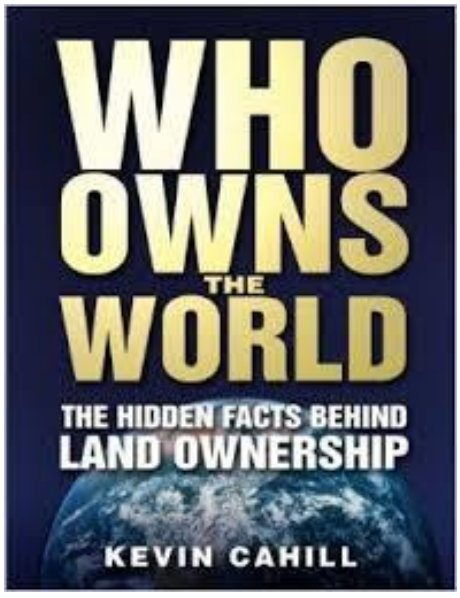
What is “the Crown”?



In a 2006 book, *"Who Owns the World: The Hidden Facts Behind Land ownership"*, Kevin Cahill claimed that Queen Elizabeth II holds ownership of one sixth of the land on the Earth's surface, more than any other individual or nation. (This amounts to a total of 6,600 million acres (2.7×1013 m2) in 32 countries.) However, this is based on the legal technicality that the Crown as an institution owns all the territory over which it rules, like any government of a non-allodial state.

This land does not actually belong to the Queen personally, but to the governments of the respective realms over which she reigns.

In reality, the Queen doesn't own much property here, in England, or in any other Commonwealth nation. The Crown Estate is not the private property of the monarch, including all Crown land anywhere in the world. It cannot be sold or owned by the monarch in any private capacity, nor do any revenues, or debts, from the estate accrue to her. Instead the Crown Estate is owned by the Crown, a corporation representing the legal embodiment the State.

The royal palaces she occupies in the United Kingdom, such as Buckingham Palace and Windsor Castle, are held in trust and do not belong to the Sovereign personally either. Instead they are state-owned and held in trust for the Queen's successors and the nation.

The Treasury refers to these assets as "*vested in the sovereign and cannot be alienated*". Even the Royal Collection, the Crown Jewels, (including the crown, orb and scepter) over 200,000 works of art, historical photographs, tapestries, furniture, ceramics, books, gold and silver plate, arms and armour, jewelry and more, is likewise state-owned, and all income generated are received by the Royal Collection Trust, the collection's management charity, and not by the Queen herself.

The Australian people as a collective own the Australian landmass. It is held in trust by our executive government, which is known as *"the Crown".*

According to *Oxford Australian Law Dictionary*: *"**The Crown**"* is an*"abstract metonymic concept"* that *"represents the legal embodiment of the executive government".*

The Queen's title *"**Head of the Commonwealth**"* (of nations) implies no sovereign authority:

> *"Head of the commonwealth, the title adopted in the London Declaration of the Commonwealth Heads of government Meeting in 1949, and vested in the person of the Queen of the United Kingdom. The title does not imply any Sovereign authority. It reflected the new role of the SOVEREIGN as a unifying force of voluntary association of free nations, separate from any notions of a common allegiance."*

The Sovereign

According to ***Vattel's Law of Nations***, the "*Sovereign"* is the entity with the power to pass laws prospectively. In the case of Australia, it's more accurate to say that the Parliament is the sovereign. This is because under the doctrine of Responsible Government, the Governor General is responsible to, and answers to, the Parliament, in regards to what legislation is assented, and has no choice in the matter. Therefore, the power of sovereignty lies in the Parliament in respect to legislation.

