The Effect of the *Australia Acts* on the Western Australian Constitution

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There is a strong inter-relationship between State Constitutions and the Australia Acts 1986. This article discusses ongoing issues that arise from the application of the Australia Acts to the States, including the application of manner and form constraints on State legislative power, the effect of the Australia Acts on the letters patent and reserve powers, the method of appointing the Lieutenant-Governor and the method of changing the rules of succession to the throne.

INTRODUCTION

The *Australia Acts 1986* (Cth) and (UK) cut off the residual constitutional links between the States and the United Kingdom. Many of their provisions have now done their work by terminating those links and do not have an ongoing impact on the state Constitutions, other than to prevent a return to the past. For example, s 11 has done its work in terminating Privy Council appeals from state courts, s 10 has terminated the role of British Ministers in advising the Queen on state matters, s 8 has ended the possibility of State laws being disallowed and s 9 has rendered of no force or effect any requirement to reserve Bills for royal assent. This article instead concentrates upon the main provisions in the *Australia Acts* that have an ongoing relevance for the Constitution of Western Australia. They are ss 2, 6, 7 and 15.

SECTIONS 2 AND 6

Legislative power with extra-territorial effect

Section 2 of the *Australia Acts* does two things. First, s 2(1) declares that State legislative powers may have extra-territorial operation. Although this provision is probably the most cited section of the *Australia Acts* when it comes to litigation, it is doubtful whether it does more than confirm the existing position before those Acts were enacted. Indeed, it was intended to do no more than confirm that position in order to prevent future back-tracking. Section 2(1) is made subject to the *Commonwealth Constitution* by s 5 of the *Australia Acts,* and is therefore subject to any implications that may be derived from it. Moreover, the reference

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to 'peace, order and good government of that State' in s 2(1) was intended to be an indication that the need for a nexus between the State and its laws was to be retained. The High Court in *Union Steamship Co of Australia v King* recognised that the nexus requirement and the 'territorial limitations of State legislative powers *inter se*' were retained and that the *Australia Acts* may do no more than what had 'already been achieved in the course of judicial decisions'.[1]

The expansion and preservation of State legislative power

The far more important provision is s 2(2). It both expands and protects State legislative power. It expands it by conferring on State Parliaments 'all the legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of [the *Australia Acts*] for the peace, order and good government of the State'. It therefore allows the States to legislate on matters, such as those concerning the sovereign, that were previously beyond the legislative powers of the States because of their subordinate colonial status. Its greater significance, however, is that it protects and preserves plenary State legislative power. While the States already had plenary legislative power conferred upon their Parliaments by their State Constitutions,[2] this conferral of power is now entrenched in the *Australia Acts* which cannot be amended or repealed or the subject of inconsistent or repugnant legislation, without a formal amendment being enacted to the *Australia Acts* in the manner set out in s 15. This means that the Commonwealth, for example, cannot remove or limit the plenary legislative powers of the States. It also means that the States cannot abdicate their own legislative powers, for example, by providing that some other body must give its approval before the State Parliament may enact a certain type of law.

Manner and form requirements

Section 2 is subject to s 6 of the *Australia Acts,* so that a manner and form requirement, that conforms with the requirements of s 6, may still limit State legislative power. However, given the plenary nature of the power conferred by s 2(2), it is doubtful that any other source of entrenchment, such as the *Ranasinghe* principle,[3] would apply. The High Court in *Attorney-General (WA) v Marquet* seemed unsupportive of any source of entrenchment of State laws outside of s 6 of the *Australia Acts* 1986.[4] It is likely that s 6 would be regarded as the exhaustive source of the manner and form requirements that a State may impose.[5] Section

1 (1988) 166 CLR 1, 14.

2 See, eg, *Constitution Act* 1889 (WA), s 2(1).

3 The principle is that 'a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law': *Bribery Commissioner v Ranasinghe* [1965] AC 172, 197.

4 (2003) 217 CLR 545, 571 [70] (Gleeson CJ, Gummow, Hayne and Heydon JJ) regarding the application of s 106 of the *Commonwealth Constitution*; and 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); and 616-17 [214]-[215] (Kirby J) regarding the application of the *Ranasinghe* principle.

5 This view has been taken in Queensland regarding purportedly entrenched provisions where

6, however, only requires compliance with manner and form requirements in the case of proposed laws respecting the constitution, powers or procedure of the Parliament. This, therefore, limits the field in which entrenchment may be effective.

This has consequences for States that wish to entrench laws other than those respecting the constitution, powers or procedure of the Parliament. For example, if a State wished to entrench a bill of rights in its Constitution, it is unlikely that s 6 of the *Australia Acts* would support this entrenchment, as a future law that amended or repealed part of that bill of rights would be unlikely to be regarded as a law respecting the constitution, powers or procedure of the Parliament. Hence the purported entrenchment would have no force or effect and the purportedly entrenched provisions could be expressly or impliedly amended or repealed by ordinary legislation.

The argument was also made in *Durham Holdings v New South Wales* that State legislative power was subject to 'deeply rooted fundamental common law rights'. A majority of the High Court rejected this argument on the basis that s 2(2) of the *Australia Acts* did not contain such a limitation.[6] If the States have the same legislative powers as the Westminster Parliament then they cannot be impliedly limited by fundamental common law rights.

Sub-section 2(2) of the *Australia Acts* therefore does not simply confer legislative power on the States but it also demands that the States retain that legislative power, free of any restrictions apart from manner and form requirements that are supported by s 6 of the *Australia Acts* and any requirements of the *Commonwealth Constitution*.

Restrictions upon entrenching future provisions

Although there was debate amongst the States during the negotiation of the *Australia Acts* as to whether States should be able to entrench laws in the future, it was eventually agreed that s 6 should apply in relation to future entrenching laws as well as past entrenching laws. Hence s 6 requires compliance with manner and form requirements 'as may from time to time be required by law made by that Parliament, whether made before or after the commencement of this Act.' In the case of Western Australia and Queensland, however, it is possible that future entrenching provisions must themselves comply with manner and form requirements already set out in the Constitution.

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that entrenchment is not supported by the *Australia Acts:* Electoral and Administrative Review Commission, *Report on the Review of the Elections Act 1983-1991 and Related Matters,* December 1991, Vol 2, Appendix D; Electoral and Administrative Review Commission, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, [4.7], [4.26], [4.27] and [6.196] and Public Submission No 20, Appendix 1 (Crown Solicitor) and Appendix 2 (Professor John Finnis).

6 (2001) 205 CLR 399, 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ).

This is the apparently inadvertent possible consequence of constitutional amendments initiated in Queensland in 1977[7] and followed in Western Australia in 1978,[8] which entrench the constitutional provision that confers legislative power on the State Parliament. In the case of Western Australia, s 2(1) of the *Constitution Act 1889 (*WA) provides that 'it shall be lawful for Her Majesty, by and with the advice and consent of the [Legislative] Council and Assembly, to make laws for the peace, order and good government of the Colony of Western Australia and its Dependencies'. This confers on the Western Australian Parliament plenary legislative power, including the unfettered power to amend and repeal existing legislation. Section 73 provides that a Bill that 'expressly or impliedly in any way affects… sections 2… and 73, shall not be presented for assent by or in the name of the Queen' unless its second and third readings have been passed with the concurrence of an absolute majority of each House and the Bill, prior to its presentation, has been approved by the electors in a referendum. Arguably, any future attempt to limit the legislative power conferred by s 2(1) would amount to a law that affects s 2 of the *Constitution Act* and is therefore bound by the manner and form requirements of s 73 of the *Constitution Act.*
Sub-section 2(3) *Constitution Act 1889* provides that:

> Every Bill, after its passage through the Legislative Council and the Legislative Assembly, shall, subject to section 73, be presented to the Governor for assent by or in the name of the Queen and shall be of no effect unless it has been duly assented to by or in the name of the Queen.

