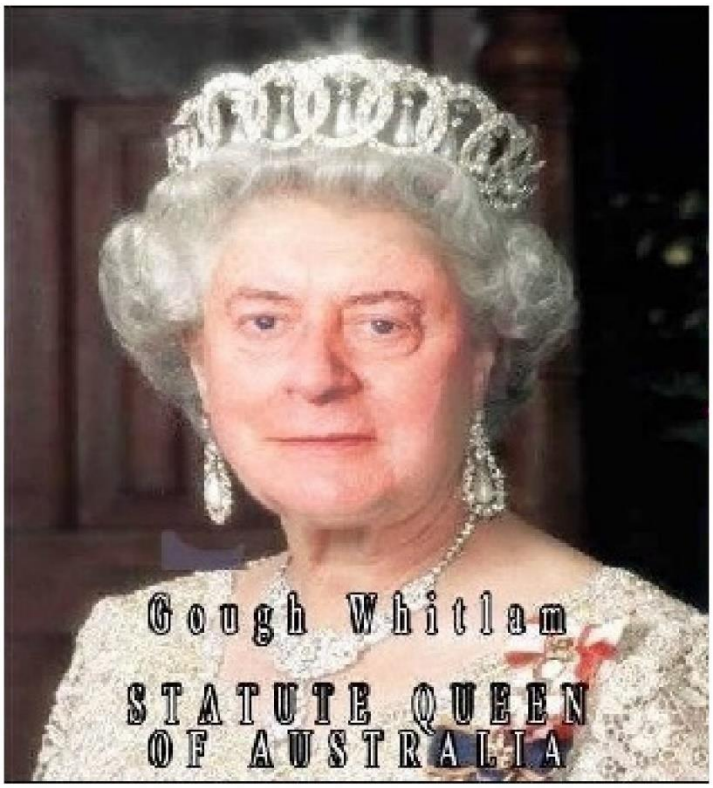
The Queen of Australia



The *Royal Styles and Titles Act 1973*, in conjunction with the *Royal Styles and Titles Act 1953*, changed the Queen's title to be used in relation to Australia to the *"Queen of Australia"* as opposed to the *"Queen of the United Kingdom".*

The OPCA movement has many different abstract speculations regarding the validity of the title of the Queen of Australia, most of these false premises are based in a misconception of the changes that had occurred in the constitutional relations between the United Kingdom and Australia. The Queen's current Australian title is in fact completely valid within constitutional theory. The amendments made by the Whitlam Government to the *Royal Style and Titles Act* in 1973 are merely a reflection of decisions previously made throughout all the former colonies at the Imperial Conferences prior to the adoption of the *Statute of Westminster*, which was decades before the amendments were made by his government.

Rodney Culleton has often referred to the *"Queen of Australia"* as a *"bush chook"*. Adherents often refer to this title as a *"paper queen"* without any attachment to the *"lawful monarch Elizabeth II".* They generally believe that Gough Whitlam *"acted in treason"* by passing this legislation, and that it was unconstitutional, as it somehow altered the *Constitution* without the referendum process set out in section 128. The basis of this belief is because covering clause 2 of the *Constitution* 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."*

The whole position of the monarch in today's political system is easily misunderstood, that's why this false premise of the invalidity of her title runs concurrent in the pseudo-legal theories of most commonwealth nations, and not just here about her Australian title amended by the Whitlam government. To refer to the Queen of Australia as the British Queen, the English Queen or the foreign monarch is fallacious when considering the Queen's role as outlined in the Australian Constitution and the several laws of Australia that relate to constitutional matters.

The "Crown of the United Kingdom of Great Britain and Ireland" that appears on the Preamble to the Australian Constitution, ceased to exist after the ***Anglo-Irish treaty of 1922*** put an end to the union of Great Britain and Ireland, creating a smaller dominion of which George V remained King. The ***Imperial Conference in 1926*** proposed a change to the Royal style and titles designated for King George V.

> *"The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last fifty years has the Royal Title been altered to suit changed conditions and constitutional developments. The present title, which is that proclaimed under the Royal Titles Act of 1901, is as follows: — "George V, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India." Some time before the Conference met, it had been recognised that this form of title hardly accorded with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It had been further ascertained that it would be in accordance with His Majesty's wished that any recommendation for change should be submitted to him as the result of the discussion at the Conference. We are unanimously of the opinion that a slight change is desirable, and we recommend that, subject to His Majesty's approval, the necessary legislative action should be taken to secure that His Majesty's title should henceforward read: "George V, by the Grace of God, of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."*

https://freemandelusion.com/wp-content/uploads/2020/11/balfour-agreement-1926.pdf

The *"Crown of the United Kingdom of Great Britain and Ireland"* became the *"Crown of the United Kingdom of Great Britain and Northern Ireland".* The Parliament in Westminster ceased to represent all of Ireland, which required a change in its style. Therefore, the ***Royal and Parliamentary Titles Act 1927 (17 Geo 5 c. 4)*** changed the style of Parliament, which would *"hereafter be known as and styled the Parliament of the United Kingdom of Great Britain and Northern Ireland"*. The change was incorporated in the ***Statute of Westminster 1931***.

> *"An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930. Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences. And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession*

to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."

At the Imperial Conference of 1949 it was agreed that *"it would not be necessary for each country to approve all the local variations of the title"* and further in 1952 it was again agreed that each country should adopt *"a form of Royal title suitable to its own circumstances"* but *"retain a substantial element which is common to all". These changes were agreed at the Imperial Conferences by "all the Dominions as of the Parliament of the United Kingdom." in accordance with the provisions of the second paragraph of the Statute of Westminster Adoption Act 1942, "...shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."*

https://freemandelusion.com/wp-content/uploads/2020/11/statute-of-westminster-act-1931.pdf

From the ***Royal Titles Act 1953 (UK)***:

"And whereas it was agreed between representatives of Her Majesty's Governments in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon assembled in London in the month of December, nineteen hundred and fifty-two, that there is need for an alteration thereof which, whilst permitting of the use in relation to each of those countries of a form suiting its particular circumstances, would retain a substantial element common to all."

Royal Titles Act 1953

1953 CHAPTER 9

An Act to provide for an alteration of the Royal Style and Titles.

[26th March 1953]

WHEREAS it is expedient that the style and titles at present appertaining to the Crown should be altered so as to reflect more clearly the existing constitutional relations of the members of the Commonwealth to one another and their recognition of the Crown as the symbol of their free association and of the Sovereign as the Head of the Commonwealth:

And whereas it was agreed between representatives of Her Majesty's Governments in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon assembled in London in the month of December, nineteen hundred and fifty-two, that there is need for an alteration thereof which, whilst permitting of the use in relation to each of those countries of a form suiting its particular circumstances, would retain a substantial element common to all:

Be it therefore enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same as follows:—

This element was retained in *"Her other realms and Territories"* and in *"Head of the Commonwealth"*, and all Commonwealth Nations STILL retain this today.

