Of Royalty and Republics: Implications for Queensland from the 1998 Constitutional Convention

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HELEN GREGORCZUK

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ABSTRACT

Moving to a republic is seen as the last symbolic step in Australia’s gradual independence from Britain. The debate on this issue has been gaining momentum recently, with the 1998 Constitutional Convention in Canberra producing a republican model for the Commonwealth. It is proposed that this model go to referendum in 1999. The Convention also recommended that the States decide the issue for themselves. This paper briefly examines the outcome of the Convention and the chosen republican model. The constitutional ramifications for the States and particularly Queensland if Australia moves to a republic are outlined. The paper highlights the consequences to the Federation if one or more States refuse to accept republican status and addresses the question of whether some parts of Australia could remain a monarchy if the rest of Australia embraces a republic. In particular, the divisibility of the Crown, the entrenchment of the Governor in Queensland and the need for a Head of State at state level are discussed. The mechanics of any change are also outlined, as well as the issue of whether the Commonwealth government has the power to compel the States to become republics.
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E 1 EXECUTIVE SUMMARY

Australia’s progression to a fully independent and mature nation has been a gradual process. The move to a republic is viewed by many as the means to gain that final and complete independence.

A republic can be defined as a state in which sovereignty is derived from the people, and in which all public offices are filled by persons ultimately deriving their authority from the people.¹

Currently Australia is a constitutional monarchy, meaning that we have a monarch as our Head of State who does not have absolute power but rather is subject to the constitution. Particularly, a constitutional monarchy can be contrasted with a republic in that under a constitutional monarchy the Head of State derives their authority through inheritance rather than the “people”.

This Bulletin examines the outcome of the recent Constitutional Convention and the implications for the States, particularly Queensland. The issue of whether or not Australia or Queensland should become a republic is not canvassed.

E 1.1 1998 CONSTITUTIONAL CONVENTION

The 1998 Constitutional Convention dealt specifically with the question of whether or not Australia should become a republic and which republic model should be put to the electorate and the timing of any such change. The Convention put together a model known as the Bipartisan Model for a Republic and recommended that a referendum be held in 1999 (pp 8-9)**. The Bipartisan Model features procedures for nomination (p 10), appointment (p 10), dismissal (p 11) and the powers of the President (pp 11-14). The powers of the President are to be the same as those currently exercised by the Governor-General (pp 11-12). These include formal powers to dissolve and summon parliament, and to give Royal Assent to bills passed by parliament (p 12); as well as reserve powers which include dismissal of the Prime Minister (p 13). The Convention did not recommend codifying the reserve powers (p 14). The Convention also dealt with the qualifications of the President and the term of office (p 15). The Convention resolved that State governments should


** Page numbers in brackets are references to pages of this bulletin
consider the implications for their respective Constitutions of any move to a republic (p 16).

E 1.2 CHANGING TO A REPUBLIC AT COMMONWEALTH LEVEL

There are 5 main issues to be addressed\(^2\)

- the removal of all references to the monarch in the Constitution;
- the need for an office of an Australian Head of State, its creation and what it might be called;
- appointment and removal of the Head of State;
- how the powers of the Head of State should be made subject to the same conventions and principles as apply to the powers of the Governor-General;
- how the Constitution would need to be changed for Australia to become a republic.

E 1.2.1 Changing the Constitution - s 128

To be changed, the Commonwealth Constitution requires adherence to the special procedure in s 128. This section requires that the proposed amendments be passed by an absolute majority of both Houses of Parliament, and then be put by referendum to the electorate within a particular time. To be successful, a majority of voters and a majority of States (this does not include Territories) must support the measure (pp 16-17). Note it is only a majority of States which must pass the amendment. As such it is possible that two States could vote against a measure introducing a republic.

E 1.2.2 Changing the Constitution Act 1900 (Imp)

The Commonwealth of Australia Constitution Act 1900 (Imp) is the Act of the United Kingdom Parliament which contains the Commonwealth Constitution in covering clause 9. There is an issue of whether the s 128 procedure will cover amendment of the Constitution Act since it is not technically the “Constitution” itself (pp 17-18).

**E 1.3 THE STATES AND THE REPUBLIC**

Australia is a federation, and as such any move to a republic by the Commonwealth must be considered in light of the relationships between the Commonwealth and the States. There is a possibility that under s 128 the Commonwealth could move to a republic with only 4 states and a overall majority of voters supporting the move. The Constitutional Convention 1998 recommended that the States should consider their own particular constitutional arrangements, and as such it seems that a republic will not be foisted on States not wishing it. The options available to the States depends on their constitutional positions (pp 20-21).

**E 1.3.1 Constitutional Position of States**

Section 106 of the Commonwealth Constitution provides that State Constitutions were preserved after the formation of the Commonwealth, and that they continue to exist subject to the Commonwealth Constitution. The effect of s 106 is that State constitutional structures can be altered by amendment to the Commonwealth Constitution. However, it is unlikely for political reasons that State constitutions would be amended in this way (p 23). Section 107 is also relevant. It has the effect of preserving State legislative power, which includes the power to alter its own Constitution pursuant to any valid manner and form provisions, and to alter the manner and form provisions themselves (p 22).

**What Constitutes the Queensland Constitution?**

At present there is no single comprehensive document that contains all relevant provisions pertaining to the State’s constitutional arrangements. There are some fourteen Acts in addition to the Constitution Act 1867 which relate to Queensland’s Constitution (p 23).

**The Current Position Generally**

The Australian states currently provide for a Westminster monarchical system in their respective constitutions. The Queen through her State Governor performs two crucial functions in that system:

- granting Royal Assent to Bills
- functioning as head of the Executive with the power of appointing and dismissing Ministers (p 24).
Role of the Governor

The Governor is the personal representative of the Crown in Queensland. All powers and functions of the Crown in respect of Queensland are exerciseable by the Governor with the exception of appointing and dismissing the Governor. Those powers and functions are largely akin to those of the Governor-General, and can be outlined in terms of:

1. ceremonial, symbolic, and representative duties; and

2. constitutional duties (pp 24 - 28).

Is the Monarchy Entrenched at the State Level?

It has been suggested by some commentators that section 7 of the Australia Acts entrenches the monarchy at state level. Based on the wording of the section it is equally arguable that section 7 merely assumes the existence of the monarchy, rather than actually entrenching it in any positive sense. However, to remove any doubt the Republican Advisory Committee in 1993 recommended that the Australia Acts be amended to make it clear that they do not entrench the monarchy (page 28).

Queensland

In 1976 the Queensland Constitution was amended to entrench certain aspects of the monarchy. Section 53 of the Constitution of Queensland Act 1867 (Qld) requires a referendum to be held to amend either section 53 itself or the provisions dealing with amongst other things, the Queen having powers to make laws for Queensland, the Queen being a component of parliament, the office of Governor and the Governor’s powers of appointment of public offices (ss 2, 2A, 11A, 14) (p 29).

Can Some States Remain a Monarchy if the Rest of Australia Becomes a Republic?

It is technically possible for States to remain a “mini-monarchy” within a republic, however this of course is subject to the Queen’s agreement to maintain her role in such circumstances (pp 29-30). This conclusion is also contingent on accepting that the “Crown” can be regarded as divisible, that is, a separate entity in each State and in the Commonwealth. For example, the “Crown in right of Queensland” is a different entity to the “Crown in right of the Commonwealth” and as such it is possible for ties to be severed at the Commonwealth level with the Crown, without necessarily also severing them for Queensland (pp 30-34). The question of divisibility arises because Australia is a federation of semi-sovereign States, inheriting the fairly abstract notion of “the Crown” from England where there is a
unitary system of government. The question is complicated by a body of literature on the Crown being an indivisible, unifying concept over the whole of the British Empire, and yet a practice which suggests divisibility (pp 30-33).

**E 1.4 REPUBLICAN OPTIONS FOR QUEENSLAND**

There are a number of key issues and questions which would need to be resolved if Queensland was going to move to a republic. The substantive ones include:

- what would replace “the Crown” in Queensland statutes
- whether a Head of State is necessary for Queensland ie would Queensland need a person to fill the role currently undertaken by the Governor
- if a Head of State was deemed necessary then specific issues about:
  - selection process (direct election, parliament select, or hybrid?)
  - qualifications/disqualifications from office
  - removal from office
  - length of term
  - title and powers
  - codification of powers and the conventions underlying them.

These issues have been discussed in detail at the Constitutional Convention in relation to the Commonwealth. The Commonwealth model therefore serves as a useful starting point for any consideration of a republican model for Queensland (p 35). The issue that arises particularly for the States that does not really apply to the Commonwealth, is whether it is necessary for a State to have a Head of State at all or any position equivalent to the Governor. A number of alternatives have been suggested (pp 39-40).

**E 1.4.1 Recommendations From Other States**

In particular some States have examined the issue of a move to a republic. Both Western Australia and South Australia have recommended that the role of state Governor be retained. All the reports examined advocated that a national move toward a republic was preferable to a piecemeal approach, but recognised that it was technically possible for part of Australia to remain a monarchy, if the move toward a republic is successful federally (pp 36-39). Tasmania’s report highlights the importance of the practical consideration that the Queen may not agree to a proposal to maintain her ties with a State in a federal republic (p 36).
E 1.4.2 Need for a State Governor

The cost associated with maintaining the role of State Governor, has been the basis for proposing alternatives to the current position, such as, combining the role with Chief Justice, or sharing the same Governor between several States (pp 39-41). However, given the significance of the Governor’s role as guardian of the State Constitution and facilitator of the workings of parliamentary democracy, most State reports on the topic have concluded in favour of maintaining the position (pp 36-38).

E 1.4.3 Machinery of Changing to a Republic in Queensland

Section 53 of the Constitution Act 1867 (Qld) entrenches the role of the Governor and the Queen in Queensland. Assuming this provision is regarded as a valid “manner and form” provision, then a referendum will be necessary in Queensland in addition to the Commonwealth level referendum to effect a republic for Queensland (pp 41-43). Nation-wide, section 7 of the Australia Acts should be amended so that it is clear that the connection between the States to the Queen and monarchy has been severed (p 44).

E 1.4.4 Transitional, Consequential and Miscellaneous Provisions

A number of miscellaneous issues have been identified by the Republic Advisory Committee as requiring attention at both Commonwealth and State levels. For example, the prerogative powers of the Crown (ie those powers which are unique to the Crown); and the interpretation of legislation which contains references to the Crown, Governor-General, and State Governors (p 45).

