Chapter Ten

The Constitution and our State Constitutions

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As has been pointed out in previous papers to this Society, the Schedule to the Commonwealth of Australia Constitution Act 1900 (Imp.) represents only part of our body of constitutional law and practice,1 and has changed in its operation since its adoption to an enormous degree, notwithstanding the almost universal lack of success of proposals for formal amendment in accordance with the procedure laid down within it.2 These changes have been uniformly in favour of the product of the Federal compact, the Commonwealth, and usually, it is said, at the expense of the States. Notable amongst the causes of increased central power have been the financial powers of the Commonwealth Government,3 and the conjoint operation of section 109 of the Constitution and the doctrines which prevailed in the High Court for the first time in the Engineers' Case4 and had their most notable recent success in Tasmania v Commonwealth.5

The underlying conclusion of this Paper is that there is a third fundamental cause of these developments, that it has interacted with the second (and in particular, the approach to the external affairs power preferred by the High Court), and that it has important implications for future constitutional developments in Australia, particularly if it were to be the case that the republican cause prevailed to the extent of successful carriage of a referendum on the topic which was nonetheless bitterly resisted by the people and/or Government(s) of one or more of the States.

The Formal Framework

As with the confederation which existed in what are now the Continental United States of America between the conclusion of the American War of Independence and the adoption of the Constitution of the United States, the Commonwealth was not the first Federal body in Australia with law-making powers. The Federal Council of Australasia Act 1885 (Imp.) created the Federal Council of Australasia, which had power to pass laws whose effect was preserved by section 7 of the Commonwealth of Australia Constitution Act. The Federal Council itself was, however, abolished by that Act.

The Constitutions of the several States are referred to in Chapter V of the Constitution. The critical provisions are sections 106, 107, 108, 109, 118, and 119. These respectively provide:

Chapter V - The States

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the

Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Reference should also be made to section 105A of the Constitution which provides, inter alia:

105A. (1) The Commonwealth may make agreements with the States with respect to the public debts of the States, including –

(a) the taking over of such debts by the Commonwealth;

(b) the management of such debts;

(c) the payment of interest and the provision and management of sinking funds in respect of such debts;

(d) the consolidation, renewal, conversion, and redemption of such debts;

(e) the indemnification of the Commonwealth by the States in respect of debts taken over by the Commonwealth; and

(f) the borrowing of money by the States or by the Commonwealth, or by the Commonwealth for the States.

(5) Every such agreement and any such variation thereof shall be binding upon the Commonwealth and the States parties thereto notwithstanding anything contained in this Constitution or the Constitution of the several States or in any law of the Parliament of the Commonwealth or of any State.

Each State, as contemplated by these provisions, has its own Constitution Act. Those of most States6 are reasonably comprehensible as comprehensive statements of formal aspects of their State Constitutions although, like the Constitution of the Commonwealth, they do not address issues involving the conventions of responsible government to any great degree. They are notable for the ease whereby they can be amended (in most cases, by simple Act of Parliament). In every case, they are the culmination of a legal framework which commenced with prerogative acts of the Crown or Acts of the Imperial Parliament, and until 1986 were controlled by the Colonial Laws Validity Act 1861 and the Australian States Constitution Act 1907, each of which has now been repealed by the Australia Act 1986.

The establishment of the separate States was not without its difficulties in each of the jurisdictions. The judicial activities of Mr Justice Boothby in South Australia provided a major part of the impetus for the enactment of the Colonial Laws Validity Act.7 Perhaps the State which had the most difficult constitutional birth was that of Queensland, details of which are recounted by Mr Justice McPherson in his history of the Supreme Court of Queensland.8

Sovereign States?

One frequently hears the comment made that prior to Federation there were six sovereign States, whose sovereignty and independence has been increasingly impaired by a centralist Federal Government. Whilst it is undoubtedly the case that the power of the Commonwealth Government has been increased since 1901, and the freedom of action of the States decreased, the notion of sovereign States existing in 1900 is wholly illusory.

