

# Forgotten Source: the Legislative Legacy of the Federal Council of Australasia

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## Introduction

Although few would be aware of it, the Constitution enacted by the Imperial Parliament in 1900 to provide for the federation of the Australian colonies was not the first attempt at an intercolonial federal body in the Antipodes. In fact the *Commonwealth of Australia Constitution Act 1900 (Imp)* marked the passing of the predecessor of the institution it was creating. The body in question, the Federal Council of Australasia, was established in 1885, and is generally regarded by Constitutional historians as a failure that provided useful lessons for the participants in the Australasian Federal Conventions late in the 19th century.

What makes the Federal Council worthy of some consideration here is that it had the power to pass its own legislation, on a variety of subjects, which was binding on the colonies who participated in it<sup>1</sup> — and invalidated any colonial law which was inconsistent with its own

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<sup>1</sup> The colonies who were permitted to enter the Federal Council were Fiji, New Zealand, New South Wales, Victoria, Queensland, Tasmania, South Australia, and Western Australia: Section 1 *Federal Council of Australasia Act 1885 (Imp)*. Section 30 of the *Federal Council of Australasia Act* provided that the legislature of a colony could only participate in the Federal Council if it passed an Act or Ordinance declaring it wished to do so. New Zealand and New South Wales never enacted legislation to join the Council, and South Australia participated between 10 December 1888 and 10 December 1890, whereupon it withdrew: see G S Knowles, *The Commonwealth of Australia Constitution Act*, Commonwealth of Australia, Canberra, 1936, 4–5.

enactments.<sup>2</sup> Further, the Federal Council's statutes were expressly preserved by the *Commonwealth of Australia Constitution Act*, potentially leaving them still to conflict with, and invalidate, contemporary State law.<sup>3</sup> This may be so even allowing for the removal of restrictions upon State power to deal with Imperial legislation conferred by section 2(2) of the *Australia Act* 1986 (Imp). Further, by virtue of Australia's gradual constitutional independence from Britain during this century, there is doubt over the Commonwealth's ability to deal with some of these statutes. This may leave a lacuna in Australian law, where a source of law exists that no Parliament, State, Federal or otherwise, is equipped to deal, that may be able to invalidate inconsistent State law into the bargain. This paper shall consider the nature of the Federal Council's statutes, their position in the Australian legal system, and the impact upon them of the *Statute of Westminster* 1931 (Imp) and the *Australia Act* which have impacted upon Australia's constitutional structure and relationship with Great Britain.

## Background

For most of the nineteenth Century, it could not be said that the Australasian colonies were keen to unite into any larger structure. Between 1845 and 1880, there were numerous conferences and other efforts to discuss some sort of federation of the Australasian colonies, but all of these efforts came to nothing.<sup>4</sup> The Australian colonies had only recently received responsible self-government, and were reluctant to dilute their new-found political freedom with the interests of rival colonies geographically remote to them. There were also fundamental policy differences between the two leading colonies, New South Wales and Victoria, especially with regard to tariffs, which also mitigated against any union.<sup>5</sup>

However, in the 1880s, the growing interest by both Germany and France in the Pacific, and proposals by the latter to ship large numbers of *récidivistes* to New Caledonia greatly concerned the Governments of the

<sup>2</sup> Section 22 *Federal Council of Australasia Act*.

<sup>3</sup> Covering clause 7 *Commonwealth of Australia Constitution Act*. The *Commonwealth of Australia Constitution Act* contains only 9 sections, the ninth of which contains the Australian Constitution. To avoid confusion with the Constitution itself, it is usual to refer to the sections of the Act as covering clauses.

<sup>4</sup> The most substantial efforts were in fact made in Britain, by the then Colonial Secretary Earl Grey in 1850. His Lordship introduced a Bill to Parliament to create a "General Assembly" for Australia. When this Bill was defeated, he created the New South Wales Governor, the Governor-General of Australia, creating an executive union. The title fell into disuse in 1861, only to be revived in 1901: J Quick & R R Garran, *The Annotated Constitution of the Australian Commonwealth*, Sydney: Legal Books, 1976, 81-90. On proposals for Federation generally in this period see Quick & Garran, above, n 4, at 79-109; I C Harris, *The Federal Council of Australasia*, University of Newcastle, MA thesis, 1969, 7-9 ("Harris").

<sup>5</sup> Quick & Garran, above, n 4, at 100-109.

