The Office of Governor of Queensland

There are several misconceived premises relating to the Office of Governor of Queensland that appear to be doing the rounds online.

The first contention is succinctly explained in ***Dooney v Henry [2000] HCA 44*** (from 19):

> *"The next matter which the respondent raises is the so called "interregnum argument" based upon an asserted deficiency in the appointment of Lord Gowrie VC as Governor-General and in the giving of Royal Assent to the Act. The substance of the same argument is set out at length in the reasons for judgment, and emphatically rejected, in* ***McKewins Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation(2000) 74 ALJR 1000; 171 ALR 335*** *by Gummow J. I fully concur in his Honour's reasoning and argument in regard to it.*
>
> *The final substantive matter advanced by the respondent is to be found in the Reply of the respondent, that the proclamation on 8 March 1986, after the commencement of the Australia Act 1986 (Cth) on 3 March 1986, of Her Majesty's Letters Patent dated 14 February 1986 under the Royal Sign Manual and the Great Seal of the United Kingdom reconstituting the office of Governor of Queensland, was an invalid exercise of sovereignty by the United Kingdom with respect to Queensland. It followed, it was submitted, that appointments of judicial officers in Queensland are invalid. How this could have any relevance to Judges appointed before 1986 is left entirely unexplained.*
>
> *However put, the argument misconceives and misunderstands the comprehensive scheme of United Kingdom, Australian and State legislation which collectively was enacted as the Australia Acts pursuant to the "request and consent" provisions then found, so far as Australia and the States were concerned, in ss 4 and 9(2) and 9(3) of the Statute of Westminster 1931 (Imp) and in s 51(xxxviii) of the Commonwealth Constitution. The Letters Patent of 14 February 1986 formed part of that scheme and anticipated the enactment by the United Kingdom Parliament of the Australia Act 1986 (UK), assent to which was given on 17 February 1986.*

> *At the time when the Letters Patent were signed and sealed the use of the Great Seal of the United Kingdom in conjunction with the Royal Sign Manual was appropriate, having regard to the residual responsibilities of the United Kingdom in relation, relevantly, to Queensland at that time. The proclamation thereafter of those Letters Patent was no more relevant to their validity than was the proclamation, after the death of King George V, of His Majesty's commission appointing Lord Gowrie VC to the office of Governor-General. While this is enough to dispose of the argument, I note in relation to Queensland that the operation of the Letters Patent of 14 February 1986 has, in any event, been superseded by the Constitution (Office of Governor) Act 1987 (Q) which presently provides for and affirms the office of Governor and the authorities and powers of that office."*

https://freemandelusion.com/wp-content/uploads/2018/07/dooney-v-henry-2000-hca-44.pdf

https://freemandelusion.com/wp-content/uploads/2018/07/mckewins-hairdressing-and-beauty-supplies-pty-ltd-v-deputy-commissioner-of-taxation-s123-1999-2000-hca-27.pdf

The Entrenched Provisions

There were a number of cases challenging various enactments with the contention that there has been an alteration to the Entrenched Provisions in ***Section 53 of the Constitution of Queensland 1867*** which provides that any Bill that expressly or impliedly provides for the alteration of the office of the Governor of Queensland or *'in any way affects'* certain specified sections must be approved at a referendum before it becomes a law.

> *"A Bill that expressly or impliedly provides for the abolition of or alteration in the office of Governor or that expressly or impliedly in any way affects any of the following sections of this Act namely— Sections 1, 2, 2A, 11A, 11B; and this section 53"*

The argument proceeds that the *Australia Acts (Request) Act 1985 (Qld)* requested the enactment of Commonwealth legislation which would alter the office of the Governor of Queensland and that the Queensland Act therefore required approval in a referendum in order to be valid. The argument concludes that the *Australia Act 1986 (Cth)* is invalid because it was not enacted pursuant to a valid request from all the affected States and that this also affected the validity of the *Australia (Request and Consent) Act 1985 (Cth)*, making the *Australia Act 1986 (UK)* invalid.