In English law, sovereignty had a different aspect depending upon whether one was concerned with the United Kingdom or with overseas possessions. Within the United Kingdom, the conventional formulation is that the Sovereign is the Queen (or King) in Parliament,9 i.e., that

the command of the Sovereign exercised by Royal prerogative is not binding in English law except to the extent that it is confirmed by Act of Parliament.

The position in relation to the Colonies was different. British subjects abroad did not enjoy the rights and privileges available as a matter of course to their compatriots within the United Kingdom. For example, they were subject to the jurisdiction of the last of the prerogative courts, the Privy Council, whose jurisdiction was abolished in England by the Long Parliament (1640-1660). They were subject to regimes of taxation without representation. In due course, insensitivity by the British Government in the handling of the grievances of the American colonists led to these rights being asserted and achieved by force of arms.10 The extent to which the rights contended for by the American colonists in the Declaration of Independence are coincident with rights contended for by the Long Parliament in England, and achieved by the Civil War and the execution of King Charles I, is not surprising when regard is had to the intellectual underpinnings of early American political thought.11

Just as it is misleading to analyse the Australian Constitution in terms of the Schedule to the Commonwealth of Australia Constitution Act, so it is misleading to analyse the position of the then Australian Colonies by reference to their Constitutions as they stood prior to Federation, particularly when regard is had to the fact that State Governors were responsible, admittedly to a degree which lessened over time, to the Colonial Office in London rather than to the ministries which they appointed.

Attempts to perform acts of sovereignty frequently met with lack of support or outright opposition from the Colonial Office, as was the case with initial attempts by the Queensland Government to annexe Papua New Guinea.12

At a time when statute law was relatively unimportant in the regulation of commerce, when the non- statute law was determined in the Privy Council, and the major commercial (in the sense of international trade) laws were to be found in statutes such as the Navigation Act and the Merchant Shipping Act of the Imperial Parliament, when the powers of the Colonial Office over both legislation and the conduct of the Queen's representative were unquestioned, and there was (from 1885) a supra-colonial body with law-making powers, the notion of independent Sovereign States which voluntarily conferred their powers upon the newly formed Commonwealth is wholly insupportable.

The Accretion of Nationhood

A more accurate description of the legal consequence of the creation of the Commonwealth is to be found in the judgment of Dixon J in In Re Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation13:

"A federal system is necessarily a dual system. In a dual political system you do not expect to find either government legislating for the other. But supremacy, where it exists, belongs to the Commonwealth, not to the States. The affirmative grant of legislative power to the Parliament over the subjects of bankruptcy and insolvency may authorize the enactment of laws excluding or reducing the priority of the Crown in right of the States in bankruptcy and it has been held that the taxation power extends to giving the Commonwealth a right to be paid taxes before the States are paid (South Australia v The Commonwealth14). But these are the results of express grants of specific powers, plenary within their ambit, to the Federal legislature, whose laws, if within power, are made paramount. Because of their content or nature, the express powers in question are considered to extend to defining the priority of debts owing to the States or postponing State claims to taxes. The legislative power of the States is in every material respect of an opposite description. It is not paramount but, in case of a conflict with a valid Federal law, subordinate. It is not granted by the Constitution. It is not specific, but consists in the undefined residue of legislative power which remains after full effect is given to the provisions of the Constitution

establishing the Commonwealth and arming it with the authority of a central government of enumerated powers. That means, after giving full effect not only to the grants of specific legislative powers but to all other provisions of the Constitution and the necessary consequences which flow from them.

