General should be made on the advice of the government

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<sup>58</sup> Inter-Imperial Relations Committee, *Report, Proceedings and Memoranda*, Imperial Conference 1926 (November 1926) 2.

<sup>59</sup> *Ibid* 4.

<sup>60</sup> Zelman Cowen, *Isaac Isaacs* (University of Queensland Press, 1967) 191–9.

<sup>61</sup> Michael Kirby, ‘Sir Isaac Isaacs - a sesquicentenary reflection’ (2005) 29(3) *Melbourne University Law Review* 880, 898.

<sup>62</sup> *Ibid*.

of the Dominion but after informally consulting the Monarch. Two weeks later, 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.<sup>63</sup>

Isaacs' appointment highlighted the moving forces towards independence. Finally, in all Commonwealth matters, including the appointment of the Monarch's representative, the power was to be exercised on the advice of Australian ministers. This meant that, by 1930, the Commonwealth received 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.

#### *States Remained as Crown Dependencies*

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

The States believed, however, that the British Government, at least since the 1930's, was a mere 'channel[] of communication' or 'post box' to put advice to the Monarch on State matters and it would be a 'breach of convention' for it to act independently.<sup>64</sup> However, to their great surprise in the 1970's, the British Government saw their role very differently. As British ministers would be responsible to the Westminster Parliament for their advice to the Monarch, even on an Australian State matter, they

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<sup>63</sup> Max Gordon, *Sir Isaac Isaacs: A Life of Service* (Heinemann, 1963) 155.

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

believed they were under an obligation to give independent advice and consider the interests of the United Kingdom.<sup>65</sup>

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 attacking the Whitlam Government and the British Government had even contemplated dismissing Hannah at the time.<sup>66</sup> 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.<sup>67</sup>

In 1979, the Wran Government in New South Wales sought 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'.<sup>68</sup> It was feared that, if the States could advise the Queen directly, she would become Queen of each State and that would place each State on equal footing with the Commonwealth. By the time that Lord Carrington's views were received, both Houses of the NSW 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.<sup>69</sup> The other Bill did not proceed.

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

<sup>66</sup> Twomey, *The Chameleon Crown* (n 53) 62–8.

<sup>67</sup> *Ibid.*

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

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

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 Monarch. These links made the States beholden to the British Government, even in a limited sense, highlighting that independence had not been completed or achieved at the State level by the 1970s.

## THE PRIVY COUNCIL

Turning now to the judiciary.

### *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 Constitutional Convention. On the one hand, some delegates saw the 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.’<sup>70</sup> 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’.<sup>71</sup> On the other hand, the Privy Council was disfavoured because of the great expense to bring an appeal.<sup>72</sup> This

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

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

<sup>72</sup> Enid Campbell, ‘The Decline of the Jurisdiction of the Judicial Committee of the Privy Council’ (1959) 33 *Australian Law Journal* 196, 204.

was forcefully highlighted in an 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.<sup>73</sup>

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.<sup>74</sup> In particular, there was a concern that the proposed 'Washminster' constitutional model and federalism 'was a subject entirely unfamiliar to English lawyers'.<sup>75</sup> 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'.<sup>76</sup> 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'.<sup>77</sup> Even proponents for 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.<sup>78</sup>

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 wanted 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.' However, this change was fundamentally different from the hard-fought compromise reached by the convention delegates. Following protests by the Australian representatives, the judicial provisions were redrafted

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

<sup>74</sup> *Ibid.*, 11 March 1898, 2306 (Josiah Symon).

<sup>75</sup> *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1111–12 (Griffith CJ) ('*Baxter*').

<sup>76</sup> Commonwealth, *Parliamentary Debates*, Senate, 29 July 1903, 2697–8 (Richard O'Connor).

<sup>77</sup> *Baxter* (n 75) 1111–12 (Griffith CJ).