Under ***the principle of Responsible Government***, the Executive and Judiciary are responsible to, and answerable to, the people, through the Legislative branch. See ***R v Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254*** at 275; ***McGinty (1996) 186 CLR 140*** at 269; ***Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106*** (Mason C.J. at 30; Dawson J. at 20; McHugh J. at 15) ***The Engineers' Case (1920) 28 CLR***, per Knox C.J., Isaacs, Rich and Starke JJ. at p 147): *"The principle of responsible government – the system of government by which the executive is responsible to the legislature – is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution."* ***The Commonwealth v. Kreglinger and Fernau Ltd. and Bardsley (1926) 37 CLR 393***, (Isaacs J.) at p 413: *"It is part of the fabric on which the written words of the Constitution are superimposed."*

Constitutional sovereignty, that is the power to amend the constitution, lies with the Australian people under section 128, and the Australian people have the power to reject a constitutional amendment proposed by Parliament. So in terms of the constitution, the sovereign is the Australian people.

"The Queen" or *"the Crown*" is a proxy for the people's *"popular sovereignty*". Therefore a literal reference to *"The Queen*" as the criminal litigant, is in spirit a reference to the "polity" which is the people, who by fact of their power to elect representatives in Parliament or change parts of the Constitution, hold the sovereignty. The body politic that is the Crown in relation to Australia is the people of Australia, and the body politic that is the Crown in relation to the States is the people of that particular State. This point is highlighted by the statements of Wheeler JA in ***Glew v Shire of Greenough [2006] WASCA 260***, in relation to the judicial oaths taken "*to the people of Western Australia"* as opposed to *"the Crown"*, stating that the change in terminology is entirely consistent with constitutional reality:

> *"When we talk of the Crown in the context of Australian government in the late twentieth century, we refer to a complex system of which the formal head is the monarch. We do not refer to a replica of sixteenth century English government, where real power was vested in and exercised by the monarch personally. Rather, we mean that collection of individuals and institutions (Ministers, public servants, a Cabinet, the Executive Council, a Governor or Governor-General, and statutory agencies) which exercise the executive functions of government".* (See Hanks & Cass, "Australian Constitutional Law: Materials and Commentary", 6th ed (1999) at [7.1.6])

The phrase: *"A subject of the Queen, resident in any State…"* in ***section 117*** of the *Commonwealth Constitution is* interpreted by the High Court as that of the body politic, in ***Re Patterson [2001] HCA 51; 207 CLR 391*** (from 226):

> *"The notion that an individual became a British subject at birth anywhere within the dominions of the Imperial Crown and by reason of allegiance to the Imperial Crown, had been abandoned both in the United Kingdom and in Australia before the birth of the prosecutor. … It may be accepted that, at the time of federation, the state of subjection identified in s 117 was to the indivisible Imperial Crown. But, as a result of the changes made in the constitutional relationships within the British Commonwealth which were reflected in the various statutory provisions that were made between 1948 and 1953 and are mentioned earlier, the allegiance owed by the subjects spoken of in s 117 was to the Crown in its Australian politic capacity. There no longer was in constitutional theory or political reality the Imperial Crown of earlier days. To continue to read s 117 as it had been read initially would have been to deprive it of any useful operation."*

The concept of popular sovereignty is given legitimacy by the High Court in ***Australian Capital Television Pty Ltd v Commonwealth [1992] HCA 45 (1992) 177 CLR 106***, in which Mason J. states (at 37):

> *"And, most recently, the Australia Act 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people. The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act."*

The former Chief Justice of the High Court, Chief Justice Brennan wrote:

> *"As the Constitution can now be abrogated or amended only by the Australian people in whom, therefore, the ultimate sovereignty of the nation resides, the Oath of Allegiance and the*

undertaking to serve the head of State as Chief Justice are a promise of fidelity and service to the Australian people."

In "***Maintaining fairness to accused in criminal matters: the separation of powers***" by Craig Myatt, he mentions an email from Anne Twooney to himself, which states:

"The terms 'Queen' and 'Crown' mean a number of different things in legislation. Sometimes they mean the Queen herself, but more commonly they mean the relevant polity or the executive government. The reference to the Queen as a party to criminal litigation has nothing to do with the Queen herself. It is just a term that represents the State as a whole."