As stated in ***Re Patterson Ex parte Taylor [2001] HCA 51*** (at 226-227):

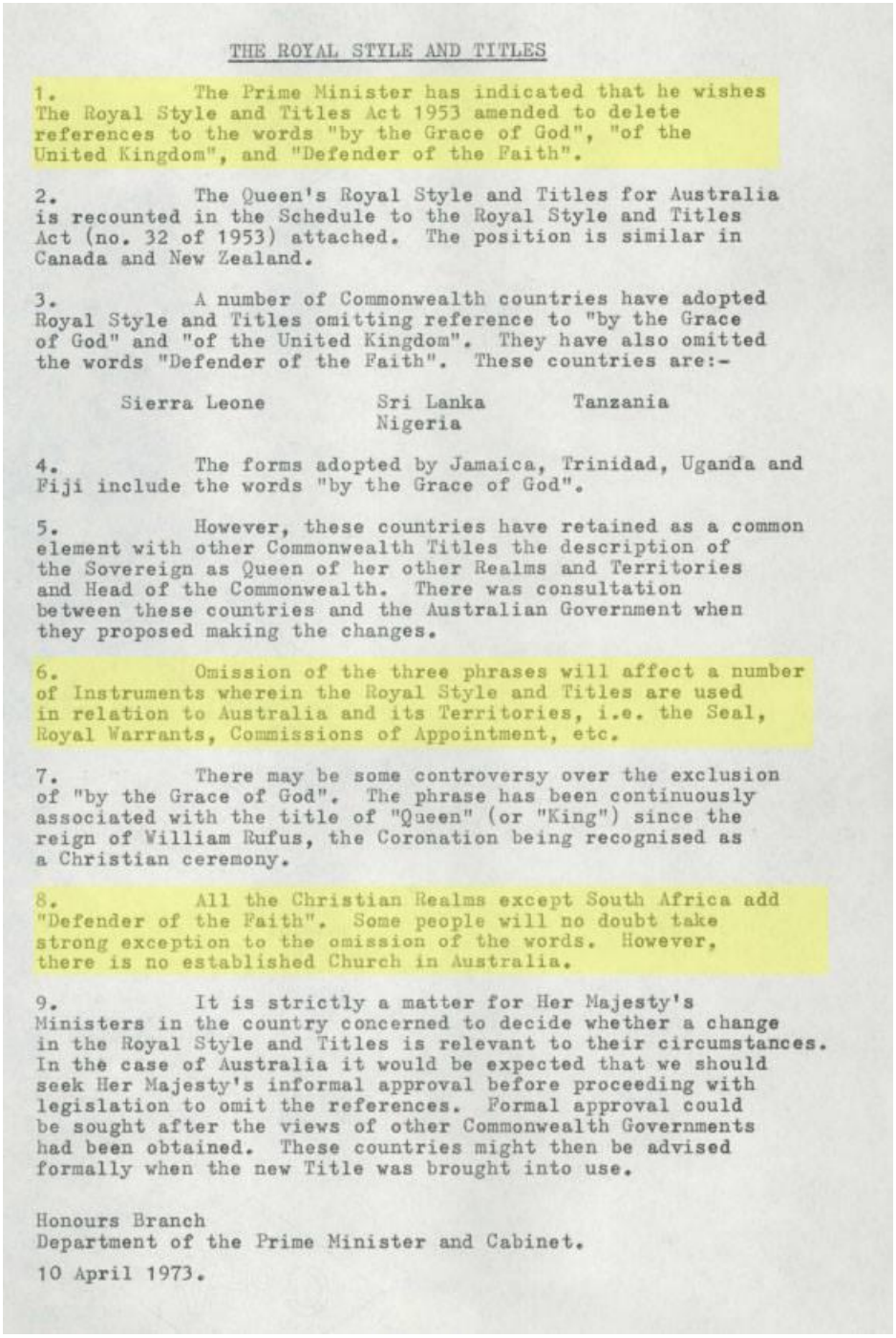
"Notions of allegiance as the factum upon which nationality laws and status turned were accommodated to international realities consequent upon the disappearance of the British Empire. Those realities were reflected in the Royal Style and Titles Act 1953 (Cth). This recited an

agreement reached at a meeting of British Commonwealth Prime Ministers in London in December 1952 that "the Style and Titles at present appertaining to the Crown are not in accord with current constitutional relationships within the British Commonwealth"."

https://freemandelusion.com/wp-content/uploads/2020/05/re-patterson-ex-parte-taylor-2001-hca-51.pdf

The amendment in 1973 did not alter this element, and was therefore within the powers of the particular parliament for this reason. It had to exclude (in the case of Australia) the Papal title given to King Henry VIII, *"Defender of the Faith"* because it was previously established that neither the Queen, the governor-general, or any state governor have any religious role in Australia. The Church of England lost its legal privileges in the Colony of New South Wales by the *Church Act* of 1836. Drafted by the reformist attorney-general John Plunkett, the act established legal equality for Anglicans, Catholics and Presbyterians and was later extended to Methodists. There never has been an established church in Australia, either before or since Federation in 1901. This amendment was reflective of one of the key differences from the Queen's role in England where she is the *Supreme Governor of the Church of England.*

It must be pointed out that it was the *Royal Style and Titles Act 1953* that added the word *"Australia"* to the Queen's style and titles, and the Queen became *Queen of Australia*. Popular mythology has it that it was Prime Minister Whitlam who did this with his *Royal Style and Titles Act 1973*, but that is simply not true. What Whitlam did was remove the words *"United Kingdom"* and *"Defender of the Faith"* from the 1953 style and titles as being no longer appropriate for use in Australia, but he added nothing to what was already there. He had wanted also to remove the words *"by the Grace of God"*, but the Queen would not hear of it.



THE ROYAL STYLE AND TITLES

1. The Prime Minister has indicated that he wishes The Royal Style and Titles Act 1953 amended to delete references to the words "by the Grace of God", "of the United Kingdom", and "Defender of the Faith".

2. The Queen's Royal Style and Titles for Australia is recounted in the Schedule to the Royal Style and Titles Act (no. 32 of 1953) attached. The position is similar in Canada and New Zealand.

3. A number of Commonwealth countries have adopted Royal Style and Titles omitting reference to "by the Grace of God" and "of the United Kingdom". They have also omitted the words "Defender of the Faith". These countries are:-

Sierra Leone Sri Lanka Tanzania
Nigeria

4. The forms adopted by Jamaica, Trinidad, Uganda and Fiji include the words "by the Grace of God".

5. However, these countries have retained as a common element with other Commonwealth Titles the description of the Sovereign as Queen of her other Realms and Territories and Head of the Commonwealth. There was consultation between these countries and the Australian Government when they proposed making the changes.

6. Omission of the three phrases will affect a number of Instruments wherein the Royal Style and Titles are used in relation to Australia and its Territories, i.e. the Seal, Royal Warrants, Commissions of Appointment, etc.

7. There may be some controversy over the exclusion of "by the Grace of God". The phrase has been continuously associated with the title of "Queen" (or "King") since the reign of William Rufus, the Coronation being recognised as a Christian ceremony.

8. All the Christian Realms except South Africa add "Defender of the Faith". Some people will no doubt take strong exception to the omission of the words. However, there is no established Church in Australia.

9. It is strictly a matter for Her Majesty's Ministers in the country concerned to decide whether a change in the Royal Style and Titles is relevant to their circumstances. In the case of Australia it would be expected that we should seek Her Majesty's informal approval before proceeding with legislation to omit the references. Formal approval could be sought after the views of other Commonwealth Governments had been obtained. These countries might then be advised formally when the new Title was brought into use.

Honours Branch
Department of the Prime Minister and Cabinet.
10 April 1973.