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

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’. But section 74 provided that appeals could be made from the High Court to the Privy Council by ‘special leave to appeal’. There was, however, a carveout: appeals were not permitted to the Privy Council as to ‘the limits inter se of the Constitutional powers of the Commonwealth and those of 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. The Commonwealth Parliament had the power to make laws that limited the matters that could reach the Privy Council but such laws were to be ‘reserved by the Governor-General for Her Majesty’s pleasure’ (and, remember, at the time of Federation, Her Majesty would have exercised that power on the advice of Her British ministers). 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*’.<sup>79</sup>

### *The High Court and Privy Council in Conflict*

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.<sup>80</sup> The Privy Council’s decision was regarded as disastrous.<sup>81</sup> Chief Justice Isaacs said that the Privy Council was ‘as unable to interpret the meaning of our statutes as if they were living on ... Mars’.<sup>82</sup>

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<sup>79</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 11 June 1903, 802 (Edmund Barton).

<sup>80</sup> *Colonial Sugar Refining Co Ltd v Commonwealth* (1913) 15 CLR 182.

<sup>81</sup> *A-G (Cth) v Colonial Sugar Refining Co Ltd* [1914] AC 237,

<sup>82</sup> Deborah Gare, ‘Dating Australia’s Independence: National Sovereignty and the 1986 Australia Acts’ (1999) 29 *Australian Historical Studies* 251, 261 n 49.

However, there was a loophole for an ‘inter se’ question that allowed it to reach the Privy Council without a High Court certificate: a party needed to appeal directly from a State Supreme Court, either by leave of that Court or the Privy Council. In *Deakin v Webb*,<sup>83</sup> the High Court held that the salaries of Commonwealth officers were immune from State income taxation. When counsel for Victoria, Isaac Isaacs (yes, the same person who would become a Justice, and then Chief Justice, of the High Court and then Governor-General), applied for an ‘inter se’ certificate, the High Court found no ‘special reason’ and refused the application.<sup>84</sup> Three months later, Isaacs, still representing Victoria, brought another case concerning State taxation of Commonwealth officers in the Supreme Court of Victoria.<sup>85</sup> 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.’<sup>86</sup> The Supreme Court granted leave to appeal directly to the Privy Council.<sup>87</sup> In *Webb v Outrim*, a decision described as of ‘dubious value’,<sup>88</sup> the Privy Council held that ‘no authority exists by which [a State law’s] validity can be questioned or impeached.’<sup>89</sup> The Privy Council, relying on the intention of the British Parliament when it passed the *Commonwealth of Australia Constitution Act* 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’.<sup>90</sup> Any law student can tell you that that decision was ‘flawed by an elementary misconception of the Australian Constitution’.<sup>91</sup> And it confirmed the fears of the convention delegates about the dangers of allowing constitutional matters to be determined by the Privy Council. Further, the aggressive tactics by Isaacs (who, in 1906, was appointed to the High Court) in

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<sup>83</sup> (1904) 1 CLR 585.

<sup>84</sup> *Ibid* 619–31.

<sup>85</sup> *Re Income Tax Acts* [1905] VLR 463 (*‘Re Income Tax Acts’*).

<sup>86</sup> Williams, Brennan and Lynch (n 51) 120–1 [3.81].

<sup>87</sup> *Re Income Tax Acts* (n 83).

<sup>88</sup> FR Beasley, ‘Appeals to the Judicial Committee: The Case for Abolition’ [1957] *Res Judicae* 399, 407.

<sup>89</sup> *Webb v Outrim* [1907] AC 81 (*Webb v Outrim*).

<sup>90</sup> *Ibid*.

<sup>91</sup> Williams, Brennan and Lynch (n 51) 121 [3.82].

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',<sup>92</sup> the High Court refused to be bound by *Webb v Outrim*.<sup>93</sup> A High Court 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, that, given the similarities between the judicial power provisions of the *Australian Constitution* and *US Constitution*, Commonwealth and State legislation are not immune to constitutional challenge.<sup>94</sup> The Commonwealth 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.<sup>95</sup>

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 inescapabl[y] hitched to the star of the English legal system'.<sup>96</sup> 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*,<sup>97</sup> the High Court overruled its earlier decision<sup>98</sup> out of deference

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<sup>92</sup> 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.

