STATE CONSTITUTIONAL LAW: GATHERING THE FRAGMENTS

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> [I]n Australia a State Constitution is fissiparous . . . in content and form. It is an elusive beast, hard to pin down.[1]

Diffusiveness is a characteristic of State, rather than Federal, constitutional law.[2] Concentration has predominantly focused on the Constitution of the Commonwealth of Australia.[3] While it might be more than

* B A , LL B (Hons) (W A); LL M , S J D (Harv)

1 Lumb, 'Methods of Alteration of State Constitutions in the United States and Australia' (1982) 13 *Fed L Rev* 1 at 4

2 In this respect Australia is not unique Canada see, e g , Sharman, 'The Strange Case of a Provincial Constitution The British Columbia Constitution Act' (1984) 17 *Can J Pol Sci* 87 U S A see, e g , Linde, 'First Things First Rediscovering the States' Bills of Rights' (1980) 9 *U Balt L Rev* 379 at 396 fn 70 (bibliography), Abrahamson, 'Reincarnation of State Courts' (1982) 36 *Southwestern L J* 951 at 964-965 fn 47-48, 972-974 (bibliography), Note, 'Developments in the Law — The Interpretation of State Constitutional Rights' (1982) 95 *Harv L Rev* 1324 at 1328-1329 fn 20 (bibliography), Collins, 'Special Section' [12 March 1984] *National L J* 25-32 (bibliography), Tarr, 'Bibliographical Essay' in M Porter & G Tarr, *State Supreme Courts Policymakers in the Federal System* (1982) 206-208, K L Hall, *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979* vol 1 (1984) 506-523, Collins, 'Reliance on State Constitutions — Away from a Reactionary Approach' (1981) 9 *Hastings Const L Q* 1, Peterkort, 'The Conflict between State and Federal Constitutionally Guaranteed Rights A Problem of the Independent Interpretation of State Constitutions' (1981) 32 *Case West Res L Rev* 158, Williams, 'State Constitutional Law Processes' (1983) 24 *Wm & Mary L Rev* 169, Chida, 'Rediscovering the Wisconsin Constitution. Presentation of Constitutional Questions in State Courts' [1983] *Wisconsin L Rev.* 483, Schoen, 'The Texas Equal Rights Amendment after the First Decade Judicial Developments 1978-1982' (1983) 20 *Houston L Rev* 1321, Pollack, 'State Constitutions as Separate Sources of Fundamental Rights' (1983) 35 *Rutgers L Rev* 707, Kramer, 'State Court Constitutional Decisionmaking' [1983] *Annual Survey Am L* 277, Fisher, 'Ballot Propositions The Challenge of Direct Democracy to State Constitutional Jurisprudence' (1983) 11 *Hastings Const L Q* 43, Linde, 'E Pluribus — Constitutional Theory and State Courts' (1984) 18 *Georgia L Rev* 165, Swindler, 'Minimum Standards of Constitutional Justice Federal Floor and State Ceiling' (1984) 49 *Missouri L Rev* 1, Williams, 'In the Supreme Court's Shadow Legitimacy of State Rejection of Supreme Court Reasoning and Result' (1984) 35 *S Carolina L Rev* 353, Stern, 'The Political Question Doctrine in State Courts' (1984) 35 *S Carolina L Rev* 405, Porter & Tarr, 'The New Judicial Federalism and the Ohio Supreme Court Anatomy of a Failure' (1984) 45 *Ohio St L J* 143, Avner, 'Some Obervations on State Equal Rights Amendments' (1984) 3 *Yale L & Pub Pol Rev* 144, Symposium, 'Civil Rights and Federalism' (1984) 59 *Notre Dame L Rev* 1062, Williams, 'State Constitutional Law in Ohio and the Nation' (1985) 16 *U Toledo L Rev* 391, Gold, 'Public Aid to Private Enterprise Under the Ohio Constitution Sections 4, 6, and 13 of Article VII in Historical Perspective' (1985) 16 *U Toledo L Rev* 405; Sedler, 'The State Constitutions and The Supplemental Protection of Individual Rights' (1985) 16 *U Toledo L Rev* 465, Comment, 'Impartial Jury Guarantees of State Constitutions May Forbid the Use of Peremptory Challenges Exercised to Exclude Jurors Solely because of Race' (1985) 16 *U Toledo L Rev* 507, Comment, 'State Constitutions' Remedy Guarantee Provisions Provide More Than Mere 'Lip Service' To Rendering Justice' (1985) 16 *U Toledo L Rev* 585, B D McGraw (ed), *Developments in State Constitutional Law* (1985), Symposium, 'The Emergence of State Constitutional Law' (1985) 63 *Texas L Rev* 959 See also, Symposium, 'State Constitutional Design in the United States and Other Federal Systems' (1982) 12 *Publius J of Federalism* 1-185 (U S A , Swiss, Yugoslav, Nigerian experiences)

difficult to justify this aspect of the Australian constitutional system not continuing to command attention, some rectification of the overall balance may be required. What, perhaps, needs to change is the relative obscurity of State Constitutions.[4] Compilation of existing scholarly and historical materials would be a first step.[5] New studies and perspectives ought to follow. Whether a consolidation or, even more radically, a renovation of State constitutional provisions should then occur, involves questions whose answers may become less opaque after such initial momentum is garnered.[6]

Revival of State constitutional law could constitute a worthwhile enterprise. Enhancement of erudition in a discrete segment of the law[7] would, of course, have intrinsic merit. But more might be expected to follow. Assessment of similarities and differences between State and federal constitutional law would be facilitated. As a consequence, each should benefit by an understanding of the other.

Prerequisite to interaction and metamorphosis of that dimension is the resurrection of State constitutional law. To succeed, its disparate fragments must be gathered. Obviously these encompass a State constitution's historical antecedents, source of authority and amendment procedure. Matters pertaining to the Legislature, Executive and Judiciary must also be included. Inevitably, some aspects of the State constitutions will, at least initially, not be elaborated. That, however, should not be a deterrent. The challenge of State constitutional law is to proceed.

3 63 & 64 Vict c 12 (1900) (U K) Does this 'written document' constitute the 'totality' of the Australian Constitution? See, e g , Thomson, 'Principles and Theories of Constitutional Interpretation and Adjudication Some Preliminary Notes' (1982) 13 *Melb U L Rev* 597 fn 1, Levinson, "The Constitution' in American Civil Religion' [1979] *Supreme Court Rev* 123 at 133-137 Federal constitutional law bibliographies are listed in Thomson, 'A Torrent of Words A Bibliography and Chronology on the Franklin Dam Case' (1984) 15 *Fed L Rev* 145 fn 1 See also, Symposium, 'Interpretation Symposium' (1985) 58 S *Calif L Rev* 1

4 See generally, Constitution Act 1889-1980 (W A), Constitution Acts Amendment Act 1899-1983 (W A), Constitution Act 1902-1984 (N S W), Constitution Act 1975-1984 (Vic), Constitution Act 1867-1978 (Qld), Constitution Act Amendment Act 1896-1982 (Qld), Constitution Acts Amendment Act 1971-1983 (Qld), Constitution Act 1934-1982 (S A), Constitution Act 1934-1983 (Tas) "[T]he various State Constitution Acts do *not* contain all those statutory provisions which could properly be described as 'constitutional' " Lumb, supra n 1, at 10 (emphasis added)