Both the 1953 and 1973 amendments to the *Royal Titles and Styles Acts* were ***reserved for her majesty's pleasure***. The ***Royal Style and Titles Act 1953*** was assented to on the April 3rd 1953, and Proclaimed in the Government Gazette ***(No 21, 9 April 1953)***

https://freemandelusion.com/wp-content/uploads/2019/06/rstact1953.pdf

No. 32 of 1953.

AN ACT

Relating to the Royal Style and Titles.

Assented to

Elizabeth R

April 3rd 1953.

The *Royal Style and Titles Act 1953* was repealed by the *Statute Law Revision Act 1973* (No. 216, 1973) vide the enactment of the *Royal Style and Titles Act 1973*. Elizabeth II personally Assented to, and made the Proclamation for the ***Royal Style and Titles Act 1973*** while in Australia on the 19th October 1973.

https://freemandelusion.com/wp-content/uploads/2019/06/c2004a00044.pdf

The Proclamation was published in the Government Gazette ***(No 152, 19 October 1973)***. along with the Royal Warrant and Proclamation for the Great Seal of Australia.

Elizabeth R

19 October 1973

Royal Style and Titles Act 1973

No. 114 of 1973

https://freemandelusion.com/wp-content/uploads/2020/09/seal.pdf

Hopes v Australian Securities and Investments Commission [2016] WASC 198 provides an excellent analysis of the historical perspective (from 42):

"A history of the royal style and titles of the monarch is summarised in two works by Professor Anne Twomey: The Chameleon Crown – the Queen and Her Australian Governors (2006) (chapter 9) and The Australia Acts 1986: Australia's Statutes of Independence (chapter 6). The history is partly recorded in the second reading speeches for the Bills that became the Royal Style and Titles Act 1953 (Cth) (the 1953 Act) and the 1973 Act and, so far as is relevant to Australia, can be traced in a succession of legislative enactments: the Royal and Parliamentary Titles Act 1927 (Imp), the Statute of Westminster 1931 (UK), the Royal Style and Titles (Australia) Act 1947 (Cth), the 1953 Act and the 1973 Act.

Briefly stated, the royal style and titles of the monarch were originally determined in the United Kingdom. The Royal and Parliamentary Titles Act authorised the King to issue a royal proclamation altering the royal style and titles in accordance with recommendations made by an Imperial Conference. The change authorised by the Act was declared in Australia by way of proclamation in June 1927 (Twomey, The Chameleon Crown, 104). The object of the Statute of Westminster was to 'give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930'. The preamble to the Statute then recorded a convention agreed at those Conferences: "And whereas it is meet and proper to set out by way of preamble to this Act that … it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

The purpose of the Royal Style and Titles (Australia) Act was to give assent to an alteration in the royal style and title consequent upon the enactment of the Indian Independence Act 1947 (UK). The preamble to the Act recited that the Act gave effect to the convention recognised in the preamble to the Statute of Westminster. The 1953 Act gave effect to a further agreement made at a Prime Ministers' conference held in London in December 1952. It was agreed that each member country of the British Commonwealth should use, for its own purposes, a form of the royal style and titles that suited its particular circumstances but retained a substantial element that was common to all countries. The preamble to the 1953 Act again recited the convention recorded in the Statute of Westminster and the agreement made at the Prime Ministers' London conference. Section 4(1) of the Act provided for the assent of the Commonwealth Parliament to the adoption by the Queen, for use in relation to the Commonwealth of Australia and its Territories, the style and titles set out in the schedule to the Act and to the issue of a royal proclamation. The royal style and titles provided for in the schedule was 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. Accordingly, the style and titles of the Queen under the 1953 Act included a reference to 'Queen of Australia'.

Section 2(1) of the 1973 Act also provided for the assent of the Commonwealth Parliament to be given to the adoption by the Queen of the royal style and titles set out in the schedule in lieu of the royal style and titles set out in the schedule to the 1953 Act and for the issue by the Queen of a royal proclamation for that purpose. The royal style and titles provided for in the schedule was 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth'. The second and third reading speeches for the Bill that became the 1973 Act indicated that it was proposed that the Queen would sign the proclamation and personally give assent to the Bill during a forthcoming trip to Australia. That occurred in

October 1973 (Twomey, The Chameleon Crown, 109; Commonwealth, Government Gazette, No 152 (19 October 1973) 5)."

The case also provides a summary on the power to enact the 1973 Act (from 51). As noted, the royal style and titles was actually adopted by royal proclamation – that is, by a prerogative act of the Queen, and was within the executive power of the Commonwealth by its very subject matter and within the legislative power of the Commonwealth as either incidentally conferred by section 51(xxxix) of the Constitution, or deduced from the nature and status of the Commonwealth as a national polity.

"Professor Twomey noted that a briefing paper prepared by the Commonwealth Attorney-General's Department in 1974 identified four sources of power to enact the 1973 Act (The Australia Acts, 452, citing Commonwealth Attorney-General's Department, Briefing Paper, 'The Queen of Queensland', November 1974, National Archives of Australia, 1209 1974/6962):

- *(a) the Statute of Westminster 'as adopted by the Australian Parliament in 1942 in its character as a basic constitutional instrument modifying and extending the Constitution Act of 1900';*
- *(b) an 'inherent power of the Commonwealth to provide for matters essentially involved in its existence as a self-governing Dominion under the sovereignty of the Queen within the Commonwealth of Nations';*
- *(c) the incidental powers conferred on the Parliament by s 51(xxxix) of the Constitution in relation to such provisions as s 1 and s 61; and*
- *(d) possibly, the external affairs power conferred by s 51(xxix).*

Professor Twomey, in The Chameleon Crown, expressed doubt as to whether the Statute of Westminster conferred legislative power on the Commonwealth Parliament to enact the 1973 Act, either by reason of the preamble or the provisions of s 2. Although the external affairs power supported the Australia Act 1986 (Cth), Professor Twomey dismissed the suggestion that the Commonwealth Parliament was empowered to enact the 1973 Act by s 51(xxix) of the Constitution. As she observed, it is difficult to characterise the subject matter of an Act that deals with the title of the Queen of Australia as an external affair (although see Freeman D, 'The Queen and her dominion successors: the law of succession to the throne in Australia and the Commonwealth of Nations (2002) 4(3) CLPR 28). Accordingly, Professor Twomey prefers the 'nationhood' power as the head of power to support the 1973 Act 'either characterised as an inherent power deriving from the status of the Commonwealth as a nation to deal with national matters such as the flag, anthem or the celebration of a bicentenary, or as a legislative power, under s 51(xxxix) of the Australian Constitution, to enact laws incidental to the executive power of the Commonwealth' (The Chameleon Crown, 110).