In Anne Twooney's '***The Unrecognised Reserve Powers***' in regard to Queensland following the passing of the Australia Acts 1986, she refers to the notion of "popular sovereignty" that *"…a new Crown is created when the Queen is directly advised by Ministers responsible to a legislature of a particular polity…"* She indicated:

"A new Crown is established… The polity itself does not need to have attained formal independence or to be internationally recognised as sovereign…".

Thus the community of Queensland is the new "sovereign" of Queensland, a concept recognised by the ***Preamble of the Constitution of Queensland 2001***:

"The people of Queensland…adopt the principle of the sovereignty of the people…"

While the Queen, as a "constitutional sovereign", maintains a ceremonial role as head of State, in practice, the Head of State who holds the actual power under the Constitution is not the Queen, but the Governor of the States, (and on a federal level, the Governor General of Australia). This was formalised in the ***Australia Acts 1986*** (Cth), which indicates:

7 Powers and functions of Her Majesty and Governors in respect of States

(1) Her Majesty's representative in each State shall be the Governor.
(2) Subject to subsections (3) and (4) below, all powers and functions of Her Majesty in respect of a State are exercisable only by the Governor of the State.

The Crown as a Body Politic

Constitution of New South Wales by Anne Twomey. (pg 386):

The notion of 'allegiance' derives from feudal times where protection was exchanged for the provision of services to a feudal lord. By 1608, allegiance was described in *Calvin's Case* as the mutual bond and obligation between the King and his subjects, whereby the subjects are bound to obey and serve him, and he should maintain and defend them.[135] At that time allegiance was to the King or Queen in their personal capacity, rather than as a body politic. However, notions of allegiance have since changed. In 1886 in *Isaacson v Durant*,[136] it was held that allegiance was owed not to the monarch in his or her personal capacity, but rather to the Crown as a body politic.[137] As the body politic was a creation of law, then allegiance could be changed by a law-making authority. Thus, in *Re Patterson; Ex parte Taylor*,[138] the High Court recognised that a person may have allegiance to Her Majesty Queen Elizabeth II, as Queen of the United Kingdom, and that this is different from allegiance to Her Majesty Queen Elizabeth II as Queen of Australia.[139] Constitutional references to the Queen are to the office, rather than the person of the Queen,[140] and allegiance relates to the body politic, rather than the Queen personally.

The duty of allegiance arises independently of the taking of any formal oath.[141] It arises by reason of birth within a country, or by naturalisation or even presence within a country.[142] The oath itself is therefore 'ceremonial' in nature, but does not have any legal significance in terms of establishing bonds of allegiance.[143]

Peaceful advocacy of reform to the *Constitution Act*, which involves changes to the constitutional system such as the removal of links to the Queen, would not breach the oath of allegiance. The oath is given to Her Majesty's heirs and successors 'according to law'. The law may change the constitutional composition of the body politic, just as it may change succession to the throne. As long as these changes are made in a constitutionally valid manner, there is no breach of the oath

Singh v Commonwealth of Australia [2004] HCA 43:

> *While the Crown remained indivisible, a British subject was outside the denotation of the term "alien". However, when the Crown divided, so to speak, the denotation of the term "subject of the Queen" changed. As a result, British subjects no longer owed permanent allegiance to the Queen of Australia and became "aliens" in Australia.*
>
> *The meaning of "aliens" in the Constitution does not turn on whether under the law of another country the person in question owes a duty of allegiance to that country. It turns on whether that person owes a duty of permanent allegiance to the Queen of Australia.*

Re Stepney Election Petition; Isaacson v Durant(1886) 17 QBD 54 *concerned the entitlement to vote in parliamentary elections of persons who were born in Hanover and who were living in England, but were not naturalised British subjects, at the time when Queen Victoria ascended the throne of Great Britain but not Hanover. Such persons were born when William IV was simultaneously the King of Hanover and the King of Great Britain and Ireland. The Queen's Bench Division held that a Hanoverian, who by birth was a British subject while William IV held both the Crowns of Great Britain and Hanover, had become an alien when Queen Victoria ascended the throne of Great Britain but not Hanover. Lord Coleridge CJ said:*
(at 59-60)