It is a fundamental constitutional error to regard the question of the efficacy of s. 282 of the Companies Act 1936 of New South Wales as if it were an exercise of an express grant, contained in the Constitution, to the States of a power to make laws with respect to the specific subject of the winding up of insolvent companies. It is a provision enacted in intended pursuance of a general legislative power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever. The content and strength of this power are diminished and controlled by the Commonwealth Constitution. It is of course a fallacy, in considering what a State may or may not do under this undefined residuary power, to reason from some general conception of the subjects which fall within it as if they were granted or reserved to the States as specific heads of power. But no fallacy in constitutional reasoning is so persistent or recurs in so many and such varied applications. In the present case the fallacious process of reasoning could not begin from s. 107 as the error has so commonly done in the past. For it is not a question whether the power of the Parliament of a Colony becoming a State continues as at the establishment of the Commonwealth. The Colony of New South Wales could not be said at the establishment of the Commonwealth to have any power at all with reference to the Commonwealth. Like the goddess of wisdom the Commonwealth uno ictu sprang from the brain of its begetters armed and of full stature. At the same instant the Colonies became States; but whence did the States obtain the power to regulate the legal relations of this new polity with its subjects? It formed no part of the old colonial power. The Federal Constitution does not give it. Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power."

The process whereby the combination of techniques of literal construction of the grants of power contained in section 51 of the Constitution, coupled with section 109, which have operated to severely limit the powers of the States, has already been comprehensively covered in papers given to this Society,15 and does not warrant further comment here.

However, it is instructive to make reference to section 105A, because many of the difficulties which have arisen with the external affairs power arise also under it. Nothing in section 105A requires the agreements to which it refers to be submitted to any Parliament in Australia. Once the agreements are made, they have force and effect notwithstanding anything contained in the Constitution or the Constitutions of the several States. The only apparent limit on the ambit of the provision is that the agreement must be between the Commonwealth and at least one State, and it must be with respect to "the public debts of the States", a topic of consuming interest to the residents of all States except Queensland at present. In New South Wales v The Commonwealth (No. 1),16 it was held that this provision enabled the Commonwealth to require payment to the Commonwealth of moneys which had not been appropriated by the New South Wales Parliament.

Given the ingenuity with which financial instruments are now being created,17 the scope for operation of this provision should not be underestimated.

Accretion of Sovereignty and Praemunire

As previously noted, at Federation a substantial body of Sovereign power in relation to matters which occurred in Australia resided not in Australia but in London. The Commonwealth

Government has been assiduous in seeking to have the remnants of this Sovereignty transferred to itself and, with the notable exception of matters involving the appointment of State Governors, has been largely successful in these endeavours, dramatically altering the nature of the original Federal compact.

It is said that nature abhors a vacuum, but that abhorrence is a trifle compared to the abhorrence which those seeking to be Sovereign have of those who challenge their Sovereignty. In this respect, there is an interesting historical parallel between the steps which have been taken in Australia to end residual United Kingdom Sovereignty, and the succession of measures adopted by the English Monarchy and Parliament and the influence of the papacy within England up to and including the Reformation.

Prior to the Reformation, the papacy exercised considerable temporal power within England and controlled a very substantial part of the nation's wealth. Frequently, the great officers of State were also senior prelates. Moreover, by use of the spiritual powers available to the papacy, the course of public policy within England was frequently capable of being altered or affected by the Pope of the day. The papacy regulated a great deal of international commerce. By way of example, in the fourteenth century, commercial dealings required the authentication of documents by a notary. Prior to the Reformation, the appointment of notaries throughout Western Christendom lay with the Pope, who so far as regards to the whole of England and Wales delegated his powers of appointment to his legate, the Archbishop of Canterbury. Accordingly, in England and Wales it was under a licence or faculty granted by the Archbishop of Canterbury in exercise of his legatine powers that a notary in this period received the right to practice.18

Early legal weapons developed in the long running conflict between the papacy and the English Government were the Statutes of Praemunire, first enacted in 1392, which prohibited the admission or execution of papal bulls or briefs (the means whereby the wishes or commands of the Pope could be made known) within the realm. Prior to that the Statute of Provisors 1351 had denied the papal claim to dispose of benefices and appoint Bishops.19 At a later time the holding of a legatine court was prohibited by the Statutes of Praemunire.20

In 1533, Parliament enacted the Act for the Restraint of Appeals whose preamble declared that:

"This realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same, etc",

by which it asserted that there was no temporal (or spiritual) authority which was superior to the English authorities.21 Shortly afterward, the universalist vision of Western Christendom, of which Sir Thomas More was perhaps the foremost contemporary exponent, was comprehensively routed by the Pelagian concept of the nation-state.22