E 1.5 CAN THE STATES BE COMPELLED TO BECOME REPUBLICS?

It seems that technically the Commonwealth has the power to sever the States’ links with the monarchy, however it is not so clear whether there is a corresponding power to force a type of government on the States. There are a number of bases for this Commonwealth power which have been suggested. These include s 128 amendment and s 106; s 109 (Commonwealth law prevails over State law to the extent of any inconsistency), and s 51(xxix) the external affairs power (pp 45-47).
E 1.5.1 A Constitutional Accord?

The arguments about the Commonwealth compelling the States to sever their links with the Crown are technical legal ones. Clearly a political solution is preferable. The preferred method urged by most commentators is that of a constitutional accord, whereby the Commonwealth and States could negotiate wider constitutional reform as a means of ensuring uniformity of approach on the republic issue. Key issues suggested as being ripe for negotiation include the disparity between State and Commonwealth revenue raising capacity, and the treaty implementation aspect of the external affairs power. Success of such constitutional negotiations is of course heavily dependent on the federal government’s commitment to a republic (p 48).

E 1.6 EXECUTIVE SUMMARY CONCLUSION

There are a number of implications for the States from any move by the Commonwealth to a republic; whether in fact to move to a republic also, whether it is possible to stay a monarchy within a republic, the desirability or otherwise of having fairly uniform republican models for the Commonwealth and the States, and uniformity of models between the different States. In addition, it will be useful for each State to examine the substantive questions of whether a Head of State is necessary, and if so what the selection/dismissal process, qualifications, and powers of this role should be. Although technically possible for the States to decide their own fate on the issue, it is clearly preferable that any republican move be an “all or nothing” approach. This is particularly so, given the symbolism of national unity and identity which the republican movement is based upon. A constitutional accord may provide a cooperative solution to the issue and may provide the States with the means to have other constitutional and federal balance concerns addressed.
1 INTRODUCTION

The 1998 Constitutional Convention met in Canberra for ten days from 2 to 13 February 1998. The Convention was concerned predominantly with the issue of whether Australia should move to a republic and if so, what model should be proposed to the electorate. It offered a unique forum for debate and discussion about Australia’s constitutional future, with 152 delegates of varying ages, experience, and backgrounds participating. One of the issues which arose for consideration was what were the implications for the States if the Commonwealth was to move to a republic in future. The Convention resolved that the Commonwealth Government and Parliament should extend an invitation to State Governments and Parliaments to consider:

- The implications for their respective Constitutions of any proposal that Australia become a republic; and
- The consequences to the Federation if one or more States should decline to accept republican status.\(^3\)

This paper outlines the outcome of the Constitutional Convention and focuses on the issue of the repercussions for the States, if a move toward a republic was made at the Commonwealth level. The constitutional position of the States and particularly Queensland is discussed with particular emphasis on the divisibility of the Crown. The theoretical potential to remain a monarchy, as well as the technical legal means through which Queensland could change to a republic are examined. The paper also examines the role of the Governor in Queensland and the associated referendum requirements for removal of the position.

2 THE CONSTITUTIONAL CONVENTION

The Convention considered three questions:

- whether or not Australia should become a republic;
- which republican model should be put to the voters to consider against the current system of government; and
- in what timeframe and under what circumstances might any change be considered.\(^4\)

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\(^4\) Constitutional Convention, *Communique*, p 1.
Three categories of model for selection of a Head of State in a possible Australian republic were proposed at the Convention. These were:

- direct election
- parliamentary election by a special majority
- appointment by a special council following prime ministerial nomination.

Although there was significant support for each of these categories, following an exhaustive balloting process, a hybrid model, the Bipartisan Appointment of the President, was endorsed by a majority of delegates who voted on the motion.

2.1 **SPECIFIC ISSUES RESOLVED BY THE CONVENTION**

The following issues were specifically dealt with at the Convention.

2.1.1 **Whether Australia should become a Republic?**

The Convention supported Australia becoming a republic, and recommended that the Bipartisan Appointment of the President Model should be put to the people in a constitutional referendum, under s 128 of the Commonwealth Constitution.

2.1.2 **Timing and Circumstances of any Change?**

The referendum should be held in 1999. If the outcome of the referendum is in favour of a republic, then the new republic should come into effect by 1 January 2001.

*Educating the Public About the Issues*

Significantly, the Convention specifically resolved that prior to the referendum being put to the people, the Government undertake a public education programme directed to the constitutional and other issues relevant to the referendum.

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5 Constitutional Convention, *Communique*, p 1.

6 Constitutional Convention, *Communique*, p 2.
2.1.3 The Bipartisan Appointment of the President Model

This was the preferred model emerging from the Convention. It comprises the following attributes:

**Nomination Procedure**

The objective of the nomination procedure is to ensure that the Australian people are consulted as thoroughly as possible.\(^7\) This process of consultation is to involve the whole community, including State and Territory parliaments, local governments, community organisations and individual members of the public, all of whom should be invited to provide nominations.\(^8\)

The Commonwealth Parliament is to establish a committee to consider the nominations for President. The Committee shall report to the Prime Minister.

The Committee’s composition should have a balance between parliamentary (including representatives of all parties with party status in the Commonwealth parliaments) and community membership, and should reflect as far as practicable, gender and cultural diversity, and federalism. Further in compiling a short list of candidates for consideration by the Prime Minister, the Committee should consider community diversity.\(^9\)

**Appointment or Election Procedure**

The Prime Minister, after having taken into account the report of the Committee, shall present a single nomination for the office of President, seconded by the Leader of the Opposition, for approval by a joint sitting of both Houses of Parliament. A majority of two thirds will be required to approve the nomination.

Currently, the Queen is Australia’s formal Head of State, however for practical reasons, the Commonwealth and State constitutions have always provided for the Queen to be represented in Australia by either the Governor-General at the Commonwealth level or State Governors at state level. The Governor-General is

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\(^7\) Constitutional Convention, *Communique*, p 3.

\(^8\) Constitutional Convention, *Communique*, p 3.

\(^9\) Constitutional Convention, *Communique*, p 3.
appointed by the Queen on the advice of the Prime Minister, and State Governors are appointed by the Queen on the advice of the relevant State Premier.\textsuperscript{10}

\textbf{Dismissal Procedure}

The Prime Minister has the power to remove the President at any time by notice in writing signed by the Prime Minister. The President is removed immediately the Prime Minister’s written notice is issued. The Prime Minister’s action must be ratified by the House of Representatives within 30 days of the removal of the President. If the House of Representatives does not ratify the Prime Minister’s action, the President would not be restored to office, but would be eligible for re-appointment. The vote of the House would constitute a vote of no confidence in the Prime Minister.\textsuperscript{11}

Currently the Commonwealth Constitution does not provide any system for removing the Governor-General. The position is held ‘during the Queen’s pleasure’ however it would be inaccurate to regard this as an arbitrary power to dismiss the Governor-General whenever it suits the Queen. Rather, according to convention it is a power to be exercised only on the recommendation of the Australian Prime Minister.\textsuperscript{12}

\textbf{Head of State’s Powers}

The powers of the President shall be the same as those currently exercised by the Governor-General. Those powers are composed of both formal executive powers (those exercised on the advice or direction of Ministers) and real or reserve powers (those which can be exercised independently or contrary to government advice). Historically there were two sources from which the Governor-General’s power was derived; the royal documents (letters patent, Instructions under the Royal Sign Manual) by which the office is created, and the Constitution. The modern view is that the Constitution is the sole source of the Governor-General’s power, however the substance of those powers is governed largely by convention.\textsuperscript{13}


\textsuperscript{11} Constitutional Convention, \textit{Communique}, p 3.

\textsuperscript{12} Constitutional Centenary Foundation, ‘The Head of State in Australia’, p 2.

\textsuperscript{13} Constitutional Centenary Foundation, ‘The Head of State in Australia’, p 2.

The current Constitution in s 61 appears to give the Queen and Governor General vast powers. Section 61 provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative. In practice, however, convention requires that almost all these powers are exercised on government advice and therefore the powers are largely formal, rather than real.\(^\text{15}\)

The powers which are exeriscible by the Governor-General include:
- appointing sitting times for parliament, dissolving, proroguing, summoning parliament (ss 5 & 28)
- issuing writs for a general election of the House of Representatives (s 32)
- dissolving both houses of parliament in the event of deadlock (s 57)
- granting or withholding Royal Assent to bills passed by Commonwealth Parliament, and a discretion to return a bill to the Parliament with proposed amendments (s 58)
- reserving bills for the Queen to consider whether to grant royal assent (s 60)
- exercising the executive power of the Commonwealth (s 61)
- appointing Ministers of State (s 64)
- acting as ‘commander in chief’ of the naval and military forces (s 68)
- submitting Constitution Alteration Bills to referendum (s 128).\(^\text{16}\)

The following powers are required to be exercised with the advice of the Executive Council:
- appointment of judges (s 72)
- writs for election of House of Representatives (s 32)
- establishing departments (s 64)
- appointment and removal of non-statutory civil servants (s 67)
- appointments to Interstate Commissions (s 103).\(^\text{17}\)

The reserve powers are the powers which allow the Governor-General some degree of personal discretion, and she or he may therefore act without, or contrary to, Ministerial advice. There are only four powers which are generally accepted as reserve powers:
- to appoint a Prime Minister


\(^{16}\) Republic Advisory Committee, An Australian Republic: The Options- The Report, AGPS, Canberra, 1993, p 34.