> *"The Hanoverian by birth who had needed no naturalization in the lifetime of William IV needed it when the Hanoverian heir and successor of that monarch was no longer the sovereign of these islands. He owed allegiance to William IV and his heirs and successors according to law, and as a Hanoverian he owed it on the death of William IV to the Duke of Cumberland, who was, according to Hanoverian law, the heir and successor of his brother, and ascended the throne as King Ernest in due course of law. He became an alien because the sovereign to whom his allegiance was due was a foreign sovereign; and the person to whom his allegiance had been due was dead leaving an heir. The Crowns had by accident been united in one person, but when the union of the Crowns came to an end the union of allegiance ceased too; and the allegiance which had been due to the King of Hanover, who was also King of the United Kingdom, was never at any time due to the Queen of the United Kingdom, who was not and who could not be by law Queen of Hanover."*

The decision established the rule that a natural born subject becomes an alien when the sovereign ceases to have dominion over the territory in which the person resides. Lord Coleridge CJ said that statements to the contrary in Calvin's Case were "dicta only". (at 64) After considering the British Nationality Act 1730 and the British Nationality Act 1772 (UK) (13 Geo III c 21), Lord Coleridge CJ also said that,

> *…as the statutes referred to the Crown and not the sovereign, allegiance was due to the King in his politic, and not in his personal, capacity. (at 65-66)*

This was a further development in the law since Calvin's Case. Fundamental to the decision in that case – that those born after the accession of James I to the English throne were "natural born subjects" of the King of England – was the conclusion that the tie of allegiance is a tie between the individual and the person of the sovereign, not between the individual and the political entity that is the sovereign.

Using the concept of "allegiance" to distinguish between British subjects and aliens invites attention to what is meant by "allegiance" in this context. Pointing to its root in the feudal idea of a personal duty of fealty to a lord from whom land is held does little to identify the content of the term. Plainly it is a term which connotes duty or obligation, but what exactly are the duties or obligations embraced by the word?

> *These duties or obligations, whatever their content, are said to be due to the Crown in the "politic" not the "personal capacity" of the sovereign.*

The relationship between sovereign power and the person who is a non-alien (that is, in Australia, the relationship between Crown and non-alien) is mutual. The Crown owes obligations to the non-alien. But again those obligations are described only in abstract terms like a "duty of protection" Their content is not spelled out, although it may very well be that these obligations find expression in Australia's exercise of its right, but not duty, in international law to protect its nationals and even, perhaps, in what the Court said was "[t]he right of the Australian citizen to enter the country [which] is not qualified by any law imposing a need to obtain a licence or 'clearance' from the Executive". Further, the relationship between the Crown and a resident alien is also mutual and is not necessarily limited to such time as the alien remains in Australia. "The protection of the laws of Australia which is the counterpart of a local allegiance due from a resident alien" may continue despite departure from Australia.

The change in the application of the term is the result of a number of significant developments since federation. They include:

- *(a) the gradual emergence of Australia as an independent, sovereign nation (which arguably culminated with the passage of the Australia Acts 1986 (Cth) and (UK));*
- *(b) the acceptance of the divisibility of the Crown (implicit in the development of the Commonwealth as an association of independent nations);*
- *(c) the creation of a distinct Australian citizenship commencing in 1948 with the passage of the Nationality and Citizenship Act and the British Nationality Act 1948 (UK); and*
- *(d) the acceptance by this Court that the phrase "subject of the Queen" in the Constitution no longer means "subject of the Queen of the United Kingdom" but "subject of the Queen of Australia".*

*As Windeyer J noted in **Ex parte Professional Engineers' Association(1959) 107 CLR 208** (at 267):*

> *"Law is to be accommodated to changing facts. It is not to be changed as language changes."*

https://freemandelusion.com/wp-content/uploads/2019/06/singh-v-commonwealth-of-australia-2004-hca-43.pdf

