THE RESPONSIBILITIES OF THE UNITED KINGDOM PARLIAMENT AND GOVERNMENT UNDER THE AUSTRALIAN CONSTITUTION

by

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Perhaps, by the time we celebrate our Law School's centenary, the residual constitutional links between the United Kingdom and Australia will have been severed.[1] In that case, this will be an essay in legal history. Still, that history has some enduring political and jurisprudential interest. Indeed, it cannot be understood at all unless one bears in mind that the constitution (small "c") includes not only the law that judges can

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1 On 25 June 1982 the Premiers' Conference adopted the following Resolution:

"1. That the present constitutional arrangements between the United Kingdom and Australia affecting the Commonwealth and the States should be brought into conformity with the status of Australia as a sovereign and independent nation.

2. That the necessary measures be taken to sever the remaining constitutional links (other than the Crown), in particular those existing in relation to the following matters:
   (i) The sovereignty, if any, of the United Kingdom Parliament over Australian matters, Commonwealth and State;
   (ii) Subordination of State Parliaments to United Kingdom legislation still applying as part of the law of the States;
   (iii) The power of the Crown to disallow Commonwealth and State legislation;
   (iv) Appeals to the Privy Council from State Supreme Courts on State matters;
   (v) The marks of colonial status remaining in the Instructions to the Governor-General and to State Governors.

3. That at the same time as the residual links are removed, any limitation on the extra-territorial competence of the States to legislate for their peace, order and good government be removed.

4. That the measures to be taken are to include simultaneous and parallel Commonwealth legislation at the request of the States pursuant to s 51(xxxviii) of the Constitution and United Kingdom legislation at the request of and with the consent of the Commonwealth, that request being made and that consent being given with the concurrence of the States, such legislation to come into effect simultaneously.

5. That the Standing Committee of Attorneys-General be instructed to prepare the necessary draft legislation to implement the above matters."

At the date of writing (September 1982), much remains to be done before the Resolution can be put into effect. And, of course, the Resolution signally fails to deal with the residual responsibilities of United Kingdom ministers in relation to the appointment of State Governors and the amendment of State Letters Patent and Instructions to Governors. This important gap in the Resolution is a consequence of disagreement between Commonwealth ministers and the States' ministers about the appropriate channel of advice to the Queen concerning appointment of State Governors.

declare and enforce on the motion of litigants, but also the conventions that responsible ministers and legislatures (all those persons whom I will call "authorities") acknowledge as authoritative and binding. "Constitutional conventions plus constitutional law equal the total Constitution of the country." [2]

Moreover, the "Australian constitution" of which I am speaking is not the Constitution of the Commonwealth set out in s 9 of the Commonwealth of Australia Constitution Act. Rather, it is that constitutional structure, and those constitutional processes, in which are included not only that Constitution and the Constitutions of the States but also all the principles and conventions that regulate the working of each of those Constitutions within its own field and inter se. So this is an essay in federalism, rather than colonialism or imperialism. It relates to principles that will retain their relevance after the responsibilities of United Kingdom authorities have been terminated.

The Independence of Australia

The Commonwealth of Australia is now an independent realm. It attained independence and fully responsible status within Her Majesty's Dominions perhaps in or before 1926 (the "Balfour Declaration"), perhaps in 1931 (the Statute of Westminster 1931), perhaps in 1939 (when the Statute of Westminster 1931 is deemed to have been adopted), perhaps in 1942 (when the Statute of Westminster Adoption Act 1942 was passed by the Commonwealth Parliament).[3] But the fact of attainment of independence is not in doubt. It was given statutory recognition in the United Kingdom and Commonwealth instruments regulating the styles and titles adopted by Her Majesty in 1953.

But this undoubted independence has never been treated by the United Kingdom authorities as, of itself, terminating their responsibilities. For, as we shall see, a continuation of those responsibilities was expressly and impliedly requested and consented to by the Australian authorities at the time when independence was attained, and was presupposed by the legal instruments which acknowledged and gave effect to that independence. A similar (not identical) request was made by the Canadian authorities in 1931. So the Foreign Affairs Committee of the House of Commons, in 1981, knew that it was making a statement of some general import when it said that "The UK Parliament's powers in relation to the Canadian constitution can be reconciled with Canada's sovereign independence only if they are exercised in accord with constitutional requirements".[4]

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2 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, 87 (Sup Ct of Canada (not following my convention regarding the small "c")).

