Chapter Nine

The Queen of Australia

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Sir Samuel Griffith and State Governors

Sir Samuel Griffith was a federalist and a nationalist. In both these guises he played a significant role in the development of the Crown in Australia. In the Canadian federation, provincial Lieutenant-Governors were appointed by, and subordinate to, the Governor-General. Provincial Bills were reserved for the Canadian Governor-General's assent, and laws could be disallowed by the Governor-General on the advice of federal Ministers. Griffith, in drafting the Commonwealth Constitution, took a different approach. He maintained the independent relationship between the States and the Crown. In the Constitutional Convention of 1891, he stated that the term "Governor" was used in the Constitution that he had drafted, rather than "Lieutenant-Governor", to show that the "states are sovereign"[1] and maintained their independent links with the United Kingdom.

The consequence was that the British government, rather than the Commonwealth government, advised upon the appointment of State Governors, assent to reserved Bills and the disallowance of laws. The States preferred this position, because they regarded the British government as less politically interested, and therefore fairer, in its treatment of State matters than a Commonwealth government was ever likely to be.

Sir Samuel, however, was also a nationalist who would have preferred no British involvement in State constitutional affairs after federation. He drafted a clause that would have allowed the States to make such provisions as they thought fit as to the manner of appointment of State Governors, their tenure in office and their removal. This would have empowered the States to select their own Governors by election or by the appointment of local people, rather than the existing system of imported English Governors. Griffith was concerned to make sure that the States obtained full power over their affairs in future. He did not want them to have to seek changes from the Imperial Parliament, or, for that matter, the Commonwealth Parliament.[2] He also argued that having an elected Governor was neither inconsistent with responsible government nor inconsistent with loyalty to the Crown.[3] This clause was later removed from the draft Constitution in 1897 on the ground that it unnecessarily interfered with State matters.

After federation, the British government continued to advise the Sovereign about the appointment of State Governors. State Ministers had no power to advise the Sovereign on such matters, but they were consulted in advance of appointments being made and could express their reservations. Sir Samuel Griffith, however, took matters further when he was acting as Queensland Governor in October, 1901, prior to a new appointment being made. In blunt terms, he advised the British government that its proposed new Governor for Queensland was "unacceptable".[4] This shocked the Colonial Office, as it made the situation "awkward"[5] (which is a very undesirable state of affairs in diplomacy).

The British Secretary of State responded that the candidate in question fully satisfied the downgraded criteria for a State Governor. He sought reasons from the State for its objection. Sir Samuel blithely replied that his responsible advisers were strongly of the opinion that the candidate was not "suitable by temperament for the position of Governor".[6] This made matters even more "awkward". To avoid a diplomatic impasse, the British government offered an alternative candidate who was deemed acceptable. Even though the State government had no power to advise the Sovereign on the appointment of State Governors, Griffith made clear that it could manipulate matters by exercising a political veto over appointments.

Sir Samuel Griffith and the divisible Crown

Once appointed as Chief Justice of the High Court, Sir Samuel Griffith played a further role in shaping the notion of the Crown in Australia. The orthodox view of the Crown was that it was "one and indivisible". While this may have been a correct view of the Imperial Crown, the notion made little sense within a federation,

where the Crown in its capacity as representing bodies politic or executive government was clearly divisible. In 1904 in *Municipal Council of Sydney v. Commonwealth,*[7] Griffith CJ observed:

> "It is manifest from the whole scope of the Constitution that, just as the Commonwealth and State are regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown, as representing those several bodies, is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea".[8]

Griffith CJ distinguished between the "Crown as representing the community of New South Wales", the "Crown as representing the Commonwealth" and the "Crown as representing the whole Empire".[9] In later cases Griffith CJ drew a distinction between the different manifestations of the Crown according to where executive authority and responsibility lay.[10] If executive authority was exercised upon the advice of State Ministers, who were responsible for that advice to the State Parliament, then it was exercised by the Crown in right of a State. If it was exercised on the advice of Commonwealth responsible Ministers, then it was exercised by the Crown in right of the Commonwealth. If it was exercised on the advice of United Kingdom responsible Ministers, then it was exercised by the Crown in right of the United Kingdom. This might seem obvious, but it was highly contentious in Griffith's time and was a view overturned by the High Court in the infamous *Engineers Case*,[11] which reverted to the notion of an indivisible Crown, with all the ambiguity, qualification and resulting confusion that this notion entailed.