5 For bibliographies containing State constitutional law materials see, e g , S R Davis (ed), *The Government of the Australian States* (1960) 737-742, W G McMinn, *A Constitutional History of Australia* (1971) 200-203, F K Crowley (ed), *A New History of Australia* (1974) 552-601, L F Crisp, *Australian National Government* 5th ed (1983) 495-496 See generally, Knight, 'The Study of Australian Federalism' (1980) 39 *Aust J Pub Admin* 318

6 Professor Lumb has already alluded to matters pertaining to "consolidation" and "modernisation" of State constitutions Lumb, supra n 1, at 10-11

7 This is not to deny that "[t]he study of Constitutional Law is allied not merely with history, but with statecraft, and with the political problems of our great and complex national life " J B Thayer, *Cases on Constitutional Law with Notes* (vol 1) (1895) v "Constitutional law grows in an environment of ideas about liberty and authority, unity and diversity, that give content to the legal categories of due process of law and federalism And atmospheric changes make the most important differences in constitutional development This is not to suggest that the shifting breezes of expediency are determinative, it is rather to assert that the steady winds of doctrine which blow through the gardens of the philosophers carry their seed as far as the fields of the judges " Freund, 'Law and the Future Constitutional Law' (1956) 51 *Nw U L Rev* 187 at 188

The Constitutions

Constituent documents providing the legal foundations for successive stages of government — from autocratic authority to representative and responsible parliamentary regimes — have progressively been amended and replaced. Particularly as an integral aspect of Australian constitutional development, their evolution from 1788 to 1901 can be traced by recourse to a good deal of scholarly analysis and exposition.[8] Post-federation State constitutions have received somewhat less attention.[9] In large measure, this paucity of historical, political and legal commentary demonstrates the extent to which the Australian Constitution has dominated constitutional exegesis of twentieth century Australia. That document does, of course, in fundamental ways, affect, shape and interact with State constitutional powers, structures and institutions. For example, it mandates a number of executive, legislative and judicial functions to be performed by the States.[10] As a consequence, that constitutional basis of some State activities carries within it the seeds of larger ramifications.

Indeed, it has been suggested that the relationship between the Australian Constitution and State constitutions is something much more than mere recognition and continuation. According to one view, the latter derive all their constitutional authority and legitimacy from the former. If this were so, a matter arising under a State constitution would for that reason alone be a matter arising under the Australian Constitution. Specific and express support for this proposition is sought in section 106 of the Australian Constitution.[11] That does not necessarily[12] entail as the

8. See, e g , J Quick & R R.Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 35-74, E Jenks, *The Government of Victoria (Australia)* (1891); Cowen, 'A Historical Survey of the Victorian Constitution, 1856 to 1956' (1957) 1 *Melb U L Rev.* 9, A.C V Melbourne, *Early Constitutional Development in Australia* (1963 ed), J H Rose, A.P Newton & E A Benians (eds), *The Cambridge History of the British Empire* (vol VII Pt 1 *Australia*) (1933) 273-295, 395-453, A C Castles, *An Australian Legal History* (1982) For bibliographies see, e g , W G McMinn, supra n 5, B Dickey (ed), *Politics in New South Wales* (1969) 191-193; C T Stannage (ed), *A New History of Western Australia* (1981) 783-801.

9 See, e g , Dixon, 'The Law and the Constitution' (1935) 51 *Law Q Rev* 590 at 598-604, Anderson, 'The Constitutional Framework' in S R.Davis (ed), supra n 5, at 3-53; Sawer, 'Constitutional Law' in G W Keeton (ed), *The British Commonwealth* vol 2 of G W.Paton (ed), *The Commonwealth of Australia*) (1952) 38-45, Castles, 'Limitations on the Autonomy of the Australian States' [1962] *Pub L* 175; Harris & Crawford, '"The Powers and Authorities Vested in Him" The Discretionary Authority of State Governors and the Power of Dissolution' (1969) 3 *Adelaide L Rev* 303, J.I Fajgenbaum and P Hanks, *Australian Constitutional Law* (1972) 2nd ed (1980) 3rd ed (1985), C Enright, *Constitutional Law* (1977), R.D Lumb, *The Constitutions of the Australian States* 4th ed. (1977), Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia' (1978) 9 *Fed L Rev* 148, Lumb, supra n 1, R D Lumb, *Australian Constitutionalism* (1983); Thomson, 'State Constitutional Law . American Lessons for Australian Adventures' (1985) 63 *Texas L Rev* —; B Galligan (ed), *Australian State Politics* (1986) (forthcoming — tentative title); G Winterton, *Monarchy to Republic Australian Republican Government* (1986) (forthcoming — tentative title)

10 See, e g , ss 9, 12, 15, 77(iii), 112, 113 of the Australian Constitution See also, infra n 59

11 Opposing views are set forth in W A v Wilsmore [1981] W A R. 179 at 181-183 per Burt C J See also, Barwick, 'Book Review' (1981) 4 *U N S W L J* 131 at 134 Proposed section 108A(4)(a) in the Constitution Alteration (Interchange of Powers) 1984 would have expressly provided legal efficacy to State laws imposing manner or form restrictions or conditions However, on 1 December 1984 the interchange of powers proposal failed to satisfy the referendum requirements of s 128 of the Australian Constitution Commonwealth of Australia Gazette No S21 (31 January 1985)

12 It depends upon whether the Australian Constitution derives its legal efficacy from the British Parliament or Australian people. For authorities on each side of this debate see Thomson, 'Constitutional Interpretation History and the High Court. A Bibliographical Survey' (1982) 5 *U N S W L J* 309 at 318 n 31. See also, infra n 86 and n 88

ultimate legal foundation of State constitutions the legislative sovereignty of the United Kingdom Parliament.[13] Only if it did would opposing views coincide. If they did, the severance of residual constitutional links should produce autochthonous Australian and State constitutions.[14] Neither section 106 nor British parliamentary sovereignty would provide the ultimate legal foundation upon which to secure State constitutional law. An independent source of authority would have been established.[15]

Section 106 has also provided the impetus to convert State Constitution amendment procedures into issues of federal constitutional law. That is, even if the sole source of authority for State constitutions is a heritage of United Kingdom legislation, conformity with their amendment procedures is mandated by the closing words — 'until [the Constitution of the State is] altered in accordance with the Constitution of the State' — of section 106.[16] This, however, is not the only source which can be suggested as providing legal justification for sustaining compliance with manner and form requirements.[17] British legislation specifically authorising such provisions provides another source.[18] A further possibility is the legislative power, conferred on State Parliaments, to make laws for the peace, order and good government of the State.[19] Resort might also be made to the more basic principle which advocates the intrinsic efficacy of restrictions in constitutions.[20] Whatever may ultimately be the efficacious source of legal authority, what is particularly important is the resultant binding force of these procedures. It gives State constitutions a special quality, an organic or fundamental status beyond that of ordinary statute law. Preservation and change by this means can, to some extent, be controlled. To that degree, the past can govern the future.