This would also appear to be in contradiction with any entrenching provision that prohibited a bill from being presented to the Governor for royal assent unless particular manner and form requirements are met. As Peter Congdon has noted elsewhere in this issue,[9] a majority of the High Court in *Attorney-General (WA) v Marquet* held that 'passage through' in s 2(3) meant 'due passage' or 'passage in accordance with applicable requirements'.[10] By doing so, the Court reconciled an *existing* manner and form provision, which required an *absolute majority* to pass laws affecting entrenched provisions, with the requirements of s 2(3) of the *Constitution Act 1889*. It remains uncertain, however, as to whether a *new* entrenching provision, which imposed a manner and form provision, would also be accommodated in this manner even though it affects the legislative power of the State under s 2(1). Moreover, as Congdon notes, a manner and form requirement of a referendum is not likely to fall within the phrase 'passage through the Legislative Council and the Legislative Assembly', as it would require action external to the Houses, rather than the internal requirement of an absolute majority.

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7 *Constitution Act Amendment Act 1977* (Qld).

8 *Acts Amendment (Constitution) Act 1978* (WA).

9 P Congdon, 'The History, Scope and Prospects of Section 73 of the Constitution Act 1889 (WA)' (2012) 36(2) *University of Western Australia Law Review* 82, 109

10 (2003) 217 CLR 545, 568 [61] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also Callinan J at 634 [284].

The consequence of the entrenchment of s 2 may therefore be that any future Bill that purported to prevent certain laws from being amended or repealed without the passage of a referendum would impliedly affect s 2(1), which grants unfettered legislative power. It would also impliedly affect s 2(3), which requires any Bill passed by both Houses to be presented to the Governor for assent subject to the application of the manner and form requirements in s 73. Section 73, of course, cannot be amended to add extra entrenched provisions without an absolute majority and a referendum, as s 73 is itself entrenched.

Accordingly, if the WA Parliament decided that it wanted to entrench certain provisions of an electoral law by way of a referendum requirement (and these provisions related sufficiently to the constitution, powers or procedure of the Parliament that a law amending or repealing them would be regarded as being a law respecting the constitution, powers or procedure of the Parliament, triggering s 6 of the *Australia Acts*),[11] such a law could only be enacted if it was passed by an absolute majority of both Houses and was approved by a referendum.

Queensland realised that it had the same problem in 1984. Its Solicitor-General at the time described it as the 'possibly unwitting result' of constitutional amendments made in 1977.[12] Realising that this was an impediment to future entrenchment, the Queensland Government sought agreement from the other States to rectify the problem by using the *Australia Act 1986* (UK) to delete from s 53 of the *Constitution Act 1867* (Qld) the entrenchment of s 2 of that Act.[13] This was not accepted by the other States, which saw it as going beyond what was necessary to achieve the termination of residual links with the United Kingdom.[14] Some, such as Finnis, have argued that a future entrenching law would only 'regulate' the exercise of s 2, rather than 'affect' it and that an entrenching law could therefore still be enacted by ordinary legislation.[15] Others, such as Ratnapala, have taken the view that any future entrenching law would have to be approved by a referendum.[16] The Electoral and Administrative Review Commission felt unable to give an authoritative answer to this question but considered that as a policy matter the prior approval of the people should be given by referendum before any further

11 Note that if the purported entrenching provisions in a Bill were ineffective (eg a manner and form provision that purported to entrench provisions concerning a 'future fund', where the future amendment of such provisions would not be a law respecting the constitution, powers or procedure of the Parliament), then such ineffective provisions would not 'affect' s 2, with the consequence that the enactment would not itself have to meet the manner and form requirements protecting s 2.

12 Letter by Qld Solicitor-General to other Solicitors-General, 17 January 1984: Queensland State Archives ('QSA') 1158/575807.

13 Ibid 17 January 1984 and 22 February 1984: QSA 1158/575807.

14 Letter by Acting Qld Solicitor-General to Mr Schubert, Queensland Premier's Department, 20 June 1984: QSA 1158/575807.

15 EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, Public Submission No 20, 21.

16 S Ratnapala, *Australian Constitutional Law – Foundations and Theory* (Oxford University Press, 2nd ed, 2006) 350.

parts of the Queensland Constitution were entrenched.[17] The practical outcome is that no further entrenching provisions have been enacted in Queensland since 1984. This episode is a stark lesson in the danger of entrenchment. It can have unexpected consequences that are very difficult to reverse.

SECTION 7

Section 7 of the *Australia Acts* fulfils a number of important roles. While on the one hand it entrenches the role of the Governor as the Queen's representative, on the other hand it makes most of the Queen's powers exercisable by the State Governor and ensures that when the Queen exercises any of her powers with respect to the State, she does so on the advice of the State Premier. This raises broader issues concerning the nature of the federation and the source of constitutional power, which will be discussed below in relation to s 15. There are some short points to make about s 7 before going on to consider the controversy concerning the appointment and removal of the Lieutenant-Governor.

Entrenchment of the office of Governor

First, sub-section 7(1) has the effect of entrenching the office of State Governor and its relationship with the Crown.[18] To the extent that s 50 of the *Constitution Act 1889* (WA) also fulfils this role, it is no longer necessary to fend off a Commonwealth attack on the role of the Governor, although it would still act as an additional impediment to a republic being instituted at a State level. In 1999, when the republic issue arose, the States all enacted legislation which would have permitted the amendment of s 7 of the *Australia Acts* to allow each State to break the link between its Governor and the Queen if it so chose.[19] The reason that this legislation was acceptable to all States is that it left it for each State to decide and to act within its own constitutional constraints. The State request legislation was made contingent upon the republic referendum passing, but as it failed the amendment to the *Australia Acts* never came into effect.

Method of choosing the Governor

Although the status of the Governor as the Queen's representative may be entrenched by s 7(1), this does not necessarily determine the method by which he or she is chosen. Curiously, s 7(3), while excluding the appointment and termination of the appointment of the Governor from the application of s 7(2),

17 EARC, *Report on Consolidation and Review of the Queensland Constitution,* August 1993, [4.110]. See also: Queensland Parliamentary Committee for Electoral and Administrative Review, *Report on Consolidation and Review of the Queensland Constitution* (November 1994) [136]. Note also Gummow J's views on the policy aspect: *McGinty v Western Australia* (1996) 186 CLR 140, 297.

18 See parliamentary recognition of this consequence in: Cth, *Parliamentary Debates,* Senate, 2 December 1985, 2688.

19 See, eg, *Australia Acts (Request) Act 1999* (WA). See further: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) ch 14.

does not expressly State that the powers of appointment and removal must be exercised by the Queen. Presumably those powers could be exercised by another person or body, as long as the Governor remained in some way a representative of the Queen. Further, there are precedents from other countries which show that a Governor-General may be elected by the Parliament, yet still be both appointed by the Queen and a representative of the Queen. For example, in Papua New Guinea the Governor General is elected by the Parliament as its nominee and then the Queen is advised by the National Executive Council to appoint the Parliament's nominee to the office of Governor-General.[20]

In Queensland in 2003 the Premier submitted his nominee for Governor to the Legislative Assembly for its approval, in the hope that in future the Parliament and the people would become involved in the process before a final recommendation is made to the Queen.[21] This precedent has not been followed by subsequent Premiers or in other States.