The House of Lords and the divisible Crown

It is now well accepted that the Crown is divisible, but there is little understanding of how this came about and by what criteria a separate Crown is to be recognised. Even the House of Lords has struggled unsuccessfully with the issues involved. In 2005 a majority of the House of Lords in the *Quark Fishing Case*[12] held that an instruction issued by the British Foreign Secretary to the Commissioner of South Georgia and the South Sandwich Islands (hereafter "South Georgia") concerning fishing licences, was actually made by the Queen of South Georgia and therefore did not fall under the *Human Rights Act* 1998 (UK). This was despite the fact that the Queen, to the extent that she was formally involved at all, acted on the advice of her British Foreign Secretary, who was responsible for that advice to the Westminster Parliament. Executive authority and responsibility with respect to this instruction rested in the United Kingdom, not South Georgia.

The House of Lords, however, thought that the mere fact that there was a separate "government" of South Georgia meant that there was a separate Crown, and that the Queen in performing any act in relation to that territory was acting under that Crown.[13] Their Lordships ignored the question of who took responsibility for the Queen's acts. Indeed, they regarded the British Foreign Secretary as merely the "mouthpiece" or "vehicle" of the Queen, implying that she must have exercised her powers upon her own initiative.[14]

This is an extraordinary conclusion, for a number of reasons. First, it is contrary to the cardinal constitutional convention that, except when exercising the reserve powers in exceptional cases, the Queen only acts upon the advice of her responsible Ministers, and those Ministers are responsible for those acts to the legislature to which they are elected.[15]

Secondly, the "government" of South Georgia was comprised of a Commissioner, who was also Governor of the Falkland Islands, and a couple of other officers, all of whom were British career diplomats posted to the Falkland Islands. They were responsible to no one but the British government and did not even live on South Georgia. There is in fact no permanent population on South Georgia—merely some visiting scientists left to maintain Britain's claim over the island to keep the Argentinians at bay. There is no representative government, let alone responsible government. The Commissioner of South Georgia had no right to advise the Queen. Instead, he was subject to instructions from the British Foreign Secretary, who remained responsible to the Westminster Parliament—not to the few people living on South Georgia.

Thirdly, we in Australia are very well aware that the mere existence of a separate government does not necessarily mean that the Queen acts in relation to the territory concerned as Queen of that territory under a separate Crown. If the House of Lords judgment were correct, then the Queen would be Queen of Victoria now, and would have been Queen of Victoria since 1855. It would also have other ramifications for places such as Scotland, which now has its own government, which is both representative and responsible, and therefore has a far greater claim for a separate Crown than South Georgia.

The identification of separate Crowns

Some of the confusion about the status of the Crown arises because the same term is used to describe a

number of different concepts. As the High Court pointed out in *Sue v. Hill,*[16] the different meanings of Crown include:

1. The Sovereign's regalia;
2. The body politic;
3. The international personality of a body politic;
4. The "government" or "executive"; and
5. The Sovereign's powers with respect to a body politic.

The divisible Crown that Griffith CJ was referring to in those early High Court cases was the Crown as a body politic, with the States and the Commonwealth all being sovereign within their spheres, and perhaps also the Crown as the "government" or "executive". At the Imperial level there remained one Crown because the Sovereign, when exercising powers with respect to any of his or her realms, continued to do so on the advice of responsible British Ministers. It was this notion of the Crown that became divisible in 1926-1930, with the recognition in Imperial Conferences of the equality of the Dominions and the United Kingdom, and that the Sovereign, when acting in relation to those Dominions, did so on the advice of the responsible Ministers of those Dominions. Thus in 1930, the King, albeit reluctantly,[17] acted on the advice of the Commonwealth government in agreeing to the appointment of Sir Isaac Isaacs as the first Australian Governor-General.[18]

This change, however, did not occur at the State level.[19] The Australian States remained dependencies of the British Crown, and when the Sovereign acted in relation to them by appointing a State Governor or giving assent to a reserved Bill, it was on the advice of British Ministers. Why? It was a relationship of convenience.

First, the States had faith in the British government to act in their interests without being affected by political self-interest. They had no such faith that the Commonwealth government would be as impartial or disinterested. Secondly, the Sovereign was not prepared to be advised by different sets of Ministers within Australia because of the risk of receiving conflicting advice on Australian matters. Hence, if the role of British Ministers in advising on State affairs were to be terminated, then the only outcome acceptable to Buckingham Palace was that the Sovereign be advised by Commonwealth Ministers with respect to State and Commonwealth matters, or that the Sovereign's powers with respect to the States be delegated to the Governor-General, as in Canada. This was not acceptable to the States. Hence, the *status quo* prevailed, and British Ministers continued to advise the Queen about State matters from 1930 to 1986.