All the provisions, including manner and form requirements, of State

13 Colonial constitutions relied for their legal efficacy upon United Kingdom legislation See generally, Lumb, *The Constitutions of the Australian States*, supra n 9, at 3-42

14 See, e g , Thomson, 'Altering the Constitution Some Aspects of Section 128' (1983) 13 *Fed L Rev* 323 at 344-345

15 For example, "[u]nder [American] constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create " Eastlake v Forest City Enterprises Inc (1976) 426 U S 668 at 672 per Burger C J A similar view has been adopted with respect to the Australian Constitution see supra n 12

16 W A v Wilsmore [1981] W A R 179 at 183-184 per Burt C J See also, proposed s 108A(4)(a) of the Australian Constitution, supra n 11

17 For examples of "manner" provisions and "form" provisions see Winterton, 'Can the Commonwealth Parliament Enact 'Manner and Form' Legislation?' (1980) 11 *Fed L Rev* 167 at 171-172

18 See, e g , Colonial Laws Validity Act, 1865 (U K) at ss 2 & 5, Western Australian Constitution Act, 1890 (U K) at s 5 See, e g , Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 169-170, Lumb, *The Constitutions of the Australian States*, supra n 9, at 98-109

19 See, e g , Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 168, 170-174, 179 See also, Winterton, supra n 17

20 See, e g , Bribery Commissioner v Ranasinghe [1965] A C 172, 197 (P C), Wilsmore v W A [1981] W A R 159 at 163 per Wickham J , 175-176 per Smith J See also, W A v Wilsmore (1982) 40 A.L R 213 at 225 per Wilson J ("It matters not in the present context whether the [first] proviso [to s 73 of the Constitution Act 1889 (W A)] is of binding force because of s 5 of the Colonial Laws Validity Act 1865 (U K), s 5 of the Western Australian Constitution Act 1890 (U K), s 106 of the Australian Constitution or simply because, on such authority as may be gleaned from *Ranasinghe*, it finds a place in the Constitution Act itself ") See also, supra n 11

constitutions are not necessarily so secured.[21] Coverage will depend not only on the terms of particular amendment formulae[22] but also on the scope of the authority which gives those procedures binding force. Section 106, for example, is in this respect limited to amendments to State constitutions. United Kingdom legislation provides legal efficacy to manner and form requirements which relate to specified aspects of State constitutions. Other sources have the potential to sustain the binding nature of these requirements to a much greater extent and over a wider range of subjects.[23]

Nevertheless, State legislative power is not entirely circumscribed. Prescribed amendment procedures can be altered or abolished.[24] State legislation enacted by simple majorities and having the requisite gubernatorial assent is sufficient.[25] It may not, however, always suffice. An alteration or abolition by this means may be thwarted if that alteration or abolition is itself subject to the observance of another stipulated manner and form procedure.[26] Whether such double entrenchment could withstand repeal by appropriately framed State legislation, which was not enacted in compliance with that stipulation, is not beyond doubt.[27] If it cannot, State legislative power will much more easily prevail over all of these limitations. That would correspond with traditional British conceptions of legislative supremacy. It might not, however, fulfil expectations engendered by the notion of a written constitution. Thus, ultimately, this represents a choice between parliamentary sovereignty and limited legislative power.[28] In the context of State constitutions a definitive answer has yet to be given.

21 Section 128 of the Australian Constitution may also not be applicable to the "covering clauses" or a number of sections in that Constitution See, Thomson, supra n 14, at 331-336

22 See, e g , A G (W A) (ex rel Burke) v W A [1982] W A R 241, W A v Wilsmore, (1982) 40 A L R 213 See generally, Okely, '"Constitutional Majority" – effect of Australian High Court decision in the Wilsmore Case' (1983) 64 *Parliamentarian* 22

23 See, e g , Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 171-174, 179, Lumb, *The Constitutions of the Australian States*, supra n 9, at 109-112 See also, McNamara, 'The Enforceability of Mineral Development Agreements to which the Crown in the Right of a State is a Party' (1982) 5 *U N S W L J* 263 at 271-277, 282-284, Warnick, 'State Agreements – The Legal Effect of Statutory Endorsement' (1982) 4 no 1 *Aust Mining & Petroleum L J* 1 at 7-15, Warnick, 'The Roxby Downs Indenture' [1983] *Aust Mining & Petroleum L Yearbook* 33 at 39-40, 70

24 See, e g , Constitution Act 1889-1980 (W A) at s 73(2) As to s 128 of the Australian Constitution see, e g , Thomson, supra n 14, at 338-340, 342-344 It has been suggested that "the imposition of excessively rigid fetters in relation to the constitutional alteration process" is beyond State legislative power Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 179

25 See, e g Wilsmore v W A [1981] W A R 159 at 165 per Wickham J , 172 per Smith J , W A v Wilsmore (1982) 40 A L R 213 at 215 per Gibbs C J

26 See, e g , Constitution Act 1889-1980 (W A) at s 72(2)(e), Lumb, *The Constitutions of the Australian States*, supra n 9, at 111-112

27 See, e g , W A v Wilsmore (1982) 40 A L R 213 at 227 per Wilson J ("it must be remembered that, however stringent a manner and form provision may be, that plenary legislative power [of the State Parliament] is always available to remove it, subject only to the observance of such manner and form provision, if any, which is applicable to its removal "), at 232 per Brennan J ("no question as to the power of the [W A] legislature to entrench provisions affecting the future exercise of its legislative powers has arisen in this case ")

28 See generally, O'Brien, 'The Indivisibility of State Legislative Power' (1981) 7 *Monash U L Rev* 225 See also, Joseph, 'The Apparent Futility of Constitutional Entrenchment in New Zealand' (1982) 10 *N Z U L Rev* 27, Brookfield, 'Parliamentary Supremacy and Constitutional Entrenchment A Jurisprudential Approach' (1984) 5 *Otago L Rev* 603, Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty A Recent Fray with Freedom of Religion' (1985) 59 *A L J* 276

Legislatures

At least three principal aspects — structure, privilege and power — of State Parliaments ought to be included in any comprehensive examination of State constitutional law. Structurally, all Australian legislatures, other than the Queensland and Northern Territory Parliaments, are constituted by the Queen and two chambers.[29] Composition of each chamber, including Ministers of the Crown,[30] and membership qualifications[31] are determined having regard to express statutory requirements. Constitutional provisions do not, however, govern all aspects of their internal powers, functions and relationship. In most situations, reliance needs to be placed on past practices and conventions.[32] Prime examples are matters pertaining to responsible government[33] and resolution of disagreements or deadlocks over supply and other parliamentary Bills.[34] More definitively, but not exhaustively, enunciated are State electoral criteria.[35] Their important structural contribution is to ensure, to the extent mandated,[36] that legislatures are the representative component[37] of Australian democracy.

Another attribute of State legislatures is parliamentary privilege. Rights, powers and immunities, which constitute the privileges of parlia-

29 See generally, P Hanks, *Fajgenbaum and Hanks' Australian Constitutional Law* 2nd ed (1980) 1-4, Lumb, *The Constitutions of the Australian States*, supra n 9, at 48 Joint sittings of both legislative chambers are also an exception to bicameralism As to legislative procedures see P Hanks, *Australian Constitutional Law* 3rd ed (1985) 62-148

30 For historical and other aspects of responsible government see supra n 8 and infra n 33 See also, A G (W A) (ex rel Burke) v W A [1982] W A R 241

31 See generally, Hanks, supra n 29, at 23-32 (2nd ed) and 22-27 (3rd ed), Enright, supra n 9, at 139-141 See also, Pryles, 'Nationality Qualifications for Members of Parliament' (1982) 8 *Monash U L Rev* 163