<sup>93</sup> *Baxter* (n 75).

<sup>94</sup> *Ibid.*

<sup>95</sup> *Judiciary Act 1907* (Cth).

<sup>96</sup> Michael Kirby, 'Permanent Appellate Courts – the New South Wales Court of Appeal 20 Years On' (1987) 61 *Australian Law Journal* 391, 392.

<sup>97</sup> *Piro v W Foster & Co* (1943) 68 CLR 313 ('*Piro's Case*').

<sup>98</sup> *Bourke v Butterfield & Lewis Ltd* (1926) 38 CLR 354.

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.<sup>99</sup> 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.<sup>100</sup>

### *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'.<sup>101</sup> The result was that decisions of the High Court on the *Constitution* and Commonwealth laws could no longer be appealed to the Privy Council. However, the Act did not affect appeals on State 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, contacted British Prime Minister Edward Heath within days of his swearing-in. Heath made it clear that he did not want 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 abolishing Privy Council appeals. Lord Clifford noted that States were 'anxious' that they would lose the ability to 'appeal to some outside

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<sup>99</sup> *Piro's Case* (n 95) 320 (Latham CJ).

<sup>100</sup> See Kirby (n 94) 392.

<sup>101</sup> *Privy Council (Limitation of Appeals) Act 1968* (Cth) s 3.

body' if there was a constitutional struggle between the States and Commonwealth governments.<sup>102</sup> 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.'<sup>103</sup> 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'.<sup>104</sup> 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'.<sup>105</sup>

The Whitlam Government persisted. It 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. However, Queensland met Whitlam's proposal with great hostility. On the initiative of Bjelke-Peterson, Queensland reacted by passing 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

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<sup>102</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 9 May 1973, vol 342, col 469 (Lord Clifford).

<sup>103</sup> Ibid col 496 (Baroness Tweedsmuir).

<sup>104</sup> Geoffrey Bolton, 'The United Kingdom', in WJ Hudson (ed), *Australia in World Affairs, 1971-75* (George Allen & Unwin, 1980) 221.

<sup>105</sup> 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.

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) Act 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 second bill was rejected in the Senate on two 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.

Nonetheless, 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. To mark this new era, the High Court unanimously declared in *Viro v The Queen* that it was no longer bound by decisions of the Privy Council.<sup>106</sup> This displaced the previous rule that Privy Council decisions were ‘strictly binding’ on the High Court, except on ‘inter se’ questions.<sup>107</sup>

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

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<sup>106</sup> *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).

<sup>107</sup> Robert S Geddes, ‘The Authority of Privy Council Decisions in Australian Courts’ (1978) 9 *Federal Law Review* 427, 428.

seems ... that the State courts must make their own decision on this matter.’<sup>108</sup> The Court of Appeal laid down a complex rule for New South Wales courts<sup>109</sup> 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.<sup>110</sup> However, if the older High Court decision has stood without being departed from by the High Court, whilst the Privy Council decision was given after 1975, the High Court decision should be followed.<sup>111</sup> The Supreme Court of South Australia also took a similar view.<sup>112</sup>

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.<sup>113</sup> Although the High Court departed from following House of Lords decisions in 1963 in *R v Parker*,<sup>114</sup> Australian courts still considered themselves bound by decisions of the House of Lords unless there were contrary Australian authorities.<sup>115</sup> 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.<sup>116</sup> 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.

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<sup>108</sup> *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)’*).

<sup>109</sup> *Ibid* 474B.

<sup>110</sup> *Ibid* 474C, 475C.

<sup>111</sup> *Ibid* 475D.

<sup>112</sup> *Australian Government Workers' Association v Armstrong* (1980) 25 SASR 441, 447–8 (Mitchell J, Zelling J agreeing at 448).

<sup>113</sup> See Gare (n 82).

<sup>114</sup> *R v Parker* (1963) 111 CLR 610, 625 (Dixon CJ).

<sup>115</sup> 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.