In 1900, the British Empire for its inhabitants (or at least those of British descent) in many ways resembled the universalist world, except, of course, that its centre was London rather than Rome and God was, if not an Englishman, at least some one very like one, and spoke in terms of Milton's Divine Mission for their race23 or Ruskin's Imperial Destiny.24 The dismantling of Australia's links with that world in many ways the most profound constitutional change since Federation was accomplished wholly without reference to the formal processes laid down in the Constitution, driven largely by Commonwealth Governments of both Parties with attitudes remarkably similar to the Parliament which enacted the Act for the Restraint of Appeals.

The Statute of Westminster, ratified by the Statute of Westminster Adoption Act 1942, made it clear that the exercise of powers by the Crown in Australia would be on the advice of Australian Ministers rather than United Kingdom Ministers. The sole remaining institutional link was the possibility of appeals to the Privy Council, which the Constitution itself permitted, although it

provided that inter se matters might only be appealed from the High Court with its leave pursuant to section 74 of the Constitution.

A promising means of avoiding this requirement was to raise the inter se matter in a State Supreme Court and appeal from its judgment to the Privy Council,25 a technique blocked by the addition of section 40A to the Judiciary Act in 1907.26

The long process whereby appeals to the Privy Council were abolished has been told elsewhere, perhaps nowhere as well as in Michael Coper's work.27 Initially, appeals from the High Court in Federal matters were abolished,28 then all appeals from the High Court.29 Finally, the residual jurisdiction of the Privy Council was ended by the Australia Act 1986. The preamble to that Act is strangely reminiscent of the Act for the Restraint of Appeals:

"Whereas the Prime Minister of the Commonwealth and the Premiers of the States ... agreed on the taking of certain measures to bring constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation ..."

As Senator Kemp has pointed out in another paper to this seminar, the contrast between attitudes to the relics of Imperial institutions expressed in the above excerpts and to United Nations bodies is acute and not readily reconcilable on grounds of principle.

Since the passage of the Australia Act, there remain no residual constitutional links between Australia and the Australian States, on the one hand, and the United Kingdom on the other. The only part of the residual sovereignty which existed in 1901 in the United Kingdom which has not been transferred to the Commonwealth is the power to appoint State Governors, which under the Australia Act became vested in State Premiers.30

Continuance of State Constitutions

It will be recalled that the Australia Act was passed both as an Act of the Australian Parliament (with the request and consent of the States) and of the United Kingdom Parliament (with like request and consent). The Commonwealth view in the negotiations was apparently that there was no need for the United Kingdom Parliament to become involved, because the Constitution conferred adequate power under placita 51(xxxvii) and (xxxviii)31 to enable the Commonwealth to deal with the matter with the consent of the States. The States declined to agree.

Be that as it may, it is now clear that the ultimate constitutional basis of the State Constitutions is Chapter V of the Commonwealth Constitution and, if it were validly altered by the process set out in section 128, that alteration would have the effect of altering the State Constitutions to the extent of the change.

It is trite law that the Commonwealth Constitution, to the extent that it creates individual rights, is binding on the States: W & A McArthur Ltd v Queensland.32 This was established even before it became clear that it bound the Commonwealth.33

The scope for the States to be abolished, have their constitutional powers substantially altered, or to be even further diminished by means of passage of Commonwealth laws in reliance on the specific heads of power as construed by the High Court, or by way of formal amendment to the Constitution, is very largely unlimited, although amendment of the Constitution would be necessary if the actual existence of the States or their capacity to operate as effective institutions of government were threatened by a Commonwealth law that was otherwise within power, having regard to the implied prohibitions doctrine first expounded in Melbourne Corporation v The Commonwealth.34

It is not to be expected that the proponents of a republic would wish to put forward, in any referendum proposal, a schedule of detailed amendments to the respective State Constitutions necessary to force recalcitrant States to adopt republican structures. To do so would expose them to even greater attack based upon the alleged complexity of the proposals. Since each State

contains provision in its Constitution for the exercise of the functions of the Office of Governor if no Governor has been appointed, legislation which simply forbade the Premiers to communicate with the Monarch for the purposes of appointing Governors would achieve, for all practical purposes, a republican structure within each State. Such legislation would be modelled on the concepts underlying the doctrine of praemunire. I have little doubt it would be held to be valid by the current High Court as an exercise of the external affairs power, and its result in practice would be to force the States to amend their Constitutions to make other arrangements, or have the functions of Governor devolve by default upon the Chief Justice when the commissions of the current incumbents expire.