The Queen's powers are 'exercisable' by the Governor

Sub-section 7(2) of the *Australia Acts* makes all the Queen's powers and functions with respect to a State 'exercisable only by the Governor', except for powers concerning the appointment and removal of the Governor. There were two reasons for this provision. It was initially included to head off the prospect that these powers might be delegated to the Governor-General under s 2 of the *Commonwealth Constitution* or exercised by or on the advice of another jurisdiction, such as the Commonwealth or British Governments. Any such delegation or exercise would now be in breach of s 7(2) of the *Australia Acts.*[22] The second reason for its inclusion (and its expansion to cover all the Queen's powers with respect to the State apart from the appointment and removal of the Governor) was to try and assuage the Queen's concerns about the potential for conflicting advice. The view taken was that if the field in which the Queen actually exercised powers with respect to the States was made as small as possible, this would mean such occasions would rarely occur and the potential for conflicting advice would be diminished. Accordingly, as many powers as possible were made exercisable by the Governor, in order to diminish the Queen's concerns.

It should be stressed, however, that the Queen's powers were not *transferred* to the Governors. They were simply made exercisable by them. They remain the Queen's powers and may still be exercised by her when she is present in the State. The word 'only' was introduced into s 7(2) at the behest of the Palace in order to eliminate the risk that the Queen would be advised to override a decision of the

20 *Constitution of the Independent State of Papua New Guinea,* s 88(1).

21 Qld, *Parliamentary Debates,* Legislative Assembly, 11 March 2003, 374-5 (Mr Beattie). See also G Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 272.

22 James Thomson, 'The Australia Acts 1986: A State Constitutional Law Perspective' (1990) 20 *University of Western Australia Law Review* 409, 425.

Governor or act in circumstances when the matter had not been raised before the Governor.[23] Her Majesty did not want to become a court of appeal in relation to the exercise of vice-regal powers or functions, or a competing alternative venue for the exercise of power. The Western Australian Solicitor-General, Kevin Parker, raised a concern in July 1985 that the word 'only' might be interpreted to 'preclude a future State law vesting any power or authority in any person other than the Governor' or to 'preclude delegation by the Governor'. It was decided to deal with this issue in the second reading speech to make it clear that such an interpretation was not intended.[24]

The result is that the powers and functions of Her Majesty, referred to in s 7(2) of the *Australia Acts,* while exercisable only by the Governor, except when the Queen is present in the States, remain the powers and functions of Her Majesty. It therefore remains appropriate for official documents to refer to them as her powers or for the Governor to exercise them formally in the name of the Queen. However, even if documentation is changed to remove references to Her Majesty and to replace them with references to the Governor or the State, this does not invalidate the exercise of relevant powers or functions of the Queen. The Western Australia Supreme Court has held in the *Glew* litigation that simple changes in terminology which do not alter the constitutional effect or status of an act will not invalidate that act.[25]

The effect of s 7 upon the reserve powers

Another concern that has occasionally been raised in relation to s 7 concerns its effects, if any, on the reserve powers.[26] Back in 1983 a draft of s 7 prepared by Western Australia provided that 'advice in relation to the exercise of the powers and functions of Her Majesty with respect to a State' was to be tendered by the Executive Council of the State.[27] This was later changed to the Premier, on the basis that the Executive Council (over which the Governor presides) was not an appropriate vehicle to advise the Queen on the dismissal of the Governor. More significantly, that early Western Australian draft would have dictated the advice upon which the *Governor* acted in exercising Her Majesty's powers or functions,

23 WA, Explanatory Memorandum, *Australia Acts (Request) Act* 1985 (WA) in WA, *Parliamentary Debates,* Legislative Assembly, 17 September 1985, 1020, 1023.

24 Cth S-G, File Note of discussion with WA S-G, 11 July 1985. See, eg: WA, Explanatory Memorandum, *Australia Acts (Request) Act* 1985 (WA) in WA, *Parliamentary Debates,* Legislative Assembly, 17 September 1985, 1020, 1023.

25 *Glew v Shire of Greenough* [2006] WASCA 260, [16]-[20] (Wheeler J); and *Glew v Governor of Western Australia* [2009] WASC 14, [65] (Hasluck J).

26 Note the concerns expressed by F Burt, 'Monarchy or Republic – It's all in the Mind' (1994) 24 *University of Western Australia Law Review* 1, 5; and Peter Johnston, '*Tonkin v Brand:* Triumph for the Rule of Law' in G Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 211, 232. For a contrary view see: Peter Boyce, 'The Reserve Powers of State Governors' (1994) *University of Western Australia Law Review* 1; and Peter Boyce, *The Queen's Other Realms* (Federation Press, 2008) 159, referring to Burt's concern about the continuation of the traditional vice-regal powers to encourage, warn and be consulted.

27 Draft *Australia Bill,* 12 September 1983.

as well as the Queen. This would have potentially killed off the reserve powers, to the extent that they are prerogative powers,[28] as it might have been interpreted as requiring the Governor to act on the advice of the Premier and precluded the Governor from acting without advice, as occurs in the exercise of a reserve power. However, this course was not taken. Sub-section 7(5) of the *Australia Acts* only governs advice 'to Her Majesty' in relation to the exercise of her powers and functions. It does not govern whether or not the Governor acts upon advice when exercising Her Majesty's powers, or by whom that advice is given. Nor does it govern the exercise of powers conferred by the *Constitution Act 1889* (WA) upon the Governor.[29]

Section 7(5) would only become relevant if the Queen had a reserve power to refuse advice to appoint or remove a Governor (eg if advised by a Premier to dismiss a Governor so to pre-empt the Governor from exercising the reserve power of dismissing a Premier). It is not clear whether the Queen has any such reserve power,[30] but if she did, there would be an interesting question of whether s 7(5) effectively removed such a power. On its face, it would appear not to do so as it merely refers to 'the advice to Her Majesty in relation to the exercise of' her powers and functions in respect of a State. It does not State that the Queen may *only* act on receipt of such advice or in accordance with such advice. It appears to be directed, rather, at excluding any other source of advice to the Queen, rather than the exclusion of any reserve powers.

Effect of s 7 of the Australia Acts on the Letters Patent

Sub-section 7(2) in providing that all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State, causes difficulty in relation to the letters patent. Sub-section 7(2) does not cover the Queen's powers in relation to the appointment and the termination of the appointment of the State Governor. Nor does it affect the powers of Her Majesty while present in a State. Accordingly, it would seem that to the extent that the letters patent concern the appointment or removal of a State Governor,[31] they may be made, amended or repealed by the Queen, while to the extent that they concern other

28 Note that to the extent that the reserve powers are conferred upon the Governor by statute (such as provisions of the Constitution), they are unaffected by s 7(2) which only deals with the Queen's prerogatives and any statutory powers conferred expressly on Her Majesty.

29 See, eg, *Constitution Act 1889* (WA), s 74.

30 See in favour of such a reserve power: R D Lumb, *The Constitutions of the Australian States,* (University of Queensland Press, 5th ed, 1991) 78-9; Geoffrey Lindell, 'The role of a State Governor in relation to illegality' (2012) 23 *Public Law Review* 268, 273. See against, on pragmatic grounds: George Winterton, 'The Constitutional Position of the Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives,* (Law Book Co, 1992) 280-1.