Australasian colonies.<sup>6</sup> These concerns were heightened when Britain refused to countenance the unilateral annexation of New Guinea undertaken by Queensland in 1883,<sup>7</sup> which demonstrated the impotence of the colonies acting alone. The apparent indifference of the British Government to the foreign interest in the Pacific and the linking of New South Wales and Victoria by rail, demonstrating the shrinking of the geographical barriers between the colonies, acted as sufficient spurs to the colonies to convene a meeting in 1883.<sup>8</sup>

Out of the meeting came a request to Britain to pass legislation to bring about a limited legislative union of the colonies to permit them to deal with the perceived crisis. The conference forwarded draft legislation to the Imperial Parliament to create a new body, the Federal Council of Australasia. The Council would consist of the nominees of each of the Australian colonies, New Zealand and Fiji<sup>9</sup> and would meet on a bi-annual basis<sup>10</sup> in the capital of one of the participating colonies.<sup>11</sup> In keeping with its perambulatory nature, the Council was to have no permanent executive, but rather have the Crown represented by the Governor of the colony where it was located from time to time.<sup>12</sup> Its legislative powers were to cover matters that were not within the legislative competence of any of the colonies singularly, and there was to be provision for the Parliaments of any participating colony to refer further powers to the Council if and when it wished to do so.

The *Federal Council of Australasia Act* came into effect on 14 August 1885. In the intervening months since the 1883 Conference, three of the colonies involved, New South Wales, South Australia and New Zealand lost enthusiasm for the proposal, and declined to request the British Government to include them within the Council structure.<sup>13</sup> In the hope that

<sup>6</sup> The irony of the Australian colonies in fear of the transportation of convicts to the Pacific appears to have been lost on the colonists: Harris, above, n 4, at 15–18; Quick & Garran, above, n 4, at 110.

<sup>7</sup> Harris, above, n 4, at 19–22; R Else-Mitchell, "The Establishment in 1885 of the Federal Council of Australasia", (1985) 59 *Australian Law Journal* 666.

<sup>8</sup> Quick & Garran, above, n 4, at 110–112; Harris, above, n 4, at 26–27; Else-Mitchell, above, n 7, at 666.

<sup>9</sup> This was originally set at two members for each colony, nominated by the colony, except for Crown colonies, who could nominate a single member: section 5 *Federal Council of Australasia Act*. This was increased by an Order-in-Council to five per colony in 1893: Harris, above, n 4, at 200.

<sup>10</sup> Section 4 *Federal Council of Australasia Act*.

<sup>11</sup> Since the Council was compelled to sit when the colonial parliaments were in summer recess, its members showed a marked preference for sitting in Hobart. All of the sessions of the Council except the last were held in Hobart, Harris, above, n 4, at 194–195.

<sup>12</sup> Sections 8 and 17 *Federal Council of Australasia Act*.

<sup>13</sup> Else-Mitchell, above, n 7, at 667. South Australia later entered the Council on a temporary basis, between 1889 and 1891. An effort to extend its membership failed in the South Australian Parliament, and it withdrew, never to return. New South Wales' non-participation has variously been ascribed to a range of factors, from fundamental disagreement with Victoria over tariffs, to the vote on joining the Council being held on Melbourne Cup day, leaving the government of the day in a minority due to the absence of its members to attend the race: *Official Record of the Debates of the Australasian Federal Convention*, Sydney; Legal Books, 1986, Vol 1 at 31 ("Official Record").

the three recalcitrant colonies would join in at a later date, provision was made for them to enter upon the passing of an Act by the Parliament of the colonies in question, rather than seeking an amendment of the Council's statute.<sup>14</sup>

The powers given to the Council strongly resemble some of those ultimately given to the Commonwealth Parliament in section 51 of the Commonwealth Constitution. They include relations with the islands of the Pacific,<sup>15</sup> prevention of the influx of criminals,<sup>16</sup> fisheries beyond territorial limits,<sup>17</sup> civil process and enforcement of judgments between colonies,<sup>18</sup> custody of colonial offenders aboard ships,<sup>19</sup> and such matters (including defence, quarantine, marriage, divorce, copyright and patents, weights and measures, bills of exchange, corporations, naturalisation) that the colonial legislatures might see fit to refer to the Council.<sup>20</sup> Also anticipatory of the Commonwealth Constitution was section 22 of the *Federal Council of Australasia Act*, which stated in the event of any inconsistency or repugnance between colonial and Council legislation, the latter should prevail to the extent of the inconsistency.<sup>21</sup>

The Council however made little use of its powers. Sitting in Hobart every two years, the Council succeeded in passing only ten Acts, with four of these coming its first session. Most of the legislation was concerned with inter-colonial enforcement of judgments and evidentiary matters, but there were also statutes dealing with the funding of certain garrisons, naturalisation and offshore fisheries. The Council appears to have been hampered by its inability to raise its own revenue and its infrequent sitting schedule, and a lack of public enthusiasm for the Council. In part this may also have been due to the non-participation of New South

<sup>14</sup> Section 30 *Federal Council of Australasia Act* provided that the Act did not have operation in any colony until adopted by the legislature of the colony. Section 31 allowed colonies to voluntarily withdraw from the Council upon a vote of their legislature, but preserved any existing Council legislation operating in the colony at the time of withdrawal. Section 1 defined colonies as Fiji, New Zealand, New South Wales, Queensland, Tasmania, Victoria, Western Australia and South Australia.