*The reference to an inherent power to deal with matters such as the 'flag, anthem or the celebration of a bicentenary' is apparently a reference to the reasoning of the Mason CJ, Deane and Gaudron JJ in **Davis v The Commonwealth [1988] HCA 63**; (1988) 166 CLR 79. Their Honours concluded that the commemoration of the Bicentenary fell squarely within Commonwealth executive power as a 'matter falling within the peculiar province of the Commonwealth in its capacity as the national and federal government' (94). Consequently, the incidental power conferred by s 51(xxxix) of the Constitution supported the enactment of the Australian Bicentennial Authority Act 1980 (Cth). Further, it was considered that it might have been possible*

*to conclude that the legislation was validly enacted without recourse to s 51(xxxix) as the 'requisite legislative power may be deduced from the nature and status of the Commonwealth as a national polity' (95) as 'the legislative powers of the Commonwealth extend beyond the specific powers conferred upon the Parliament by the Constitution and include such powers as may be deduced from the establishment and nature of the Commonwealth as a polity' (93). The 'nationhood power' is a term that has been given by academic writers to the power recognised in that case and in earlier authorities, particularly in the judgments of Mason J and Jacobs J in **Victoria v The Commonwealth and Hayden [1975] HCA 52**; (1975) 134 CLR 338. The scope of the Commonwealth's executive power has been subsequently considered in a series of cases challenging legislation to give effect to various Commonwealth programmes and most recently, in relation to a claim for damages for wrongful imprisonment commenced by a refugee claimant who was detained on an Australian border protection vessel: **Pape v Commissioner of Taxation [2009] HCA 23**; (2009) 238 CLR 1; **Williams v The Commonwealth [No 1] [2012] HCA 23**; (2012) 248 CLR 156; **Williams v The Commonwealth [No 2] [2014] HCA 23**; (2014) 252 CLR 416 and **CPCF v Minister for Immigration & Border Protection [2015] HCA 1**; (2015) 89 ALJR 207; (2015) 316 ALR 1.*

I do not consider that it is necessary to further explore the scope of the Commonwealth's executive power and the incidental power conferred by s 51(xxxix), read with s 61, or the 'nationhood' power as discussed in those cases for two reasons. First, the royal style and titles referred to in the schedule to the 1973 Act was actually adopted by royal proclamation – that is, by a prerogative act of the Queen. As French CJ observed in Pape, the executive power of the Commonwealth Government includes the prerogatives of the Crown [126] – [127]. Second, there is nothing in the authorities to which I have referred that suggests that the style and titles of the monarch to be adopted in Australia is a matter that is outside the executive and legislative powers of the Commonwealth. The 1973 Act (and the 1953 Act) were within the executive power of the Commonwealth by their very subject matter and within the legislative power of the Commonwealth as either incidentally conferred by s 51(xxxix) or deduced from the nature and status of the Commonwealth as a national polity."

https://freemandelusion.com/wp-content/uploads/2020/11/hopes-v-australian-securities-and-investments-commission-2016-wasc-198.pdf

Nevertheless, there is an abundance of cases in which the premise that the change in titles made all subsequent legislation invalid, all of which are available on this website under the Tag "***The Queen of Australia***". Some were listed in ***Petrie; Trustee of the property of Aitken (Bankrupt) v Aitken & Ors [2019] FCCA 16***:

"...allegations that the plaintiff was prosecuting provisions of law that are not recognised by the Commonwealth Constitution, and was making fraudulent misrepresentations of their nature and standing, that there are no acts or provisions made recognised by the Constitution from a time in 1973 upon using the Queen of Australia for Royal Assent, that the action was a departure from the constitutional law, that the Queen of Australia is not a legal personality and that name cannot be placed on court documents, and that, effectively, laws passed since the Royal Style and Titles Act 1973 are invalid and, judges and magistrates in Western Australia have taken an alternate or extra jurisdictional oath in contempt of the Commonwealth of Australian

Constitution Act, and such office bearers have not been lawfully installed by a deputy governor or administrator commissioned under the Queen of Australia."

*These or similar submissions, in relation to both State and Commonwealth Acts, using the same grounds or variants thereof have been made in a large number of cases and characterised over a period of almost 17 years as having no basis in law by Commonwealth courts: **Joosse & Anor v Australian Securities and Investment Commission [1998] HCA 77; (1998) 159 ALR 260**; **Helljay Investments Pty Ltd v Deputy Commissioner of Taxation [1999] HCA 56**; **McKewin's Hairdressing and Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation [2000] HCA 27; (2000) 171 ALR 335**; and State courts: **Hedley v Spivey [2011] WASC 325**; **Shaw v Jim McGinty in his capacity as Attorney General & Anor [2006] WASCA 231**; **Glew & Anor v Shire of Greenough [2006] WASCA 260** (special leave refused: **Glew v Shire of Greenough [2007] HCATrans 520**); **Glew Technologies Pty Ltd v Department of Planning and Infrastructure [2007] WASCA 289**; **Glew v City of Greater Geraldton [2012] WASCA 94**; **Glew v Frank Jasper Pty Ltd [2012] WASCA 93**; **Krysiak v Hodgson [2009] WASCA 114**; **Glew v The Governor of Western Australia [2009] WASC 14**; **Glew v Frank Jasper Pty Ltd [2010] WASCA 87**; **O'Connell v The State of Western Australia [2012] WASCA 96**; **Hedley v Spivey [2012] WASCA 116**; **Bell v Cribb [2012] WASCA 234**; and also by courts in other jurisdictions: **Meads v Meads [2012] ABQB 571**.*

Some of these cases dealt with submissions relating to the alleged constitution invalidity, particularly since the Royal Style and Titles Act 1973 (Cth) of, inter alia, the ITAA, the TAA and various state courts. In each case the points sought to be agitated were found not to be arguable, as are the defendant's submissions in this case. Accordingly, I reject the submission that the ITAA or the TAA are invalid on Constitutional grounds and that the writ is in some way invalid because it refers to the Queen of Australia.

https://freemandelusion.com/wp-content/uploads/2019/05/petrie-trustee-of-the-property-of-aitken-bankrupt-v-aitken-ors-2019-fcca-16.pdf

In what is likely the first of these cases to be heard by the High Court, and subsequently referred to in many cases in the Supreme Courts, was in ***Joosse & Anor v Australian Securities and Investment Commission [1998] HCA 77***. Hayne J. rejected the notion that the change in titles worked any fundamental constitutional change (at 20):

"As I have noted earlier, the second of the three themes identified by the applicants relies on the Royal Style and Titles Act. As I understand it, the principal burden of the argument is that an Act of Parliament, changing the style or title by which the Queen is to be known in Australia, worked a fundamental constitutional change. The fact is, it did not. So far as Commonwealth legislation is concerned, it is ss 58, 59 and 60 of the Constitution that deal with the ways in which the Royal Assent may be given to bills passed by the other elements of the Federal Parliament. So far as now relevant, s 58 governs. It provides that the Governor-General "shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name". And there is no material that would suggest that has not been done in the case of each Commonwealth Act that now is challenged."

https://freemandelusion.com/wp-content/uploads/2020/07/joosse-v-australian-securities-and-investment-commission-1998-hca-77.pdf

This decision has been referred to in cases such as ***Conroy v Deputy Commissioner of Taxation [2005] QSC 206***:

> *"The argument is that the Governor- General was appointed by commission by the Queen as Queen of Australia and that there is no-one answering that description having any legal role in the constitutional or legal affairs of this country. The argument is one which has been raised a number of times and it can, I think, be seen set out in somewhat more extensive form in the judgment of the Chief Justice of South Australia in Money Tree Management Systems Pty Ltd v Deputy Commissioner of Taxation [2000] SASC 54.*
>
> *The argument, wherever it has been raised, has been rejected. I, with respect, adopt what was said by the Chief Justice of South Australia in that case. The position is, in my view, clear that the Queen acts in her capacity as Queen of Australia using that style or title in exercising the relevant powers and I reject this argument. I also refer to the judgment of Hayne J in Joosse and Anor v Australian Securities and Investment Commission (1998) 159 ALR 260. I also reject the argument that the great seal of Australia is not the correct seal for use by the Queen. This argument is based upon a similar premise to the first argument and, in my view, also has to be rejected.*