32 As to the inter-relationship of constitutional law and conventions see generally, Munro, 'Laws and Conventions Distinguished' (1975) 91 *L Q Rev* 218, Hogg, 'Amendment of the British North America Act — Role of the Provinces' (1982) 60 *Can Bar Rev* 307, Galligan, 'Interpreting the Constitution after 1975' (1984) 56 *Aust Q* 142, G Marshall, *Constitutional Conventions The Rules and Forms of Political Accountability* (1984), Maley, 'Laws and Conventions Revisited' (1985) 48 *Modern L Rev* 121 See also, infra n 70

33 See generally, P Weller and D Jaensch (eds), *Responsible Government in Australia* (1980) esp at 264-270 (Select Bibliography) "The classic Westminster theory has it that the Minister acts through his subordinate officials and that in law their actions, carried out on his behalf are his actions, for which he is responsible as if they were his own The law is coming to reflect the political reality that executive power does not descend from the Crown, but flows up from the electorate, and that it is to the electorate through the Parliament, and not to the Crown, to which the Executive Government is ultimately responsible We have ceased to believe that the theoretical model of the Westminster system corresponds with the practical operation of ministerial government, if indeed it ever did " Curtis, 'Freedom of Information in Australia' (1983) 14 *Fed L Rev* 5 at 6-7 See also, Reid, 'The Westminster Model and ministerial responsibility' (1984) 61 no 1 *Current Affairs Bull* 4

34 See generally Lumb, *The Constitutions of the Australian States*, supra n 9, at 51-62, Lumb, *Australian Constitutionalism*, supra n 9, at 92-95, *Royal Commission into the Constitution Act 1934 Tasmania* (4 vols) (1982), *Royal Commission into Parliamentary Deadlocks* (Western Australia) (4 vols) (1985), Constitution (Duration of Parliament) Act 1984 (Vic) For bibliographies concerning the Senate and Supply see R Eggleston and E St John, *Constitutional Seminar* (1977) 63-68, *The Senate and Supply* (Standing Committee D Report) (1977) 149-150 in *Proceedings of the Australian Constitutional Convention* (1978)

35 See, e g , H V Emy, *The Politics of Australian Democracy Fundamentals in Dispute* 2nd ed (1978) 596-622, Rydon, 'The Electoral System' in H Mayer & H Nelson (eds), *Australian Politics A Fifth Reader* (1980) 376-388, W G McMinn, supra n 5, at 140-144, Lumb, *Australian Constitutionalism*, supra n 9, at 60-61

36 See generally, A G (Cth) (ex rel McKinlay) v Commonwealth (1975) 135 C L R 1, Burke v W A [1982] W A R 248, Lumb, 'Commentaries' in G Evans (ed), *Labor and the Constitution 1972-1975* (1977) 99-100, Constitution Alteration (Democratic Elections) 1985 [intro Senate 17 April 1985], Lumb *Australian Constitutionalism*, supra n 9, at 59-60

37 The Governors, Governor-General, High Court, Federal and State judges are all appointed, not elected Senators can also be appointed see Aust Const at s 15 State Parliaments may not be able to abolish their representative component See, e g , Lumb 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 177-179, Lumb, *Australian Constitutionalism*, supra n 9, at 59-60

ment, are attached to individual members or each chamber.[38] Determination of the substantive dimension of any particular privilege may not, however, be solely a matter of State constitutional exegesis. In this context, the question is whether the Commonwealth Parliament possesses constitutional power to enact legislation so that, pursuant to section 109 of the Australian Constitution, inconsistent State parliamentary privilege laws would be rendered inoperative. In response, contradictory answers affirming and denying Commonwealth competence have been proferred.[39]

State legislative power, despite the seemingly plenary terms in which it is conferred on State Parliaments,[40] is subject to paramount restrictions and prohibitions. Some judicial authority may be garnered to support the proposition that, within the terms of such a grant of legislative authority, the words "peace, order and good Government of the Colony" constitute a justiciable limitation.[41] The grant of power does, however, encompass State laws which have an extra-territorial operation.[42] Those laws, subject to compliance with other restrictions, will be valid if there is a nexus between the operation of the law beyond territorial limits and the peace, order and good government of the state.[43] The necessary nexus can be constructed from the subject matter of the State legislation, such as taxation, penal provisions, fisheries or shipwrecks, or from some other factor, for example, propinquity.[44] At least within three nautical miles seaward from Australian baselines and in respect of specified matters beyond that distance, this may all be unnecessary. Within that geographic region, State extra-territorial legislative competence may derive from a

38 See generally Fajgenbaum & Hanks, supra n 9, at 157-194, Lumb, *The Constitutions of the Australian States*, supra n 9, at 62-63 See also, Joint Select Committee [of the Commonwealth Parliament] on Parliamentary Privilege, *Final Report* (Oct 1984), Spender, 'Parliamentary Privilege in Australia — Breaking with the Past' (1985) 66 *Parliamentarian* 55, Coleman, 'Publish But Be Damned Journalists v Parliament' (July 1985) 29 no *7 Quadrant* 11

39 See, e g , Evans and Byers, 'Joint Opinion' (23 Aug 1983) Senate Hansard 12-14, Sawer, 'Freedom of Speech in State Parliaments Should there be constraints on absolute privilege within a Federal system?' (7 Sept 1983) *Canberra Times* 2, 'Tapes, documents 'legally worthless" (22 Feb 1984) *Sydney Morning Herald* 8 [edited text of N S W Solicitor General's opinion of 17 Feb tabled in N S W Parliament on 21 Feb], Flahvin, 'Gaudron, Landa pull blind on police tapes' (22 Feb 1984) *Aust Financial Review* 3, Gaudron, 'Courts must rule on phone taps' (28 Feb 1984) *Sydney Morning Herald* 8, E Campbell, *Contempt of Royal Commissions* (1984) 49-52, Senate Select Committee on Legal and Constitutional Affairs, *Report on Commonwealth Lawmaking Power and the Privilege of Freedom of Speech in State Parliaments* (1985), *Senate Hansard* (30 May 1985) 2849-50

40 The terms of the grant in each State Constitution is set out in Enright, supra n 9, at 158-168 As to that plenary authority and the inapplicability of the principle *delegatus non potest delegare* see Lumb, *The Constitutions of the Australian States*, supra n 9, at 81-82 The Australian Constitution also confers legislative power on State Parliaments see, e g , ss 9, 29 Proposed section 108A in the Constitution Alteration (Interchange of Powers) 1984 would have conferred legislative power on State Parliaments See supra n 11

41 See, e g , Robinson v W A Museum (1977) 138 C L R 283 at 294-296 per Barwick C J But contrast id at 304-305 per Gibbs J , at 331 per Mason J , R D Lumb & K W Ryan, *The Constitution of the Commonwealth of Australia Annotated* 3rd ed (1981) 100 ("clear that no court can substitute its own idea of peace and good government for that of the Legislature ")

42 See, e g , Wacando v Commonwealth (1981) 148 C L R 1 at 21 per Mason J , Lumb, *The Constitutions of the Australian States*, supra n 9, at 82-91 See also infra n 44

43 See, e g , Pearce v Florenca (1976) 135 C L R 507 at 517-520 per Gibbs J , at 526-527 per Jacobs J See also infra n 44 State territorial limits are the low water mark N S W v Commonwealth (1975) 137 C L R 337

44 See, e g , Hanks, supra n 29, at 265-296 (3rd ed) See also, Hunt v B P Exploration Co (Libya) Ltd (1980) 144 C L R 565

Commonwealth statute.[45] If it does, those offshore State laws may not be invalidated by Imperial restrictions.[46]