<sup>15</sup> Section 15(a) *Federal Council of Australasia Act*; cf s 51(xxx) Constitution (References to "Constitution" are to the Australian Constitution).

<sup>16</sup> Section 15(b) *Federal Council of Australasia*; cf s 51(xxviii) Constitution.

<sup>17</sup> Section 15(c) *Federal Council of Australasia*; cf s 51(x) Constitution.

<sup>18</sup> Section 15(d) *Federal Council of Australasia Act*; cf s 51(xxiv) Constitution.

<sup>19</sup> Section 15(g) *Federal Council of Australasia Act*.

<sup>20</sup> Sections 15(h) and 15(i) *Federal Council of Australasia Act*; cf s 51(vi) Constitution: defence; s 51(ix) Constitution: quarantine; s 51(xxi) Constitution: marriage; s 51(xxii) Constitution: divorce; s 15(xviii) Constitution: copyright and patents; s 15(xvi) Constitution: bills of exchange; s 15(xix) Constitution: naturalisation; s 15(xx) corporations; s 51(xv) Constitution: weights and measures.

<sup>21</sup> Section 22 stated:

"If in any case the provisions of any Act of the Council shall be repugnant to, or inconsistent with, the law of any colony affected thereby, the former shall prevail, and the latter shall, so far as such repugnance or inconsistency extends, have no operation."

cf s 109 Constitution.

Wales, New Zealand and (for all but one session) South Australia, that the Council's membership was appointed and not elected, and to the Constitutional Conventions held through the 1890s, during which it was apparent a more concrete federation would result.<sup>22</sup>

Nevertheless, the Federal Council did not repeal any of its own legislation prior to its abolition in 1900, and this legislation was expressly saved from repeal by covering clause 7 of the *Commonwealth of Australia Constitution Act* 1900. The status of this legislation, and its impact on State and Commonwealth law will be examined below.

## The Imperial Parliament & the Acts of the Federal Council

### Prior to the *Statute of Westminster*

The Federal Council of Australasia was created by a British Act of Parliament in 1885, and was abolished in 1900 by another British Act. Accordingly, in 1900, it was within the Imperial Parliament's power to pass an Act to repeal any law passed by the Federal Council, or alternatively to remove any invalidity arising from inconsistency between State and Federal Council law. The British Parliament did not do so, leaving only covering clause 7 in the *Commonwealth of Australia Constitution Act* to deal with the question.

As to whether the Imperial Parliament could have repealed Federal Council statutes after 1900, there are a number of issues to be considered. This is particularly interesting if any such repeal would implicitly repeal covering clause 7 of the Australian Constitution. Firstly, Diceyan notions of the power of the Imperial Parliament would have it that that body was completely sovereign in all matters, and accordingly it could make or repeal law on any subject, including the enactments of the Federal Council.<sup>23</sup> On the other hand, such a view would have it that the Imperial Parliament could equally repeal the Australian Constitution, even though it

<sup>22</sup> Harris, above, n 4 passim.

<sup>23</sup> Dicey took the view that within the Westminster system, Parliament was "sovereign", and therefore there were no internal limits on the nature and scope of the legislation that might be passed: A V Dicey, *The Introduction to the Study of the Law of the Constitution*, London: Macmillan, 1959 (1960 [printing]), 39–85. Although expounded over 100 years ago, such a view was still receiving judicial support in Australia as recently as 1988: *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1. Allan has recently reconsidered Diceyan theory, and argues that since the authority of Parliament is derived from its democratic character, then legislation that sought to erode democracy would by necessity lack validity: T R S Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1993, 282–290. With either construction, the Imperial Parliament would have had power to repeal Federal Council statutes.

had set down in the *Commonwealth of Australia Constitution Act* the only mechanisms for alteration of the Constitution were to be the procedure set down in section 128.<sup>24</sup> Covering clause 7 sets down the means whereby the Federal Council's legislation may be repealed, and so an Act repealing such law would come into conflict with the intention of the Imperial Parliament in 1900. This raises the issue of manner and form provisions and whether Parliament may bind future Parliaments.<sup>25</sup> From a theoretical perspective, the Imperial Parliament cannot bind itself with respect to future Parliaments, and therefore any legislation passed ought to be capable of repeal. This could include the *Commonwealth of Australia Constitution Act*, the *Statute of Westminster* and the *Australia Act*, both of which seek to impose limits on the Imperial Parliament's ability to deal with Acts in relation to Australia. In practice, the question is not significant as the United Kingdom Parliament has indicated it will not repeal or amend these statutes in the future. Further, even if such a repeal took place, British law is now regarded as foreign law by Australian courts, and there would be no obligation upon the High Court to take judicial notice of the law of a foreign country in assessing the content of Australian law.<sup>26</sup> As such, from an Australian perspective, the repeal of these fundamental statutes could not take place — regardless of the finding a British court would be compelled to make on the same question.