Until the *Australia Acts* came into force on 3 March, 1986, Her Majesty performed her functions with respect to the Australian States in her capacity as the Queen of the United Kingdom, rather than the Queen of Australia. This can be seen by the royal style and title used on the commissions of State Governors and State Letters Patent, and the fact that the counter-signature was that of a British Minister, indicating that this Minister took responsibility for the action involved.[20] When new Letters Patent were issued in 1986 to make them consistent with the *Australia Acts*, the British government still insisted that the counter-signature be that of a British Minister rather than a State Minister, because Her Majesty was still acting as the Queen of the United Kingdom in issuing new Letters Patent for the States, until the *Australia Acts* came into force in a matter of days. State Premiers requested that they also be permitted to counter-sign the Letters Patent, to indicate the change in status of the Queen. British officials replied that they could add their names if they wished, but they would have no more significance than an ink blot, as they were not yet Her Majesty's responsible advisers.[21]

The "Queen of Australia" did not perform any functions with respect to the States. In that capacity, the Queen only dealt with Commonwealth matters on the advice of Commonwealth responsible Ministers. To this extent the term "Australia" was misleading, and deliberately so.

Constitutional conflicts of the 1970s

During the 1970s, the Whitlam Government tried to convince the British government that the Queen should act on the advice of Commonwealth Ministers in all Australian matters, including State matters.[22] One of its weapons was a change in terminology. The Whitlam Government ceased to use the word "Commonwealth" and instead referred to itself as the "Australian Government",[23] thus blurring the distinction between the Commonwealth and the States. It also altered the Queen's royal style and title to make it clear that she was "Queen of Australia".[24] The next step in this argument was that the Queen must then act in relation to "Australian" matters on the advice of "Australian Ministers", meaning that Commonwealth Ministers would advise the Queen about State matters. This argument was neither accepted by the British Government nor the Queen.

The dispute was at its starkest with respect to the seabed petitions.[25] Tasmania and Queensland petitioned the Queen to refer to the Privy Council for an advisory opinion, the question of who owned the seabed adjacent to the States. The Commonwealth government claimed that it owned the seabed and that it had the right to advise the Queen in all Australian matters. It advised her to reject the petition. The States claimed that they were petitioning the Queen of Tasmania and the Queen of Queensland.

The British Cabinet, after seeking legal and scholarly opinions, took the view that the Queen was not separately Queen of each State, even though the States had separate representative and responsible governments. The British Cabinet accepted advice that Her Majesty acted as Queen of the United Kingdom with respect to the States, because she was advised by her responsible Ministers for the United Kingdom, who were in turn responsible to the Westminster Parliament for that advice.[26] The British Cabinet also accepted that while it would advise the Queen with respect to the petitions, because they concerned the States, the Commonwealth government also had the right to advise Her Majesty with respect to the petitions, as it had also claimed an interest in the seabed.[27] In the end, both the United Kingdom and Commonwealth governments advised Her Majesty not to refer the petitions to the Privy Council, and Her Majesty accepted the advice of both Governments.[28] In doing so, she tacitly accepted the view that her United Kingdom Ministers remained responsible for advising her with respect to State matters, and that Commonwealth Ministers did not have exclusive power to deal with such issues.

This did not deter Justice Murphy and other Commonwealth officers from attempting to argue that the Queen had accepted the argument that only Commonwealth Ministers may advise upon Australian (including State) matters.[29] Indeed, the Queen's speech on the opening of the Commonwealth Parliament in 1974, as drafted by Commonwealth officials, referred only to her receiving and accepting advice from Commonwealth Ministers on the seabed petitions. The Queen's Private Secretary, Sir Martin Charteris, had to insist that "for the sake of truth", it be added that she also accepted the advice of her responsible British Ministers.[30] While the Queen might have been obliged to act on the advice of her Commonwealth Ministers with respect to the opening of the Commonwealth Parliament, she still had sufficient moral power to force a change to her speech to ensure that she stated the truth.