As Anne Twomey points out on page in ***The De-Colonisation of the Australian States***:

> *"This argument was rejected by the Queensland Court of Appeal in Sharples v Arnison and by the Federal Court in Kelly v Campbell. The fundamental flaw is that the Australia Acts (Request) Act 1985 (Qld) did not of itself have the effect of expressly or impliedly altering the office of Governor. It merely requested the Commonwealth and Westminster Parliaments to do so. The question then arises as to whether such a request law 'affected' the purportedly entrenched provisions. A request for a change does not itself affect the existing law. The request may, indeed, be rejected. If so, there could be no effect upon the law."*

In the Supreme Court of Queensland, Connolly J. first rejected this argument in *The Queen v The Minister for Justice and Attorney-General of Queensland; ex parte Alan George Skyring,* (unreported, 17 February

1986). Muir J upheld this decision (at 15) in ***Skyring v Electoral Commission of Queensland [2001] QSC 080***:

> *"In proceedings in the Supreme Court in 1986 … Connolly J rejected the argument finding that: the Australia Acts (Request) Act made no alteration to the Constitution Act; Section 53 of the Queensland Constitution could not restrict the legislative powers of the Parliament at Westminster; there was no limit to that Parliament's legislative power and that any relevant alteration to the Constitution Act was effected by an enactment of the Parliament at Westminster (and/or by the Commonwealth Parliament). The decision, with respect, is plainly correct."*

Sharples v Arnison [2001] QSC 56, per Ambrose J (at 30):

> *"Connolly J dismissed this application on the basis that s 53 of the Constitution Act did not and could not affect the power of the Queensland Government or Parliament to request constitutional change through the Commonwealth Parliament pursuant to s 51 XXX(viii) of the Australian Constitution. Although on one view it might be contended that the use of s 51 XXX (viii) to effect an alteration by partial repeal of ss 11B and 14 of the State Constitution Act was a device adopted to circumvent the provisions of s 11A(2) and s 53(1) of the Constitution Act, nevertheless, it could not be said that the presentation of the bill for the Australia Act (Request) Act 1985 for assent without first having it approved by the electors upon referendum was contrary to the requirements of either s 11A(2) or s 53(1) of the Constitution Act 1867 as at 1985."*

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In ***Sharples v Arnison [2001] QCA 274*** de Jersey CJ upheld the judgment of Ambrose J.; and likewise Philippides J (at 15-19) in ***Skyring v Crown Solicitor [2001] QSC 350***.

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In ***Sharples v Arnison [2002] 2 Qd R 444***, per McPherson JA (at 25) (McMurdo P and Davies JA agreeing).

> *"The combined effect of these enactments, which joined together the legislative powers of the Parliament of the United Kingdom, the Commonwealth, and Queensland, had, through the force of what in each of them was numbered as s 13(3), the effect of repealing s 11B in the form in which it had been enacted in the 1977 Act, and simultaneously of substituting a new s 11B in the limited form in which it now appears in the Constitution Act 1867. The result unquestionably was to "affect" s 11B in its original form; but the referendum requirement imposed by s 53 was not set in motion by what was done. There never has at any time been a Bill in the Queensland Parliament to repeal, amend or otherwise "affect" s 11B. The Australia Acts (Request) Act 1985 (Qld) did not do so. Instead, it requested that the United Kingdom Parliament and the Commonwealth Parliament take that step. Neither of those legislative bodies was bound by s 53(1) of the Constitution Act 1867 (Qld) as amended by the 1977 Act to submit the Bills which would become those Acts to a referendum of the voting electors of Queensland before they were presented for assent. The Parliament of Queensland would have been bound by s 53(1) to do so; but the Bill that became the Australia Acts (Request) Act 1985 (Qld) did not "affect" s 11B. It simply asked the Parliaments of the United Kingdom and the Commonwealth to take that step."*