In ***Flowers v State of New South Wales (No 5) [2021] NSWSC 887*** the plaintiff sought that since Rothman J, as a judicial officer, had sworn allegiance to the Crown, he should disqualify himself on the basis he is not impartial and/or independent in the determination of the outcome of the proceedings. As explained (at 59), a judicial officer in New South Wales is required to swear an oath of allegiance to the monarch, and the judicial oath, as prescribed by the second and fourth schedule to the *Oaths Act 1900* (NSW). His Honour goes on (from 111):

> *"The allegiance and service to which a judicial officer swears in the oath of allegiance and the judicial oath is allegiance to the monarch, not in his or her personal capacity, but, rather, to the body politic. The allegiance, for example, would not apply to applying or enforcing Canadian law or English law. The Crown as a body politic is "an abstraction", used in a metaphysical or metaphorical sense. Hence, we speak of the Crown in the Right of New South Wales as a distinct entity from the Crown in the Right of Victoria. As the High Court explained in Re Patterson; ex parte Taylor [2001] HCA 51 (at 224), the body politic is a creation of law and, as a consequence, the allegiance would be changed by any validly made law or by a lawmaking authority. The allegiance is to the body politic, being the State as an entity, not the government and not the monarch personally. On any analysis, properly informed, of the effect of the oath of allegiance and the judicial oath, neither requires or allows conduct by a judicial officer inconsistent with the judicial officer's duty to uphold the law and administer it and certainly does not allow favour, affection or ill-will towards the Government over the rights, under law, of the citizens of the State."*

Re Patterson; ex parte Taylor [2001] HCA 51 (at 224):

> *"Allegiance" examines the relationship between an individual and a sovereign power from the point of view of the individual, and principally by reference to duties and obligations which the individual may owe to that sovereign power. In a monarchy, questions of allegiance may be personified and, if that is done, insufficient attention may be given to identifying the distinction between relevant separate sovereign powers. The notion of personal allegiance "lay at the very root of the feudal system" but long before federation that state of affairs had ceased to exist. In*

1886, Lord Coleridge CJ had explained that allegiance was due from subjects to the Crown in "the politic" not the "personal capacity" of the sovereign. In Sue v Hill [1999] HCA 30, Gleeson CJ, Gummow and Hayne JJ discussed this and other senses in which the term "the Crown" has been used in constitutional theory derived from the United Kingdom."

More recently in ***Love v Commonwealth [2020] HCA 3*** (at 107-108):

"Before and after federation, in the vestigial language of feudalism taken to be descriptive of the formal legal relationship between a British subject and the "Crown", Aboriginal and Torres Strait Islander Australians were accordingly understood to have owed "allegiance" to the Crown and to have been entitled, at least in theory, to the "protection" of the Crown in exactly the same way and to exactly the same extent that other Australians were understood to have owed allegiance to the Crown and to have been entitled to the protection of the Crown. By federation, the Crown to which such allegiance was owed was understood to be the monarch "in his politic, and not in his personal capacity" and the full feudal dimensions of what might once have been meant by the "protection" of the Crown had been lost in the mists of time. To the extent that the "protection" of the Crown might have been thought to involve a positive duty on the part of the Crown to exercise prerogative power physically to protect a British subject, any such duty of the Crown to provide that protection to a British subject was understood to be one of "imperfect obligation".

An identical change in the meaning of the term occurred in the US, as cited in ***Re Minister for Immigration and Multicultural Affairs; ex parte Te* [2002] HCA 48**; (at 229 per Callinan J.), in ***United States v Wong Kim Ark (1898) 169 US 649***, Gray J. referred to what was then recent English authority in which it was said that: *"feudalism being long gone, it was to the sovereign in his or her politic not personal capacity that allegiance was due."*

Hasluck J provides an excellent analysis of the meaning of the Crown in ***Glew v The Governor of Western Australia [2009] WASC 14*** (from 48-60):

"Before proceeding further it will be useful to make some further observations about the role of the Monarch in the Westminster system of government and the way in which the term 'crown' is used to describe the relationship between the Monarch and the exercise of executive powers. I make these further observations in order to flesh out Wheeler J's comment that the Acts Amendment and Repeal (Courts and Legal Practice) Act 2003 (WA) purports to change terminology only, not constitutional reality, and her further comment that in modern times a reference to the crown is a reference to those persons or bodies exercising the executive functions of government.