Within Australia it had long been assumed that, although British Ministers formally advised the Queen with respect to State matters, they were merely the channels of communication of State advice.[31] This assumption was wrong. The British Cabinet, when deciding on the seabed petitions, took into account British political interests and felt not in the slightest bit obliged to comply with State wishes.[32]

This attitude became even more obvious during the Sir Colin Hannah affair. Sir Colin, who was the Governor of Queensland, caused a controversy in 1975 by making statements critical of the Whitlam Government. The British government seriously considered dismissing him from that office, but the dismissal of the Whitlam Government by Sir John Kerr made that course of action impractical.[33] As a British official noted, few would understand why Sir Colin was dismissed for involving himself in local politics when Sir John Kerr had done so in an even more spectacular fashion.[34]

The Queensland Premier, Joh Bjelke-Petersen, sought to support Sir Colin by asking the Queen to extend his term for another three years. The British government was enraged by this attempt to embroil the Queen in this controversy, and angry at Sir Colin for his acquiescence in it. The British government refused to put this advice to the Queen, and made it clear that Sir Colin's term would not be extended. The Queensland Premier later observed that until that point he had believed that he was advising the Queen through the British government.[35] This experience brought home to him, and to other State Premiers, that the British government was providing independent advice to the Queen on State matters.

The development of the *Australia Acts* 1986

This was a spur to the States to break off constitutional relations with the United Kingdom. The States were willing to continue the role of the British government as long as it was disinterested and supported State wishes. It was now clear to the States that this was not the case. The Wran Government in New South Wales decided to take unilateral action by legislating to terminate appeals from State courts to the Privy Council, and by requiring the Queen to act on the advice of State Ministers when appointing the State Governor.[36] The British Foreign Secretary, at the behest of the Queen, replied that he would advise the Queen to refuse royal assent to such Bills.[37] The only way out was a formal termination of constitutional links between all the States and the United Kingdom.

The dilemma for the States, however, was the same as in 1930. It remained unacceptable to Buckingham Palace that the Queen be advised by different sets of Ministers within Australia. This was regarded both as "unconstitutional" and dangerous, as it had the potential to place the Queen in the invidious position of receiving conflicting advice from State and Commonwealth Ministers.[38]

At one stage in negotiations the "post-box solution" was proposed.[39] It involved the Commonwealth Prime Minister acting as a "post-box" for State advice to the Queen. The States begrudgingly agreed to it, as did the Palace. It was scuttled in the end by the Department of the Prime Minister and Cabinet, after it was made clear by the Palace that the Prime Minister would have to be politically accountable and responsible to the Commonwealth Parliament for his advice to the Queen (even though the advice originated with a State Minister). For example, if Queensland sought the appointment of Sir John Kerr as Governor of Queensland, Bob Hawke would have been responsible for proposing it and would have to take responsibility in the Commonwealth Parliament for the appointment. This prospect was too unpalatable for the Prime Minister to bear, so the "post-box solution" was abandoned. The impression was given to the States, however, that it was Buckingham Palace that had vetoed the proposal.

This sent negotiations back to the table. Prime Minister Hawke said he would not advise the Queen to accept advice directly from State Premiers. This was based in part upon concerns about advancing State claims to sovereignty, but mostly upon the concern that such advice would be unacceptable to the British government and the Queen.

The next proposal was that the Governor-General advise the Queen about State matters. This would have absolved the Prime Minister from responsibility. British officials noted that such a proposal was constitutionally impossible, because only responsible Ministers could advise the Queen—not the Governor-General (unless he was doing so on behalf of his responsible Ministers). This proposal was rejected by the States, largely because of concerns about how it would fit with the Governor-General's existing relationship with responsible Commonwealth Ministers.

The Commonwealth then proposed to leave the question of advice to the Queen on State matters to an inter-governmental agreement to be reached in the future. This worried the British government. It did not want the Commonwealth alone to advise the Queen as to whether to agree to a future proposal. Even though the subject concerned Australian matters, British officials took the view that:

> "We have a constitutional duty towards The Queen as Queen of the United Kingdom in Her present relationship with the Australian States; we have a duty to advise Her whether Her current position should be relinquished and we have a duty to advise Her whether any new arrangements are constitutionally acceptable".[40]

The States wanted to advise the Queen directly. From both ends of the political spectrum, John Cain and Joh Bjelke-Petersen argued that the Queen must accept State advice and that anything less was unacceptable. The States' position was hardened by the outcome in the *Tasmanian Dam Case.*[41] They were not prepared to see more powers going to the Commonwealth.