Lamont v Bright [2002] HCATrans 229:

> *MR. LAMONT: Further, my notice of motion of 27 March seeks to have this Court answer a number of questions applicable to the Queen's title, role and authority as identified in the Commonwealth of Australia Constitution Act. It is my submission that the Queen of Australia is not a recognisable entity within the Commonwealth of Australia Constitution Act 1900 and at no time since that Act's implementation has the United Kingdom Parliament suitably amended that Act so as to recognise a Queen of Australia.*
>
> *The letters patent of 1984 signed by Prime Minister Hawke identifies only the Queen of Australia and the Great Seal of Australia, both having no nexus to the Commonwealth of Australia Constitution Act and are so ultra vires. It is to this end that I have applied to this Court to have the current proceedings before the Family Court removed, in part, to this Court so that the matters arising under the Constitution and certain treaties to which Australia has ratified our acceptance can be dealt with more fully and appropriately.*
>
> *HIS HONOUR: Arguments similar in principle but not in detail to those now relied on by the applicant were considered and rejected by Justice Hayne of this Court in Joosse v ASIC in a judgment with which I fully agree. The questions that the applicant seeks to argue do not, in my view, have sufficient prospects of success to warrant removal into this Court and taking up the time of the Justices of the Court. Even if I thought that the applicant had an arguable case, which I do not, I would not order the removal of the Family Court proceedings.*

Nibbs v Devonport City Council [2015] TASSC 34:

> *"The Queen's title in the Commonwealth of Australia was changed, firstly by the Royal Style and Titles Act 1953 (Cth), and again by the Royal Style and Titles Act 1973 (Cth). Following those changes, Her Majesty's title was Elizabeth II, by the Grace of God Queen of Australia and her other Realms and Territories, Head of the Commonwealth. For some, that left room for argument*

about Her Majesty's title in the States, what power the British monarch could exercise in and in relation to those States, and whether the relationship of Australian States to the Crown was truly independent of the relationship of the Commonwealth to the Crown: see for instance Commonwealth v Queensland [1975] HCA 43; (1975) 134 CLR 298 (the 'Queen of Queensland Case') 409 The Australia Act 1986 (UK) repealed the Imperial Colonial Laws Validity Act 1865. Thereafter there were no residual powers or responsibilities of the United Kingdom in relation to Australian States. Generally, the provisions of the Australia Act (UK) left a discrete Australian monarchy."

Final Report of the Constitutional Commission 1988

The following is an extract from ***Volume 1 of the Final Report of the Constitutional Commission 1988.*** The report was forwarded to the the then Attorney-General of the Commonwealth of Australia, The Hon Lionel Bowen MP, on 30 June 1988. Authors of the report include Sir Maurice Byers CBE QC, Professor Enid Campbell OBE, The Hon Sir Rupert Hamer KCMG, The Hon E G Whitlam AC QC and Professor Leslie Zines.

Effect of independent nationhood

2.129 The sovereign status of Australia resulted in the rejection of earlier colonial restrictions on the interpretation of the powers of the Commonwealth. It has been declared by a number of High Court judges that the Governor-General, as the Queen's representative, possesses the prerogatives of the Crown relevant to the Federal Government's sphere of responsibility, which includes, for example, all matters relating to external affairs. (See eg Barton v Commonwealth (1974) 131 CLR 477, 498 (Mason J); Victoria v Commonwealth and Hayden (1975) 134 CLR 338, 406 (Jacobs J); New South Wales v Commonwealth (1975) 135 CLR 337.373 (Barwick C J)

2.130 The development of Australian nationhood did not require any change to the Australian Constitution. It involved, in part, the abolition of limitations on constitutional power that were imposed from outside the Constitution, such as the Colonial Laws Validity Act 1865 (Imp) and restricting what otherwise would have been the proper interpretation of the Constitution, by

virtue of Australia's status as part of the Empire. When the Empire ended and national status emerged, the external restrictions ceased, and constitutional powers could be given their full scope.

2.131 Sir Garfield Barwick has described the result, in relation to the Framers' purpose in drafting the Constitution as follows:

The Constitution was not devised for the immediate independence of a nation. It was conceived as the Constitution of an autonomous Dominion within the then British Empire. Its founders were not to know of the two world wars which would bring that Empire to an end. But they had national independence in mind. Quite apart from the possible disappearance of the Empire, they could confidently expect not only continuing autonomy but approaching independence. This came within 30 years. They devised a Constitution which would serve an independent nation. It has done so, and still does. (See PH Lane, The Australian Constitution (1986) viii.)

2.132 As a result of federal legislation all appeals to the Privy Council from Australian courts exercising federal jurisdiction were abolished in 1968 (Privy Council (Limitation of Appeals/Act 1968 (Cth)). All appeals from any decision of the High Court (other than those where a certificate might be granted under section 74 of the Constitution) were terminated by the Privy Council (Appeals from the High Court) Act 1975 (Cth).

2.133 The growth to full national status, of course, did not affect the position of the Commonwealth as a community under the Crown. While the preceding events dissolved most of the constitutional links with the British Government, those with the Sovereign remain.

2.134 Indeed the notion of the Crown pervades the Constitution. The preamble recites that the people of the named colonies had agreed to unite in a Federal Commonwealth under the Crown. The Queen is empowered by section 2 of the Constitution to appoint a Governor-General who 'shall be Her Majesty's representative'. Section 61 of the Constitution vests the executive power of the Commonwealth in the Queen and declares that it is exercisable by the Governor-General as the Queen's representative.

2.135 These powers are, of course, consistent with British constitutional practice, exercised on the advice of Australian Ministers (except in those very rare cases which are said to come within the 'reserve powers' of the Crown). On those occasions when the Queen acts in her own capacity, such as in appointing the Governor-General, she also acts on the advice of Australian Ministers, rather than British ones, in accordance with the principle established at the Imperial Conference of 1926.

2.136 The position of the Queen as the Sovereign of a number of independent realms was recognised at a conference of Prime Ministers and other representatives of the nations of the Commonwealth in December 1952 where it was agreed that each country should adopt a form of Royal title suitable to its own circumstances. As a result, the legislation of each country of the Commonwealth (other than Pakistan which expected to become a republic) included for the first time a reference in its Royal Style and Titles to the particular country which enacted the legislation.

2.137 The Royal Style and Titles Act 1953 (Cth), therefore, for the first time referred to the Queen as 'Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith'. As a result of amendments made in 1973 (Royal Style and Titles Act 1973) the present Royal Style and Titles in Australia are 'Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.'

2.138 The disappearance of the British Empire has therefore meant that the Queen is now Sovereign of a number of separate countries such as the United Kingdom, Canada, Australia, New Zealand and Papua New Guinea, amongst others. As Queen of Australia she holds an entirely distinct and different position from that which she holds as Queen of the United Kingdom or Canada. The separation of these 'Crowns' is underlined by the comment of Gibbs CJ in Pochi v Macphee (1982) 151 CLR 101,109. that 'The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia.'