• to dismiss a Prime Minister who cannot obtain supply or is acting persistently unlawfully\textsuperscript{18}
• to refuse to dissolve Parliament
• in limited circumstances, to force a dissolution of parliament.\textsuperscript{19}

A common feature of most of these situations is that they occur when a Prime Minister no longer holds the support of a majority of members of the House of Representatives.\textsuperscript{20} However, there is less certainty in relation to the situation where a Prime Minister still holds the support of the House of Representatives. For example, if a government which retains the confidence of the lower House, cannot secure the passage of its supply bills through the Senate, what is the Governor-General entitled to do?\textsuperscript{21} This was the situation in November 1975 when Sir John Kerr dismissed the Whitlam Government and appointed a caretaker government headed by Malcolm Fraser. These actions have been the subject of controversy ever since.\textsuperscript{22}

Another example of uncertainty regarding the Governor-General’s reserve powers relates to whether he or she has any independent role in determining whether to grant a double dissolution under s 57 of the Constitution. One view is that the Governor-General should make her or his own judgment about whether the constitutional preconditions for a double dissolution have been met, and refuse to grant a dissolution if it appears that they have not.\textsuperscript{23} On the other hand, there is an argument that the Governor-General should simply follow advice and allow the courts to determine the matter.\textsuperscript{24} This is because a majority of the High Court have indicated that issues arising under s 57 are justiciable\textsuperscript{25} and as such there is a


\textsuperscript{19} Republic Advisory Committee, \textit{An Australian Republic: The Options - The Appendices}, AGPS, Canberra, 1993, p 245.

\textsuperscript{20} Constitutional Centenary Foundation, ‘The Role of the Head of State’, p 2.

\textsuperscript{21} Republic Advisory Committee, \textit{An Australian Republic: The Options - The Report}, pp 91-92.

\textsuperscript{22} Peter Hanks, \textit{Constitutional Law in Australia}, 2\textsuperscript{nd} edition, Butterworths, Sydney, 1996, pp 201-205.

\textsuperscript{23} Republic Advisory Committee, \textit{An Australian Republic: The Options - The Report}, p 92.

\textsuperscript{24} Republic Advisory Committee, \textit{An Australian Republic: The Options - The Report}, p 92.

\textsuperscript{25} \textit{Victoria v Commonwealth & Connor (PMA case)} (1975) 134 CLR 81, per Barwick CJ, Gibbs, Stephen, & Mason JJ.
reasonable prospect that an unconstitutional dissolution would be restrained by the Courts if challenged before the election was held.²⁶

The Constitutional Convention recommended that the Parliament consider:

• the non-reserve powers being spelled out as far as practicable

• a statement that the reserve powers and the conventions relating to their exercise continue to exist.²⁷

To Codify or Not to Codify?

It is noteworthy that the Convention did not recommend codification of reserve powers and the conventions that underpin their use. This is despite the persuasive arguments for codification. Arguments for codification address the issue that there is uncertainty and confusion over the precise content of the reserve powers.²⁸ Codification then offers an opportunity to clarify the powers and a greater level of accountability and consequently greater public confidence in the position of Head of State. Codification also presents the advantage of distancing the Head of State from politics and interference from party politics, by clarifying the correct and proper use of the reserve powers.²⁹

However, the decision to leave open the reserve powers seems to be because the reserve powers are based on conventions which have evolved over many years and are open to interpretation, such that any attempt to codify the reserve power must be based on agreement as to the precise content of those conventions. Any move toward codification then is undermined by a fear that one interpretation of the conventions would have to be preferred over others, and as such undue weight would be given to the interpretation preferred by the pro-codification proponents.³⁰

As the Report of the Republic Advisory Committee states, the reserve powers depend on the accumulation of precedents and on the agreement of both participants


²⁷ Constitutional Convention, Communique, p 4.


²⁹ Marsh, p 45.

and expert commentators as to what those precedents mean.\textsuperscript{31} The difficulty of obtaining agreement as to the content of either what the rules are concerning the reserve powers and the relevant conventions, or what the rules should be, might be inimical to the codification\textsuperscript{32}. Further, codification would require the conversion of unwritten, adaptable conventions into rigid justiciable rules of law.\textsuperscript{33}

**Qualifications & Term of Office**

The Convention resolved that the Head of State should be an Australian citizen, and qualified to be a member of the House of Representatives pursuant to section 44 of the Constitution. Section 44 provides a list of factors which will disqualify someone from being chosen to be a Senator or a member of the House of Representatives. These disqualifications apply to any person who:

- is under any acknowledgment of allegiance, obedience to a foreign power, or is a subject or a citizen of a foreign power; or
- is attainted of treason, or has been convicted and is under sentence for any offence punishable by imprisonment for one year or longer; or
- is an undischarged bankrupt or insolvent; or
- holds any office of profit under the Crown, or any pension payable out of Commonwealth revenue; or
- has any direct or indirect pecuniary interest in any agreement with the Commonwealth public service.

Further, the Head of State should not be a member of any political party. The Convention resolved that the term of office should be five years.\textsuperscript{34}

**Implications for the States**

The Convention resolved that the Commonwealth Government and Parliament extend an invitation to State Governments to consider the implications for their respective Constitutions of any proposal that Australia become a republic; and the

\textsuperscript{31} Republic Advisory Committee, *An Australian Republic: The Options - The Report*, p 90.

\textsuperscript{32} Marsh, p 50.


\textsuperscript{34} Constitutional Convention, *Communique*, p 4.
consequences to the Federation if one or more States should decline to accept republican status.\textsuperscript{35}

Further the Convention resolved that any move to a republic at the Commonwealth level should not impinge on State autonomy, and the title, role powers, appointment and dismissal of State heads of state should continue to be determined by each State.

As well the Convention acknowledged that whilst it was desirable that the advent of any republican government occur simultaneously in the Commonwealth and all States, not all States may wish, or be able, to move to a republic within the timeframe established by the Commonwealth.\textsuperscript{36}

These issues will be examined in detail in Part 3.

\textbf{2.2 \hspace{1em} THE MECHANICS OF CHANGING TO A REPUBLIC AT THE COMMONWEALTH LEVEL}

\textbf{2.2.1 Constitutional Change - s 128}

The Commonwealth Constitution would need to be amended in order to establish a republic in Australia. Amendment of the Commonwealth Constitution is governed by s 128. It provides that the special procedure outlined in the section is the only way to amend the Constitution. The process is as follows:

1. The amendments to the Constitution must be contained in a bill, which must be passed by an absolute majority of both Houses of Parliament.

2. It must then be put to the electors, between 2 and 6 months after its passage through both Houses. However if the first step fails, that is if one House fails to pass it or passes it with amendments unacceptable to the other House, and this is repeated after three months, then the Governor-General may submit the proposed law as last proposed, to the electors in each State and Territory.

3. To be successfully passed, a double majority is required. That is, a majority of electors and a majority of States (Territories are not counted for this purpose) are required to approve the constitutional amendment proposal.

\textsuperscript{35} Constitutional Convention, \textit{Communique}, p 2.

\textsuperscript{36} Constitutional Convention, \textit{Communique}, p 2.
Nothing in s 128 requires majorities in all States to amend the Constitution so that the Commonwealth becomes a republic. The effect of this then is that a situation could arise whereby a majority of voters in two States do not wish to change to a republic, and so a republic at the federal level would be imposed upon them because s 128 was satisfied. However, it is not so clear what the options are at State level. Could they remain a constitutional monarchy within a republic? The recommendations of the Constitutional Convention seem to suggest this.

There are a number of sections of the Commonwealth Constitution which would need to be changed to accommodate the republican model proposed by the 1998 Constitutional Convention. There are approximately 50 sections in the present Constitution which refer either to the Queen or the Governor-General. However, most of those changes would be consequential, largely amounting to a replacement of references to the Queen or Governor-General with references to the ‘President’. However substantive changes would have to be made to incorporate the Bipartisan Model for the Head of State into the Constitution. That is, provisions establishing the President, dealing with the method of nomination, appointment, dismissal and qualifications for appointment and term of office, would need to be incorporated into the amendment. Potentially, the Convention’s recommendations about the position of the States would need to be included, so that it was clear that it was for the States to make their own choice as to whether they keep their current constitutional arrangements and links with the Crown.

### 2.2.2 Changing the Constitution Act 1900 (Imp)

The Commonwealth Constitution is actually contained in covering clause 9 of the Commonwealth of Australia Constitution Act 1900 (Imp). The 1998 Constitutional Convention resolved that the existing Preamble before the covering clauses of the Imperial Act should remain intact. Further they recommended any provisions of the Constitution Act which have continuing force should be moved into the Constitution itself and those which do not should be repealed. However, it was not stated what

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38 This issue will be discussed in the Part 3.


40 Republic Advisory Committee, An Australian Republic: The Options - The Report, p 117.

41 Constitutional Convention, Communique, p 4.
procedure would need to be followed to repeal the covering clauses of the Constitution Act.

Currently the covering clauses and the preamble have references to the Crown or the Queen. There is some doubt as to whether s 128 can be used to change the covering clauses of the Constitution Act, since they are not actually in the Constitution itself. Section 128 refers specifically to alteration of the “Constitution” rather than the Constitution Act, so it is not clear if there is sufficient power in s 128 to alter the Constitution Act.

Various suggestions have been made to overcome this. For example s 128 might itself be changed by referendum, to extend it to the covering clauses. Or cooperative action by all governments under s 15 of the Australia Acts 1986 is another possibility. Section 15 requires the request or concurrence of all Australian Parliaments in relation to any amendments by the Commonwealth Parliament to the Statute of Westminster 1931 (Imp) or the Australia Acts. The Statute of Westminster (in s 2(2)) gave the Commonwealth Parliament the power to legislate inconsistently with or repeal Imperial legislation which applied to Australia by paramount force, however (in s 8) it preserved the Constitution Act (as an Imperial enactment applying to Australia by paramount force) from repeal by the Commonwealth Parliament “otherwise than in accordance with the law existing before the commencement of this Act”. On one view this last phrase simply means that the procedure of a s 128 referendum was required for amendments to both the Constitution and Constitution Act. Lindell and Rose endorse this view relying on the centrality of the role of the people in s 128 and the considerable difficulty of complying with its procedures as evidence that the power is a plenary one. However, to overcome any doubt as to the availability of s 128 to amend the Constitution Act, the argument made is that s 15 of the Australia Acts could be

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45 Republic Advisory Committee, An Australian Republic: The Options - The Report, p 120.

utilised to amend s 8 of the Statute of Westminster, and consequently leave open the way for the Commonwealth Parliament to repeal the covering clauses.

An alternative argument about the difficulty of amending the covering clauses of the Constitution is that the monarchy is entrenched by the covering clauses, and that it forms the “basis of the union”. The argument is that the agreement to form the union of the States, was an agreement to unite under the Crown, and the abolition of the monarchy effectively dissolves the union, and requires a new union agreement. That is, the Crown is integral to the States which are integral to the Commonwealth and abolishing the monarchy in effect abolishes the States and requires new States and therefore a new Commonwealth to be created.