Queensland commissioned a paper by John Finnis of Oxford University, which argued that if the Queen's functions were narrowed to matters such as the appointment and removal of State Governors, there could be no risk of conflicting advice to the Queen, as it would be clear which jurisdiction had the right to advise her. The British Attorney-General found the paper "interesting and cogent", but Buckingham Palace rejected it as "ill-founded" and continued to assert that the Queen could not be advised by State Premiers.[42]

This impasse was resolved largely by accident. The New South Wales Solicitor-General, Mary Gaudron, who was visiting London for a Privy Council Appeal, met with the Legal Advisers to the Foreign Office on the subject of residual links. Foreign Office officials wrote the following description of the meeting:

> "Ms Gaudron came bristling with prejudice and holding a deep conviction that we were in collusion with the Commonwealth Government at the expense of the States. She also thought it was the British Government which was imposing impossible restrictions on proposals for severing the residual constitutional links.
>
> "It was abundantly clear that the Commonwealth Government, and probably in particular Senator Evans, has to some extent misrepresented our position so as to disguise the fact that the difficulties stem from the position of the Commonwealth Government itself. For example, Ms Gaudron was firmly of the view that the "Post Box" proposal … had been rejected by the British Government. We know of course, that it was Mr Hawke's Department which objected to the proposal".[43]

One of the consequences of this meeting was that the British decided to open up new channels of communication with the States, in the words of one official, "to stop the Commonwealth misleading the States about our views and misleading us about the States' views and to stop the States misleading us about the Commonwealth's views".[44]

More significantly, Mary Gaudron came away from the meeting with the impression that the British government would accept direct access to the Queen as long as the possibility of conflicting advice was eliminated. It appears that this was a misunderstanding. The nuances of British diplomatic-speak were lost upon the more direct and blunt Solicitor-General. British officials were later shocked to learn that the Solicitor-General had convinced her fellow Solicitors-General that the British position had shifted, and that direct access would be acceptable if the powers of the Queen were narrowed to the appointment and removal of State Governors. This stripped away the Commonwealth government's argument that it would not support direct access because it was unacceptable to the United Kingdom. The Commonwealth was therefore persuaded to agree to the proposal. By the time the British were aware of the misunderstanding, it was too late. The States and the Commonwealth had agreed to direct access upon this minimal basis.

British Foreign Office officials, when faced with the agreement of six States and the Commonwealth government, noted that they would need some "fairly persuasive arguments" that it was unconstitutional if they were to object to it, but they were at a loss as to what they might be.[45]

Buckingham Palace continued to object to the proposal for direct access. It had two concerns. First, that the Queen might be put in an invidious position if she received conflicting advice from different sets of Ministers. Second, the Palace was concerned that it would be "unconstitutional" for the Queen to accept advice from the Ministers of a sub-national polity. This issue had arisen once previously with regard to Nigeria. In 1960, the Order in Council that gave Nigeria independence provided for the Premiers of the Regions, having consulted the Prime Minister, to advise the Queen on the appointment of regional Governors. The Palace had objected to this arrangement, but British officials argued that it was not an "unconstitutional" arrangement as it was expressly provided for in the Constitution of Nigeria. The system only lasted from 1960 to 1963, when Nigeria became a republic. However, it was a minor precedent for what the Australians proposed.

The British Foreign Office recognised that the status of the Crown in a true federation is necessarily different from a unitary state. The Permanent Head of the Foreign Office, Sir Antony Acland, noted that Australia is an independent country and that:

> "When the United Kingdom bows out, the Government of that independent country will comprise all Australia's Governments (Commonwealth and State)—in other words 'independence' and 'sovereignty' will not be the prerogative solely of Commonwealth Ministers".[46]

This view of the divided or shared sovereignty with the federation, with which Sir Samuel Griffith would have agreed, was further explained in a brief to the UK Attorney-General for advice on the subject. In that brief, a Foreign Office Legal Adviser observed:

> "The non-independent status of the Australian States does not seem necessarily to rule out the possibility of State Ministers being a constitutionally proper source of advice on certain State matters…
>
> "This is more especially the case in the present context where the non-independent status of the Australian States is by no means clear cut. This may be illustrated by the correspondence with the Law Officers in 1965 in which the then Law Officers agreed that, in the context of [litigation against the State of Victoria]… that State was recognized by the British Government as a sovereign State, the Governments of which were the Commonwealth Government and the State Government".[47]

The British Attorney-General, in his advice, stated that he found the above statement from the brief "wholly convincing".[48] In relation to whether UK Ministers should advise the Queen on the termination of residual links with Australia, he noted that UK Ministers had a formal role to play because of their constitutional relationship with the States, but that they should advise Her Majesty to accept whatever has been decided upon by the Commonwealth and the States. If, however, the proposals had an adverse effect on the Queen of the United Kingdom (apart from the termination of her functions regarding the States) or as Head of the Commonwealth, then he thought it would be appropriate for UK Ministers to advise her on the substance of the proposals. This was because the United Kingdom government was *primus inter pares* in advising the Queen.