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Sue V Hill [1999] HCA 30

The following is an extract of the High Court decision (High Court of Australia, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ - ***Sue v Hill [1999] HCA 30*** relating to the Henry (Nai Leung) Sue - Petitioner and Heather Hill & Anor Respondents case in which Heather Hill lost her right to take her place in the Senate post the 1998 Federal election. The High Court confirmed that the Queen of Australia does not act as a foreign Queen. One of the main arguments that was raised by Heather Hill was that the Queen of Australia is the same person as the Queen of the United Kingdom and Northern Ireland. Therefore swearing allegiance to the Queen of Australia was the same as swearing allegiance to the Queen of the United Kingdom and Northern Ireland. This argument was rejected by the Court on the basis that whilst physically it is the same person (Queen Elizabeth II) they are "independent and distinct" legal personalities. This notion is known as the divisibility of the Crown which Justice Gaudron found to be *"implicit in the Constitution."*

74. We turn now to the position of the Crown in relation to the government of the Commonwealth. Section 2 of the Constitution states:

"A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution , such powers and functions of the Queen as Her Majesty may be pleased to assign to him." (emphasis added)

It has been accepted, at least since the time of the appointment of Sir Isaac Isaacs in 1931, that in making the appointment of a Governor-General the monarch acts on the advice of the Australian Prime Minister [1]. The same is true of the exercise of the power vested by s4 of the Constitution in the monarch to appoint a person to administer the government of the Commonwealth and the power given to the monarch by s126 to authorise the Governor-General to appoint deputies within any part of the Commonwealth.

75. Section 58 makes provision for the Governor-General to reserve a "proposed law passed by both Houses of the Parliament" for the Queen's pleasure, in which event the law shall not have any force unless and until, in the manner prescribed by s60, the Governor-General makes known the receipt of the Queen's assent. Further, s59 provides for disallowance by the Queen of any law within one year of the Governor-General's assent. The text of the Constitution is silent as to the identity of the Ministers upon whose advice the monarch is to act in these respects.

76. As indicated when dealing earlier in these reasons with the former position of the States, provisions in colonial constitutional arrangements for reservation and disallowance had been designed to ensure surveillance of colonial legislatures by the Imperial Government. The convention in 1900 was that the monarch, in relation to such matters, would act on the advice of a British Minister. That advice frequently was given after consultation between the Colonial Office and the Ministry in the colony in question [2]. With respect to the Commonwealth, the whole convention, like that respecting the appointment of Governors-General, changed after the Imperial Conference of 1926 [3].

77. As early as 1929, it was stated in the Report of the Royal Commission on the Constitution [4] with reference to the provisions of ss 58 and 59 of the Constitution that "in virtue of the equality of status which, from a constitutional as distinct from a legal point of view, now exists between Great Britain and the self-governing Dominions as members of the British Commonwealth of Nations, and on the principles which are set out in the Report submitted by the Inter-Imperial Relations Committee to the Imperial Conference in 1926", for "British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter appertaining to the affairs of the Commonwealth" would "not be in accordance with constitutional practice".

78. Whilst the text of the Constitution has not changed, its operation has. This reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the United Kingdom. The Constitution speaks to the present and its interpretation takes account of and moves with these developments. Hence the statement by Gibbs J in Southern Centre of Theosophy Inc v South Australia [5], with reference to the Royal Style and Titles Act I973 (Cth), that:

"[i]t is right to say that this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia".

79. It remains to consider the provision in s 122 of the Constitution whereby the Parliament may make laws, among other things, "for the government of any territory ... placed by the Queen under the authority of and accepted by the Commonwealth". The requirement of acceptance by the Commonwealth and, earlier in s 122, the reference to the surrender of territory by a State and the acceptance thereof by the Commonwealth serve to confirm the placement "by the Queen" of a territory under the authority of the Commonwealth as being a dispositive act by the Crown acting on other than Australian advice.

80. For example, what had been the Crown Colony of British New Guinea was by Imperial instruments placed under the authority of the Commonwealth after the Senate and the House

had passed resolutions authorising the acceptance of British New Guinea as a territory of the Commonwealth [6]. The procedures adopted for the acquisition of Christmas Island and the Cocos (Keeling) Islands reflected the Statute Of Westminster Adoption Act 1942 (Cth). They involved, as a first step, the passage of the Christmas Island (Request and Consent) Act 1957 (Cth) and the Cocos (Keeling) Islands (Request and Consent) Act 1954 (Cth). The Parliament of the Commonwealth thereby requested and consented to an enactment by the Parliament of the United Kingdom enabling the Queen to place the respective islands under the authority of the Commonwealth. There followed the passage of the Cocos Islands Act 1955 (UK) and the Christmas Island Act 1958 (UK) [7].

81. The point is that the reference to "the Queen" in s122 to distinguish the sovereign from "the Commonwealth" indicates within the structure of the Constitution itself a recognition of the involvement of the Crown in distinct bodies politic.

82. Nevertheless, it is submitted for Mrs Hill that the reference in the preamble to the Constitution Act to unification "in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established" and the identification in covering cl 2 to the heirs and successors of Queen Victoria in the sovereignty of the United Kingdom have a special and immutable significance for the construction of s44(i) of the Constitution. This is said to be so notwithstanding, as we have indicated, that in the regal capacities for which provision is made by the constitutions of the Commonwealth and the States, the sovereign acts on Australian ministerial advice.

The meaning of "the Crown" in constitutional theory

83. Accordingly, it is necessary to say a little as to the senses in which the expression "the Crown" is used in constitutional theory derived from the United Kingdom. In its oldest and most specific meaning, "the Crown" is part of the regalia which is "necessary to support the splendour and dignity of the Sovereign for the time being", is not devisable and descends from one sovereign to the next [8]. The writings of constitutional lawyers at the time show that it was well understood in 1900, at the time of the adoption of the Constitution, that the term "the Crown" was used in several metaphorical senses. "We all know", Lord Penzance had said in 1876, "that the Crown is an abstraction" [9], and Maitland, Harrison Moore, Inglis Clark and Pitt Cobbett, amongst many distinguished constitutional lawyers, took up the point.

84. The first use of the expression "the Crown" was to identify the body politic. Writing in 1903, Professor Pitt Cobbett [10] identified this as involving a "defective conception" which was "the outcome of an attempt on the part of English law to dispense with the recognition of the State as a juristic person, and to make the Crown do service in its stead". The Constitution, in identifying the new body politic which it established, did not use the term "the Crown" in this way. After considering earlier usages of the term in England and in the former American colonies, Maitland rejoiced in the return of the term "the Commonwealth" to the statute book. He wrote in 1901 [11]:

"There is no cause for despair when 'the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland'. We may miss the old words that were used of Connecticut and Rhode Island:

'one body corporate and politic in fact and name'; but 'united in a Federal Commonwealth under the name of the Commonwealth of Australia' seems amply to fill their place. And a body politic may be a member of another body politic."

85. The second usage of "the Crown" is related to the first and identifies that office, the holder of which for the time being is the incarnation of the international personality of a body politic, by whom and to whom diplomatic representatives are accredited and by whom and with whom treaties are concluded. The Commonwealth of Australia, as such, had assumed international personality at some date well before the enactment of the Australia Act. Differing views have been expressed as to the identification of that date [12] but nothing turns upon the question for present purposes. Since 1987, the Executive branch of the Australian Government has applied s61 of the Constitution (which extends to the maintenance of the Constitution) consistently with the views of Inglis Clark expressed over 80 years before [13] and the Governor-General has exercised the prerogative powers of the Queen in regard to the appointment and acceptance, or recall, of diplomatic representatives and the execution of all instruments relating thereto [14].