While interesting, there are two points to be made. Firstly, to simply repeal Federal Council Acts would not of itself necessarily be inconsistent with covering clause 7. To repeal the Federal Council Acts would not deprive the Commonwealth of the power to repeal the same Acts, merely the opportunity to exercise that power. Secondly, the Imperial Parliament did not pass any legislation in relation to the enactments of the Council, so speculating on the ramifications of such action is interesting on a hypothetical level, but is pointless on a practical one.

### **Post-Statute of Westminster; pre-Australia Act**

After 1931,<sup>27</sup> the position in relation to the Imperial Parliament may have changed. Such change would be brought about by the *Statute of Westminster*. Section 2(2) of *Statute* provided that:

<sup>24</sup> This was the view of the Law Officers in their advice to the British Government, when Western Australia sought legislation to secede from the Commonwealth: D P O'Connell & A Riordan, *Opinions on Imperial Constitutional Law*, Sydney: Law Book Co, 1971, 415–416.

<sup>25</sup> See J Goldsworthy, "Manner and Form in the Australian States", (1987) 16 *Melbourne University Law Review* 403.

<sup>26</sup> *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30.

<sup>27</sup> For Australia, perhaps a more correct date would be either 3 September 1939 or 7 October 1942. The latter marks the coming into force of the *Statute of Westminster Adoption Act* 1942 (Cth) and the former, the backdated commencement date of that Act.

"[n]o law ... of a Dominion<sup>28</sup> shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of the Parliament of the United Kingdom".

Equally important is section 4 which provides that the United Kingdom Parliament will only make laws for a Dominion if the Dominion has requested and consented to those laws.

These provisions would seem to have removed the Imperial Parliament's ability to affect Federal Council statutes without the express request of the Commonwealth. However, the situation is complicated by section 9(2) of the *Statute of Westminster*. This sub-section states that the United Kingdom Parliament may continue to pass laws affecting the Australian States, not being matters within the power of the Commonwealth Parliament and/or Government, and which traditionally concurrence was not sought.

This would mean that the Imperial Parliament might have a rather limited power to deal with the statutes of the Federal Council. Repealing statutes would be problematic, as covering clause 7 of the Australian Constitution gives this power to the Commonwealth, thereby disentitling the Imperial Parliament to make laws in the field by virtue of the *Statute of Westminster*. Amending Federal Council statutes could also be problematic, as most of the powers of the Council are reflected in section 51 of the Australian Constitution, and are accordingly matters upon which the Commonwealth can make laws. However, this is not so for laws made pursuant to section 15(h) and 15(i) of the *Federal Council of Australasia Act*.<sup>29</sup> These were powers granted to the Federal Council on the reference of colonies. If the Australian States did not refer such matters to the Commonwealth, nor were they within the enumerated powers of the Commonwealth, then they would not be matters within the authority of the Commonwealth. However, they would not fall within the ambit of section 9(2) of the *Statute of Westminster* since they would not be matters within the authority of the States of Australia, as the States individually could not have the authority to affect Federal Council legislation. Accordingly, a Federal Council statute based on sections 15(h) or (i) would exist in a lacuna of jurisdiction between the Commonwealth,<sup>30</sup> the States,<sup>31</sup> and the Imperial Parliament, at least for the purposes of the *Statute of Westminster*.

<sup>28</sup> Section 1 defines "Dominion" to include the Commonwealth of Australia. There is no reference anywhere in the *Statute* to the Federal Council of Australasia.

<sup>29</sup> While s 15(i) did enumerate lists of powers analogous to those in s 51 of the Constitution, it also provided for matters referred to the Federal Council by the colonial legislatures: see above, n 20.

<sup>30</sup> See further below.

<sup>31</sup> See further below.

### Post-Australia Act

The *Statute of Westminster* is not the only instrument affecting the Imperial Parliament's ability to legislate for Australia. In 1986, the *Australia Act* effectively removed the power of the United Kingdom Parliament to make laws with respect to Australia.<sup>32</sup> Section 1 of the *Australia Act* states no Act of the Imperial Parliament shall extend or be deemed to extend to the Commonwealth, the States or the territories of Australia as part of the law of the Commonwealth, the States or the territories.<sup>33</sup> Certainly, this does not make any direct reference to the laws of the Federal Council of Australasia, but an Australian court construing the meaning of the section would be obliged to consider the intention of the legislatures that passed it.<sup>34</sup> The Commonwealth also cannot invite the Imperial Parliament to do so, as the request and consent procedure has also been repealed.<sup>35</sup> It is reasonable to assume that the Imperial Parliament is no longer in a position to affect any existing enactments of the Federal Council, so if the power to do so still exists, it must be found in Australia.