The Substance or the Shadow?

The foregoing conclusions, if correct, demonstrate the contemporary fragility, in a purely legal sense, of our State Constitutions. They are vulnerable to change at the whim of their current parliamentary majorities, the Commonwealth in exercise of its legislative and financial powers, parliamentary collusion between the Commonwealth and the State concerned under placita 51(xxxvii) and (xxxviii) of the Constitution, and the Commonwealth and State Governments, in exercise of executive powers, entering into agreements pursuant to section 105A of the Constitution and (in the case of the Commonwealth) entering into international treaties.

It is also pertinent to note that State legislatures can, by agreement with the Commonwealth, assist the Commonwealth to evade constitutional limitations upon it, as occurred in the facts the subject of the litigation in Pye v Renshaw,35 where grants under section 96 to a State Government willing to resume lands at below market value to enable Commonwealth policy to be implemented, thereby defeating the protection otherwise available under placitum 51(xxxi), were held to be valid.

There have been over the years many thoroughly unsatisfactory attempts, some unfortunately successful, to change State Constitutions. Probably the darkest aspect of that history was the conduct of the Theodore Government in Queensland between 1919 and 1922.

1921 was not an auspicious year for Queensland's democracy. In 1920 the Theodore Labor Government had taken advantage of the retirement of the Governor to appoint as Lieutenant Governor William Lennon, the Speaker of the Legislative Assembly, a former (Labor) Minister.36 He acceded to its recommendation to appoint sufficient Members of Legislative Council to ensure passage of the Government's legislative program (including abolition of the Legislative Council hence their nickname of "the suicide squad").

In addition to the passage of legislation for the abolition of the Legislative Council,37 1921 saw the enactment of legislation which removed three judges from the Supreme Court by reason of a retrospective age limitation, shortened terms of office of the remainder and abolished the District Court.

The Government justified these measures on the grounds that the Legislative Council and Supreme Court were frustrating the will of the democratically elected government of the day. Although this argument had a superficial attraction,38 it does not withstand close analysis. Since 1908, the Parliamentary Bills Referendum Act had permitted the Government to enact legislation not approved by the Legislative Council by submitting it to a referendum. The only legislation so submitted was a Bill for abolition of the Legislative Council, which was decisively defeated in 1917.39 Moreover, Ryan and Theodore had been able to placate their more radical supporters by proposing legislation neither supported, secure in the knowledge that the Legislative Council would reject it.40 Decisions of the Supreme Court, whether favourable or unfavourable from the Government's viewpoint, were subject to appeal to either the Privy Council or the High Court, neither of which was amenable to changes in composition at the instance of the Queensland

Government to secure more favourable outcomes. Nor, in any event, is it clear that the decisions to which the Government took exception were wrong as a matter of legal principle.41

It should not be thought that the "suicide squad" were unmindful of the possible loss of perquisites of office when they voted to abolish their positions. The Constitution Act Amendment Act of 1922 provided42 that upon abolition of the Legislative Council, its members should retain the privileges of office, including gold travel passes. These were abolished by the Moore Government,43 and restored by the Forgan Smith Government.44

As a result, the imbalances in executive and legislative power which apply throughout Australia are very much greater in Queensland due to the abolition of the Legislative Council in 1922. The only contemporary Australian Parliaments in which the Government controls the Upper House of its Parliament are those of Victoria and Western Australia: indeed, in New South Wales (and prior to their most recent elections, Western Australia and South Australia), the Government does not control the Lower House either. The occasions when Governments have controlled their Upper Houses have been comparatively rare: in the Senate, the Government of the day has had a majority for only 5 years out of the past 27.