86. In State Authorities Superannuation Board v Commissioner of State Taxation (WA) , McHugh and Gummow JJ said [15]:

"Questions of foreign state immunity and of whether an Australian law, upon its true construction, purports to bind a foreign state now should be approached no differently as regards those foreign states which share the same head of state than it is for those foreign states which do not[16]. This is consistent with the reasoning and outcome in Nolan v Minister for Immigration and Ethnic Affairs [17]."

87. Thirdly, the term "the Crown" identifies what Lord Penzance in Dixon called "the Government" [18], being the executive as distinct from the legislative branch of government, represented by the Ministry and the administrative bureaucracy which attends to its business. As has been indicated, under the Constitution the executive functions bestowed upon "the Queen" are exercised upon Australian advice.

88. The fourth use of the term "the Crown" arose during the course of colonial development in the nineteenth century. It identified the paramount powers of the United Kingdom, the parent state, in relation to its dependencies. At the time of the establishment of the Commonwealth, the matter was explained as follows by Professor Pitt Cobbett in a passage which, given the arguments presented in the present matters, merits full repetition [19]:

"In England the prerogative powers of the Crown were at one time personal powers of the Sovereign; and it was only by slow degrees that they were converted to the use of the real executive body, and so brought under control of Parliament. In Australia, however, these powers were never personal powers of the King; they were even imported at a time when they had already to a great extent passed out of the hands of the King; and yet they loom here larger than in the country of their origin. The explanation would seem to be that, in the scheme of colonial government, the powers of the Crown and the Prerogative really represent, - not any personal powers on the part of the Sovereign, - but those paramount powers which would naturally belong to a parent State in relation to the government of its dependencies; although owing to the failure of the common law to recognise the personality of the British 'State' these powers had to be

asserted in the name and through the medium of the Crown. This, too, may serve to explain the distinction, subsequently referred to, between the 'general' prerogative of the Crown, which is still wielded by Ministers who represent the British State, and who are responsible to the British Parliament, - and what we may call the 'colonial' prerogative of the Crown, which, although consisting originally of powers reserved to the parent State, has with the evolution of responsible government, been gradually converted to the use of the local executive, and so brought under the control of the local Legislature, except on some few points where the Governor [20] is still required to act not as a local constitutional Sovereign but as an imperial officer and subject to an immediate responsibility to his imperial masters. [21]"

89. What Isaacs J called the "Home Government" ceased before 1850 to contribute to the expenses of the colonial government of New South Wales [22]. On the grant of responsible government, certain prerogatives of the Crown in the colony, even those of a proprietary nature, became vested "in the Crown in right of the colony", as Jacobs J put it in New South Wales v The Commonwealth [23]. Debts might be payable to the exchequer of one government but not to that of another and questions of disputed priority could arise [24]. Harrison Moore, writing in 1904, observed [25]:

"So far as concerns the public debts of the several parts of the King's dominions, they are incurred in a manner which indicates the revenues out of which alone they are payable, generally the Consolidated Revenue of the borrowing government; and the several Colonial Statutes dealing with suits against the government generally limit the jurisdiction of the Court to 'claims against the Colonial Government,' or to such claims as are payable out of the revenue of the colony concerned ..."

Section 105 of the Constitution provided for the Parliament to take over from the States their public debts "as existing at the establishment of the Commonwealth" [26].

90. The expression "the Crown in right of ..." the government in question was used to identify these newly created and evolving political units [27]. With the formation of federations in Canada and Australia it became more difficult to continue to press "the Crown" into service to describe complex political structures. Harrison Moore identified "the doctr ine of unity and indivisibility of the Crown" as something "not persisted in to the extent of ignoring that the several parts of the Empire are distinct entities" [28]. He pointed to the "inconvenience and mischief" which would follow from rigid adherence to any such doctrine where there were federal structures and continued [29]:

"The Constitutions themselves speak plainly enough on the subject. Both the British North America Act and the Commonwealth of Australia Constitution Act recognize that 'Canada' and the 'Provinces' in the first case, the 'Commonwealth' and the 'States' in the second, are capable of the ownership of property, of enjoying rights and incurring obligations, of suing and being sued; and this not merely as between the government and private persons, but by each government as distinguished from and as against the other this in fact is the phase of their personality with which the Constitutions are principally concerned. Parliament has unquestionably treated these entities as distinct persons, and it is only by going behind the Constitution that any confusion of personalities arises."

91. It may be thought that in this passage lies the seed of the doctrine later propounded by Dixon J in Bank of New South Wales v The Commonwealth [30], and applied in authorities including Crouch v Commissioner for Railways (Q) [31] and Deputy Commissioner of Taxation v State Bank (NSW) [32], that the Constitution treats the Commonwealth and the States as organisations or institutions of government possessing distinct individuality. Whilst formally they may not be juristic persons, they are conceived as politically organised bodies having mutual legal relations and are amenable to the jurisdiction of courts exercising federal jurisdiction. The employment of the term "the Crown" to describe the relationships inter se between the United Kingdom, the Commonwealth and the States was described by Latham CJ in 1944 [33] as involving "verbally impressive mysticism". It is of no assistance in determining today whether, for the purposes of the present litigation, the United Kingdom is a "foreign power" within the meaning of s 44(i) of the Constitution.

92. Nearly a century ago, Harrison Moore said that it was likely that Australian draftsmen would be likely to avoid use of the term "Crown" and use instead the terms "Commonwealth" and "State" [34]. Such optimism has proved misplaced. That difficulties can arise from continued use of the term "the Crown" in State legislation is illustrated by The Commonwealth v Western Australia [35]. However, no such difficulties need arise in the construction of the Constitution.

93. The phrases "under the Crown" in the preamble to the Constitution Act and "heirs and successors in the sovereignty of the United Kingdom" in covering cl 2 involve the use of the expression "the Crown" and cognate terms in what is the fifth sense. This identifies the term "the Queen" used in the provisions of the Constitution itself, to which we have referred, as the person occupying the hereditary office of Sovereign of the United Kingdom under rules of succession established in the United Kingdom. The law of the United Kingdom in that respect might be changed by statute. But without Australian legislation, the effect of s1 of the Australia Act would be to deny the extension of the United Kingdom law to the Commonwealth, the States and the Territories.

94. There is no precise analogy between this state of affairs and the earlier development of the law respecting the monarchy in England, Scotland and Great Britain. It has been suggested [36]:

"The Queen as monarch of the United Kingdom, Canada, Australia and New Zealand is in a position resembling that of the King of Scotland and of England between 1603 and 1707 when two independent countries had a common sovereign."

But it was established that a person born in Scotland after the accession of King James I to t he English throne in 1603 was not an alien and thus was not disqualified from holding lands in England. That was the outcome of Calvin's Case [37]. Nor does the relationship between Britain and Hanover between 1714 and 1837 present a precise analogy, if only because there was lacking the link of a common law of succession [38].

IV CONCLUSIONS

95. Almost a century has passed since the enactment of the Constitution Act in the last year of the reign of Queen Victoria. In 1922, the Lord Chancellor [39] observed that doctrines respecting the Crown often represented the results of a constitutional struggle in past centuries, rather than

statements of a legal doctrine. The state of affairs identified in Section III of these reasons is to the contrary. It is, as Gibbs J put it [40], "the result of an orderly development - not ... the result of a revolution". Further, the development culminating in the enactment of the Australia Act (the operation of which commenced on 3 March 1986 [41]) has followed paths understood by constitutional scholars writing at the time of the establishment of the Commonwealth.