31 See, eg, Cl V of the 'Letters Patent Relating to the Office of Governor of the State of Western Australia', 14 February 1986, which provides: 'The appointment of a person to the office of Governor shall be during Our Pleasure by Commission under Our Sign Manual.' See also cl XVII regarding the oath to be taken before a person appointed to be Governor may assume office.

matters, they may be made, amended or repealed by the Governor. Moreover, the Queen could make, amend or repeal the letters patent in their entirety when physically present in the State.

This difficulty was recognised before the *Australia Acts* came into force and Her Majesty was asked to amend the Letters Patent with respect to each State to ensure that they conformed with the *Australia Acts,* while the Queen still had full capacity to do so. Her Majesty therefore made new Letters Patent for Western Australia on 14 February 1986, which were to take effect at the same time that the *Australia Acts* came into force on 3 March 1986.[32] It was anticipated that in the future letters patent would be amended, revoked or made by the Governor[33] (presumably as long as they did not relate to the appointment or removal of the Governor).

New South Wales and Victoria have since caused their Letters Patent to be revoked and have enacted the relevant provisions in their Constitution Acts.[34] Queensland also initially suspended and later repealed its Letters Patent.[35] South Australia has retained its Letters Patent, but they have been amended by the State Governor, rather than the Queen.[36] Western Australia has also retained its letters patent, but so far has not amended them since the 1986 Letters Patent were made.

The appointment of the Lieutenant-Governor

Sub-section 7(3) of the *Australia Acts* makes it clear that the powers and functions made exercisable by the Governor under s 7(2) do not extend to the appointment or the termination of the appointment of the 'Governor'. However, no mention is made of the Lieutenant-Governor or Administrator. Were appointments to these offices intended to be made by the Queen, due to the application of s 7(3), or was this a power that was made exercisable only by the Governor under s 7(2)?

This question turns on the definition of 'Governor' in s 16 of the *Australia Acts.* It States that 'Governor', in relation to a State, 'includes any person for the time being administering the government of the State'. It clearly picks up the Lieutenant-Governor or Administrator whilst he or she is actually administering the State, but presumably at the point at which a person is appointed to the office of Lieutenant-Governor or Administrator, he or she is not actually *administering* the State. It would therefore seem likely that s 7(3) does not exclude the appointment of the Lieutenant-Governor or Administrator from s 7(2). The Governor, while administering the State, could thus appoint the Lieutenant-Governor or Administrator.

32 Western Australia, *Government Gazette,* No 25, 28 February 1986, 683-6.

33 Memorandum by Mr Kolts, Cth Parliamentary Counsel, to Sir G Engle, UK Parliamentary Counsel, 23 July 1985.

34 *Constitution (Amendment) Act 1987* (NSW); *Constitution (Amendment) Act 1994* (Vic).

35 *Constitution (Office of Governor) Act 1987* (Qld), s 13, which suspended the operation of the Letters Patent for as long as that Act was in force. That Act and the Letters Patent were subsequently repealed by: *Constitution of Queensland 2001* (Qld), s 95 and Schs 3 and 4.

36 South Australia, *Government Gazette,* No 141, 25 October 2001, 4687.

Neither the drafting history nor the correspondence showing the 'intent' of the drafters is particularly helpful in interpreting these provisions, as the most it reveals is confusion. The early drafts of s 7 show that there was a consciousness of this issue and an early intention that the Queen should continue with the appointment of the Lieutenant-Governor and the Administrator. For example, the draft of 18 March 1983 made express reference to the 'tendering of advice to the Queen in relation to the offices of Governors and Lieutenant-Governors of the States'. That express reference was removed in the draft of 23 March 1983, but replaced by a reference to 'any office authorizing the holder to administer the Government of a State'. In the draft of 20 May 1983, however, the clause concerning advice to the Queen about appointments was simplified so that it only referred to appointments to the office of Governor, but a separate definitional sub-clause was added which defined 'the office of Governor' for the purposes of that clause as including any 'office, the holder of which is authorized to administer the Government of a State'. This definitional sub-clause survived until the August 1983, when Western Australia proposed a complete redraft of the provision.

On 10 August 1983, the Western Australian Solicitor-General, Kevin Parker, proposed a clause which provided that the Governor shall have and may exercise in a State the powers and functions of Her Majesty with respect to the State save 'appointment to or dismissal from the office of Governor of the State'. The Solicitor-General did not include the separate definitional sub-clause which had been included in previous drafts. Instead, he relied on the general definition of 'Governor' in the separate definitions section, which had throughout provided that the 'Governor' includes 'any person *for the time being* administering the Government of the State' [emphasis added]. The Solicitor-General noted the difficulty with such a definition, in that it needed to be broad enough to pick up acts by Lieutenant-Governors and Administrators in assenting to bills for the purposes of the clauses concerning reservation and disallowance, but narrower regarding appointments and removals from office. The Solicitor-General thought that it would be 'inappropriate' for the provision concerning advice to the Queen to require the Queen to appoint a Lieutenant-Governor or Administrator. He concluded by observing that perhaps the problem should be 'left to be overcome by a State Act which determines who will administer the government if there is no Governor'.[37]

The Solicitor-General's view that it would be inappropriate for the Queen to appoint the Lieutenant-Governor and Administrator is consistent with the rationale behind s 7. It is obviously necessary that the power to appoint and, more particularly, remove the Governor is held by someone other than the Governor (who is fairly unlikely to be prepared to remove himself or herself from office and who would be incapable of appointing a successor if he or she died in office). The same necessity does not apply in relation to the appointment of the Lieutenant-Governor or Administrator. There is no logical reason why the appointment of

37 Letter by Western Australian Solicitor-General to State Solicitors-General, 10 August 1983.

a person to such an office could not be made by the Governor. As the *Australia Acts* were progressively re-drafted to reduce the powers reserved for exercise by the Queen, in order to reduce the fields in which a potential for conflicting advice might arise and ease her concerns about the *Australia Acts*, it would have been logical for the role of appointing the Lieutenant-Governors and Administrators to be shifted to the Governor under s 7(2).

Nonetheless, if it was at that stage the intent that the Queen not appoint Lieutenant-Governors or Administrators, this understanding was lost in the negotiation process or simply forgotten. The Commonwealth, in its negotiations with the Palace after the drafting of the *Australia Acts* was completed, clearly anticipated that the Queen would continue to appoint Administrators, but that this would happen rarely because most States had dormant commissions which conferred upon the Chief Justice of the Supreme Court the role of Administrator. Hence the Queen was told that she would not need to be involved unless 'a State wished to vary its dormant arrangements' or 'an Administrator [needed] to be removed for illegality, gross incompetence etc'.[38]

Further, when it was decided that the Letters Patent had to be amended or replaced in order to make them consistent with the *Australia Acts,* the new Letters Patent for Western Australia expressly provided in cl XV that the 'appointment of a Lieutenant-Governor and of an Administrator shall be during Our Pleasure by Commission under Our Sign Manual.' This was consistent with the Western Australian *Constitution Act 1889*, s 50(3) of which defines the 'Governor' as including 'any other person appointed by dormant or other Commission under the Royal Sign Manual to administer the Government of the State of Western Australia'. This provision was inserted in the Western Australian *Constitution Act 1889* in 1978, following similar amendments in Queensland that were aimed at entrenching the role of the Governor in the State Constitution. Note, however, the difference between the provisions – the Western Australian *Constitution Act* refers to a person appointed to administer the government of the State, whereas s 16 of the *Australia Acts* refers to a person who is *for the time being* administering the government of the State.