<sup>116</sup> *Life Savers (Australasia) Ltd v Frigmobile Pty Ltd* [1983] 1 NSWLR 431, 433 (Hutley JA, Glass JA agreeing).

## THE FINAL BREAKTHROUGH: THE AUSTRALIA ACTS

So let's recap to the pre-1986 mess.

### *The Pre-1986 Mess*

By 1985, the Commonwealth and the States found themselves 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 stranger than fiction'.<sup>117</sup> 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.'<sup>118</sup>

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'.<sup>119</sup> 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 who wanted to 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.

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<sup>117</sup> Coper (n 44) 6.

<sup>118</sup> Ibid.

<sup>119</sup> Peter Durack, 'Abolition of Residual Constitutional Links with Britain other than the Crown' (July 1982) 53(1) *Australian Foreign Affairs Record* 466.

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.<sup>120</sup>

### *The Australia Acts*

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

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.<sup>121</sup> 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*].’<sup>122</sup> Although Australia’s legislative independence had been a ‘political reality’ in 1986, the *Australia Acts* ensured that ‘this was also a reality legally and constitutionally.’<sup>123</sup>

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 Monarch’s powers to disallow a State law and no longer required assent to be withheld on any State Bill for the Monarch’s pleasure. Combined, the ‘apron strings were finally and formally untied’ by severing the residual

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<sup>120</sup> Twomey, *Independence Day* (n 6) 2–3.

<sup>121</sup> *Australia Acts* s 12.

<sup>122</sup> *Sue v Hill* (1999) 199 CLR 462, 492 (Gleeson CJ, Gummow and Hayne JJ).

<sup>123</sup> Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 5<sup>th</sup> ed, 2013) 178 [6.130].

colonial legislative limitations on the States.<sup>124</sup> 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 must meet ‘manner and form’ requirements in State laws.<sup>125</sup> The States had not wanted this limitation removed to ensure that entrenched constitutional provisions, such as clauses preventing the abolition of Legislative Councils without a referendum,<sup>126</sup> remained effective.

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 federalism and necessary for maintaining the ‘sovereign identities and powers’ of the States.<sup>127</sup> To avoid the risk that the Sovereign receives conflicting advice from their Commonwealth and State ministers, section 7 provides that all of the Monarch’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 Monarch for exercising their 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.’<sup>128</sup> 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

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<sup>124</sup> Ibid.

<sup>125</sup> *Australia Acts* s 6.

<sup>126</sup> See, eg, *Constitution Act 1902* (NSW) s 7A.

<sup>127</sup> Twomey, *Battle for Sovereignty* (n 65).

<sup>128</sup> Explanatory Memorandum, *Australia (Request and Consent) Bill 1985* (Cth) 6 [15].

Commonwealth, State and Territory courts other than the High Court.<sup>129</sup> Although the *Privy Council (Appeals from the High Court) Act 1975* continues to prevent appeals from the High Court to the 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.'<sup>130</sup> 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 this section as '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.'<sup>131</sup>

## 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

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<sup>129</sup> *Australia Acts* s 16(1) (definition of 'Australian court').

<sup>130</sup> *Kirmani v Captain Cook Cruises Pty Ltd (No 2)* (1985) 159 CLR 461, 465 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

<sup>131</sup> Twomey, *Battle for Sovereignty* (n 65).

of the Queen’ but instead an ‘alien’.<sup>132</sup> When the people<sup>133</sup> of the six colonies voted to approve the *Constitution* in 1899 and 1900, they would have thought that that understanding was utterly absurd.

But Australia’s evolutionary independence tells a history of restraint motivated by loyalty to the Mother Country against a growing sentiment of Australia’s own national identity. In my view, Australia’s evolutionary approach does not lend to a single magic date for its independence. It is a matter that depends on the branch and level of government.

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<sup>132</sup> See *Sue v Hill* (1999) 199 CLR 462; *Palmer v Western Australia* [2021] HCA 31, [6]; *Singh v Commonwealth* (2004) 222 CLR 322.

<sup>133</sup> It would be remiss to fail to acknowledge that the conception of ‘the people’ at the time of Federation, regrettably, 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.