3 In *Bonser* v *La Macchia* (1969) 122 CLR 177, Barwick CJ dated the independence of Australia to "at or since the passage of the *Statute of Westminster* (Imp) in 1931" (at 189), while Windeyer J appears to have treated the Statute as decisive (at 223f). Barwick CJ subsequently altered his views; in *China Ocean Shipping Co* v *South Australia* (1979) 27 ALR 1, 8 he seems to have dated independence at "some period of time subsequent to the passage and adoption of the Statute of Westminster". In *Southern Centre of Theosophy Inc* v *South Australia* (1979) 27 ALR 59, 65 Gibbs J appears to have treated the adoption of the Statute of Westminster as decisive.

4 UK, Parl, *British North American Acts: the Role of Parliament*, First Report of the Foreign Affairs Committee, HC Paper 42 (1980-1981) xii; see also paras 7, 85, 86, 88, 95, 103. This Report was unanimous; the Committee, a Standing Committee of the House, comprised six Conservative and five Labour members, including former Ministers of State at the Foreign and Commonwealth Office.

United Kingdom Opinion at the Time of Australia's Independence

The opinion of the Foreign Affairs Committee in 1981 conformed, substantially and consciously,[5] to the opinion of a weightier committee which considered these matters in 1935, in the very wake (or, perhaps, in the very midst) of the processes of recognising and accomplishing the independence of the Commonwealth of Australia. The report of the Joint Committee on the Petition of Western Australia[6] is of particular value, not only for itself, but also because it records verbatim the argument of counsel on all aspects of my topic.

In 1934 the State of Western Australia petitioned the King and the Houses of Parliament for the enactment of a statute "to effectuate the withdrawal of the people of Western Australia from the Federal Commonwealth of Australia". The Secretary of State for the Dominions, on behalf of His Majesty, sought the advice of the Law Officers, which was to the effect that, while such an enactment would be within the legal powers of the Parliament of the United Kingdom, it would nevertheless, as "legislation with regard to the constituent members of the Federation forming the Commonwealth of Australia", require, "as a matter of constitutional practice", the concurrence of the Commonwealth Government. To consider the propriety of receiving the Petition, the House of Lords and the House of Commons appointed a Joint Select Committee: Viscount Goschen, Lord Ker (the Marquess of Lothian), Lord Wright (a Lord of Appeal in Ordinary), Mr Leo Amery, Mr Isaac Foot and Mr Lunn. The Committee heard elaborate arguments of counsel for the petitioners (Prof J H Morgan KC) and for the Commonwealth of Australia (Wilfrid Greene), which examined in detail all aspects of the law, convention, usage and practice concerning the relations between the States, the Commonwealth and the United Kingdom. The conclusion of the Joint Committee was the same as that of the Law Officers: although the legislation prayed for would be within the legal competence of the United Kingdom Parliament, it would be outside its jurisdiction and competence *as defined by the established constitutional convention*; moreover, the State of Western Australia, as such, had no locus standi in asking for legislation from the United Kingdom Parliament in regard to the constitution of the Commonwealth.

The four principles on which the foregoing conclusion rests were fully stated by the Joint Committee in its report. The first principle is that "the abstract right of Parliament to legislate for the whole Empire [is] only exercised, in relation to the affairs of the Dominions, in accordance with certain . . . clearly understood constitutional principles, principles to which Parliament has more recently given its formal and statutory approval in the Statute of Westminster".[7] The second principle is more particular:

> "It is . . . a well established convention of the constitutional practice governing the relations between the Parliament of the United Kingdom and other Parliaments of the Empire, that the Parliament of the United

5 Ibid paras 8, 93, 104.

6 UK, Parl, *Petition of the State of Western Australia: Report from the Joint Committee of the House of Lords and the House of Commons*, HC Paper 88 (1935).

7 Ibid vi. Note that in 1935 the Statute of Westminster 1931, save for ss 2-6, extended to Australia: see Lord Wright's statement — ibid 133.