The Letters Patent of 1986, which were drafted to ensure consistency with the *Australia Acts,* could (and most probably should) have been drafted so as to make it clear that it was the Governor who appointed the Lieutenant-Governor and Administrator – not the Queen. Moreover, to the extent that Queensland and Western Australia already had entrenched constitutional provisions that required the Lieutenant-Governor and Administrator (but not a Deputy Governor) to be appointed by the Queen under her royal sign manual, this could have been changed in the amendments made to these entrenched provisions by ss 13 and 14 of the *Australia Acts.* However, no such changes were made, or indeed even proposed or discussed. This suggests that there was a belief in both Western Australia and

38 Cth, Mr S Hamilton, DPMC, 'Residual Constitutional Links', 27 September 1984.

Queensland (despite Parker's early views to the contrary) that the *Australia Acts* provided for the Queen to continue to appoint the Lieutenant-Governor and the Administrator.

It was not until 2001 that South Australia first recognised that the appointment of the Lieutenant-Governor by the Queen might well be invalid. It did not have entrenched constitutional provisions to deal with, so it simply amended its Letters Patent to make it clear that the Governor appoints the Lieutenant-Governor.[39] The Tasmanian Letters Patent were also amended to this effect in 2005[40] and the Victorian practice with regard to the appointment of the Lieutenant-Governors was changed in 2006, with the Victorian Lieutenant-Governor being appointed in that year by the Governor for the first time.

As the Tasmanian Attorney-General has recounted:

> In July 2006 the Solicitors-General of the States of Tasmania, New South Wales, South Australia, Victoria and Queensland formed a joint view that, since the *Australia Act 1986* came into force, the power to appoint a Lieutenant-Governor to administer the government of a State of Australia could only be exercised by the Governor of that State and not the Queen, unless the Queen was physically present in the State…
> Since 2006 this matter has been the subject of significant and complex discussions amongst Solicitors-General of the affected States. Ultimately discussions amongst Solicitors-General recommended that this problem be fixed at a national level by requesting the Commonwealth to amend the *Australia Act* to specify that the Governor of a State appoints Lieutenant-Governors and to validate the appointment of past Lieutenant-Governors appointed by the Queen… To date, States have not been able to reach agreement to progress such an amendment concurrently.[41]

Note that the one Solicitor-General missing from the list was that of Western Australia. Presumably if Western Australia did not join in with support for an amendment to the *Australia Acts* 1986 that would clarify the position concerning the appointment of Lieutenant-Governors, then such an amendment could not pass. This is because of an innovation that Western Australia itself proposed during the drafting of s 15(1) of the *Australia Acts* – that the request or concurrence of *all* States would be needed for an amendment to those Acts.

39 South Australia, *Government Gazette,* No 141, 25 October 2001, 4687. See also the public recognition of this problem in: B M Selway, 'The Constitutional Role of the Queen of Australia' (2003) 32 *Common Law World Review* 248, 257; and Twomey, *The Constitution of New South Wales*, above n 19, 672-3.

40 Tasmania, *Government Gazette,* No 20 619, 21 November 2005, 2017. The Governor revoked the existing letters patent, except for the clause that established the office of the Governor, and substituted new Letters Patent, including cl X which provided for a Lieutenant-Governor to be appointed during the Governor's pleasure by Commission under the Public Seal of the State.

41 Tasmania, *Parliamentary Debates,* House of Assembly, 5 November 2009, 35-6.

In the absence of agreement to amend the *Australia Acts,* the Victorian Government announced in 2009 that it would enact its own legislation to rectify the position in relation to Victoria and to validate the acts of past Lieutenant-Governors. This caused Tasmania, New South Wales and South Australia to announce that they would also act. Queensland had no need to take any action as it had avoided the problem by not appointing a Lieutenant-Governor.[42] Victoria, Tasmania and South Australia all enacted legislation validating the acts of Lieutenant-Governors back to the date the *Australia Acts* commenced. The Tasmanian Act amended the *Constitution Act 1934* (Tas) by removing the requirement in s 8(3) that the Lieutenant-Governor be appointed under the royal sign manual and signet. The Victorian Act amended s 6A of the *Constitution Act 1975* (Vic) to provide that the Governor appoints the Lieutenant-Governor. The Tasmanian provision was not entrenched, so it was changed by ordinary legislation. The Victorian provision was purportedly entrenched, requiring a special 3/5 majority of both Houses for its amendment, which was achieved. South Australia did not have such a provision in its Constitution at all, as it was only included in its Letters Patent and these had been amended in 2001.

New South Wales took a different approach. It left untouched in its *Constitution Act 1902* (NSW) the requirement in s 9B(2) that the Lieutenant-Governor be appointed by Commission under Her Majesty's sign manual. It simply added a s 9B(6) which provides that any future or past act of the Chief Justice which is performed in his or her capacity as Lieutenant-Governor, if done when the Chief Justice was not validly Lieutenant-Governor, is taken to be done in his or her capacity as Administrator. The Chief Justice is automatically appointed as Administrator under s 9B(3) without the need for the Queen's involvement, unless the Queen appoints someone else to the role. The effect of this provision is to have a bet both ways on the interpretation of the *Australia Acts.* If it is the Queen who must appoint the Lieutenant-Governor, then this will be validly done, both in the past and in the future. If the appointment by the Queen is invalid (because the power could only be exercised by the Governor except when the Queen was in Australia) then the Lieutenant-Governor's acts will still be valid as the acts of the Administrator.[43] This only works if it is always the Chief Justice who is made Lieutenant-Governor and Administrator.

Curiously, just before this controversy became public in November 2009, the Western Australian Government announced in October 2009 that it had advised the Queen to appoint the Chief Justice of the Supreme Court, the Hon Wayne Martin, as Lieutenant-Governor and that she had done so.[44] One wonders how

42 South Australia, *Parliamentary Debates,* House of Assembly, 18 November 2009, 3934.

43 Note that Chief Justice Bathurst was initially only sworn in as Administrator of New South Wales on 1 June 2011. It was not until later that he took the oath of office as Lieutenant-Governor on 1 February 2012.

44 The Commission is dated 27 August 2009, but was not gazetted until 6 October 2009 and formally announced on 9 October 2009. See: Western Australia, *Government Gazette,* No 179, 6 October 2009, 3980.

the Queen has been dealing with advice from her various States, with Western Australia telling her that she has the power to appoint the Lieutenant-Governor, Victoria, South Australia and Tasmania telling her that she does not, New South Wales advising her to appoint although it might be invalid and Queensland not making any appointment at all in order to avoid the issue! Given the confusion, one would have thought that a cooperative amendment to the *Australia Acts,* made under s 15(1) of the *Australia Acts* at the request of all the States would be the most appropriate path, whichever way it chose to resolve the issue of appointments and removals.