96. The point of immediate significance is that the circumstance that the same monarch exercises regal functions under the constitutional arrangements in the United Kingdom and Australia does not deny the proposition that the United Kingdom is a foreign power within the meaning of s 44(i) of the Constitution. Australia and the United Kingdom have their own laws as to nationality [42] so that their citizens owe different allegiances. The United Kingdom has a distinct legal personality and its exercises of sovereignty, for example in entering military alliances, participating in armed conflicts and acceding to treaties such as the Treaty of Rome [43], themselves have no legal consequences for this country. Nor, as we have sought to demonstrate in Section III, does the United Kingdom exercise any function with respect to the governmental structures of the Commonwealth or the States.

97. As indicated earlier in these reasons, we would give an affirmative answer to the question in each stated case which asks whether Mrs Hill, at the date of her nomination, was a subject or citizen of a foreign power within the meaning of s 44(i) of the Constitution.

Justice Gaudron Extract

164. The first consideration which tells against the United Kingdom not being permanently excluded from the concept of "a foreign power" in s 44.(i) of the Constitution is that the Constitution, itself, acknowledges the possibility of change in the relationship between the United Kingdom, on the one hand, and the Commonwealth of Australia and the Australian States, on the other. Thus, for example, s34 acknowledges that Parliament may alter the qualifications for election so as to eliminate the requirement that candidates be subjects of the Queen. Of greater significance is that, by s5l(xxxviii) of the Constitution, the Commonwealth has power to legislate with respect to "the exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia". It was pursuant to s51.(xxxviii) that the Parliament of the Commonwealth enacted the Australia Act 1986 (Cth), to which further reference will shortly be made.

165. The second consideration is that, It is implicit in the existence of the States as separate bodies politic with separate legal personality, distinct from the body politic of the Commonwealth with its own legal personality. The separate existence and the separate legal identity of the several States and of the Commonwealth is recognised throughout the Constitution, particularly in Ch III [44].

166. Once it is accepted that the divisibility of the Crown is implicit in the Constitution and that the Constitution acknowledges the possibility of change in the relationship between the United Kingdom and the Commonwealth, it is impossible to treat the United Kingdom as permanently excluded from the concept of "foreign power" in s 44(i) of the Constitution. That being so, the phrase is to be construed as having its natural and ordinary meaning."

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- *[1] Cunneen, King's Men - Australia's Governors-General from Hopetoun to Isaacs , (1983) at 173-182.*
- *[2] Inglis Clark, Studies in Australian Constitutional Law , (1901) at 323.*
- *[3] Final Report of the Constitutional Commission , (1988), vol 1, pars 2.122-2.123.*
- *[4] at 70.*
- *[5] (1979) 14.5 CLR 246 at 261.*
- *[6] Strachan v The Commonwealth (1906) 4 (Pt 1) CLR 455 at 461-463, 464-465. See also the recitals to the Papua Act 1905 (Cth).*
- *[7] See the recitals to the Christmas Island Act 1958 (Cth) and the Cocos (Keeling) Islands Act 1955 (Cth).*
- *[8] Chitty, Prerogatives of the Crown , (1820), Ch XI, Section III.*
- *[9] Dixon v London Small Arms Company (1876) 1 App Cas 632 at 652.*
- *[10] "'The Crown' as Representing 'the State"', (1903) 1 Commonwealth Law Review 23 at 30. See also Hogg, Liability of the Crown , 2nd ed (1989) at 9-13; Law Reform Commission of Canada, The Legal Status of the Federal Administration , Working Paper 40, (1985) at 24-28.*
- *[11] "The Crown as Corporation", (1901) 17 Law Quarterly Review 131 at 144 (footnote omitted).*
- *[12] Victoria v The Commonwealth (Industrial Relations Act Case) (1996) 187 CLR 416 at 477-478.*
- *[13] Inglis Clark, Studies in Australian Constitutional Law , (1901) at 65-66.*
- *[14] Instrument dated 1 December 1987, Commonwealth of Australia Gazette , $270, c_) September 1988; see Starke, "Another residual constitutional link with the United Kingdom terminated; diplomatic letters of credence now signed by Governor-General", (1989) 63 Australian Law Journal 149.*
- *[15] (1996) 189 CLR 253 at 289.*
- *[16] See, generally, Foreign states Immunities Act 1985 (Cth), ss 9-22.*
- *[17] (1988) 165 CLP, 178 at 183-186.*
- *[18] (1876) 1 App Cas 632 at 651.*
- *[19] "The Crown as Representing the State", (1904) 1 Commonwealth Law Review 145 at 146-147.*
- *[20] Who, legally [represented] the King, but really [represented] the British 'State'.*
- *[21] As with regard to the reservation of Bills and the exercise of the power of pardon in matters affecting imperial interests.*
- *[22] Williams v Attorney-General for New South Wales (1913) 16 CLR 404 at 448.*
- *[23] (1975) 135 CLR 337 at 494.*
- *[24] Federal Commissioner of Taxation v Official Liquidator of E 0 Farley Ltd (1940) 63 CLR 278 at 302-303.*
- *[25] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 357.*
- *[26]Words of limitation omitted in 1910, after a successful referendum: Constitution Alteration (State Debts) Act 1909 (Cth).*
- *[27] Evatt, The Royal Prerogative , (1987) at 63.*
- *[28] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 358. See also Harrison Moore, "Law and Government", (1906) 3 Commonwealth Law Review 205 at 207.*
- *[29] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 359.*

- *[30] (1948) 76 CLR I at 363.*
- *[31] (1985) 159 CLR 22 at 28-29, 39.*
- *[32] (1992)174 CLR 219 at 230-231.*
- *[33] Minister for Works (WA) v Gulson (1944) 69 CLR 338 at 350-351.*
- *[34] "The Crown as Corporation", (1904) 20 Law Quarterly Review 351 at 362.*
- *[35] (1999) 73 ALJR 345 at 352-353, 359, 364-368, 387-390; 160 ALR, 638 at 647-649, 656-657, 663-669, 695-700.*
- *[36] Zines, The High Court and the Constitution , 4th ed (1997) at 314.*
- *[37] (1606) 7 Co Rep la [77 ER 377]. Coke's report of the litigation was "a massive achievement of ponderous learning": Tanner, English Constitutional Conflicts in the Seventeenth Century 1603-1689 , (1957) at 269.*
- *[38] Nolan v Minister for Immigration and Ethnic Affairs (1988) t 65 CLR 178 at 192-193; In re The Stepney Election Petition; Isaacson v Durant (1886) 17 QBD 54 at 59-60.*
- *[39] Viscount Birkenhead LC in Viscountess Rhondda's Claim [1922] 2 AC 339 at 353.*
- *[40] Southern Centre of Theosophy Inc v South Australia (1979) 145 CLR 246 at 261.*
- *[41] Commonwealth of Australia Gazette , s85, 2 March 1986 at 1.*
- *[42] Nolan v Minister for Immigration and Ethnic Affairs (1988) 165 CLR 178.*
- *[43] See European Communities Act 1972 (UK), European Communities (Amendment) Act 1986 (UK), European Communities (Amendment) Act 1993 (UK) and R v Secretary of State for Transport; Ex parte Factortame Ltd [1990] 2 AC 85; R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Rees-Mogg [1994] QB 552; R v Employment Secretary; Ex parte Equal Opportunities Commission [1995] 1 AC 1.*
- *[44] See especially ss 75(iii), (iv) and 78.*

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