> Kingdom should not interfere in the affairs of a Dominion *or self-governing State* or Colony, save at the request of the Government or Parliament of such Dominion, *State* or Colony, that is to say, in effect that interference should only take place at the request of such Dominion, *State* or Colony speaking with the voice which represents it as a whole and not merely at the request of a minority. That rule was well established before 1900, and has been consistently acted upon as an undoubted Constitutional Convention . . . [and] must be regarded as fundamental in these matters." [8]

The references in this passage to "self-governing States" must be understood as concerning primarily (more probably exclusively) the States of Australia, as six constitutional units distinct from the Commonwealth of Australia as a seventh constitutional unit exercising powers of government over the same geographical area (also known as the Commonwealth of Australia),[9] within what Dixon J would call a "Federal system by which two governments of the Crown are established within the same territory, neither superior to the other".[10]

The third principle enunciated by the Joint Committee concerned the foregoing distinction between the constitutional units carrying on the Crown's government in Australia:

> "The establishment of the Commonwealth, in fact, set up, within the geographical limits of Australia, an all-pervading division of powers between the Commonwealth, on the one hand, as a separate and integral national authority covering the whole area of Australia, sovereign within the ambit of its powers, and the States, on the other hand, as political entities within that area, *each State sovereign within the ambit of its respective powers.* Both *Commonwealth and States are equally independent* in respect of the powers and functions severally assigned to them. This division is one which, in the opinion of the Committee, cannot be ignored in considering the application of the general constitutional principles governing the intervention in the affairs of any self-governing member of the British Empire." [11]

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8 Ibid viii. Emphasis added.

9 Since the Crown is sovereign in, and as part of the constitutions of, each of the seven constitutional units in Australia, and not merely in respect of the Commonwealth considered as one of those seven, the royal style and title adopted by Australia, both in 1953 and in 1973, avoids the ambiguity by styling Her Majesty not Queen of the Commonwealth of Australia but Queen of Australia: Royal Style and Titles Act 1953 (C'th); Royal Style and Titles Act 1973 (C'th).

10 *Federal Commissioner of Taxation* v *Official Liquidator of E O Farley Ltd* (1940) 63 CLR 278, 312.

11 Supra n 6 at ix. Emphasis added. Lord Wright substantially repeated this analysis in giving the judgment of the Judicial Committee in *James* v *Commonwealth* (1936) AC 578, 611; 55 CLR 1, 41:

> "the powers of the States were left unaffected by the Constitution except in so far as the contrary was expressly provided; subject to that each State remained sovereign within its own sphere. The powers of the State within those limits are as plenary as are the powers of the Commonwealth."

One could make verbal refinements to this analysis of the constitutional structure of Australia.[12] But in substance it is neither defective nor exaggerated. Australians of unimpeachable authority have said substantially the same — Dixon J and Evatt J, to mention two.[13]

The fourth principle enunciated by the Joint Committee in 1935 is a deduction from the three principles already set out:

> "It is clearly only at the request of the Government and Legislature *primarily concerned* that the Parliament of the United Kingdom can be entitled to legislate. In respect of matters appertaining to the Commonwealth, it could not so legislate without the request of the Commonwealth authorities; *in respect of matters appertaining to the sphere of State powers it could not so legislate without the request of the State authorities.* The State of Western Australia, as such, has no locus standi in asking for legislation from the Parliament of the United Kingdom in regard to the constitution of the Commonwealth, any more than it would have in asking for legislation to alter the constitution of another Australian State, *or than the Commonwealth would have in asking for an amendment of the constitution of the State* of Western Australia." [14]

This finding of the Joint Committee affords clear guidance on the question of the proper source of advice to Her Majesty on State matters generally.

The Adoption of the Statute of Westminster

But is the 1935 Joint Committee report superseded by the Commonwealth's adoption of the Statute of Westminster in 1942? The answer must be: No. The language of the 1935 report has an archaic ring, from time to time. But the substance of its argument is unaffected by later events. Consider the following five points.