Mr Justice McPherson has expressed a similar view in his observation that:

"A tendency for the legislature to assert its dominance over the judiciary, and for the executive to dominate the legislature, may have its origins in the bungling of Queensland's Constitution at Separation ... Its apotheosis was the decision in McCawley's Case and The Supreme Court Act of 1921, followed a year later by the abolition of the Legislative Council. In fashioning an instrument of power for their use the politicians of that era lacked the wisdom to foresee, or perhaps to care, that control of it would one day pass to their opponents. Those who now regret the ambit of Executive authority in Queensland can be in no doubt who were responsible for creating it ... "45

Nor should it be thought that the consequences in Queensland of abolition of the Upper House were unintended. Premier Theodore, proposing it, expressed the view that an upper house which duplicated the composition of the lower house would be superfluous, while one that obstructed the working of a constitutionally elected lower house would be destructive of parliamentary democracy.46

Whilst conservative parties in Australia have generally been supportive of bicameral Legislatures, that was not universally the case. The Bill for abolition of the Legislative Council was carried in the Legislative Assembly by a majority of 51 to 15, even though the composition of the Assembly at the time was 34 Labor to 32 non-Labor.47

Subsequent attempts to re-establish the Legislative Council by the Moore Government, which was elected in 1929 with a promise to do so, came to nothing in 1931 when 12 members of the Government Party wanted a referendum on the subject first, and indicated they would cross the floor if the Government proceeded without one.48 Since 1934, re-establishment of a Legislative Council has required a referendum.49 No attempt was made to re-establish the Legislative Council after Labor lost office in 1957, although it was National Party policy to do so for much of that time.

Nor, in any event, would re-establishment of the Legislative Council of itself be adequate to fully restore the necessary checks and balances. It would take Queensland only to the position of the other States and the Commonwealth. That position is not regarded by many as satisfactory. And if Australia were to become a republic on the basis presently suggested, with political appointees not directly elected simply taking on the roles of Governor-General and Governor, it would present a real risk of untrammelled executive dominance. This Society is pledged to support the system of constitutional monarchy. But if its views on that subject ultimately do not prevail, it is

of profound importance that the form of republican government adopted does not exacerbate an already unsatisfactory state of affairs.

Given that the legal foundations of the States are not particularly secure, wise statecraft would involve not only seeking to increase that security by legal means, but also by creating a situation in which the State Constitutions were held in some affection by their citizens. The conduct of many recent State Governments suggests that such has not been a priority in the handling of the public administration for which they have been responsible.50

Another step would be to entrench provisions so that future changes can only be made by referendum. Even this, however, is subject to limitations, as the history of amendments made to the Queensland Constitution in 1977 shows. The Constitution Act Amendment Act 1977 inserted new sections in the Constitution of that State, including sections 11A, 11B, and 53. Section 53 provided that those sections, together with section 14, could be amended only if it had been submitted for the approval of the electors at a referendum. Notwithstanding that, the Queensland Parliament, by the Australia Acts (Request) Act 1985, requested amendments to sections 11A, 11B, and 14 of the Constitution Act by both the Parliament of the Commonwealth and the Parliament of the United Kingdom. Those Acts were duly passed, and although there has been no formal amendment to the law by the Queensland Parliament amending the Queensland Constitution, there is little doubt that the provisions of the Australia Act have amended the Queensland Constitution Act in a manner which section 53 seeks to forbid, and presumably, a request to the Commonwealth Parliament for legislation amending a State Constitution would be held to be equally effective in terms of placita 51(xxxvii) and (xxxviii).

Truly, the States stand on inadequate legal foundations in the event of future determined attacks upon their operation and independence.