In Law of the Constitution: A V Dicey (3rd ed, Macmillan, London, UK, 1889) at 10 the learned author referred to an injurious tendency of Blackstone and other less famous constitutionalists to adhere to unreal expressions. The harm wrought was said to be that unreal language obscures or conceals the true extent of the powers, both of the King and of the government. It makes it difficult to say for certain what is the exact relation between the facts of constitutional government and the more or less artificial phraseology under which they are concealed.

The learned author goes on to say this (at 11):

> *"Thus to say that the King appoints the Ministry is untrue; it is also of course, untrue to say that he creates courts of justice; but these two untrue statements each bear a very different relation to actual facts. Moreover, of the powers ascribed to the Crown, some are in reality exercised by the government, whilst others do not in truth belong either to the King or to the Ministry. The general result is that the true position of the Crown as also the true powers of the government are concealed under the fictitious ascription to the sovereign of political omnipotence, and the reader of, say, the first Book of Blackstone, can hardly discern the facts of law with which it is filled under the unrealities of the language in which these facts find expression."*

Observations of this kind prompted jurists in a later age to endeavour to explore these so-called unrealities at greater length. Thus, Maitland in Selected Essays (ed by H D Hazeltine, G T Lapsley and P H Winfield, 1936, repr 1968) observed that 'the crown' is regarded, not merely as a chattel now lying in the dower, but as the personification of the state.

In Liability of the Crown: P W Hogg and P J Monahan (3rd ed, Carswell, Scarborough, Ont, 2000), a learned Australian author, observed (at 10) that the state is a legal person. It is entirely accurate to speak simply of 'the State of Victoria', for example, as the subject of legal rights and duties, and this usage is indeed quite common. But it is far more common, in the language of parliaments, courts and commentators, to find that 'the crown' is used as a convenient symbol for the state. According to this usage, in order to distinguish a particular state from others which recognise the same Queen, it is necessary to speak of 'the crown in right of' the particular state. Whether this is convenient or not may be debated, but it is important not to allow the symbol to raise unnecessary conceptual difficulties.

The same author went on to observe that Harold Laski took the mysticism out of the concept of 'the crown' with these apt words:

> *"Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money bags of the State behind them."*

Hogg goes on to say that like a corporation, the crown can only act through human servants or agents. This does not usually cause difficulty in the creation of rights and duties because the doctrines of agency and vicarious liability can be used by or against the crown to hold it bound by the acts of its servants or agents.

It was against this background that George Winterton, the author of Parliament, The Executive and the Governor-General (Melbourne University Press, Melbourne, 1983), observed (at 207) that 'the crown' is used in the monarchies of the Commonwealth as a shorthand expression for the executive government.

The learned author cited in support of that proposition these observations by Lord Diplock in ***Town Investments Ltd v Department of the Environment [1978] AC 359*** *(at 380):*

> *"My Lords, the fallacy in this argument is that it is not private law but public law that governs the relationships between Her Majesty acting in her political capacity, the government departments among which the work of Her Majesty's government is distributed, the ministers of the Crown in charge of the various departments and civil servants of all grades who are employed in those departments. These relationships have in the course of centuries been transformed with the*

continuous evolution of the constitution of this country from that of personal rule by a feudal landowning monarch to the constitutional monarchy of today; but the vocabulary used by lawyers in the field of public law has not kept pace with this evolution and remains more apt to the constitutional realities of the Tudor or even the Norman monarchy than to the constitutional realities of the 20th century."