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Kelly v Campbell [2002] FCA 1125, per Madgwick J (at 31):

> *"If that view is correct, it is unnecessary to deal further with the matters at issue. However, I would add some further brief comments. Firstly, as to what may be called the "Queensland" point, the manner and form restriction relied on by Mr Kelly relevantly applied so as to require a referendum before royal assent might be given, among other things, to "a bill that expressly or impliedly provides for the for the abolition or alteration of the office of the Governor [of Queensland]": s 53 of the Constitution Act 1867 (Qld) ("the Queensland Constitution"). However, the Australia Acts (Request Act) 1985 (Qld) ("the Queensland Request Act") is not a law within the contemplation of s 53 of the Queensland Constitution. The Queensland Request Act did not purport to abolish or alter the office of the Governor of Queensland (nor otherwise affect the other manner and form protected provisions of the Queensland Constitution). While it expressed a request for the enactment of legislation by the Commonwealth and United Kingdom Parliaments, the Queensland Request Act did not itself abolish or alter the Governor's office. Consequently, there was no requirement that the Bill for the Queensland Request Act should have been approved by a referendum of the Queensland people. Any complaint about the effect secured by the Queensland Request Act process lies in the realm of politics, not law. Sharples v Arnison [2001] QCA 518, a unanimous decision of the Queensland Court of Appeal, in litigation brought by Mr Kelly before he adopted his present name, makes this clear. Even if I thought this decision were attended by some doubt, which as presently advised I do not, I would certainly follow it as to matters concerning the Queensland Constitution, unless I were quite convinced that it was plainly wrong; it is obvious that I am not so convinced."*

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The issue was not pursued in the High Court: ***Re Australian Electoral Commission; Ex parte Kelly (2003) 77 ALJR 1307***, per Gummow J (at 20):

> *"In oral submissions, counsel for the applicant correctly accepted that his client could only have standing with respect to the election for Senators for New South Wales. He correctly also did not press complaints in the applicant's written submissions of 16 April 2003 concerned with the validity of the appointment of the Governor of New South Wales."*

https://freemandelusion.com/wp-content/uploads/2018/07/re-australian-electoral-commission-ex-parte-kelly-2003-77-aljr-1307.pdf

James Bowes makes similar claims:

> *"There is no valid legislation in Queensland since the parliament altered the Office of Governor in the 2001 Constitution."*

HIs ideas are further discussed in the article "***James Bowes***".

Alterations to Queensland's Constitution can, in the majority of cases, be effected by the Queensland Parliament via the passage of legislation. Only certain measures are to be supported by referendum.

They do not prevent the parliament from legislating regarding the Office of Governor, merely that the alteration of these sections must be supported by referendum.

These sections are provided unaltered and current in ***Section 53 of the Constitution of Queensland 1867***, and can also be found in ***Attachment 1 of the Constitution of Queensland 2001***, where they also remain unaltered.

The Entrenched Provisions:

The Entrenched Provisions

The Legislative Assembly can consolidate the majority of Queensland's constitutional provisions into a Constitution of Queensland by passing an ordinary Act of Parliament. However, to wholly consolidate the existing provisions of constitutional legislation would require a referendum as a number of the provisions of the Constitution are said to be 'entrenched'.

Entrenched provisions are laws that the Parliament has sought to protect so that the laws may not be repealed or changed through normal law-making procedures. Entrenched provisions may not be repealed, amended, or affected (depending on the terms of the entrenchment) unless Parliament follows certain special measures that are required, for example, first obtaining the approval of electors at a referendum.

In Queensland, constitutional provisions that are said to be referendum entrenched (the "entrenched provisions") are contained in the *Constitution Act 1867* (sections 1, 2, 2A, 11A, 11B and 53), the *Constitution Act Amendment Act 1890* (section 2) and the *Constitution Act Amendment Act 1934* (sections 3 and 4). These provisions concern the establishment and law-making power of the Parliament of Queensland and the Legislative Assembly, the duration of the Parliament and matters pertaining to the office of the Governor.