### The Commonwealth and the Acts of the Federal Council

The Parliament of the Commonwealth of Australia was created by the *Commonwealth of Australia Constitution Act*, which also repealed the *Federal Council of Australasia Act*. The latter task was achieved in covering clause 7 of the *Constitution Act*, which in part provides that the Commonwealth may repeal Federal Council statutes as to any State.<sup>36</sup> This seems, on its face, to vest a power in the Commonwealth Parliament to deal with any statute of the Federal Council insofar as that statute applies to any State. The power is circumscribed, in that it is only a power of repeal, and it cannot affect Federal Council statutes that operate in places outside Australia.<sup>37</sup>

<sup>32</sup> Section 1 *Australia Act*.

<sup>33</sup> Section 1 *Australia Act* provides: "No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory."

<sup>34</sup> In the context of the Commonwealth, s 15AA of the *Acts Interpretation Act 1901* (Cth) requires such an approach to statutory interpretation; for the States see s 33 *Interpretation Act 1987* (NSW); s 14A *Acts Interpretation Act 1954* (Qld); s 22 *Acts Interpretation Act 1915* (SA); s 8A *Acts Interpretation Act 1931* (Tas); s 35 *Interpretation of Legislation Act 1984* (Vic); s 18 *Interpretation Act 1984* (WA).

<sup>35</sup> Section 12 *Australia Act* repealed the request and consent procedure contained in s 4 of the *Statute of Westminster*.

<sup>36</sup> Covering clause 7 provides (in part): "Any [Federal Council] law may be repealed as to any State by the Parliament of the Commonwealth."

<sup>37</sup> This would only affect Federal Council statutes operating in Fiji, as New Zealand never voted to join the Federal Council. As a side issue, it is unclear what the status of Federal Council Statutes in Fiji might be. There is no reference to the Federal Council in the *Fiji*



The Commonwealth has used this power on a number of occasions, to repeal Federal Council statutes.<sup>38</sup> Notably, these repeals have always been in areas that fell within the Commonwealth's powers under section 51. The repeals have never been the focus of direct judicial examination, which leaves open the question of whether the Commonwealth's power to deal with Federal Council legislation implicitly rests upon its ability to make law on that subject.

There are two potential points-of-view. The first is that the Australian Constitution is the document that has paramount force in Australia, and that all legislation affecting Australia is to be read subject to it. Accordingly, the Commonwealth would only be able to repeal a Federal Council statute in the event that the repeal fell within the scope of a Commonwealth head of power expressly set out in the Constitution. Such a view finds implicit support in the *Australia Act*, which differentiates between the Australian Constitution on the one hand, and the *Commonwealth of Australia Constitution Act* on the other.<sup>39</sup> If the two are treated separately, and the former is the source of Commonwealth legislative power, then an independent grant of legislative power from the latter would be inappropriate and not a true reflection of the nature of Commonwealth power. Such a construction is consistent with the terms of the Constitution itself, in which the powers of the Federal Council of Australasia are vested in the Commonwealth and the States acting jointly, pursuant to section 51(xxxviii).

Certainly such a view is not inimical to the position of Sir Samuel Griffith, who drafted covering clause 7. Sir Samuel was of the opinion that all of the power of the Federal Council was within the express powers to be given to the Commonwealth. When a delegate to the 1891 Australasian Constitutional Convention suggested changing the draft clause

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*Independence Act 1970 (Imp)*, but it is clear that the Fijian Parliament did have the power to repeal Federal Council statutes, as such power was expressly granted in covering clause 7 of the *Commonwealth of Australia Constitution Act 1900*. Whether this power has ever been used by Fiji cannot be readily ascertained, but it is submitted that should any difficulties arise from the application of Federal Council statutes, the Fijian Parliament could easily remove by repeal the offending legislation. Further, it could only adversely impact on the validity of a Fijian statute passed prior to 1900, as it would be open for a Fijian court to hold that any post-1900 legislation inconsistent with a Federal Council statute might implicitly repeal the Federal Council statute by virtue of covering clause 7.

<sup>38</sup> *Australasian Civil Process Act 1886 (FCA)* repealed by *Service and Execution of Process Act 1901 (Cth)*; *Australasian Judgments Act 1886 (FCA)* repealed by *Service and Execution of Process Act 1901 (Cth)*; *Queensland Pearl Shell and Bêche-de-Mer Fisheries (Extraterritorial) Act of 1888 (FCA)* repealed by *Fisheries Act 1952 (Cth)*; *Western Australian Pearl Shell and Bêche-de-Mer Fisheries (Extraterritorial) Act of 1889 (FCA)* repealed by *Fisheries Act 1952 (Cth)*; *Federal Garrisons Act 1893 (FCA)* repealed by *Defence Act 1903 (Cth)*; *Australasian Naturalization Act 1897 (FCA)* superseded by *Immigration Act 1903 (Cth)*; *Australasian Testamentary Process Act 1897 (FCA)* repealed by *Service and Execution of Process Act 1901 (Cth)*; see Knowles, above, n 1, at 4-5.