Lord Diplock then went on to make these further observations:

> *"To use as a metaphor the symbol of royalty, 'the Crown', was no doubt a convenient way of denoting and distinguishing the monarch when doing acts of government in his political capacity from the monarch when doing private acts in his personal capacity, at a period when legislative and executive powers were exercised by him in accordance with his own will. But to continue nowadays to speak of 'the Crown' as doing legislative or executive acts of government, which, in reality as distinct from legal fiction, are decided on and done by human beings other than the Queen herself, involves risk of confusion. … I believe that some of the more Athanasian-like features of the debate in your Lordship's House could have been eliminated if instead of speaking of 'the Crown' we were to speak of 'the government' - a term appropriate to embrace both collectively and individually all of the ministers of the Crown and Parliamentary Secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by 'the Crown' in the fictional sense in which that expression is now used in English public law."*

*In **Cain v Doyle (1946) 72 CLR 409** Williams J observed (at 431) that it is certainly most unusual if not unique for legislation to provide for the prosecution of the crown. But there is no constitutional difficulty in the law of the Sovereign binding himself and parliament. It is a question in each case of the extent to which he is intended to be bound.*

His Honour went on to hold that the legislation before him, being the Re-establishment and Employment Act 1945 and the Acts Interpretation Act 1901, were Acts binding the crown. He then observed that "the crown means of course not his Majesty in person but the government of the Commonwealth or State of the day".

I pause here to note in passing that shortly after the case I have just mentioned was decided, the legislature in this state repealed the Crown Suits Act 1898 and sought to make better provision for suits by and against 'the crown' by enacting the Crown Suits Act 1947 (WA). Having regard, perhaps, to some of the unrealities mentioned by Blackstone and Lord Diplock the term 'crown' was defined by section 3 of the Act to mean more exactly 'the Crown in right of the Government of Western Australia'. By section 5 of the Act the crown may sue and be sued in the same manner as a subject. Every proceeding should be taken by or against the crown under the title 'The State of Western Australia'. This is an example of the way in which the sovereign power of parliament in the modern world can be used not only to bind the crown in the same manner as a citizen but also to change the description of the body exercising governmental powers."

https://freemandelusion.com/wp-content/uploads/2018/07/glew-v-the-governor-of-western-australia-2009-wasc-14.pdf

The meaning of the Crown in constitutional theory

"*The Crown*" of the States are entirely different and distinct legal personalities from the Commonwealth Crown, and from the Crown of England, or any other Commonwealth nation. This notion is known as the divisibility of the Crown which Justice Gaudron found to be "implicit in the Constitution." in ***Sue v Hill [1999] HCA 30*** (from 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.*
>
> *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", and Maitland, Harrison Moore, Inglis Clark and Pitt Cobbett, amongst many distinguished constitutional lawyers, took up the point.*
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> ***The first use of the expression "the Crown"** was to identify the body politic. Writing in 1903, Professor Pitt Cobbett 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:*
>
> *"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."*
>
> ***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 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 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.

In State Authorities Superannuation Board v Commissioner of State Taxation (WA) , McHugh and Gummow JJ said: "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. This is consistent with the reasoning and outcome in Nolan v Minister for Immigration and Ethnic Affairs."

Thirdly, the term "the Crown" *identifies what Lord Penzance in Dixon called "the Government", 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.*

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:*

"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 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."

What Isaacs J called the "Home Government" ceased before 1850 to contribute to the expenses of the colonial government of New South Wales. 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.

Debts might be payable to the exchequer of one government but not to that of another and questions of disputed priority could arise. Harrison Moore, writing in 1904, observed: "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".

***The expression "the Crown in right of** the government in question was used to identify these newly created and evolving political units. 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 doctrine 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". He pointed to the "inconvenience and mischief" which would follow from rigid adherence to any such doctrine where there were federal structures and continued:*

"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."

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, and applied in authorities including Crouch v Commissioner for Railways (Q) and Deputy Commissioner of Taxation v State Bank (NSW), 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 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.

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". 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. However, no such difficulties need arise in the construction of the Constitution.

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.

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: "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 the 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. 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.

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 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, "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) has followed paths understood by constitutional scholars writing at the time of the establishment of the Commonwealth.

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 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, 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.

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