British officials decided that the Australian proposal could not be faulted constitutionally and that they had no ground to attack it. Mrs Thatcher stated that it would be "too colonial for words" for the British

government to interfere, and she supported the proposal.[49] The British Foreign Secretary, Sir Geoffrey Howe, agreed that the right of Premiers to advise the Queen directly was a "consequence of Australia having been established as a federation with a fragmentation of sovereign powers".[50]

Even though it was no longer supported by the British government, Buckingham Palace continued to object to the *Australia Acts* proposal. It was concerned that the Queen might be faced with "outlandish advice". The Queen's Private Secretary took on negotiations directly with the Commonwealth government, using his status as the Private Secretary to the Queen of Australia, rather than the Queen of the United Kingdom. This worried the British government, which considered that the "independence negotiations" should be conducted by British Ministers, not the Palace.

In January, 1985 Senator Evans told the British High Commissioner that Australian patience was wearing thin, and suggested for the first time that the Queen might be formally advised to act despite her personal objections. Senator Evans presented to the Queen's Private Secretary a paper that accepted the States' arguments about sovereignty. It said:

> "The States are jealous of their sovereignty, and the Commonwealth has no wish to impinge upon it. The States are not prepared to solve one offence by committing themselves to another—that is, by handing to the Australian Prime Minister the right to recommend or block appointments of State Governors who, in the States, exercise significant constitutional authority. Any such solution would run counter to the nature and history of federation in Australia, as shown by the express provisions of the Commonwealth Constitution continuing the constitutions and residual sovereign powers of each State".[51]

The Palace remained unconvinced. Finally, the formidable Sir Geoffrey Yeend, the Secretary of the Department of the Prime Minister and Cabinet, travelled to London to secure the Queen's agreement. One Foreign Office official hoped that the Palace appreciated the beauty of the situation that the "Secretary of an Australian Prime Minister, associated with the idea of a republic and an enemy of State rights, is obliged, in the face of Palace objections, to argue the case for how The Queen might entrench Her position in the Australian States".[52]

Second hand sources report that Sir Geoffrey explained that the package would fall if direct access to the Queen by State Premiers was removed, and that the Australian Prime Minister therefore had no alternative but to advise that the Queen accept the entire package. This would be the case for both his informal and formal advice to the Queen. The Queen had no choice but to agree or cause a constitutional crisis of enormous proportions. She agreed to the enactment of the *Australia Acts,* but the Palace continued to negotiate a convention to protect the Queen's position.

While s.7 of the *Australia Acts* limited the Queen's powers with respect to the States to those of appointing and removing State Governors, the Queen was still to have the capacity to exercise her other powers while visiting a State. She did not want to be advised, for example, to read a speech upon the opening of a State Parliament that criticised one of her other governments. After much negotiation, it was agreed that the Queen would not have to act upon the advice of State Premiers, when visiting the State, unless she agreed to do so.[53] A convention was agreed that when Her Majesty was present in a State she would "only do what she wants to do". An attempt to write this into the *Australia Acts* was abandoned, as it was too stark a departure from the principle of responsible government. Effectively, it gave the Queen the discretion to reject advice. Instead, the final form of the agreed "convention" is that the Queen will only perform functions or exercise powers within a State if there is prior and mutual agreement on the subject.

The effect of the *Australia Acts*

Apart from this convention, s.7 of the *Australia Acts* 1986 requires the Queen to act upon the advice of State Premiers with respect to the appointment and removal of State Governors. What effect did the *Australia Acts* have upon the status of the Queen of Australia? Clearly, as Sir Samuel Griffith recognised in 1904, there were separate "Crowns" with respect to the States from their creation, to the extent that the term "Crown" refers to separate bodies politic or to separate executive governments. However, to the extent that the "Crown" refers to the role of the Sovereign with respect to a body politic, the position was different. Until the *Australia Acts* came into force, it was the Queen of the United Kingdom who exercised powers with respect to the Australian States. The Queen of Australia was confined to dealing with matters within the executive authority of the Commonwealth level of government.

The *Australia Acts* terminated the responsibility of British Ministers to advise the Queen with respect to State matters,[54] and instead provided for State Premiers to advise the Queen on the exercise of any remaining

powers she holds with respect to the States.[55] Does this make Her Majesty now Queen of Victoria or Queen of New South Wales? According to the orthodox analysis above, it would do so. Indeed, Lord Bingham of Cornhill in the *Quark Fishing Case*, expressly referred to Her Majesty as "Queen of New South Wales",[56] pointing to an authority from 1873,[57] but as discussed above, the reasoning in that case is flawed.