However this argument can be countered with the view that it was the Commonwealth of Australia Constitution Act 1900 (UK) which bound the people of the various colonies together, not the Crown. As Winterton argues:

\[
\text{The monarchy was indeed an important feature in the Constitution but, like all other elements thereof, it was inherently subject to alteration pursuant to s 128. Moreover, it was not one of the matters especially entrenched in what was originally the final paragraph of that section.}
\]

A further response to this argument is that the fundamental principles that sustain and legitimise the States’ constitutional systems are not the monarchy and the

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47 Section 8 preserves the Constitution Act from amendment by the ordinary procedures of the Commonwealth Parliament.


51 Gibbs, p 299.


Crown, but rather principles such as representative democracy and responsible government.\textsuperscript{54}

3 THE STATES AND THE REPUBLIC

There are a number of questions which arise in considering the issue of a republic and how this will sit with the Australian federation. Carney has stated that most assume that, since Australia is a federation, any move to an Australian republic will replace the monarchy at both the Commonwealth and State levels.\textsuperscript{55} However this is not necessarily the case. As mentioned above, the process in s 128 only requires a majority of states to approve the referendum, so that there is the possibility that the Commonwealth may become a republic when two states may not wish to embrace republicanism. If Australia at the federal level does move to being a republic, what options does this leave for the States? Is it constitutionally possible for some parts of Australia to remain a monarchy whilst others change to a republic? Does the Australia Act, s 7, entrench the monarchy at State level? Does the Commonwealth have the power to compel the States to become republics? If Queensland’s electorate wished to change to a republic, what issues would need to be considered?

3.1 OPTIONS FOR THE STATES IF THE COMMONWEALTH MOVES TO A REPUBLIC

As mentioned in Part 2 of this paper, any change to a republic would constitutionally require a majority of electors and a majority of States voting in favour of the model. Three alternatives have been proposed:

1. a national single referendum that would bind the nation and the States provided the double majority in s 128 was satisfied;
2. a national referendum with subsequent action by the States to deal with their own particular constitutional arrangements;
3. a national referendum which would simultaneously bind the States and Commonwealth, provided that every jurisdiction agreed.\textsuperscript{56}


The second option seems to have been the preferred one at the Constitutional Convention. The underlying question then is whether any of the States would wish to retain the monarchy, notwithstanding the abolition of the monarchy at the federal level.\(^\text{57}\) It seems likely that the States which vote in favour of a republic at the federal level would also wish their States to become republics, but where does this leave the States who wish to retain a monarchy? The consequences for the Australian federation if one or more States should decline to accept republican status depends largely on the constitutional position of the States.

### 3.1.1 Constitutional Position of the States

The largely flexible amendment procedures of the States’ respective Constitution Acts has meant that whilst the State Constitutions exhibit certain uniform features they also differ in significant respects.\(^\text{58}\) As such the exact process for changing to a republic will need to be considered by each State.\(^\text{59}\) However, a number of general points can be made.

#### State Constitutions Preserved But Subject to the Commonwealth Constitution - Sections 106 & 107

Section 106 of the Commonwealth Constitution provides that State Constitutions were preserved after the formation of the Commonwealth in 1901, and continue to exist, subject to the Commonwealth Constitution. Section 106 has not been widely explored by the High Court, however it has been canvassed as being a way of reading implied rights into state constitutions.\(^\text{60}\)

Chief Justice Barwick CJ in the Seas and Submerged Lands Case, explained the effect of s 106 as follows -

*On the passage of the Imperial Act, those colonies ceased to be such and became States forming part of the new Commonwealth. As States, they owe their existence to the Constitution which by ss 106 and 107, provides their constitutions and powers referentially to the constitutions and powers which the former colonies*

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\(^{59}\) A full discussion of the constitutional positions of all Australian States is beyond the scope of this Bulletin.

\(^{60}\) eg. *McGinty v Western Australia* (1996) 186 CLR 140, p 173, per Brennan CJ.
enjoyed, including the power of alteration of those constitutions. Those constitutions and powers were to continue by virtue of the Constitution of the Commonwealth. But those constitutions and the powers of the States were subjected to the Australian Constitution.61

Further s 107 of the Commonwealth Constitution is headed ‘Saving of power of State Parliaments’. It preserves the legislative competence of State Parliaments in respect of any topic that is not exclusively vested in the Commonwealth Parliament or withdrawn from the State parliament. The effect of s 107 is to preserve State legislative competence with respect to matters within concurrent power and matters within State residuary power.62 This includes the power to alter its own Constitution pursuant to any valid manner and form provisions, and to alter the manner and form provisions themselves.63

It has been said that it follows from ss 106 and 107 that the Constitution of a State at any time must be ascertained by reference to:

1. its Constitution as at Federation;

2. the overriding effect of the provisions of the Commonwealth of Australia Constitution Act and the Constitution of the Commonwealth;

3. the modifications of the State Constitution that have been made either by Imperial legislation or State legislation provided, in the case of State legislation, it has been made in accordance with any relevant manner and form provisions of the particular State Constitution;

4. the Australia Act 1986.64 Particularly, there is the issue of whether section 7 of the Australia Act entrenches the monarchy at state level. See below.

The effect of s 106 then is that the constitutional structures of the States can be modified by amendment to the Commonwealth Constitution. However, as pointed out by Winterton65 and other commentators66, it would be highly unlikely politically

61 New South Wales v Commonwealth (Seas and Submerged Lands case) (1975) 135 CLR 337, p 372, per Barwick CJ.


63 McGinty v Western Australia (1996) 186 CLR 140, p 172, per Brennan CJ.

64 McGinty v Western Australia (1996) 186 CLR 140, pp 172-3, per Brennan CJ.

for a State Constitution to be amended pursuant to section 128 without the consent of the State’s electors.

**What Constitutes the Queensland Constitution?**

At present there is no single comprehensive document that contains all relevant provisions pertaining to Queensland’s constitutional arrangements. The Queensland Parliamentary Legal, Constitutional and Administrative Review Committee has pointed out that in addition to the *Constitution Act 1867* (Qld), there are some fourteen other Acts which relate to the State’s Constitution. These include:

- *Legislative Assembly Act 1867*
- *Constitution Act Amendment Acts* from 1890, 1896, 1922, and 1934
- *Officials in Parliament Act 1896*
- *Constitution (Office of Governor) Act 1987*
- *Parliamentary Papers Act 1992*
- *Parliamentary Committees Act 1995*
- *Electoral Act 1992*

**The Current Position Generally**

The six Australian states provide in their respective Constitutions for a Westminster monarchical system. This system is usually referred to as a **constitutional monarchy**. The Queen through her State Governors performs two crucial functions in that system:

- granting royal assent to Bills passed by the Parliament in order for them to become law

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functioning as the head of the Executive with the power of appointing and dismissing Ministers.\textsuperscript{70}

However according to convention, these powers are exercised on the advice of the government.\textsuperscript{71} This seems to be the lynch pin in a constitutional monarchy, namely, a state or nation which is “headed by a sovereign who reigns but does not rule”.\textsuperscript{72}

The distribution of powers between the Queen and the State Governor in each State reflects the similar distribution of powers between the Queen and the Governor-General under the Commonwealth Constitution.\textsuperscript{73} On one view, because the Queen has the power of appointment and dismissal of the Governor-General and of the State Governors, she is formally the Head of State at the Commonwealth level and Head of State in each of the six States.\textsuperscript{74}

\textbf{Role of the Governor}

Typically, Governors were the first officials appointed in Britain’s new colonies.\textsuperscript{75} Initially in Australia, they ran the respective colonies autocratically, but as the character of the settlement changed from penal settlement to a more ‘normal’ society, with notions of representative and responsible government permeating the new colonial administration, the Governor’s powers diminished.\textsuperscript{76} The original office of the Governor of Queensland was created by Letters Patent issued by Queen Victoria on 6 June 1859, through which Sir George Bowen was appointed as the first Governor of the new colony.\textsuperscript{77} Today, the office is governed by the \textit{Constitution (Office of Governor) Act 1987} (Qld). The effect of the Act is that the

\begin{itemize}
\item \textsuperscript{70} Carney, ‘Republicanism and State Constitutions’, p 184.
\item \textsuperscript{71} Carney, ‘Republicanism and State Constitutions’, p 184.
\item \textsuperscript{73} Carney, ‘Republicanism and State Constitutions’, p 184.
\item \textsuperscript{74} Carney, ‘Republicanism and State Constitutions’, p 185.
\item \textsuperscript{75} George Winterton, ‘The Constitutional Position of Australian State Governors’ in \textit{Australian Constitutional Perspectives}, HP Lee and George Winterton (eds), Law Book Co, Sydney, pp 274-335, p 275.
\item \textsuperscript{76} Winterton, The Constitutional Position of Australian State Governors’, p 275.
\item \textsuperscript{77} Sir Walter Campbell, \textit{The Role of a State Governor: With particular reference to Queensland}, Royal Australian Institute of Public Administration, Brisbane, 1989, p 1.
\end{itemize}
latest Letters Patent for the Office of Governor of Queensland made by the Queen on 14 February 1986 and proclaimed by the Governor on 6 March 1986 are suspended in their operation for as long as the Act is in force (s 13). The Act deals with some of the specific powers of the Governor (s 8) and provides that the Governor shall attend and preside at all meetings of the Executive Council (s 7). The Executive Council is comprised of Cabinet Ministers, and the convention is that the Governor acts on the advice of the Executive Council. Particularly, the *Acts Interpretation Act 1954 (Qld)* provides that the term “Governor in Council” which appears in many pieces of Queensland legislation means the “Governor acting with the advice of the Executive Council”.

This body is the principal authority for the making of subordinate legislation in Queensland. The office is also recognised by section 7 of the Australia Acts (discussed below), which acknowledges that the Queen’s representative in each State is the Governor, who can exercise all of the Queen’s powers in respect of the State, except those dealing with the Governor’s dismissal.

The Governor’s duties and responsibilities span a wide spectrum of activities of a Head of State, and are largely akin to those of the Governor-General. Although it is probably technically incorrect to refer to a Governor as a ‘Head of State’ because the States are not independent nation-states, it is a useful shorthand since a Governor is effectively a ‘de facto Head of State’.