If it is the case that s 7(2) has made the power to appoint or remove the Lieutenant-Governor and Administrator one that is only exercisable by the Governor unless the Queen is present in the State, what effect would this have on s 50(3)(b) of the *Constitution Act 1889*? First, we know that State Constitutions may be expressly amended by the *Australia Acts,* as occurred with s 14, which amended the *Constitution Act 1889*. Arguably only the *Australia Act 1986* (UK) is effective in this regard, as the Commonwealth Parliament, under s 51(xxxviii) most likely does not have the power to amend State Constitutions because this was not something that *only* the Westminster Parliament could do at the time of federation.[45] Indeed, it was the somewhat Machiavellian argument of the Western Australian and Queensland Solicitors-General that the express amendments to the Western Australian and Queensland Constitutions should be included in the Commonwealth version of the *Australia Acts,* to make it 'manifestly clear' that parts of the Commonwealth Act were beyond the Commonwealth's legislative power.[46] Secondly, we also know that parts of the *Australia Acts* have rendered of no force and effect certain provisions in State Constitutions, such as those concerning reservation of Bills for royal assent.[47]

Section 50(3)(b) of the *Constitution Act 1889* defines 'Governor' in all Western Australian statutes as including any person appointed by dormant or other Commission under the Royal Sign Manual to administer the Government of Western Australia. Even if s 7(2) of the *Australia Acts* made the power to appoint the Lieutenant-Governor and Administrator exercisable 'only' by the Governor, s 50(3)(b) would still potentially have a limited operation, because it would include within the definition of Governor any person appointed by the Queen *when she was present in the State,* because of the application of 7(4) of the *Australia Acts*. Hence, it would not be impliedly repealed. It would just have to be read down to those circumstances in which the Queen could validly exercise the power – namely when present in the State. In the case of the appointment of Chief Justice

45 This was the view taken by the Western Australian Cabinet in approving the *Australia Acts:* WA, Cabinet Minute by Attorney-General, 20 August 1985: WA State Records Office ('SRO'): 5362/10259/1.

46 Letter by WA Solicitor-General to Qld Solicitor-General, 20 January 1984.

47 For example, the requirement in s 73 of the *Constitution Act 1889* (WA) that certain Bills be 'reserved by the Governor for the signification of Her Majesty's pleasure thereon' was rendered of no 'force or effect' by s 9(2) of the *Australia Act 1986* (UK).

Martin as Lieutenant-Governor, however, the Queen made that appointment while in London. Hence, it would be arguable that this appointment did not fall within a power that the Queen could exercise and that his appointment could not be regarded as satisfying the definition 'Governor' in s 50(3) for the purposes of the *Constitution Act 1889* or any other legislation.

Even if the appointment of the Lieutenant-Governor failed because it was inconsistent with the *Australia Acts,* it would appear that the current Lieutenant-Governor is also Administrator by default, by virtue of his office as Chief Justice,[48] in the absence of a validly appointed Lieutenant-Governor, and has also been validly appointed by the Governor to be his deputy.[49] It may therefore be the case that any acts performed by the Lieutenant-Governor in his capacity as Administrator or Deputy of the Governor will be valid, even if his appointment as Lieutenant-Governor is defective. Nonetheless, it would be preferable to deal with the uncertainty concerning who appoints the Lieutenant-Governor to avoid any unforeseen difficulties. The most obvious way of doing so would be to support an amendment to the *Australia Acts.* If this is not achievable, then the next obvious approach would be to amend the *Constitution Act 1889* (and the Letters Patent) either to provide that the Lieutenant-Governor is to be appointed by the Governor or to include a clearer default mechanism, as in New South Wales, that ensures that he or she validly exercises power regardless of what interpretation is made of s 7 of the *Australia Acts.*

It would appear that one of the reasons why the Western Australian Government has not acted, when other States have done so, is that s 50 of the *Constitution Act 1889* is purportedly entrenched. Section 73 of the *Constitution Act 1889* provides that a Bill that expressly or impliedly in any way affects s 50 of the *Constitution Act* shall not be presented for assent unless its second and third readings shall have been passed by an absolute majority of the whole number of the members of the Legislative Council and the Legislative Assembly respectively *and* it has been approved by electors in a referendum.

This leads to the interesting question of whether s 50 could be amended by ordinary legislation, without a referendum or special majority, in order to provide that the Lieutenant-Governor is to be appointed by the Governor. For present purposes, let it be assumed that the amendment would be the repeal of the words 'by dormant or other Commission under the royal Sign Manual' from s 50(3)(b) of the *Constitution Act 1889* (WA) and their replacement with the words 'by the Governor'. Would such an amendment be a law 'respecting the constitution, powers or procedure of the Parliament of the State' pursuant to s 6 of the *Australia Acts*? It is difficult to characterise it as falling within that category.

48 WA Letters Patent, 1986, cl XIII. Note, however, that s 50 of the *Constitution Act 1889* only appears to recognize an Administrator appointed by the Queen under her sign manual, not one who holds the office by default by virtue of being Chief Justice or the next most senior Justice willing and able to perform the duties of the office. Query whether such recognition is necessary?

49 See WA Letters Patent, 1986, cl XVI and the *Deputy Governor's Powers Act 1911* (WA).

When the 1978 amendments were made to the *Constitution Act 1889*, which inserted s 50 and purported to entrench the office of the Governor under s 73, the argument ran as follows. First, s 2 of the *Constitution Act 1889* was amended by expressly providing that that the Queen was a constituent part of the Western Australian Parliament. This provision was entrenched. Thus, any law to abolish the role of the Queen would affect the constitution of the Parliament and therefore be subject to the manner and form requirement of a special majority and a referendum. Then s 50 provided that the Governor was the Queen's representative. Hence, it was argued that the abolition of the role of the Governor would involve the removal of the representative of a constituent part of the Parliament, therefore affecting the constitution of the Parliament.[50] This argument is a step removed, but at least has some level of plausibility.[51] However, if the Parliament passed a law that did *not* affect the continuation of the Queen as a constituent part of the Parliament and did *not* affect the role of the Governor as her representative, but merely provided that the Governor could appoint the Lieutenant-Governor and any Administrator (just as the Governor is currently permitted to appoint a Deputy), then it is very difficult indeed to see how such a law could be regarded as one respecting the constitution of the Parliament (or indeed, its powers or procedures). Accordingly, s 6 would not apply to give effect to the manner and form requirements with respect to such an amendment.[52] As noted above, because of the effect of s 2 of the *Australia Acts,* it is doubtful that any other source would effectively prevent the making of such an amendment by ordinary legislation.

Hence, there are two ways out of this dilemma, neither of which involves a referendum. First, Western Australia could agree with the other States to support an amendment to the *Australia Acts* which clarifies who appoints and removes the Lieutenant-Governor and Administrator.[53] Secondly, it could enact amendments to s 50 of the *Constitution Act 1889* by ordinary legislation which ensured that the Lieutenant-Governor could be validly appointed by the Governor, as long as such a law was not one with respect to the constitution, powers or procedure of the Parliament.

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50 See in relation to the equivalent Queensland provisions: Anne Twomey, 'The Entrenchment of the Queen and Governor in the Queensland Constitution', in Michael White and Aladin Rahemtula, *Queensland's Constitution – Past, Present and Future* (Supreme Court of Queensland Library, 2010) 185.

51 Note, however, that with respect to the equivalent Queensland provisions, the Queensland Government's legal advisers had mixed views on whether this attempt at entrenchment would be effective, with Dr Finnis expressing doubt about the provision: Ibid 185, 200.

52 Note that Queensland repealed one of the provisions entrenched by its equivalent constitutional amendments of 1977 by the enactment of ordinary legislation on the basis that the repealing law was not a law respecting the constitution, powers or procedure of the Parliament. See s 146 of the *Public Service Act 1996* (Qld) which repealed s 14(1) of the *Constitution Act 1867* (Qld) and amended s 53 by removing reference to s 14 as an entrenched provision. The validity of this provision was not challenged in the courts. See further: Twomey, 'The Entrenchment of the Queen and Governor', above n 50, 185, 208-9.

53 It would be preferable to do this with prospective effect and leave it to legislation to deal with any necessary validation of past acts due to the complexity of such legislation.