<sup>39</sup> See ss 5 (a) and (b) *Australia Act*.

to permit repeal of Federal Council legislation on the application of an affected State, Griffith was succinct in his reply:

"No; because all the matters that could be dealt with by the Federal Council can be dealt with by the federal parliament."<sup>40</sup>

With respect to Sir Samuel Griffith, it is submitted that his assessment is not entirely correct. Although the bulk of the Federal Council's heads of power were given, verbatim in most cases, to the Commonwealth Parliament, the Federal Council could be referred power from the colonial legislatures,<sup>41</sup> on matters that have not been referenced to the Commonwealth, nor that fall within areas of Commonwealth heads of power. If such a statute was passed, and the Commonwealth's power to repeal was limited to areas of its own legislative competence as expressed within the body of the Constitution, then the Commonwealth Parliament would have no power to affect a repeal — unless and until the States affected chose to refer the requisite power to the Commonwealth under placitum (xxxvii).<sup>42</sup>

The alternative point-of-view is to take a literal view of covering clause 7. It states "*any such law*" of the Federal Council as to any State can be repealed by the Commonwealth. This would not seem to imply any fetter or limitation, nor that it is to be read subject to the rest of the Constitution. As such, regardless of the nature of a Federal Council statute, the Commonwealth would have a power of repeal in relation to it.

It is likely that the latter is the correct view. The bald statement in covering clause 7 indicates that the Commonwealth has a power to repeal. Such a power would not infringe any constitutional prohibitions if it is simply a power to repeal, and not a power to amend,<sup>43</sup> and accordingly, there should not be any implied prohibitions upon the Commonwealth's ability to remove Federal Council statutes. However, the former approach is not unrealistic,<sup>44</sup> and would present an interesting constitutional lacuna in Commonwealth power if it was adopted by the courts.

<sup>40</sup> *Official Record*, above, n 13, Vol 1 at 558.

<sup>41</sup> Section 15(h) and (i) *Federal Council of Australasia Act*.

<sup>42</sup> The text of s 51(xxxvii) reads:

"Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law."

It is the equivalent to s 15(i) of the *Federal Council of Australasia Act*.

<sup>43</sup> The Commonwealth would not seem to have a power to amend Federal Council statutes, but that is not likely to present any difficulties in the majority of cases. The Commonwealth could simply repeal an existing Federal Council statute, and enact a Commonwealth statute in similar terms, incorporating the desired amendments. This would be effective in all but those cases where the Federal Council statute fell outside a head of Commonwealth power.

<sup>44</sup> For example, note the comments of various members of the High Court in relation to Commonwealth power and section 9 of the *Statute of Westminster* in *Kirmani v Captain Cook Cruises Pty Ltd (No1)* (1985) 159 CLR 351 at 378 per Mason J; at 384 per Murphy J; at 431-434 per Deane J; cf Brennan J at 413.

## The States and the Acts of the Federal Council

The position of the States in relation to the Federal Council is perhaps the most unusual. Prior to Federation, the participating Federal Council colonies had no power to amend or repeal Federal Council statutes. This is because of section 22 of the *Federal Council of Australasia Act*. This section invalidated repugnant or inconsistent colonial law, to the extent of the inconsistency with, or repugnance to the relevant Federal Council statute. Accordingly, any attempt by a colony to repeal or amend a Federal Council statute would logically be inconsistent with it, and therefore invalid. Nor would the *Colonial Laws Validity Act 1865 (Imp)* permit a colony from passing legislation to seek to remove section 22 of the *Federal Council of Australasia Act* itself, as section 2 of the former Act protected Imperial law from contradictory or repugnant colonial law by invalidating such law.

After Federation, potentially change might have been possible. The *Federal Council of Australasia Act* was repealed, and with it section 22 to strike at State legislation. However, covering clause 7 expressly preserved the operation of Federal Council statutes, and it would seem reasonable to assume that such statutes should continue to operate on the same terms and conditions as previously. If this is so, then any colonial inconsistency with a Federal Council statute would continue to invalidate that colony's (now State's) law, to the extent of any inconsistency.

Taking this a step further, there would be no legitimate reason to say that there was any intrinsic difference between any existing colonial legislation at the time of Federation, and the legislation passed by a State parliament post-Federation. As such, although the Federal Council has ceased to exist for almost a century, its legislation would continue to operate in relation to State law in much the same way that contemporary Commonwealth legislation interacts with such law, by virtue of section 109 of the Constitution. Section 109 and section 22 of the *Federal Council of Australasia Act* are phrased in almost identical terms, which is most suggestive of a similar, if not identical, operation. As such, a court seeking to test the extent of any inconsistency between State and Council law would have a ready-made and highly detailed jurisprudence to work from in the cases dealing with section 109.<sup>45</sup> This being so, the State would still be unable to repeal or amend a Federal Council statute.