Richard McGarvie has argued that the Governor is the guardian for the whole community of the Constitution and that the most important responsibility of the Governor is to facilitate the working of the parliamentary democracy of the State. Facilitating the working of the parliamentary democracy of the State seems like a fairly amorphous task, however it can probably be outlined in terms of

1. ceremonial, symbolic and representative duties; and
2. constitutional duties.

*Ceremonial, Symbolic & Representative*

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78 *Acts Interpretation Act 1954 (Qld)*, s 36.


The role of Governor is seen as important not only because of the check and balance function it serves on political power, but because of the representative role he or she plays. There is a sentiment that a Governor is somehow neutral and above politics, and represents the ordinary people in a way that politicians can’t. Dr Davis MaCaughey, a former Governor of Victoria, in a lecture outlining why the function of Governor should be performed at state level, has said that the Governor:

...symbolises what is of more permanent significance than parties and their challengeable leaders. The fact that he can only be removed with the greatest of difficulty emphasises his distinct representative character. Politicians come and go, people’s interests remain, and must be reassessed, given expression in varying ways from time to time.\(^{82}\)

\(^{82}\) Dr Davis MaCaughey, ‘The Position of State Governor’, excerpt of lecture reproduced in Constitutional Centenary, 2(5) December 1993, p 5. (1 page only)
As mentioned, the Governor’s role is akin to the Governor-General. Sir Zelman Cowen wrote, reflecting on his time as Governor-General, that the:

...Governor-general offers encouragement and recognition to many of those Australians who may not be very powerful or visible in the course of everyday life, and to the efforts of those individuals and groups who work constructively to improve life in the nation and the community.\(^{83}\)

Further, the office of Governor has been described as a symbol of unity strengthening social cohesion. The people of a State should be able to feel an empathy and secure relationship with the occupant of the office.\(^{84}\) McGarvie has argued that:

In our democracy where government and opposition are properly in continuous competition for the support of the electorate, it is important that the person performing the functions of the Head of State be seen to emphasise that the things that bind the community are stronger than the things that divide.\(^{85}\)

It seems then that the ceremonial/representative role of the Governor is significant in terms of forging community links and public spirit and support for worthy projects.

**Constitutional**

The Governor’s constitutional duties include to appoint the Executive Council, and to preside at its meetings\(^{86}\); to summon, prorogue, and dissolve the Legislature; to assent, refuse to assent to, or reserve Bills passed by the Legislature; to keep and use the Public Seal of the State\(^{87}\); to appoint all Ministers and officers of State, and in certain circumstances to remove and suspend officers of State.\(^{88}\) Whilst there is some variation between the views of commentators on the topic, the reserve powers of the Governor seem akin to those of the Governor-General. The only reserve

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\(^{84}\) McGarvie, p 154.

\(^{85}\) McGarvie, p 154.

\(^{86}\) *Constitution Act (Office of Governor) Act 1987*, (Qld) ss 6 & 7.

\(^{87}\) *Constitution Act (Office of Governor) Act 1987*, (Qld) s 4.

\(^{88}\) Treasury Department (Qld), *Guide to Public Financial Administration in Queensland*, p 22.
powers (ie those which can be exercised without or contrary to advice) of the Governor seem to be the powers to dissolve the Legislature and to appoint and dismiss ministers or the premier when circumstances require a change of government. The key then is the circumstances which require a change of government. Examples include dismissal of Ministers or the Premier for illegal conduct, loss of support in the Lower House or parliamentary denial of funds. Controversy surrounds these examples and as such many commentators argue that this independent discretion should only be utilised to the extent that it is absolutely necessary to protect constitutional government.

Dr Davis McCaughey, a former Victorian Governor has remarked:

..in most circumstances the most important thing for a Governor to do constitutionally is to do nothing. If there are reserved powers vested in a Governor they are most likely to be effective if they remain reserved.

In Queensland the Constitution Act 1867 (Qld) specifically provides that in appointing or dismissing “officers liable to retire from office on political grounds”, the Governor “shall not be subject to direction by any person whatsoever nor be limited as to his sources of advice”. It has been suggested that this provision is evidence of the preservation of the Governor’s reserve powers, despite the argument that s 7 of the Australia Act terminated the Queen’s prerogative powers, and therefore the Governor’s reserve powers.

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89 Note whilst a full discussion of the governor’s reserve powers is beyond the scope of this paper, there is also an argument albeit obscure, that s 7(5) of the Australia Acts requires the Governor to follow the Premier’s advice and thereby eliminates any reserve powers. George Winterton, ‘The Constitutional Position of Australian State Governors’ in Australian Constitutional Perspectives, eds HP Lee and George Winterton, Law Book Co, Sydney, 1992, pp 274 - 335, p 300.

90 Campbell, p 8.

91 Carney, ‘Republicanism and State Constitutions’ pp 187-188.


94 This phrase is taken to mean Ministers. See for example Hon WD Lickiss, Constitution Act Amendment Bill, Queensland Parliamentary Debates, 30 November 1976, p 1951.

95 s 14(2). See further discussion of this provision in the last section on “Manner and Form” requirements in the Queensland Constitution.

As well as these specific duties, there is a more general check and balance role, which has sometimes been referred to as the right to be consulted, to advise and to warn.\textsuperscript{97} It is a subtle but effective mechanism whereby the Governor’s influence is based not on specific power or a mandate but on the fact that the government knows that it will have to explain the chosen course of action to the Governor, who may question and counsel against it. Further that influence is strengthened by the fact that it comes from one acting apolitically and impartially.\textsuperscript{98}

### 3.1.2 Is the Monarchy Entrenched at the State Level?

**The Australia Acts 1986**

It has been suggested that s 7 of the Australia Acts entrenches the monarchy at State level.\textsuperscript{99} Section 7 provides that Her Majesty’s representative in each State shall be the Governor, and that the powers of Her Majesty in respect of a State are exercisable generally only by the Governor of the State. It also provides that the advice to Her Majesty in relation to the exercise of the powers and functions relating to the State, is to be tendered by the Premier of the State. A better view of s 7, based on its wording, is that it merely assumes the existence of the monarchy, rather than requiring any positive entrenchment of it. Nonetheless, the Republican Advisory Committee in its 1993 Report recommended that the Australia Acts be amended so as to make it clear that the Acts do not entrench the monarchy.\textsuperscript{100}

**Queensland**

In Queensland the Constitution Act 1867 entrenches certain aspects of the Crown. Section 53 entrenches sections 1, 2, 2A(2), 11A, 11B, 14\textsuperscript{101} and 53 by requiring that any bills purporting to alter or repeal these provisions must be put to referendum. For example abolition or an alteration to the office of Governor must be in


\textsuperscript{98} McGarvie, p 153.


\textsuperscript{100} Republic Advisory Committee, *An Australian Republic: The Options - The Report*, p 127.

\textsuperscript{101} Broadly, these sections deal with the powers of the Queen, Parliament and the Governor.
accordance with section 53 (s 11A(2)). The section 53 requirement for referendum and the arguments for validity of manner and form provisions are discussed in the last section of the paper.

3.1.3 Can Some States Remain A Monarchy if the Rest of Australia Becomes a Republic?

Although described as everything from anomalous to constitutionally untenable to a “constitutional monstrosity”, it seems that it is constitutionally possible for some parts of Australia to be a republic whilst others remain a monarchy. This is particularly so, if it is accepted that the concept of “the Crown” is divisible. Furthermore as for anomalous constitutional positions, past experience has revealed quite sharp distinctions between the Commonwealth and State in their constitutional arrangements, for example, the ability of the Commonwealth to legislate extraterritorially and inconsistently with Imperial legislation applying by paramount force as early as 1942 by virtue of the Statute of Westminster Adoption Act 1942 (Cth), compared to the States who did not reach the same level of independence from Britain until the passage of the Australia Acts in 1986. The ability to remain a “mini-monarchy” within a republic is of course subject to the Queen’s agreement to maintain her role in such circumstances.

The Crown

Conceptually “the Crown” is a complex term because of the variety of meanings attributed to it. It can mean the monarch of the day in a personal sense; it can be used as a uniting term for the various organs of government, or it can be the embodiment of the executive government. It is also sometimes used synonymously with ‘the state’, in the sense that the term goes beyond the government of the day, to refer to the source of legal authority or legitimacy in a society. This last sense illustrates an important conceptual difference between a constitutional monarchy and a republic. Namely, in a republic the ultimate source of

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103 Submission to the Republican Advisory Committee, Republic Advisory Committee, An Australian Republic: The Options - The Report, p 126.


105 Griffith, Constitutional Monarchy or Republic? Implications for NSW, p 10.
legal authority is the people. The legitimacy of the legal and governmental system is based directly upon notions of popular sovereignty rather than parliamentary sovereignty or the sovereignty of the Crown.

**Divisibility of the Crown**

Right up until the 1920’s “the Crown” was regarded as one and indivisible throughout the British Empire.\(^\text{106}\) That is there was only one entity known as the King or Queen of the United Kingdom of Great Britain and Ireland, under which the people of Australia agreed to unite at federation.\(^\text{107}\) As the High Court declared in the Engineers’ case, relying on the preamble to the Constitution Act:

*The first step in the examination of the Constitution is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King’s dominions.*\(^\text{108}\)

**The Cagey Concept of the Crown in a Federation**

The reason for this indivisible notion of the Crown lies in the history of the concept ‘the Crown’. The executive government is often referred to as ‘the Crown’; government ministers are ‘ministers of the Crown’\(^\text{109}\) and the legal rights and duties of the government are affected by such legal concepts as the ‘shield of the Crown’ or ‘Crown immunity’, or the ‘prerogative rights of the Crown’.\(^\text{110}\) This notion of the Crown as the personification of the executive government developed in English law, as it adjusted to the transition from a feudal monarchy to a parliamentary democracy.\(^\text{111}\)

\(^{106}\) *Amalgamated Society of Engineers v Adelaide Steamship Co* (the Engineer’s Case) (1920) 28 CLR 129 at 152.

\(^{107}\) Preamble to the *Constitution Act 1900* (Imp).

\(^{108}\) *Amalgamated Society of Engineers v Adelaide Steamship Co* (the Engineer’s Case) (1920) 28 CLR 129 at 152.