The Australians who negotiated the *Australia Acts* avoided the issue, preferring the safety of ambiguity to the potential conflict that might arise if the matter were dealt with explicitly. British officials however contemplated the issue. They accepted that orthodox reasoning would lead to the view that the Queen would become Queen of Victoria and the other States. However, in their pragmatic style, they also accepted that the role of the Queen of Australia could be expanded so that there is one Crown but with different advisers—a form of federal Queen.[58] They left it to Australians to determine which course they pursued. That is a matter now for us to decide.

Endnotes:

* Much of the material in this paper is derived from A Twomey, *The Chameleon Crown—The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), which in turn is based upon British and State Government records.

1. *Official Record of Debates of the Australasian Federal Convention* (Legal Books, Sydney, 1986 (reprint)), Sydney, 1891, p. 866, per Sir Samuel Griffith.

2. *Ibid.*, p. 874, per Sir Samuel Griffith.

3. *Ibid.*, p. 875, per Sir Samuel Griffith.

4. Telegram by the Queensland Lieutenant-Governor to the Colonial Secretary, 14 October, 1901.

5. Colonial Office, internal memorandum, 14 October, 1901.

6. Telegram by the Queensland Lieutenant-Governor to Colonial Secretary, 17 October, 1901.

7. (1904) 1 CLR 204.

8. *Ibid.*, per Griffith CJ at 231.

9. *Commonwealth v. New South Wales* (1906) 3 CLR 807, per Griffith CJ at 813-4.

10. *R v. Sutton* (1908) 5 CLR 789, per Griffith CJ at 796.

11. *Amalgamated Society of Engineers v. Adelaide Steamship Co Ltd* (1920) 28 CLR 129, per Knox CJ, Isaacs, Rich and Starke JJ at 152.

12. *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 3 All ER 111.

13. *Ibid.*, per Lord Bingham of Cornhill at [10] and [19]; and per Lord Hope of Craighead at [72] and [76]. See also per Lord Hoffman at [64], on the slightly different (and also dubious) point that the actions were taken under a law of South Georgia, rather than a law of the United Kingdom.

14. *Ibid.*, per Lord Bingham of Cornhill at [10]; and per Lord Hope of Craighead at [76].

15. R Brazier, *Constitutional Reform and the Crown*, in M Sunkin and S Payne, *The Nature of the Crown* (OUP, Oxford, 1999); S de Smith and R Brazier, *Constitutional and Administrative Law* (Penguin

Books, London, 7th ed, 1994) at 124; and R W Blackburn, *The Queen and Ministerial Responsibility* [1985] Public Law 361.

16. *Sue v. Hill* (1999) 199 CLR 462, per Gleeson CJ, Gummow and Hayne JJ at [83]—[88].

17. Letter by Lord Stamfordham, Buckingham Palace, to Mr R Howorth, UK Cabinet Office, 15 July, 1930, noting that the King wanted to appoint as his representatives persons personally known to him.

18. Z Cowen, *Isaac Isaacs* (OUP, Melbourne, 1967), pp. 191-205. Isaacs took up office in 1931.

19. UK, *Parliamentary Debates,* House of Commons, 16 December, 1930, col 1037; and Memorandum by the Dominions Secretary, *The Constitutional Position of New South Wales*, Cabinet Paper, July, 1931, CP 177 (31).

20. See, for example, the appointment of the Victorian Governor: Victoria, *Government Gazette,* 18 February, 1986, p. 392; and the Letters Patent of 14 February, 1986 made with respect to South Australia by the Queen of the United Kingdom, not the Queen of Australia: SA, *Government Gazette,* 6 March, 1986, pp. 518-20.

21. Memorandum by Mr Watts, Deputy Legal Adviser, Foreign and Commonwealth Office (FCO), to Mr Thompson, FCO, 17 February, 1986.

22. Letter from Mr Whitlam to Mr Heath, 18 January, 1974.

23. *The Term "Australian Government"* (1974) 48 ALJ 1.

24. *Royal Style and Titles Act* 1973. See: A Twomey, *The Chameleon Crown—The Queen and Her Australian Governors* (Federation Press, Sydney, 2006), Ch 9.