WESTERN AUSTRALIA AND S 15 OF THE *AUSTRALIA ACTS*

Western Australia's role in the drafting of s 15

Western Australia was the lead State in pushing for the inclusion of s 15 in the *Australia Acts*. From a very early stage in the negotiations, Western Australia stressed that it was necessary that all constitutional provisions concerning Australia could be repealed or amended in Australia and that a properly protected means to do so must therefore be provided. The Western Australian Government was concerned that:

> if there was no obvious repeal or amendment procedure the High Court would be likely to hold that the power lay in the Commonwealth Parliament under some power or other (eg nationhood or external affairs…) In that event there might be no fetter on the Commonwealth legislative power. Express provision was therefore considered an important safeguard for the States.[54]

It was also Western Australia that suggested that the UK and Commonwealth versions of the *Australia Acts* should be amended at the same time by use of the same mechanism and that therefore the s 51(xxxviii) request or concurrence approach should be used. As noted above, Western Australia added that the request or concurrence of *all* the States should be required (in contrast to the States directly concerned) as it took the view that any amendment to the *Australia Acts* or the other entrenched constitutional Acts, would be a matter of direct concern to all the States.[55] At that stage in the drafting process, the *Australia Acts* did not include provisions such as ss 13 and 14 that concern specific States.

It was also Western Australia that added the 'repugnancy' clause in s 15(2) so that any Commonwealth law that is repugnant to the *Statute of Westminster* or the *Australia Acts* is treated as if it is a law to repeal or amend those Acts and therefore must comply with the manner and form procedure in s 15(1) or be invalid.[56]

The effectiveness of s 15

When the Western Australian draft of s 15 was put to the Commonwealth, the Commonwealth Solicitor-General, Sir Maurice Byers, strenuously objected to the inclusion of such a provision in the United Kingdom Act, regarding it as 'unthinkable' that such a provision would 'hamper the legislative freedom and sovereignty of the Commonwealth Parliament in the future'. He was not, however, concerned about including such a provision in the Commonwealth

54 Western Australia, Opinion, *Australia Act* (undated, circa 1985).

55 Western Australia, 'Comments on Suggested Drafting Instructions Circulated by Queensland', 24 August 1982.

56 Western Australia, Telex by Crown Law Dept to legal officers in other States, 26 October 1982.

Act.[57] The Western Australian Solicitor-General observed that:

> One or two comments made in the course of the meeting suggested that [Sir Maurice Byers] may have seen such a provision in the s 51(xxxviii) Act to be invalid or of no legal effect and was therefore concerned to ensure that it didn't find its place in the United Kingdom legislation so that the Commonwealth Parliament would be free (subject to it having the legislative power to do so – which Byers believes it has) to amend this fundamental Act or the *Statute of Westminster* as the Commonwealth Parliament should think fit.[58]

The States insisted that the provision be inserted in both Acts and the Commonwealth eventually conceded, despite the Commonwealth Solicitor-General's objections. (Byers' advice concerning s 15 is still being kept secret by the Commonwealth as it is too sensitive to be revealed).

The scope of the amending power

One issue of concern that occasionally arose during the negotiation of s 15 was whether it could be used as a means of inserting extraneous material into the *Australia Acts* at a later date, giving such material a quasi-constitutional status. Could s 15 be used as a means of entrenching statutes, such as a bill of rights, without having to undertake a referendum? Could it be used to insert recognition of Indigenous Australians into the preamble to the *Commonwealth of Australia Constitution Act* without the holding of a referendum? Could s 15 become a Trojan Horse for unrelated amendments, especially if one political party controlled all State Parliaments and the Commonwealth Parliament simultaneously?
Western Australian legal officers rejected this view, arguing:

> [Section 15] is not thought to confer an unlimited or unrestricted power to vary, or add to, the provisions of the Australia Acts or the Statute of Westminster. On ordinary constructional principles the power to amend the Australia Acts must be limited to the general scope and objects of these Acts. These are the severance of the links between the UK Government and Parliament and Australia (particularly the States). It would allow the correction of difficulties experienced with the working out of the Act and variation of a provision so long as the new provision did not depart from the scope and objects of the Act viewed as a whole. That would certainly allow some scope for change but it should not allow wholesale or fundamental change to the scheme of the Act.[59]

Despite this reassurance, the Western Australian Government became concerned

57 See further: Anne Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence* (Federation Press, 2010) 121 and 333-4.
58 Letter by WA Solicitor-General to WA Attorney-General, 1 February 1983.
59 Western Australia, Opinion, Australia Acts (undated, circa 1985).

in 1985 that the s 15 mechanism could be used to amend the Constitution of Western Australia, as s 14 of the *Australia Acts* had brought the *Constitution Act 1889* within the scope of the *Australia Acts* and any future amendments. It proposed adding a s 15(4) to the *Australia Acts* which would have provided that:

> Nothing in this section confers a power to amend the Constitution Act 1867 of the State of Queensland or the Constitution Act 1889 of the State of Western Australia, as amended and in force from time to time.

This proposal was later dropped, with the Western Australian Solicitor-General advising that there could be no absolute guarantees against future amendments.[60] The Western Australian Solicitor-General wisely advised:

> There is much scope for arguments about the effect and scope of section 15 of the Australia Acts. It bristles with academic possibilities. But when the context and obvious purpose of the provision is kept in mind most of these possibilities prove unrealistic.[61]

It is, for example, quite fruitless to speculate about whether s 15 of the *Australia Acts* could be used as a backdoor means of amending the *Commonwealth Constitution*. In reality, the people would never stand for their power to approve such changes under a referendum being negated by State and Commonwealth Parliaments. No political party would therefore be likely to be game to propose or support such an approach.

The relevance of s 15 today

What relevance does s 15 of the *Australia Acts* have today for the Western Australian Constitution? First, s 15 provides important support to the federal system. The big question in the de-colonisation of Australia was who would replace the role of the British when they pulled out of the Australian constitutional system. The Commonwealth wanted to fill that gap, but the States did not want to be subordinated to the Commonwealth. This is why it took so long for the British to retire from the field. Just as in the case of a republic, the big issue was not the departure of the British, but who would replace them. The great victory for the States in the negotiation of the *Australia Acts* was that it was the federal system that replaced the British, rather than the Commonwealth Government alone.

Section 15 of the *Australia Acts* does *not* give unilateral power to the Commonwealth Parliament to amend or repeal Australia's fundamental constitutional documents. That power is vested by s 15(1) in the States and the Commonwealth collectively. Although there is an alternative route, through s

60 Western Australia, Memorandum by the WA Solicitor-General to the WA Attorney-General, 23 September 1985.

61 Letter by WA Solicitor-General to the Hon Ian Medcalf, 20 January 1987.

15(3) of the *Australia Acts,* it still denies the Commonwealth Parliament unilateral power, as it tempers Commonwealth power with the power of the people in a referendum and the federal constraint of requiring majorities in a majority of States. Hence s 15 of the *Australia Acts* bolsters the argument that sovereignty is vested in the Commonwealth and the States collectively as a federation, rather than the Commonwealth Government alone. It reinforces a vision of the federal system that the framers and the first High Court held, but which has since been neglected for a long time.

Section 15 is also important in terms of what is entrenched in the *Australia Acts* (such as the relationship between the Governor and the Queen) and how it may be amended in the future. It requires the cooperation of all States and the Commonwealth, but that is not impossible to achieve. At the time of the republic referendum, all States, regardless of whether their governments supported or rejected the idea of a republic, were prepared to enact laws seeking to amend the *Australia Acts* to facilitate each State being able to make its own choice as to whether or not to sever its links with the Queen if Australia became a republic.