In 1865 the Colonial Laws Validity Act was perceived as releasing colonial parliaments from the repugnancy doctrine restrictions of Imperial constitutional law.[47] That liberating United Kingdom statute did, however, stipulate a restriction on legislative power. State laws repugnant to United Kingdom statutes extending to the State are void.[48] As a consequence there is a diminution of State legislative competence in direct proportion to the ambit of any such British legislation. With the continuing existence of British statutes which extend to the Australian States, a not insignificant restriction has ensued.[49] Whether, when and how it should be removed from the purview of State constitutional law are questions of current debate.[50]

State legislative power is also diminished by the Australian Constitution. This is the direct effect of constitutional prohibitions. Within their perimeters, State legislation cannot operate.[51] State statutes can, however, subsist with respect to areas of concurrent Commonwealth legislative power.[52] Even that legislative domain may be rendered inaccessible to State Parliaments. To achieve this, a valid Commonwealth law is required. Then, inoperative legislation will be the only result of any past or future inconsistent exercise of State legislative power.[53] As the potential breadth of this limitation corresponds to the scope of concurrent legislative power vested by the Australian Constitution in the

45 Coastal Waters (State Powers) Act 1980 (Cth) esp at ss 4 & 5 As to the effect of this Commonwealth Act in relation to State legislative power see, e g , Crommelin, 'Offshore Mining and Petroleum Constitutional Issues' (1981) 3 *Aust Mining & Petroleum L J* 191 at 193-194 ("confers" or "adds to"), Freeman, 'Comment', id at 227-229 ("confirms"), Booker, 'Section 51(xxxviii) of the Constitution' (1981) 4 *U N S W L J* 91 at 109 fn 2 ("preserved") See generally, R Cullen, *Australian Federalism Offshore* (1985)

46 See, e g , Booker, supra n 45, esp at 97, 99-101, 109 fn 8 (citing references) See also infra n 50 (discussing s 51(xxxviii) of the Australian Constitution) and supra n 11 (opposing views as to whether state constitutions and therefore state legislative power derives legal efficacy from section 106 of the Aust Const) Proposed section 108A(4) in the Constitution Alteration (Interchange of Powers) 1984 would have excluded from the operation of State legislative power derived from s 108A restrictions that arise out of United Kingdom laws, such as s 2 of the Colonial Laws Validity Act, 1865 (U K) However, s 108A was not included in the Australian Constitution see supra n 11

47 Quick & Garran, supra n 8, at 348, D B Swinfen, *Imperial Control of Colonial Legislation 1813-1865* (1970) 7, 167, Swinfen, 'The Genesis of the Colonial Laws Validity Act' (1967) 12 *Juridical Rev* 29, K Roberts-Wray, *Commonwealth and Colonial Law* (1966) 396, Union Steamship Case (1925) 36 C L R 130 at 155 per Higgins J , W G McMinn, supra n 5, at 82, Cowen, supra n 9, at 33

48 Colonial Laws Validity Act, 1865 (U K) at s 2 See generally, Hanks, supra n 29, at 225-234, 239-242 (3rd ed), Castles, supra n 9, at 182-185, K Roberts-Wray, supra n 47, at 397-399

49 For a list of such United Kingdom statutes see, e g , Lumb, *The Constitutions of the Australian States*, supra n 9, at 91-92 See also, China Ocean Shipping Co v S A (1979) 145 C L R 172, Southern Centre of Theosophy v S A (1979) 145 C L R 246

50 For example, United Kingdom legislation, or Commonwealth legislation pursuant to s 51(xxxviii) of the Australian Constitution, or United Kingdom, Commonwealth and State legislation See, e g , N S W Law Reform Commission, *Working Paper on Legislative Powers* (1972), Kewley, 'Our Legacy of Laws A Comment on the Constitutional Powers (Request) Act 1980' (1981) 55 *Law Institute J* 270, Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 180-184 As to Commonwealth legislation pursuant to s 51(xxix) of the Constitution see Kirmani v Captain Cook Cruises Pty Ltd (1985) 59 A L J R 265 See also, infra n 86 and n 88

51 See, e g , Aust Const ss 90, 92, 114, 115, 117 As to implied constitutional prohibitions see, e g , L Zines, *The High Court and the Constitution* (1981) 267-281 Some Commonwealth legislative powers are exclusive see, e g , Aust Const s 52

52 See, e g , Aust Const ss 9, 51

53 Aust const s 109 See generally, Lumb & Ryan, supra n 41, at 373-378

Commonwealth Parliament, it has the capacity to exorcise from State Parliaments a good deal of authority.[54]

Executive Power

Executive power is an elusive and amorphous concept.[55] Even the extent and manner of its investiture in State Governors are matters of dispute. Do Governors possess all or only some of the Crown's prerogatives?[56] Do those prerogatives constitute the executive power of a State by virtue of prerogative instruments emanating from the Crown, provisions in State Constitutions or the gradual development towards autonomous status? Answers to those questions will assist in determining whether, as a matter of constitutional law, Governors are now or will in the future become something more than merely the Crown's local representative.[57]

Curtailment of State executive power also depends on answers to those questions. Royal prerogatives conveyed by the Crown to Governors could be withdrawn, legislatively abrogated[58] or reassigned by the monarch to another person, for example, the Governor-General.[59] If State constitutions are the source of executive power the requisite amendment procedure would need to be followed. That executive power, if any, which may inhere in the attainment of responsible government would presumably be subject to Commonwealth and State legislative powers.[60]

54 For example the concerns expressed following Commonwealth v Tasmania (1983) 46 A L R 625 See, e g , Thomson, 'A Torrent of Words', supra n 3 See generally, Galligan, 'Writing on Australian Federalism The Current State of the Art' (1984) 43 *Aust J Pub Admin* 177, Sharman, 'Grappling with Proteus Intergovernmental Relations' (1984) 43 *Aust J Pub Admin* 287 Delineation of one concurrent Commonwealth legislative power is in Rumble, 'Federalism, External Affairs and Treaties Recent Developments in Australia' (1984) 17 *Case W Res J Int'l L* 1

55 As to the different frames of reference to determine the denotation of executive power under the Australian and United States Constitutions see Thomson, 'Executive Power, Scope and Limitations Some Notes from a Comparative Perspective' (1983) 62 *Texas L Rev* 559 at 572-578

56 For a discussion as to whether 'prerogative' refers "to all the non-statutory or common law powers of the Crown" or is "confined to powers unique to the Crown" see G Winterton, *Parliament, The Executive and the Governor-General A Constitutional Analysis* (1983) 111-112 Generally concerning prerogative powers see Winterton at 111-122 As to the exercise of prerogative powers in colonial Australia see Thomson, supra n 55, at 574 fn 84 (citing references)

57 See generally H E Renfree, *The Executive Power of the Commonwealth of Australia* (1984) 24-28, Zines, 'The Growth of Australian Nationhood and Its Effect on the Powers of the Commonwealth' in L Zines (ed), *Commentaries on the Australian Constitution* (1977) 2-10, 14-15, 35-36, Hanks, supra n 29, at 340-352 (2nd ed), Cowen, supra n 8, at 21-29, Bailey, 'Self-Government in Australia, 1869-1900' in Rose, Newton & Benians (eds), supra n 8, at 395-410 For similar concerns regarding the Governor-General see e g , Hanks, supra n 29, at 352-372 (2nd ed), Sawer, 'The Governor-General of the Commonwealth of Australia' (1976) 52 no 10 *Current Affairs Bull* 20 at 23-24, Zines (ed), supra, at 22-25, 30-35, Campbell, 'Parliament and the Executive' in Zines (ed) supra, at 88-89, Winterton, supra n 56, at 48-52, Renfree, supra, at 138-145, 146-150 As to executive power under the United States Constitution see, e g , Thomson, supra n 55, and under American State Constitutions see, e g , Williams, 'State Constitutional Law Processes' supra n 2, at 213-216, Note, 'Gubernatorial Executive Orders as Devices for Administrative Direction and Control' (1964) 50 *Iowa L Rev* 78