25. See: Twomey, *op. cit.*, Ch 10.

26. Opinion of Law Officers of the Crown, 12 June, 1973; Opinion of the UK Attorney-General, Sir P Rawlinson, 27 July, 1973; Memorandum by the Lord Chancellor, Lord Hailsham, to the UK Prime Minister, Mr Heath, 25 July, 1973; Memorandum by the Foreign Secretary to the Defence and Overseas Policy Cabinet Committee, July, 1973; and Advice by Professor de Smith to the UK Government, July, 1973.

27. Record of meeting of the UK Defence and Overseas Policy Cabinet Committee, 30 July, 1973.

28. Letter by Sir M Charteris, Buckingham Palace, to Mr Acland, FCO, 22 January, 1974.

29. *Commonwealth v. Queensland* (1975) 134 CLR 298, per Murphy J at 335; and Letter by Sir M Byers, QC, Commonwealth Solicitor-General, (1981) 55 ALJ 360-1.

30. Letter by Sir M Charteris, Buckingham Palace, to Mr Wright, No 10 Downing St, 27 December, 1974.

31. J Fajgenbaum and P Hanks, *Australian Constitutional Law* (Butterworths, Melbourne, 1972), pp. 19-20; R D Lumb, *The Constitutions of the Australian States* (4th ed, UQP, Brisbane, 1977), pp. 70-2; Sir W Campbell, *The Role of a State Governor*, 1988 Endowed Lecture of the Royal Australian Institute of Public Administration (Queensland Division), 22 March, 1988, p. 2; and M Stokes, *Are there separate Crowns?* (1998) 20 *Sydney Law Review* 127, at 133, fn 27.

32. UK Cabinet Minute DOP(73) 77, 17 December, 1973.

33. See: Twomey, *op. cit.*, Chs 5 and 13.

34. Letter by Mr Fergusson, FCO, to Sir M Charteris, Buckingham Palace, 6 January, 1976.

35. Transcript of the Premiers' Conference, 24 June, 1982, p. 44.

36. See Twomey, *op. cit.*, Ch 14.

37. Despatch by Lord Carrington to Sir R Cutler, 19 November, 1979.

38. Letter by Sir P Moore, Buckingham Palace, to Sir A Acland, FCO, 2 March, 1984.

39. See Twomey, *op. cit.*, pp. 230-4.

40. Teleletter by Mr Chick, FCO, to Sir J Mason, UK High Commissioner, Canberra, 7 October, 1983.

41. *Commonwealth v. Tasmania* (1983) 158 CLR 1.

42. Memorandum by Sir P Moore, Buckingham Palace, to Mr Dove, Protocol Department, FCO, 11 November, 1983.

43. Letter by Mr Chick, FCO, to Sir J Mason, UK High Commissioner, Canberra, 1 November, 1983.

44. Memorandum by Mr Watts, Legal Adviser, FCO, to Mr White, FCO, 26 October, 1983.

45. Memorandum by Mr Watts, Legal Adviser, FCO, to Mr Chick, FCO, 22 November, 1983.

46. Letter by Sir A Acland, FCO, to Sir P Moore, Buckingham Palace, 14 February, 1984.

47. Letter by Mr Watts, Deputy Legal Adviser, FCO, to Mr Steel, Law Officers Department, 22 March, 1984.

48. Letter by Mr Saunders, Legal Secretary, UK Attorney-General's Chambers, to Mr Watts, Deputy Legal Adviser, FCO, 19 April, 1984.

49. Letter by Mr Butler, Principal Private Secretary to Mrs Thatcher, to Sir A Acland, FCO, 11 September, 1984.

50. Letter by Mr Appleyard, Private Secretary to the Foreign Secretary, to Mr Butler, Principal Private Secretary to Mrs Thatcher, 8 February, 1985.

51. Commonwealth "Aide-Memoire" provided by Senator Evans to Sir P Moore, February, 1985.

52. Memorandum by Mr Chick, FCO, to Dr Wilson, FCO, 8 May, 1985.

53. Twomey, *op. cit.*, Ch 20.

54. *Australia Acts* 1986, s.10.

55. *Ibid.*, s.7.

56. *R (on the application of Quark Fishing Ltd) v. Secretary of State for Foreign and Commonwealth Affairs* [2006] 3 All ER 111, per Lord Bingham at [9].

57. *Re Bateman's Trust* (1873) LR 15 Eq 355 at 361. The case, however, is not authority for the divisibility of the Crown. Rather, it supports the notion of the indivisibility of the Crown.

58. Letter by Mr Watts, Deputy Legal Adviser, FCO, to Mr Steel, Law Officers Department, 22 March, 1984.