\(^{109}\) Although note that there seems to have been a development in the language in recent years. For example, in the draft Constitution of Queensland Bill 1998, Chapter 3 deals with the Governor and the Executive Government and Part 3 of that chapter is headed “Ministers of the State” rather than “Ministers of the Crown”.

\(^{110}\) Peter Hanks, *Constitutional Law in Australia*, p 229.

\(^{111}\) Hanks, *Constitutional Law in Australia*, p 229.
The reception of English law in Australia upon British settlement meant that Australia inherited these concepts.\textsuperscript{112} As Hanks states, this notion has taken on extra complexity in the Australian context because we have a federal system which assumes seven autonomous executive governments.\textsuperscript{113} This assumption of seven autonomous executive governments\textsuperscript{114} has been confused by the notion of the indivisibility of the Crown.\textsuperscript{115} Although the Engineers case upheld this latter notion, it has been criticised in later cases. For example, Gibbs ACJ denounced the doctrine as being remote from practical realities and of little practical assistance.\textsuperscript{116}

What has emerged since 1926 is a notion of the divisibility of the Crown. This was the date of the Imperial Conference in which the prime ministers of the United Kingdom, Canada, Australia, New Zealand, Newfoundland, and South Africa declared in what became known as the Balfour Declaration, that Britain and the Dominions were:

\textit{autonomous Communities within the British Empire, equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.}\textsuperscript{117}

Following the Conference, the Imperial Crown began to be regarded as divisible, at least as between its various national emanations.\textsuperscript{118} In Australia, it seems that:

\textit{The subsequent drift of judicial opinion has tended to reduce the importance of the rule, but it has not been disavowed; instead the courts merely act as if the rule did not exist.}\textsuperscript{119}

\begin{thebibliography}{119}
\bibitem{112} Australian Courts Act 1828 (Imp) s 24, which sets the date for the reception of English law in Australia as July 25, 1828.
\bibitem{113} Hanks, \textit{Constitutional Law in Australia}, p 229.
\bibitem{114} This does not take into account the self-government legislation which applies to the ACT and Northern Territory.
\bibitem{115} Hanks, \textit{Constitutional Law in Australia}, p 230.
\bibitem{116} Bradken Consolidated v Broken Hill Proprietary Co Ltd (1979) 145 CLR 107, p 123.
\bibitem{118} Republic Advisory Committee, \textit{An Australian Republic: The Options - The Report}, p 124.
\end{thebibliography}
What Does Divisibility Mean?

Australian caselaw and legislation offers examples of references to the ‘Crown in right of the Commonwealth’, or the ‘Crown in right of Queensland’. These terms refer to institutions, or legal corporations, with a series of rights and liabilities which exist in law quite independently of the physical existence of the Monarch. Sawer argues that the courts have interpreted the position as being that the Crown in right of the Commonwealth is a different legal person from the Crown in right of the States, so that each ‘Crown’ has its separate legal rights. For example, a Crown can makes agreements with another Crown, and a Crown can sue another Crown.

One of the key means of identifying a separate divisible Crown is that of the different sources of advice which the Monarch is obliged to follow. The recognition of a divisible Crown in Australia was somewhat confused until the Australia Acts in 1986, since prior to that time, British Ministers tendered advice to the Queen of Australia on Australian State matters, such as the appointment of State Governors. That is, if the source of advice was British, it suggested that the Crown was an indivisible entity. It seems that the identity of the Ministers (that is which nation or state they are from) advising the Queen is the most obvious means of determining in which capacity she is acting. For example, when the Queen acts on advice of Queensland Ministers, it would generally be in the capacity of the “Crown in Right of Queensland”. But the mere existence of separate ministerial advisers does not of itself establish the existence of a separate Crown. Although the practice has been that in respect of matters concerning each Australian state jurisdiction the Queen acts only on the advice of ministers in that jurisdiction, it has never been customary to refer to the Queen as ‘Queen of Queensland’ or ‘Queen of Tasmania’.  

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120 For example, the Mineral Resources Act 1989 (Qld) refers to the law making power vested by the Commonwealth in the “Crown in right of Queensland” regarding coastal waters (s 3).

121 Hanks, Constitutional Law in Australia, p 230.

122 Sawer, Australian Federalism in the Courts, p 125.


Monarchy or Heptarchy?

Seven Crowns

If there is a Crown in right of Queensland, and a Crown in right of the Commonwealth, and so forth, does it follow then that there are seven Crowns in Australia? The academic commentators on the area are divided on this issue. One view is that the Crown is divisible and that as such there is a ‘heptarchy’ in Australia rather than a ‘monarchy’. It would follow from this, that the removal of the Crown from government at the Commonwealth level would not necessarily have any effect on the position of the Crown(s) in the six states.\(^{128}\) Craven argues that the monarchy and its attendant system of Governors appointed by the Queen would continue precisely as before.\(^{129}\)

One Crown

The alternative view is that there is only one Crown of Australia, since Australia is one nation, and therefore it can only have one Head of State. This is irrespective of the Crown acting in different capacities and on different advice in different jurisdictions. Some of the supporters of this view of ‘one Crown’ have argued that the relationships between the single Crown and each of the seven Australian polities are independent, and that the severing of links with the Crown in one polity need not affect the others.\(^{130}\)

However, if it is accepted that since Australia is a nation, there is only one Head of State, then there is an alternative argument to the one in the preceding paragraph. It could be argued that the state Governors represent the Head of State of Australia, who at present happens to be the Queen. So that if at the Commonwealth level a change in favour of a republic was made, and the Head of State became ‘the president’, then the state Governors would no longer represent the Queen but the new president.\(^{131}\) The Republic Advisory Committee in its report explains it as an alternative argument that no special provision would need to be made for the States to abolish links with the Crown since if the Crown was removed at the

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Commonwealth level it would also be effectively abolished at State level. However the persuasiveness of this argument is undermined by s 7 of the Australia Acts which clearly mentions the Governor as the Queen’s representative.

Either way

Irrespective of which view is taken, it is probably going to be necessary to clarify what will happen to the State’s links to the Crown should they be severed at Commonwealth level. The recommendation of the Republic Advisory Committee was that any proposed amendments at Commonwealth level should articulate what was going to happen to the links between the States and the monarchy.

3.2 Republican Options for Queensland

There are a number of key issues and questions which would need to be resolved if Queensland was going to change to a republic.

The substantive ones include:

- what would replace “the Crown” in Queensland statutes
- whether a Head of State is necessary for Queensland
- if a Head of State was deemed necessary then issues about:
  - selection process (direct election, parliament select or hybrid?)
  - qualifications/disqualifications for the office
  - removal from office
  - length of term
  - title & powers
  - codification of those powers and the conventions underlying them

As mentioned earlier, these issues have been discussed in detail at the Constitutional Convention in relation to the Commonwealth. The Commonwealth model therefore serves as a useful starting point for any consideration of a republican model for Queensland. It seems from the Convention’s Communiqué that it is possible for States to decide not only on whether they choose to become a republic, but on the timing of such change, and also the actual model of the republic. Accordingly, there may be variation between the republican models adopted by the different states, and the timing of any such adoption.

133 Republic Advisory Committee, An Australian Republic: The Options - The Report, p 125.
However, some degree of uniformity amongst the States would clearly be desirable. For this reason it is instructive to consider what has been proposed by the various State’s Constitutional Commissions which have examined the issue.

3.2.1 Other States’ Constitutional Committee Recommendations

**Tasmanian Advisory Committee on Commonwealth/State Relations**

The Tasmanian Advisory Committee\(^{134}\) examined the issue of whether States could retain a monarchy in the event of the Commonwealth moving to a republic and concluded that there was no reason why Tasmania could not retain the monarchy. The Committee pointed out however, that as a practical matter the Queen may not agree to such a situation and that ultimately the choice would not be available to Tasmanians as the determination of the continuation of monarchical links would rest with Her Majesty.\(^{135}\) The Committee also highlighted that if the States make their own independent decision about the timing of any change and the nation does not move to a republican status together, then it will undermine one of the key ideals behind an Australian Republic which is its symbolic value and its expression of national identity.\(^{136}\)

**South Australian Constitutional Advisory Council**

The South Australian Constitutional Advisory Council (the SA Council) made a number of recommendations in its 1996 First Report;\(^{137}\) amongst them:

- If the States do not want change in the current federal balance to come about by default, then new machinery for the appointment and dismissal of the State Governors must be put in place simultaneously with any republicanisation of the Federal Constitution (Recommendation 2)
- All State governments should insist that the Commonwealth proposal for a referendum should incorporate all the changes necessary to republicanise the

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\(^{135}\) Tasmanian Advisory Committee on Commonwealth/State Relations, p 30.

\(^{136}\) Tasmanian Advisory Committee on Commonwealth/State Relations, p 27.

States’ constitutional instruments as well, so that the Commonwealth and the States all change together (Recommendation 16).138

- A State plebiscite should be held well in advance of any Federal referendum on the republican question offering these three options:
  - the people agree that the State Government may negotiate with the Commonwealth to ensure that any Federal referendum, if passed would also change the State’s constitutional arrangements to republican forms. If a Federal referendum in terms which are acceptable to the State government cannot be negotiated then the State government will oppose the Federal referendum; or
  - the people agree that the State government should oppose any Federal referendum to sever the links with the monarchy; or
  - neither of the above.

- The SA Council recommended that the State government should support the first option since it is not a vote for a republic, but only a vote for a process. Further, if this option was successful, the State would negotiate with the Commonwealth to achieve the desired result. The mechanism to achieve this result would be a combination of s 51(38) and s 128 of the Commonwealth Constitution (Recommendation 17).

- South Australia should have its own Head of State, if there is a move to a republic, who should be called the “Governor of South Australia” (Recommendation 20) and who should be appointed and dismissable on the advice of the Premier of the State (Recommendation 21). The Premier’s advice should be presented to the retiring Governor, who ultimately must accept the Premier’s advice (Recommendation 23).

**Western Australian Constitutional Committee**

The Western Australian Committee139 found that a republican Commonwealth of Australia containing one or more monarchist states was possible, but that the preference was for the Commonwealth not to become a republic unless all the States choose to become republics as well. It recommended that if the monarchy were removed from the State Constitution, then Western Australia should retain a Head of State with the same standing and possibly the same title as the Governor (Recommendation 25). Interestingly, the Committee held that the exercise of the

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138 The 1998 Constitutional Convention left this issue open, such that the timing and circumstances of change are up to individual States.