Such a conclusion is itself remarkable, when one considers the effect of section 3 of the *Australia Act*. This Act removed impact upon the States of the *Colonial Laws Validity Act*,<sup>46</sup> and expressly granted to them the power

<sup>45</sup> There is a wealth of both commentary and cases on section 109. For succinct summaries of the effect of the section and the cases concerned see P H Lane, *A Manual of Australian Constitutional Law*, Sydney: Law Book Company, 1991, 395–416; P Hanks, *Constitutional Law in Australia*, Sydney: Butterworths, 1991, 210–231.

<sup>46</sup> Section 3(1) *Australia Act*.

to amend or repeal any law of England or the Imperial Parliament insofar as it was part of the law of the State.<sup>47</sup> This means that, were it still in existence, the States could repeal the *Federal Council of Australasia Act*, thereby removing the legislative provision rendering their legislation invalid, and allowing the States to effectively repeal any Federal Council statutes. Further, section 3(2) of the *Australia Act* provides that the States are given the legislative power of the United Kingdom Parliament existing before 1986 with respect to their own affairs. Since the Imperial Parliament probably had the power to deal with Federal Council statutes, it might be argued that the States, through section 2(2) of the *Australia Act*, received the power to amend or repeal Federal Council statutes.

However, since the *Federal Council of Australasia Act* was repealed, and its legislation was preserved by the *Commonwealth of Australia Constitution Act*, the States cannot affect it, or the legislation made under it. Covering clause 7 of the Constitution guarantees continuation of Federal Council statutes. The *Australia Act* expressly protects the Constitution, the *Commonwealth of Australia Constitution Act* and the *Statute of Westminster* from being amended or repealed by the States, and the *Australia Act* is to be read subject to the Constitution.<sup>48</sup> Therefore, if the effect of covering clause 7 is to continue the inability of the States to deal with Federal Council legislation, no grant of power to the States under the *Australia Act* alter the situation. Thus, Federal Council statutes, although made by a subordinate body to the Imperial Parliament, cannot be affected by State law, yet any Imperial statutes (except the two most notable exceptions referred to above) may be amended or repealed by the States without restriction.

## The Current State of Federal Council Law

During its 14 year existence, the Federal Council did not pass much in the way of substantive law, managing to pass only ten statutes.<sup>49</sup> The laws passed covered a variety of subjects, including fisheries, defence and recognition and enforcement of judgments throughout the participating colonies.

From this relatively small base, one might expect that very little Federal Council law remains. Of the original ten statutes, only three have not been repealed by Commonwealth legislation.<sup>50</sup> Of the three, two relate to other statutes of the Council: the *Federal Council Interpretation Act* 1886 and the *Federal Council Evidence Act* 1886. These two Acts serve only to

<sup>47</sup> Section 3(2) *Australia Act*.

<sup>48</sup> Section 5(a) and (b) *Australia Act*.

<sup>49</sup> Four of these were passed at the first session of the Council.

<sup>50</sup> The text of these statutes (and those other Federal Council statutes still in force in 1936) are reproduced in Knowles, above, n 1, at 124-141.

clarify other Federal Council statutes, and indicate how the substance of a Federal Council statute is to be brought into evidence. Neither statute is likely to conflict with other statutes, and therefore they are of limited importance and impact. The third Act is of greater interest, as it potentially falls into the lacuna in Commonwealth and State power described above, and may conflict with contemporary State law.

The Act in question is the *Australasian Orders in Lunacy Act 1891*. The Act is unusual, in that it does not fall within any of the enumerated heads of power of the Federal Council, but rather was enacted on the reference of four of the participating colonies,<sup>51</sup> under section 15(h) of the *Federal Council of Australasia Act* and therefore only operates in those four States. It is also reasonable to assume that the subject-matter of the Act is beyond the legislative power of the Commonwealth to enact without a similar reference, as the Commonwealth's power to make laws to enforce the judgments of civil courts beyond the limits of a State mirrors a similar power to make such laws that was held by the Federal Council. If the Act fell within the subject matter of section 15(e) of the *Federal Council of Australasia Act* (and therefore under section 51(xxiv) of the Constitution), it would not have been necessary to have the matter referred to the Council to pass the necessary law. As such, without covering clause 7 of the *Commonwealth of Australia Constitution Act*, it is submitted that it would not be possible for the Commonwealth Parliament to repeal the *Australasian Orders in Lunacy Act*, and even with the covering clause, as was considered above, it may well be impossible.

Certainly, neither the States nor the Imperial Parliament has the power to effect the *Australasian Orders in Lunacy Act*, and this leaves a remarkable, and potentially unique situation. A law, operational in four of the six Australian States, that is not a constitutive statute nor restricted by special manner and form provisions, may not be able to be amended or repealed by the Commonwealth, the States or the Imperial Parliament. Further that law may operate to invalidate sections of contemporary State law. The image of a statutory "runaway train", unable to be stopped, and destroying any State law in its path readily comes to mind.