These provisions will not be relocated, therefore, into the Constitution of Queensland 2001 and will remain in the *Constitution Act 1867*, the *Constitution Act Amendment Act 1890* and the *Constitution Act Amendment Act 1934*.

The entrenched provisions have not been restated in modern drafting style in the Bill in the manner recommended by the Legal, Constitutional and Administrative Review Committee.

There is a concern that a court could find that modernised versions of the entrenched provisions included in the Bill would impliedly repeal the entrenched provisions by applying the general principle of statutory interpretation that a later enactment will repeal an earlier inconsistent provision. It may be open for a court to conclude that the fact the proposed later provision purports to restate in modern language the precise effect of the earlier provision demonstrates that the two provisions are in law inconsistent and cannot stand together. In doing so, the court could strike the whole Act down on the basis that Assent should not have been given to a Bill which included a provision which had the effect of repealing the entrenched sections until a referendum had been held.

This interpretation may be applied even if the Parliament expressed an intention not to amend (or repeal) the entrenched provision. A court may be forced to the conclusion that the Parliament's statement of intention is inconsistent with the actual effect of what it has purported to do.

For these reasons, the entrenched provisions have not been modernised and restated in the Bill. However, to ensure that Queensland's constitutional legislation is as accessible as possible, signpost provisions have been included in the Bill. These signpost provisions refer to the entrenched provisions in their original Acts as containing the substantive law about the various matters pertaining to the Parliament and the office of the Governor. To further enhance accessibility, copies of the entrenched provisions have been included in attachments 1, 2 and 3 of the Bill.

The Constitution of Queensland 2001, in particular, the inclusion of the signpost provisions and attachments 1, 2 and 3, is not intended to expressly or impliedly in any way affect the entrenched provisions.

Lade and Company Pty Ltd v Finlay & Anor; Lade v Franks & Anor [2010] QSC 382: (at 16, 19-21):

> *"Apart from invalidity brought about by a failure to comply with Imperial legislation Mr Lade also seems to contend, relying on s 53 of the Constitution Act 1867 (Qld), that, absent a referendum, the constitutional requirements necessary to validate the various legislative provisions under which rates have been levied or his Certificate of Title dealt with were not met.*
>
> *There are at least two difficulties for Mr Lade's contentions. First, parliament is quite at liberty to alter these provisions if it so wishes, even though the Act is expressed to be a constitutional one: see McCawley v R [1920] AC 691 (PC). So if the relevant Acts have been passed without regard to the requirements of the Constitution Act 1867 (Qld), as Mr Lade contends, then Parliament must be assumed to have so intended.*
>
> *Secondly, I am required to take judicial notice of Acts of Parliament and assume the accuracy of copies of such Acts: s 43 and 46A of the Evidence Act 1977 (Qld). So, without evidence to the contrary, I am not concerned with the question of whether the constitutional requirements relating to the valid passing of any Act of Parliament have been complied with.*
>
> *Now, so far as I am aware, there never has been a referendum held to alter these constitutional arrangements. Equally, so far as I am aware, there has been no Bill passed that expressly or impliedly provides for the abolition of or alteration in the office of Governor or that expressly or impliedly in any way affects any of the nominated sections of the Constitution Act 1867, nor do any of the legislative enactments mentioned by Mr Lade in his pleading have this effect. As well, again so far as I am aware, the constitutional requirements were followed in the passing into law of the enactments in question."*

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(See **Section 123 of the Evidence Act 1977 (Qld)** also **Section 143 of the Evidence Act 1995 (Cth)** which provides that proof is not required about the Assent of legislation, Section **150 Seals and signatures** Section **153 Gazettes and other official documents** and **Section 5** extending the operation of these provisions to proceedings in all Australian courts.)

There are further cases involving the Entrenched Provisions, which can be located on this website under the Tag "***State Entrenched Provisions***".

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