139 Western Australian Constitutional Committee, Overview of the Report of the Western Australian Constitutional Committee, 1995.
discretionary power of the Western Australian Head of State should be non-justiciable, that is, not a subject matter which can be brought before the courts for review (Recommendation 27).

In terms of the powers of the Western Australian Head of State, the Committee held that the office should carry with it the same powers and duties that are currently exercised and performed by the Governor. The Committee was divided on whether the existing powers and the conventions that govern them should be identified in broad terms in the State Constitution or preserved by including a statement in the State constitution that they will continue. (Recommendation 26).

In terms of appointment of the WA Head of State, the Committee’s preference was for a two-thirds majority sitting of both Houses of State Parliament, although it was recognised that the procedure ultimately adopted at Commonwealth level could influence this (Recommendation 29). The WA Head of State should have the same security of tenure as State judges, and the appointment term should be fixed at five years and be non-renewable (Recommendations 30 & 31).

The WA Committee also made several recommendations regarding the provision of civic education for the public and the establishment of federalism research centres. (Recommendations 33-37).

**Northern Territory Sessional Committee on Constitutional Development**

The Northern Territory is in a slightly different position to the States in that it is not a State but a Territory under s 122 of the Commonwealth Constitution. Although the Northern Territory achieved self-government under the *Northern Territory (Self-Government) Act* 1978, it is still subject to Commonwealth control because of the very fact s 122 gives the Commonwealth a plenary power over territories. The Sessional Committee on Constitutional Development in its discussion paper was of the view that the Northern Territory should follow the Commonwealth’s lead on the republican issue and outlined issues that should be considered in the preparation of a new State constitution for the Northern Territory in the event of the

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141 A recent example of this was the quashing of the Territory’s euthanasia law by the Federal Parliament.

establishment of an Australian Republic. It pointed out that the Northern Territory has no history in its own right of direct links with the Crown, although it did have such links prior to 1911 but only as part of either NSW or South Australia. The current Northern Territory links with the Crown are indirect, in that the Administrator is appointed by the Governor-General. The Committee left open the question of whether the Northern Territory needs a separate Head of State under a republican constitution, however it canvassed the issues of appointment, dismissal, term, qualifications, and powers of the Head of State.

3.2.2 Need for a State Governor under a Republic

A key question for the States is whether it is necessary for a State to have a Head of State at all or any position equivalent to the State Governor. The Commonwealth of Australia is recognised as an independent nation state under international law, and as such clearly requires a Head of State, however the States do not have any international status as independent nations, and so the basis for having their own Head of State is somewhat different.

Both the South Australian and Western Australian Constitutional Committees concluded in favour of maintaining a Head of State at State level (discussed above).

The arguments in favour of maintaining a Governor are that his/her role of “facilitating the working of parliamentary democracy” and being the guardian of the State constitution are too significant to be delegated to other officials. It has been argued that these functions would be no less important if a republican system of government were adopted. Further, retaining a “Head of State” for the States with the same standing as the Governor, is an indication of the sovereignty of the

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143 Sessional Committee on Constitutional Development (Northern Territory), Item B6(e)-(g), p 10.

144 Sessional Committee on Constitutional Development (Northern Territory), pp 13-30.


147 Carney, ‘Republicanism and State Constitutions’, p 190.

States within their own sphere and has been suggested as a means of maintaining the status of the States within the Australian Federation.\textsuperscript{149}

However a number of options have been set out as alternatives to the current situation.\textsuperscript{150} For example:

- Maintain the Governor but in a reduced form to reduce the costs associated with the office. The idea of a part-time Governor has been canvassed.\textsuperscript{151}
- Combining the office of Governor with the office of Chief Justice\textsuperscript{152} (although this is already provided for to some extent through sections 9 and 10 of the \textit{Constitution (Office of Governor) Act 1987}, which provide that in the absence of a Lieutenant-Governor then the Chief Justice can fill the role, there is a potential conflict with the doctrine of separation of powers, and particularly the requirement for the independence of the judiciary) or having the constitutional aspects of the position performed by the speaker of the lower house, as in Sweden.\textsuperscript{153}
- The President at the Commonwealth level could act as the Head of State of each of the States. The idea seems to be that the President in acting, for example as the Governor of Queensland, would rely on the advice of the Premier of the State. It seems likely that for most practical purposes this would mean that only the most critical constitutional functions of the Governor (such as the exercise of the reserve powers in times of constitutional need) would be exercised.\textsuperscript{154}
- Several states could share the same Governor. An amendment to the Indian Constitution in 1956 authorised the sharing of State Governors such that the same person could be appointed as Governor of two or more States.\textsuperscript{155}
- The office of Governor could be abolished entirely. Winterton has suggested that Australia could follow the German and Austrian models of

\begin{thebibliography}{99}
\bibitem{149} Griffith, \textit{Constitutional Monarchy or Republic? Implications for NSW}, p 21.
\bibitem{150} Griffith, \textit{Constitutional Monarchy or Republic? Implications for NSW}, p 20.
\bibitem{151} Eg there was a 1996 proposal in NSW to this effect. See David Humphries, ‘His Part-Time Excellency’, \textit{Sydney Morning Herald}, 17 January 1996, p 1.
\bibitem{152} Mike Steketee, ‘Governors: Do They Have a Future?’, \textit{Australian}, 20 January 1996, p 26.
\bibitem{154} Griffith, \textit{Constitutional Monarchy or Republic? Implications for NSW}, p 20.
\end{thebibliography}
eliminating the necessity for the constitutional aspect of a Head of State by enacting detailed provisions to cover most situations.\textsuperscript{156} That is, these detailed rules would be justiciable before the courts, and would be the means of resolving all future constitutional problems.\textsuperscript{157} In the ACT, the Chief Minister assumes a similar role to Premiers in the States, however he or she also performs ceremonial roles similar to the State Governors.\textsuperscript{158} The ACT model gives the Governor-General a constitutional role since the Governor-General can step in and dissolve the ACT Legislative Assembly where the Governor-General believes the Assembly is incapable of effectively performing its functions or is conducting its affairs in a grossly improper manner.\textsuperscript{159}

3.2.3 Machinery (what procedures would have to be followed to change?)

If there were no binding restrictions on the Queensland Legislative Assembly’s legislative power, conversion to a republic could be effected by ordinary legislation. However, there are two restrictions which must be considered in Queensland - manner and form, and s 7 of the Australia Acts.

\textit{Manner and Form}

As discussed earlier, the roles of the Queen and the Governor are entrenched in the Queensland Constitution Act 1867, by virtue of s 53, a ‘manner and form’ provision which requires a referendum to be held before certain provisions can be removed. Provisions are usually “entrenched” because of a perception that they are so fundamental and important that the provisions should only be amended or repealed with considerable care and after consideration of all the implications.\textsuperscript{160}

\textsuperscript{156} Winterton, \textit{Monarchy to Republic: Australian Republican Government}, p 106.

\textsuperscript{157} Griffith, \textit{Constitutional Monarchy or Republic? Implications for NSW}, p 20.

\textsuperscript{158} Tasmanian Advisory Committee on Commonwealth/State Relations, p 29.

\textsuperscript{159} \textit{Australian Capital Territory (Self-Government) Act} 1988 (Cth), s 16.

These provisions entrenching the Governor were introduced into the Queensland Legislative Assembly on 30 November 1976. The provisions appear to have been a reaction to the Commonwealth legislation which abolished appeals from state supreme courts to the Privy Council and to the dismissal of Whitlam by Kerr in the preceding year. That is, the motivation for entrenching the Governor seems to have been based on a fear that the Commonwealth parliament would sever Queensland’s links with the Crown, introduce a republican form of government and in the process ensure greater centralisation of power within Australia.

However, the requirement for a referendum in s 53 is dependent on it being a valid manner and form provision. “Manner and form” relates to the special procedures which parliaments must follow in order to enact a valid law. Normally in Queensland the procedure for passing legislation is a simple majority of the Legislative Assembly voting in favour of a bill, followed by Royal Assent. A manner and form provision then is sometimes referred to as “reconstituting parliament” such that a special majority is required or alternatively the parliament is defined to include the electorate by virtue of a referendum requirement. Conceptually, manner and form provisions have the potential to run contrary to notions of parliamentary sovereignty, in that one parliament is trying to bind a later successor parliament. For this reason, it is important that the manner and form requirement only be a procedural fetter (not a substantive limitation on power) and that a legal basis exists which enforces the manner and form provision. Otherwise, a parliament could just legislate inconsistently with the provision, thereby repealing it. To be effective, manner and form provisions need to be protected themselves by containing special provisions for their own repeal or amendment. This is referred to as “double entrenchment”. Section 53 is doubly entrenched.

Section 6 of the Australia Acts appears to be the legal basis for most manner and form provisions. It provides that:

\[\text{...a law made after the commencement of this Act by the Parliament of a State respecting the constitution, powers or procedure of the Parliament of the State shall be of no force or effect unless it is made in such manner and form as may}\]

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from time to time be required by a law made by the parliament, whether made before or after the commencement of this Act.\textsuperscript{164}

To be valid then, a manner and form requirement must:

- not be a substantive fetter on later parliaments - the manner and form should only relate to the process or procedure through which legislation can be passed, not the substantive topic of the legislation;
- relate to the “constitution, powers or procedures of parliament” (s 6 Australia Acts);
- alternatively to s 6 of the Australia Acts, be within the Ranasinghe\textsuperscript{165} principle, namely that a parliament has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make laws. That is, it may be enough that the manner and form provision is contained in the formal constitution for it to be valid;\textsuperscript{166}
- there is also an argument that a manner and form provision should only be inserted through the means which it seeks to impose on later parliaments (ie; if the manner and form requires a referendum to be used to change a provision, then to be valid, it (the entrenching provision) must also have been inserted through the same means (through referendum)).\textsuperscript{167}

Interestingly, the provisions entrenching the Governor, were not inserted by way of referendum, despite a statement that the Government’s belief was that “putting the whole matter in the hands of the people rather than in the hands of a Government is the most democratic thing to do.”\textsuperscript{168} Rather it was passed by way of ordinary legislation, relying on the Colonial Laws Validity Act 1865 (Imp) s 5 (now s 6 of the Australia Act) and the Ranasinghe principle for validity.\textsuperscript{169} Particularly, there has

\textsuperscript{164} emphasis added.