58 There are, however, limits As to State legislation see Zines (ed), supra n 57, at 10-15, Lumb, 'Fundamental Law and the Processes of Constitutional Change in Australia', supra n 9, at 175-177 As to Commonwealth legislation see, e g , Winterton, supra n 56, at 47, 239-240, Tasmania v Commonwealth (1983) 46 A L R 625 at 694-695, 703-705, 728, 765-768, 801, 823-824, Queensland Electricity Commissioners v Commonwealth (1985) 59 A L J R 699 As to Commonwealth prerogatives or executive power see infra n 60

59 See e g Winterton, supra n 56, at 52, 246 (citing references discussing section 2 of the Australian Constitution)

60 See e g supra n 58 As to the position under the Australian Constitution see Winterton, supra n 56 at 33-34, 50 93-122 It should also be noted that some executive powers or prerogatives may be exclusively vested in the Commonwealth See, e g , Winterton, supra n 56 at 47, 239, Zines (ed), supra n 57, at 35-36

Similarly, other consequences may eventuate if State executive authority is not synonymous with a delegation of royal prerogative powers. For example, the constitutional necessity for Governors to be appointed by the Crown and the legal efficacy of royal instructions may no longer be beyond doubt.[61] Pressed to these conclusions, the result could be autochthonous and autonomous State Governors.

Any movement away from or towards such a result entails an appraisal of the office of Governor. From the perspective of State constitutional law, this should include arrangements pertaining to the creation, term, tenure, alteration and abolition of that office.[62] The importance of these structural components is that, taken in conjunction with the Executive Council, cabinet and principles of responsible government, they constitute the institutional framework through which executive power is exercised.[63]

State Governors are vested with other powers, functions, duties and responsibilities. This authority is derived from either the Australian Constitution[64] or legislation. These statutory provisions, for example, empowering Governors to promulgate regulations, are numerous. Some confer novel powers and functions. Others abrogate prerogative powers. In both instances, however, there are constitutional parameters which coincide with the limits, if any, on legislative power.[65]

Whatever the source of a Governor's authority — prerogative, constitutional or statutory — a further fundamental question demands attention. When, as a matter of State constitutional law, are Governors required to act upon advice? At least, they must do so when acting upon advice is an express requirement of the terms in which their authority is conferred.[66] If the grant of authority contains no express stipulation,[67] are Governors consequently empowered to act without or contrary to the advice of Ministers of the Crown? A negative answer might be endorsed by sustaining an argument that, even without explicit textual reference,

61 See, e g , Hanks, supra n 29, at 345-346, 350-352 (2nd ed), Bailey, supra n 57, at 396 See also, Swinfen, 'The Legal Status of Royal Instructions to Colonial Governors' (1968) 13 *Juridical Rev* 21

62 Letters patent, royal instructions, commission, constitutional and statutory provisions are set forth in Hanks, supra n 29, at 341-344, 347-350 (2nd ed)

63 See, e g , Lumb, *The Constitutions of the Australian States*, supra n 9, at 70-71 See also, Dunstan, 'The State, The Governors and The Crown' in G Dutton (ed), *Republican Australia?* (1977) 202-209

64 Sections 12, 15, 126 See generally, Lumb & Ryan, supra n 41, at 71-72 [s 12], 74-76 [s 15], 398-399 [s 126], Renfree, supra n 57, at 145-146 [s 126], Crawford, 'Senate Casual Vacancies Interpreting the 1977 Amendment' (1980) 7 *Adel L Rev* 224 The office of State Governor is recognised by the Australian Constitution see e g , ss 7, 12, 15, 21, 84, 110

65 Generally as to limits on legislative power see text accompanying supra nn 16-28 Specifically with respect to executive power see supra n 58

66 See, e g , Interpretation Act 1984 (W A) at s 60 Compare, Clause VI of the Victorian Governor's Instructions, reproduced in Hanks, supra n 29, at 349 (2nd ed) (Governor to be "guided by" but may "dissent from" Executive Council's advice) Similar instructions have been issued to other State Governors but clause VI "does not affect the convention that [Governors] will act on advice" FAI Insurances v Winneke (1982) 56 A L J R 388 at 397 per Mason J See also, ss 32, 33, 63, 64, 67, 70, 72, 83, 85(i) & 103 of the Australian Constitution, ss 86(2) & 138 of the Constitution of the Independent State of Papua New Guinea (1975)

67 See, e g , Constitution Act 1889-1980 (W A) at s 3, Constitution Act 1867-1978 (Qld) at s 14(2) See also, ss 2, 5, 21, 28, 56-58, 61, 62, 64, 65, 68-70, 126, 128 of the Australian Constitution

notions of responsible government, including a constitutional obligation to act only upon advice,[68] are enshrined or implied in the general language of prerogative instruments, constitutions or other documents. That is, by interpreting these texts in the light of antecedent developments, responsible government is constitutionalized.[69]

If general and unconditional grants of executive authority are not susceptible to this method of circumscription, an attempt might be made, by seeking compliance with constitutional conventions, to achieve the same practical, if not legally compellable,[70] result.[71] That is, even if there is no textual reference to the need to act on advice, a Governor should not exercise an independent discretion. In these circumstances, enforcement of a convention that Governors act only pursuant to ministerial advice is a matter of constitutional politics, not law. Success involves *de facto*, not *de jure*, limitations upon executive power.

An exercise of executive power may be further fettered by judicial intervention. Courts review the constitutionality of State executive action by ascertaining whether executive acts are encompassed by the prerogative or exceed the ambit delimited by the terms of the provisions conferring express powers.[72] Apart from these examples of *ultra vires* actions, the manner in which State executive power is exercised may also be subject to judicial review.[73] Clearly within this category are powers conferred on a Governor by legislation. In these circumstances, particularly where there is an express obligation to act on ministerial advice, the judiciary will intervene if statutory powers are exercised without good faith, in reliance upon irrelevant considerations, in contravention of the rules of natural justice or for a purpose extraneous to the purpose for which the power had been granted.[74] Greater uncertainty surrounds judicial review of prerogative powers. The traditional view is that the existence

68 "The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility It is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play " FAI Insurances v Winneke (1982) 56 A L J R 388 at 397 per Mason J See also, supra n 33

69 See, e g , FAI Insurance v Winneke (1982) 56 A L J R 388 at 397 per Mason J , at 401 per Murphy J , at 413 per Wilson J , at 419 per Brennan J With respect to the Governor-General's powers this argument has been advanced by Winterton, supra n 56, at 3-7, 13-17, 22-26, 71-85 But see, Lindell, 'Book Review' (1983) 6 *U N S W L J* 261 at 266-267, Thomson, supra n 55, at 566-572 As to the historical method of constitutional interpretation see, e g , Thomson, supra n 12