Succession to the throne and the amendment of the Australia Acts

Apart from the perennially lurking issue of a republic and the need to clarify the method of appointment of Lieutenant-Governors and Administrators, the only other potential amendment to the *Australia Acts* on the horizon might arise out of the proposed changes to the rules of succession to the throne. On 28 October 2011, it was agreed by the representatives of all of Her Majesty's Realms, meeting at the Commonwealth Heads of Government Meeting ('CHOGM') in Perth, that the rules of succession to the Crown would be changed so that:

(a) males would no longer be given preference over females in the succession; and
(b) heirs would no longer be disqualified from succeeding to the throne as a consequence of marrying a Roman Catholic.

The British Government further proposes the repeal of the *Royal Marriages Act 1772,* and its replacement with more limited provisions which will also affect succession to the throne.[62] It proposes to make these changes with respect to the Crown of the United Kingdom by way of legislation, to be passed by the Westminster Parliament, which will extend only to the United Kingdom and its British overseas territories. The Queen's other Realms, such as Australia, will have to make their own changes, in accordance with their own constitutional requirements, to achieve consistent rules for the succession to the throne, as agreed at Perth.[63]

62 See further: Succession to the Crown Bill 2013 (UK)

63 The Queen's speech on the opening of the Westminster Parliament in 2012 announced further work with the 15 other Realms on this issue: UK, *Parliamentary Debates,* House of

While there is an argument that covering clause 2 of the *Commonwealth of Australia Constitution Act 1900* (Imp)[64] mandates that whoever is the sovereign of the United Kingdom is also, by virtue of this external fact, sovereign of Australia,[65] it is unlikely that since the enactment of s 1 of the *Australia Acts,* terminating the power of the United Kingdom to legislate for Australia,[66] the High Court would accept that proposition. In *Sue v Hill,*[67] Gleeson CJ and Gummow and Hayne JJ noted that covering clause 2 identifies the Queen 'as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom'. However, their Honours went on to State:

> The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s 1 of the Australia Act would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.[68]

Hence the question arises as to which body (or bodies) in Australia holds the power to make laws with respect to the succession to the throne in relation to Australia.[69] This raises the further difficult question, unresolved at the time of the enactment of the *Australia Acts,* as to whether there is one federal Crown of Australia, under which the Queen acts with respect to different constituent polities within the federation on the advice of the responsible Ministers of the relevant polity, or whether, because the Queen is directly advised by State Ministers with respect to State matters, there are separate Crowns in relation to each State.[70] In either case, however, it is unlikely that the Commonwealth would have the unilateral

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Lords, 9 May 2012, col 2.

64 Covering clause 2 provides: 'The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom'.

65 A B Keith, 'Notes on Imperial Constitutional Law' (1937) 19 *Journal of Comparative Legislation and International Law* (3rd series) 105, 106. See also the Statement by Winterton that the Queen of Australia 'is constitutionally required to be the British monarch': G Winterton, 'The Evolution of a Separate Australian Crown' (1993) 19 *Monash University Law Review* 1, 2.

66 Section 1 provides that no future UK law shall extend to the Commonwealth, States or Territories as part of their law.

67 (1999) 199 CLR 462.

68 *Sue v Hill* (1999) 199 CLR 462, [93] (Gleeson CJ, Gummow and Hayne JJ). See also: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, [228] (Gummow and Hayne JJ). Compare the Canadian approach: succession to the Throne Bill 2013 (Canada)'.

69 Note that the Commonwealth in 1936 accepted that it had no legislative power regarding succession to the throne: Cth, *Parliamentary Debates*, House of Representatives, 11 December 1936, 2908-9 (Mr Menzies). See also: K H Bailey, *The Statute of Westminster 1931* (Government Printer, Melbourne, 1935) 8-9. Today, however, the Commonwealth would no doubt argue that it had various heads of power including the nationhood power and the external affairs power. See further: D Freeman, 'The Queen and her dominion successors: the law of succession to the throne in Australia and the Commonwealth of Nations Pt 2' (2001) 4(3) *Constitutional Law and Policy Review* 41.

70 See the more detailed analysis of this issue in: Twomey, *The Australia Acts 1986*, above n 57, 455-79.

legislative power to deal with succession to the relevant Crown.[71] Apart from anything else, the fact that the Queen comprises an essential and fundamental part of State constitutional systems, including in some cases being a constituent part of State Parliaments, would suggest that the *Melbourne Corporation* principle would prevent unilateral Commonwealth legislation from interfering with State constitutional powers and institutions.[72]

The obvious answer, which appears to have been accepted by the Gillard Government,[73] is that legislation should be enacted pursuant to s 51(xxxviii) of the *Commonwealth Constitution*.[74] This would involve the 'exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned', which in this case would mean all of them, of a power which at the establishment of the Constitution could 'be exercised only by the Parliament of the United Kingdom'. Certainly, at the time of federation, only the United Kingdom Parliament could have legislated concerning succession to the throne.

As the s 51(xxxviii) method in such a case will be exactly the same as the s 15(1) method of amending the *Australia Acts* and the *Statute of Westminster,* the same legislation could be used simultaneously to amend covering clause 2 (through an amendment to s 8 of the *Statute of Westminster*) to refer instead to the Queen's heirs and successors in the sovereignty of 'Australia' (rather than the United Kingdom). This would avoid any problems that might otherwise arise through a potentially inconsistent provision remaining in the covering clauses. The opportunity could also be taken to clarify whether there is one federal Crown of Australia or seven Crowns, although this might be asking too much in terms of achieving agreement between all parties.

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71 B Selway, 'The Constitutional Role of the Queen of Australia' (2003) 32 *Common Law World Review* 248, 272. Note that if there are separate State Crowns, then s 2 of the *Australia Acts* gives the States the legislative power concerning succession to those Crowns, subject to any implications derived from the *Commonwealth Constitution*.

72 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, as reinterpreted in *Austin v Commonwealth* (2003) 215 CLR 185. See also: *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 242 (McHugh J); and *Clarke v Commissioner of Taxation* (2009) 240 CLR 272, [19] (French CJ).

73 Prime Minister Gillard announced that she had received 'in principle' support from all State Premiers prior to the announcement being made at CHOGM: Joint Press Conference, Prime Ministers Cameron and Gillard, CHOGM, 28 October 2011: <http://www.chogm2011.org/Resources/Latest_News/pm-united-kingdom-david-cameron-pm-australia-julia-gillard-joint-press-confere.html>.

74 E Campbell, 'Changing the rules of succession to the throne' (1999) 1(4) *Constitutional Law and Policy Review* 67, 68. Note that while the other States appear to have agreed to such a course, the Queensland Government has objected: Malcolm Farr, 'Queensland holds out on royal succession legislation at COAG meeting in Canberra', *Courier-Mail,* 7 December 2012. See: Succession to the Crown Bill 2013 (Qld).

CONCLUSION

The *Australia Acts 1986* form a fundamental part of State Constitutions. They extend and protect State legislative power and govern the limits that may be placed upon it through manner and form requirements. They govern certain aspects of executive power, including the advice upon which the Queen acts and the extent of the powers that are exercisable by the Governor. Most significantly, however, they recall the States to their role as fundamental constituent elements of the Australian federation, conferring upon them a share in Australia's sovereignty by giving them a role in the future amendment and repeal of Australia's foundational constitutional documents.

Western Australia played a major role in shaping and drafting the *Australia Acts,* and those Acts now play a major role in Western Australia's constitutional future.