\textsuperscript{165} This comes from the Privy Council case of The Bribery Commissioner v Pedrick Ranasinghe [1965] AC 172.

\textsuperscript{166} See also s 106 of the Commonwealth Constitution which may support this. It contains the phrase: “until altered in accordance with the Constitution of the State”.


\textsuperscript{168} Hon WD Lickiss, Constitution Act Amendment Bill, Queensland Parliamentary Debates, 30 November 1976, p 1952.

\textsuperscript{169} Hon WD Lickiss, Constitution Act Amendment Bill, Queensland Parliamentary Debates, 30 November 1976, p 1952.
been some doubt raised about the validity of the entrenching of s 14 of the Queensland Constitution dealing with the requirement for the Governor-in-Council to appoint all public offices, since it is argued the substance of it is not caught by the phrase “constitution, powers or procedures of parliament” pursuant to the Colonial Laws Validity Act 1865, s 5 (now s 6 of the Australia Acts).

Amending the Australia Acts

There is an argument that to get around valid manner and form provisions it is possible to repeal s 6 of the Australia Acts pursuant to the special procedure in s 15. With the request or concurrence of all the States, the Commonwealth parliament can amend the Australia Acts. Specifically the Report of the Republic Advisory Committee, proposed the following draft provision to illustrate one possible approach:

(2) Notwithstanding anything in the laws of a State, the Parliament of the State may make laws for the abolition of the monarchy in that State.

(3) The parliament of the Commonwealth may make laws amending the Australia Acts 1986 to the extent necessary to remove inconsistencies between those Acts and laws made under subsection (2).

The Republic Advisory Committee expressed the view that the effect of such a provision would be that a State Parliament could pass a law abolishing the monarchy, expressed to come into effect at the same time as subsection (2), without having to comply with the entrenching provisions. However, such an approach would be controversial since it bypasses the people and so unless there is a Supreme Court decision that the entrenching provisions in the Queensland Constitution are invalid, it could be concluded that a referendum is necessary to abolish the monarchy in Queensland.

Australia Acts s 7

Furthermore, s 7 of the Australia Acts would need to be amended to make it clear that the connection between the States to the Queen and monarchy has been severed.

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171 Republic Advisory Committee, An Australian Republic: The Options - The Report, p 129.

172 Republic Advisory Committee, An Australian Republic: The Options - The Report, p 129.

Transitional, Consequential and Miscellaneous Provisions

If there is a move towards a republic at the Commonwealth level, and the States do not wish to or are unable to move to a republic at the same time then it might be necessary to insert a provision in the Commonwealth Constitution or in Commonwealth legislation to the effect that if the Commonwealth does change to a republic, then it will not affect the states’ relationship with the monarchy, so as to not leave a void.\textsuperscript{174}

Other miscellaneous issues identified by the Republic Advisory Committee, as requiring attention at both Commonwealth and State level, include:

- preservation of the prerogative powers of the Crown;
- removal of references to the Crown, the Queen and Governor General and potentially the Governor if States choose to change this title;
- laws and practices regarding royal charters, the use of ‘royal titles’ and honours and awards would need to be reviewed;
- the future interpretation of existing laws that refer to the monarch, the Crown, the Governor-General, the Governor, or the Governor-General in Council, or the Governor-in-Council.\textsuperscript{175}

3.3 CAN THE COMMONWEALTH COMPEL THE STATES TO BECOME REPUBLICS?

Despite the Constitutional Convention’s recommendation that any move to a republic at the Commonwealth level should not impinge on State autonomy, it is still worth outlining the arguments proposed by various commentators as to the Commonwealth’s power to sever the State’s links with the monarchy.

3.3.1 Section 128 Amendment & Section 106

According to the Republic Advisory Committee, the Commonwealth could with the support of a majority of electors in a majority of states under s 128, force the issue by inserting provisions in the Commonwealth Constitution which abolish the monarchy at State level.\textsuperscript{176} However, the penultimate paragraph of s 128 provides:

\textsuperscript{174} Republic Advisory Committee, An Australian Republic: The Options - The Report, p 149.

\textsuperscript{175} Republic Advisory Committee, An Australian Republic: The Options - The Report, p 148.

\textsuperscript{176} Republic Advisory Committee, An Australian Republic: The Options - The Report, p 129.
No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

This last paragraph contains a “triple majority” requirement (that is, in addition to a majority of States and a majority of electors, there must be a majority of electors in the State that is being affected) where there is an amendment to the Commonwealth Constitution which affects “the provisions of the Constitution in relation thereto”. In the writer’s view the “thereto” refers only to the matters listed in the paragraph - that is, the State’s representation in Parliament or the limits of the State. It seems unlikely then that this triple majority requirement would be triggered in these circumstances since curtailing the links between the Crown and the States is not an alteration which diminishes the proportionate representation or limits of any State.

It seems possible then that, through satisfaction of the double majority requirement in s 128, the Commonwealth could alter the Constitution in such a way that would force all of the States to become republics. As outlined earlier, s 106 makes the State Constitutions subject to the Commonwealth Constitution, so an alteration to the Commonwealth one may be able to force a change on the States. However s 106 does seem to preserve manner and form requirements in State constitutions with the phrase: “until altered in accordance with the Constitution of the State”.

3.3.2 Section 109

It has also been suggested that the Commonwealth may be able to sever the State’s links with the Monarchy by virtue of s 109. Section 109 provides that to the extent of any inconsistency between a valid Commonwealth law and a state law, Commonwealth law prevails. That is, if the Commonwealth Constitution was amended in such a way that the State laws relating for example, to the office of Governor are inconsistent with the Commonwealth Constitution, then it may be that as long as the amended Constitution was regarded as a valid law of the Commonwealth that it would prevail over the State law to the extent of the inconsistency, and the State law would be inoperative. There may be a problem with using s 109 in relation to the Constitution itself, given that it is a statute of the Imperial Parliament, rather than a law of the Commonwealth.


However, it is probably unnecessary to resort to s 109 given s 106 provides that State Constitutions continue to exist, subject to the Commonwealth Constitution.

### 3.3.3 External Affairs Power

Section 51(29) of the Commonwealth Constitution gives the Commonwealth parliament the power to make laws with respect to external affairs. This power has been interpreted by the High Court as including not only the power to implement treaties the executive has entered into, but also power over matters which are “external to Australia”. The argument based on s 51(29) is that relationships of the states with the British monarchy are an “external affair” and that the Commonwealth then would have power to legislate on the matter as being a matter for which it has legislative power under s 51(29). However, this argument has been criticised based on a view that such situation does not involve external affairs because the link to be severed is between a part of Australia and the Queen as the Queen of Australia, and is thus not an ‘external affair’.

### 3.3.4 Commonwealth Severing State Links with the Monarchy versus Compelling the States to Become Republics

It is worth noting that there is probably a conceptual difference between referring to a power to sever links with the monarchy on the one hand, and actually compelling the states to become republics. Most commentators have focused on the former. In the writer’s view, a power to sever links with the monarchy may not necessarily give the Commonwealth the power to go the next step and impose a republican system of government on the states without first fulfilling section 128 referendum requirements, particularly given the wide array of possible republican models. As mentioned earlier, it is possible to have variation in the republican models adopted by states, and it is this variation or diversity which is seen to be a strength of the federal system. On the other hand, it seems a practical necessity that if the Commonwealth can sever links with the Crown it must also have the power to compel the states to become republics, to dismiss any possibility of a constitutional void.

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179 *eg NSW v Commonwealth* (The Seas and Submerged Lands case) (1975) 135 CLR 337.


3.3.5 Would such arguments need to be used?

However these arguments are really ones of last resort. They are based on technical legal points, which neglect the political realities that govern such situations. It is urged by most commentators that some practical political agreement will be reached between the Commonwealth and the States on this issue. Most likely this will depend on the federal government of the day’s commitment to a republic.

Reforming Federal-State Relations through a Constitutional Accord?

Assuming such commitment, it has been suggested that the States might be persuaded to join the move to a republic, if there was a constitutional reform package that dealt with other key issues, such as the disparity between State and Commonwealth revenue raising capacity (the vertical fiscal imbalance) or the breadth of the treaty implementation aspect of the external affairs power. Some commentators also suggest that unless all the States agree to a republic, then there is no moral basis for shifting to a republic at Commonwealth level. Interestingly, despite speculation that Queensland and other smaller states may not accept the model proposed at the Convention, there is some evidence to show that a majority of people surveyed in Queensland support a republic. As mentioned earlier, the preferred method emerging from the Constitutional Convention for achieving a republican system of government in the States, is for the States to determine the issues relating to their Head of State, and to the timing of any change. In addition Wayne Goss, former Queensland Premier, has pointed out that the move towards a federal republic in Australia is an ideal opportunity to reform federal - state relations by reviewing and restructuring responsibilities of federal and state governments for

182 Griffith, Constitutional Monarchy or Republic? Implications for NSW, p 41.
183 Griffith, Constitutional Monarchy or Republic? Implications for NSW, p 41.
greatest efficiency. However, a countervailing view is that the republic and federalism issues are distinct and would be better dealt with separately.

4 CONCLUSION

Australia is a federal constitutional monarchy, borrowing elements of the British Westminster system and the American federal system. The republic debate is gaining momentum. The 1998 Constitutional Convention produced a model for a republic for the Commonwealth sphere, which is to be put to referendum in 1999. The fact that Australia is a federation, muddies the waters somewhat since it is not entirely clear what will happen at the State level and whether the republican push will strengthen or undermine the federation. As this paper has outlined, it is constitutionally possible for the Commonwealth to move to a republic with a majority of the population and only four of the six states agreeing to it. Although consistency is clearly preferable, since it is somewhat divisive for part of Australia to retain its links to the Crown, there is no technical reason why this may not occur. Further the Constitutional Convention’s recommendation was that the States would decide the issue for themselves, irrespective of any power that the Commonwealth may have to force the issue. As has been suggested in this paper, it is preferable that some political arrangement or agreement between the Commonwealth and the States resolve the matter. If Queensland does choose to become a republic, a number of questions similar to those addressed at the Commonwealth level, would require examination as well as the need for a Head of State at State level. In addition, a State referendum will be needed for Queensland to convert to a republican system.


189 Of course this is subject to the Queen agreeing to such arrangement.
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