70 As to the justiciability of constitutional conventions see, e g , Reference re Amendment of the Constitution of Canada (Nos 1, 2 & 3) (1981) 125 (3rd) D L R 1, Phillips, 'Constitutional Conventions in the Supreme Court of Canada' (1982) 98 *L Q Rev* 194, G Marshall, supra n 32, at 180-209 See also, supra n 32

71 See generally, Hanks, supra n 29, at 381-433 (2nd ed), Sawer, 'The double dissolution looking at the documents, past and present' (9 Feb 1982) *Canberra Times* 2, Blackshield, 'Can the Liberal Ministers Resign?' (17 Aug 1983) *Age* 13, Winterton, 'Crown can accept Ministers' Resignations' (19 Aug 1983) *Age* 12, Structure of Government Sub-Committee of the Australian Constitutional Convention, *Report to the Standing Committee* (Aug 1984) 3-85 See also, Mercux, 'The Codification of Constitutional Conventions in the Commonwealth Caribbean Constitutions' (1982) 31 *Int & Comp L Q* 263

72 Authorities are cited by Winterton, supra n 56, at 306 fn 14-15

73 As to Commonwealth executive power see, e g , id at 123-143

74 See, e g , Re Toohey, Ex parte Northern Land Council (1981) 56 A L J R 164, FAI Insurances v Winneke (1982) 56 A L J R 388, Sneddon, 'Casenote' (1982) 13 *Melb U L Rev* 642, Current Topics, 'Judicial impugnment of the Crown's exercise of statutory powers' (1982) 52 *A L J* 323, Winterton, supra n 56, at 130-132

and scope of prerogative powers are judicially examinable, but not the manner in which the power has been exercised. There are, however, indications of some movement away from this established position. The direction is towards increased judicial supervision of the executive branch of government. Eventually, courts may be prepared to equate their review of the exercise of State prerogative power with that which is accorded to statutory powers.[75]

State Courts

As a matter of constitutional law, State judiciaries are not the exclusive repository of judicial power to determine issues concerning State law. In the Australian federation, State law matters may be resolved by State and Federal courts, the High Court or the Judicial Committee of the Privy Council.[76] State constitutional law, including determination of the validity of State legislation and executive action, can, therefore, fall within the purview of courts whose institutional[77] and jurisdictional[78] arrangements cannot be repealed, altered or modified by the States. Insofar as this occurs, for example, by more frequent resort to the Federal Court's accrued or associated jurisdiction which encompasses State law matters, the relative institutional importance of State courts declines. If the Commonwealth or the States possess constitutional competence to render that jurisdiction exclusive or independently from association with Federal law matters to vest State jurisdiction in Federal courts, State courts could become redundant.[79]

Historically, the reverse has prevailed. State courts have been invested with federal jurisdiction and Federal courts confined to specific and

75 See, e g , Winterton, supra n 56, at 124, 127-139, Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All E R 935

76 See generally, J Crawford, *Australian Courts of Law* (1982) As to the Privy Council see e g , Blackshield, 'The last of England Farewell to their Lordships forever' (1982) 56 *Law Institute J* 780 Pagone, 'The Place of the Privy Council in the Australian court hierarchy' (1984) 58 *Law Institute J* 959, Current Topics, "Patriation' to Australia of the Privy Council's Appellate Jurisdiction' (1984) 58 *A L J* 307, Viro v R (1978) 141 C L R 88, Caltex Oil (Aust) Pty Ltd v XL Petroleum (N S W) Pty Ltd (1984) 51 A L R 1, A G (Cth) v Finch (No 2) (1984) 51 A L R 41, Kirmani v Captain Cook Cruises Pty Ltd (No 2), ex parte A G (Qld) (1985) 58 A L R 108

77 As to the appointment and removal of Federal and High Court Judges see s 72 of the Australian Constitution, J A Thomson, *Some Notes on the History of Section 72(ii) of the Australian Constitution* (Occasional Paper No 2 – Dept of the Cth Parliamentary Library) (rev ed , Oct 1984) [reprinted in Thomson, Removal of High Court and Federal Judges Some Observations Concerning Section 72(ii) of the Australian Constitution' (June 1984) *Aust Current L* 36033 (Pt 1) (July 1984) *Aust Current L* 36055 (Pt 2)] As to State judges see Lumb, *The Constitutions of the Australian States*, supra n 9, at 73, 113

78 Except non-coercive vesting by State legislation of State jurisdiction in Federal courts See infra n 79 Otherwise the jurisdiction of the High Court and Federal Courts is mandated by the Commonwealth Constitution or Parliament See e g , ss 73, 75, 76 77 of the Australian Constitution

79 As to the Federal Courts' accrued, attached or associated jurisdiction see e g , French, 'Jurisdiction Stripping and Bottom of the Harbour State Courts' (Oct 1983) 18 no 9 *Aust L News* 12 (pt 1), (Nov 1983) 18 no 10 *Aust L News* 32 (pt 2), Jackson, Federalism in the Future The Impact of Recent Developments' (1984) 58 *A L J* 438 439-441, Renfree *The Federal Judicial System of Australia* (1984) 387-394, R S French, The Reach of Federal Court Jurisdiction' (W A Law Summer School unpub paper) (1984), Byers, 'Federal and State Judicatures' (1984) 58 *A L J* 590, O'Brien, And Jurisdictional Disputes The Federal Court Versus the State Supreme Courts' (1985) 13 *Aust Business L Rev* 77, Nygh, 'The Accrued and Associated Jurisdiction of the Family Court of Australia' in J H Wade (ed), *Family Law in 1984* (1985) 121 Commonwealth legislation vesting State jurisdiction in Federal

specialized areas of Commonwealth law. Recent developments, however, have not conformed with this arrangement.[80] They confirm that State courts can be deprived of their state and federal jurisdiction. The extent to which this occurs depends upon the degree to which the Commonwealth Parliament utilizes its constitutional power to legislate with respect to areas governed by State law and jurisdiction, which may previously have been considered to be beyond its competence, and to vest jurisdiction pertaining to that Commonwealth legislation in Federal courts.

Realization that State courts are constitutionally vulnerable[81] and perceived problems of jurisdictional conflict which emerge from the operation of State and Federal court systems[82] have engendered a number of proposals. Suggestions include abolition of Federal courts, vesting of co-ordinate jurisdiction with remitter power in State and Federal courts, and the creation of a unified national Australian court system.[83] Implementation of any such proposal would, in varying degrees, entail ramifications extending beyond an immediate and perceptible impact on State courts. For the institutional structure and substance of State constitutional law the issues involved cannot be labelled transient.