There is however a mechanism to stop this "runaway train", although it is an involved and seldom used measure. Section 51(xxxviii),<sup>52</sup> the Commonwealth, legislating with the concurrence of the States, has all the powers of the Federal Council of Australasia or the Imperial Parliament at Federation. Such conjoint legislation would certainly be effective to repeal Federal Council statutes on two grounds. Firstly, as considered

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<sup>51</sup> Victoria, Tasmania, Queensland and Western Australia.

<sup>52</sup> This placitum has been used very rarely by the Commonwealth, with the most notable examples being the legislation putting in place the Offshore Constitutional Settlement (OCS), and the *Australia Act*. The High Court expressly approved its use in the context of the OCS in *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340.

above, in 1901, the Imperial Parliament certainly had the power to pass any law it wished in relation to the statutes of the Federal Council, and thereby conjoint legislation with the same plenary effect could also do so.<sup>53</sup> Secondly, the Federal Council may have been able to repeal the offending Act itself,<sup>54</sup> and so any legislation vested with its power could do so.<sup>55</sup>

## Conclusion

It is unclear whether the *Australasian Orders in Lunacy Act* has any impact upon existing law in the four Australian States who authorised the Federal Council to enact it. An assessment of that would best be left to those with a detailed knowledge of the relevant State legislation, but on the whole it would seem unlikely. The legislation itself seems to be confined to inter-colonial recognition that an individual has been declared insane. This area does not have a vast ambit, and it seems reasonable to assume that the level of interference with State that might be attracted is minimal.

In the unlikely event that the High Court were required to consider the impact of Federal Council statutes, a number of responses are possible. The most probable would be to construe covering clause 7 to be a grant of power to the Commonwealth, and therefore conclude that the Commonwealth would have the power to repeal Federal Council legislation. This would avoid the possibility that neither the Commonwealth nor the States independently could repeal an aberrant Federal Council statute without having to resort to conjoint legislation under section 51(xxxviii) of the Constitution.

A lacuna within Australia legislative power would also seem to be contrary to some contemporary theories of the basis of the legitimacy of the Australian Constitution. If the Constitution draws its authority from

<sup>53</sup> The High Court has indicated the use of conjoint legislation can be used for "plugging gaps" in the legislative powers exercisable by the Commonwealth and States: see *Port MacDonnell Professional Fishermen's Association Inc. v South Australia* (1989) 168 CLR 340 at 379 per the Court.

<sup>54</sup> This is by no means certain. A further reference from the affected colonies may have been required. This issue, in the context of s 51(xxxviii) of the Constitution, has been considered by Cullen: see R Cullen, *Federalism in Action: The Australian and Canadian Offshore Disputes*, Sydney: Federation Press, 1990, 112-117.

<sup>55</sup> This notation referring to the Federal Council was almost deleted from the final draft at the suggestion of Sir Isaac Isaacs. He was of the view that at the time the Constitution came into force, the Council would have already ceased to exist (as was in fact the case, with the Council's demise in July 1900, and the Constitution coming into force on 1 January 1901), it would have no power when the Constitution came into force. He viewed the section as a nonsense, and his contention was not disputed, although for whatever reason the delegates did not remove the reference to the Federal Council from the final draft: *Official Record*, above, n 13 Vol IV, at 225-226.

“agreement of the people to federate” as well as legislative action devolving power from Britain,<sup>56</sup> it would seem strange that there should be an area of law that neither State nor Commonwealth power ought to be able to deal with. That said, the Constitution does provide in section 51(xxxviii) a mechanism giving the Commonwealth and States acting together the power of the Imperial Parliament or the Federal Council itself. It is submitted that to avoid the potential difficulties that might arise in the removal of Federal Council legislation, the use of section 51(xxxviii) would certainly be advisable, although in all likelihood the power to repeal Federal Council statutes rest with the Commonwealth by virtue of covering clause 7.

The purpose of this analysis was simply to consider the constitutional conundrums created by this largely forgotten source of Australian law, and the unsuccessful attempt at Australasian federation. In the event the Council’s old law does strike at State legislation today, then consideration of the reasons for such invalidity are worthy of some examination. However, even if no substantial impact from the Council’s legislative efforts have descended to the present, consideration of its place in Australia’s constitutional structure is still a fruitful endeavour, if only to compel the reader to ponder the nature of the structure itself.

This is particularly so in the current environment calling for substantial revisions to Australia’s constitutional structure. The value in considering the curious legal anomalies created by the existence of Federal Council legislation is that it compels examination of the residue of Australia’s Imperial connections, and the legislative effects they may still make upon the broader constitutional structure. Failure to take into account such anomalies could potentially create embarrassing and difficult to correct situations in an Australia with new constitutional arrangements.

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<sup>56</sup> G J Lindell, “Why is Australia’s Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence”, (1986) 16 *Federal Law Review* 29, at 37.