Endnotes:

1. See, e.g. SEK Hulme, QC, The Constitution: Its Defects or Ours, (1992) Proceedings of the Inaugural Conference of the Samuel Griffith Society ("1 Proceedings") 21.
2. Section 128.
3. See, in particular, D Chessel: The Lion in the Path, 1 Proceedings, 89-104.
4. Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd. (1920) 28 CLR 129.
5. (1983) 158 CLR 1.
6. But not Queensland – see the EARC Report on the subject.
7. See Lumb: The Constitutions of the Australian States (2nd ed. Rev.), (1962) University of Queensland Press at p.90.
8. B H McPherson: Supreme Court of Queensland (1989), Butterworths Pty Ltd, Sydney, at pp.23- 25.
9. Dicey: The Law of the Constitution (10th ed.) pp.39-85, IV Halsbury's Laws of England, Vol. 8 para 811.
10. For a more comprehensive discussion, see Johnson, P: The Offshore Islanders (1972), Holt Rinehart and Winston, New York, pp.224-235.
11. Johnson, op.cit., esp. at p.228.
12. See Cilento and Lack: Triumph of the Tropics (1959), Smith & Paterson, Brisbane at pp.166-176.
13. (1947) 74 CLR 508, at pp.529-531.
14. (1942) 65 CLR 373.
15. e.g. Sir Harry Gibbs: The Threat to Federalism (1993), 2 Proceedings, 183.
16. (1932) 46 CLR 155.
17. The Papua New Guinea Government was recently reported to have securitised its future revenue streams in a transaction involving a Bank in the Cayman Islands.

18. V Halsbury, Vol.34 para.201.
19. E Carpenter: Cantuar – The Archbishops in their Office (1971), Cassell, London at pp.42-43.
20. It was for this that Cardinal Wolsey was prosecuted in 1530, the Clergy being required to pay a collective fine and acknowledge the King as Head of State by way of penalty.
21. See generally in this area Hutchinson: Cranmer and the English Reformation (1951), English Universities Press, London at pp.39-63, and JR Green, A Short History of the English People (1874) (rep.1992), The Folio Society, London at pp.339-351.
22. See Johnson, op.cit.
23. Johnson: op.cit., esp. at pp.205-6, 218, 234-5.
24. Quoted in J Morris: Pax Britannica (1992), Folio Society, London, Vol.1 pp.317-8.
25. As occurred in Webb v Outtrim (1906) 4 CLR 356.
26. Judiciary Act 1907.
27. M Coper: Encounters with the Australian Constitution (1987), CCH, Sydney at pp.14-18.
28. Privy Council (Limitation of Appeals) Act 1968.
29. Privy Council (Appeals from the High Court) Act 1975.
30. Subsection 7(5).
31. "(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law:
"(xxxviii) 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: "
32. (1920) 28 CLR 530.
33. James v Commonwealth (1936) 55 CLR 1, at p.220.
34. (1947) 74 CLR 31.
35. (1951) 84 CLR 58.
36. The traditional practice was to appoint either the President of the Legislative Council or the Chief Justice : see (ed.) Murphy and Joyce: Queensland Political Portraits, p.317 (Murphy).
37. Constitution Act Amendment Act of 1992.
38. Murphy (ed. Murphy and Joyce, op.cit., pp.315, 320) and Cilento and Lack (Triumph in the Tropics, pp.403-4) accept it.
39. For abolition, 116,196: against abolition, 179,105 (figures quoted in (ed.) Murphy and Joyce, op.cit., p.277.)
40. Irwin E Young, Theodore : His Life and Times, Alpha Books, 37.
41. See, e.g. McPherson: op.cit. at pp.290-1.
42. Section 3.
43. Constitution Act Amendment Act of 1929 (No.2).
44. Constitution Act Amendment Act of 1935.
45. McPherson: op.cit., p.399.
46. Quoted by Murphy, (ed.) Murphy and Joyce : op.cit. at p.322.
47. ibid. at p.321.
48. Costar, (ed.) Murphy and Joyce, op.cit., p.390.
49. Constitution Act Amendment Act of 1934, section 3.
50. See e.g. B Lawrence: WA Inc: Why didn't we hear the alarm Bells? (1994), 3 Proceedings, 37.