Conclusion

State legislative, executive and judicial powers interact with and, to

Courts may be valid by analogy to the Federal Courts' constitutional exercise of non-federal jurisdiction granted by Commonwealth legislation pursuant to the Territories power in s 122 of the Australian Constitution Capital T V and Appliances Pty Ltd v Falconer (1971) 125 C L R 591 at 599-600, 604-605, 612, 626 But see, Collins v Charles Marshall (1955) 92 C L R 529 at 543 A contrary view is that Commonwealth legislation conferring jurisdiction on the Federal Courts in State law matters is unconstitutional because they would not be matters "arising under" a Commonwealth law within the meaning of s 76(ii) of the Australian Constitution It may also be constitutional for Federal Courts to exercise State jurisdiction conferred by State legislation where Commonwealth legislation authorises Federal Courts to exercise jurisdiction conferred by State law See, e g , Capital T V Case, supra, National Crime Authority Act 1984 (Cth) at s 56A(3), National Crime Authority (State Provisions) Act 1984 (Vic) at ss 21(4), 22(5), Constitution Alteration (Interchange of Powers) 1984 (proposal, defeated on 1 December 1984 – see supra n 11 -, to insert a new s 108A(2)(d) in the Australian Constitution which, pursuant to a designation by the Commonwealth Parliament, would have empowered State Parliaments to invest specified federal courts with State jurisdiction). Zines, 'Integrated Courts Scheme', in Judicature Sub-Committee of the Australian Constitutional Convention, *Report to Standing Committee on an Integrated System of Courts* (Oct 1984) 27-32

80 See, e g Lane, 'The New Federal Jurisdiction' (1980) 54 *A L J* 11, Dawson, 'The Constitution – Major Overhaul or Simple Tune-Up?' (1984) 14 *Melb U L Rev* 353 at 362-364, Renfree, supra n 79

81 But see, Harvey & Thomson, 'Some Aspects of State and Federal Jurisdiction under the Australian Constitution' (1979) 5 *Monash U L Rev* 228 (discussion of State Court jurisdiction pursuant to covering clause 5 of the Commonwealth of Australia Constitution Act 1900 (U K.))

82 Even so "jurisdictional questions" are not merely "barren pedantry " "[P]rocedure is instrumental, it is the means of effectuating policy " F Frankfurter & J Landis, *The Business of the Supreme Court A Study in the Federal Judicial System* (1928) 2 "The jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government " P Bator, P Mishkin, D Shapiro & H Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 2nd ed (1973) xix For another example, in the context of constitutional law, of the notion that process and procedural concerns have substantive dimensions see, e g Tribe, 'The Puzzling Persistence of Process – Based Constitutional Theories' (1980) 89 *Yale L J* 1063, Brest, 'The Substance of Process' (1981) 42 *Ohio State L J* 131, Parker, 'The Past of Constitutional Theory Theory – And Its Future' (1981) 42 *Ohio State L J* 223

83 See, e g , Judicature Sub-Committee of the Australian Constitutional Convention, *Report to Standing Committee on an Integrated System of Courts* (Oct 1984) The 1985 Plenary Session of the Australian Constitutional Convention endorsed "cross-vesting" of jurisdiction to be effected by conferring original federal jurisdiction on State Supreme Courts and conferring original State jurisdiction on the Federal Court and Family Court Aust Const Conv Resolution on Item no B4

a not inconsiderable extent,[84] exist at the behest of Commonwealth constitutional power. This is an inevitable consequence of a federal system of government where, within the Constitution's parameters, Commonwealth legislative power is paramount. Preservation of a federal structure, however, requires not only that States continue to exist but that their existence continues to occur within the confines of the federation. That is, secession, if constitutionally feasible, is the power through which the federal system exists at the behest of the States.[85]

State legislative, executive and judicial powers also continue to exist by virtue of the residual constitutional authority of the United Kingdom Parliament and the British Crown's prerogative power. Similarly secured by that authority are the remaining specific links between State constitutions and the United Kingdom. Governors and the Colonial Laws Validity Act are examples. To achieve State autonomy *vis a vis* British legal supremacy a constitutionally effective severance of residual authority and links must be achieved. Several possible methods might be utilized to accomplish this result.[86] Thereafter, what will become of State constitutional law? The source of authority will change. State parliamentary power will not succumb to any repugnant United Kingdom legislation. Legal efficacy of manner and form provisions will not derive from the legislative supremacy of the British Parliament. The prerogative might not continue to support a Governor's actions. Denotations of executive power may, instead, have to be ascertained and fixed by reference to the terms of new letters patent and instructions.[87] Their authority, and eventually that of the Crown, would flow from whatever grundnorm sustained the States' constitutions. Whether that would be the Australian Constitution or some measure of State autochthony can be achieved is as yet unanswered.[88]

84 See e g , supra n 58 (referring to Tasmania v Commonwealth), Saunders, 'The National Power and Implied Restrictions on Commonwealth Power (1984) 14 *Fed L Rev* 265 Zines supra n 51 at 267-281 Compare Berner, The Repudiation of National League of Cities The Supreme Court Abandons the State Sovereignty Doctrine (1984) 69 *Cornell L Rev* 1048 L H Tribe, *Constitutional Choices* (1985) 121-137, 362-370, Garcia v San Antonio Metropolitan Transit Authority (1985) 469 U S — [83 L Ed 2d 1016]

85 See e g , G Craven *The Lawfulness of the Secession of an Australian State* (LL M thesis Melb Univ) (1984) Craven An Indissoluble Federal Commonwealth The Founding Fathers and the Secession of an Australian State (1983) 14 *Melb U L Rev* 281 Craven, The Constitutionality of the Unilateral Secession of an Australian State' (1984) 15 *Fed L Rev* 123 G Craven *Secession The Ultimate States Right* (1986) (forthcoming) Thomson supra n 14 at 334 n 60 (citing references)

86 For example, United Kingdom legislation on Commonwealth legislation, or British Commonwealth and State legislation See, e g , Lumb 'Fundamental Law and the Processes of Constitutional Change in Australia' supra n 9 at 180-184, Gaudron Shaking the Imperial Links' (July 1982) 17 no 7 *Aust Law News* 13, Sawer, 'Dealing with residual problems of Australia's imperial tie' (7 July 1982) *Canberra Times* 2, Sawer, '"Unamendable" parts of Constitution pose a patriation puzzle' (21 July 1982) *Canberra Times* 2 Jennings, 'The Imperial Connection Residual Constitutional Links' in C Saunders et al, *Current Constitutional Problems in Australia* (1982) 68, Finnis, The Responsibilities of the United Kingdom Parliament and Government Under the Australian Constitution' (1983) 9 *Adel L Rev* 91, Thomson supra n 14, at 344-345, M J Detmold, *The Australian Commonwealth A Fundamental Analysis of its Constitution* (1985) 86-110 See also, supra n 50

87 For an example where prerogatives do not determine the scope of executive power see Thomson, supra n 55, at 572-574

88 A proposal to sever residual constitutional links between Australia and the United Kingdom announced by the Australian Prime Minister in a press release on 16 August 1985 will involve

Other large and important questions also remain. What are or should be the general themes and premises of State constitutions? Do traditional public law notions, for example, separation of powers, have any significance or meaning in this context? Can coherent theories of interpretation and processes of decisionmaking be developed and applied to State constitutional law? To seek answers is the ultimate enterprise. Gathering the fragments of State constitutional law is only the beginning.

* State legislation – Australia Acts (Request) Act 1985 – requesting the Commonwealth and United Kingdom Parliaments to enact legislation severing residual constitutional links
* Commonwealth legislation – Australia Act 1986 – pursuant to s 51 (xxxviii) of the Constitution severing residual constitutional links
* Commonwealth legislation – Australia (Request and Consent) Act 1985 – requesting the United Kingdom Parliament to enact an Australia Act
* United Kingdom legislation – Australia Act 1986

On 17 September 1985 request legislation was introduced in the Legislative Assembly of the Western Australian Parliament W A Parliamentary Debates 1018-1026 (Sept 17, 1985) All States have enacted an Australia Acts (Request) Act 1985 The Australia Act 1986 and Australia (Request and Consent) Act 1985 were introduced in the Commonwealth Parliament on 13 November 1985, Parliamentary Debates, House of Representatives (Nov 13, 1985) 2693-2695