(i) Immediately after the sentences last quoted above, the Joint Committee's report proceeds:

> "This distinction is recognised and enforced in the Statute of Westminster. The Preamble to that Statute reaffirms the established rule that the Parliament of the United Kingdom will not pass any law extending to a Dominion, as part of the law of that Dominion, otherwise than at

12 In *New South Wales* v *Commonwealth (No 1)* (1932) 46 CLR 155, 220 Evatt J (dissenting) noted that there is an ambiguity in attributing sovereignty to a State (or to the Commonwealth) itself: "In some aspects, both the States and the Commonwealth are bodies which may lawfully exercise sovereign powers. The Governors of the States are as much the representatives of His Majesty for State purposes as the Governor-General of the Commonwealth is for Commonwealth purposes . . . For all purposes of self-government in Australia, sovereignty is distributed between the Commonwealth and the States . . . For the purposes of judicial process in this Court, although the States are not sovereign bodies, neither is the Commonwealth."

13 See text and footnotes supra n 10 and infra nn 21-23. See also *Broken Hill South Ltd* v *Commissioner of Taxation (New South Wales)* (1937) 56 CLR 337, 378 per Evatt J: "constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself."

14 Supra n 6 at ix. Emphasis added.

> the request of that Dominion; the Statute is there dealing solely with Dominion affairs. But in section 9(2) the Statute provides for the case of the States, by enacting that the Parliament of the United Kingdom may deal with respect to any matters within the authority of the States of Australia, without any concurrence of the Commonwealth, *that is, it may deal with such matters at the request of the States.*" [15]

(ii) The Secretary of State for the Dominions stated by Written Answer to the House of Commons on 1 December 1931 that the Statute of Westminster was "designed to maintain the existing constitutional position in relation to the Australian States".[16] This assurance was communicated by the Secretary of State to the States by direct communication as well as through the medium of the Commonwealth Government.[17] A similar assurance was formally repeated by the Commonwealth Government in nearly identical terms in both the House of Representatives and the Senate in 1931: "The rights of the States with regard to the maintenance of their constitutional powers are also therefore fully safeguarded." [18]

(iii) Express safeguards were, however, inserted into the Statute:

> "s.8 Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia . . . otherwise than in accordance with the law existing before the commencement of this Act.
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> s.9(1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.
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> s.9(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence."

(iv) It is important to bear in mind that ss 9(1) and 9(2) were inserted at the request of the Government and Parliament of the Commonwealth. The Commonwealth further requested (again with the full support of the

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15 Ibid. Emphasis added.
16 UK, Parl, *Debates*, HC (1931) vol 260, col 954.
17 See Report of Foreign Affairs Committee, supra n 4 at para 104.
18 Aust, Parl, *Debates* (1931) vol 130, 3420 (HR); vol 131, 4503(S).

Opposition) the inclusion of a clause to the effect that nothing in the Statute should be deemed "to authorise the Parliament or Government of the Commonwealth, without the concurrence of the Parliament and Government of the States concerned, to request or consent to the enactment of any Act by the Parliament of the United Kingdom on any matter which is within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia". The United Kingdom Government refused to propose to the United Kingdom Parliament the enactment of this clause.[19] In consequent correspondence between the Commonwealth Government (which rightly maintained that the proposed clause had a distinct and appropriate purpose) and the United Kingdom Government, it emerged that the legal advisers to the United Kingdom Government thought the proposed clause unnecessary. They considered that its insertion would be a mistake *from the point of view of the States* – that insertion of the clause would suggest that s 4 of the Statute of Westminster might be construed as applying to the States. They further considered (as is stated and supported by Wilfrid Greene arguing for the Commonwealth before the Joint Committee in 1935) "that it would be wrong . . . and absurd to include in the Bill the provision that the Commonwealth Parliament or Commonwealth Government shall not do *something that it would . . . be unconstitutional for them to do without any such provision*".[20]

(v) In moving and supporting the Statute of Westminster Adoption Bill in the Commonwealth Parliament, Dr Evatt (then Attorney-General in the [Labor] Commonwealth Government) gave to both the Houses formal and repeated assurances, both orally and in writing, that the position of the States would not be "in any way affected" either in law or in *constitutional practice*.[21] He stated that it was unnecessary to include in the preamble or otherwise any declaration corresponding to the clause proposed in 1931 but rejected by the United Kingdom Government, for (he stated) even if some such request and consent were put forward by the Commonwealth Government and Parliament "in respect of a matter that really came within the jurisdiction of a State . . . the Imperial Parliament would not enact the legislation".[22] Our right to request, he said, should be "limited to matters within our jurisdiction".[23]

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19 Notice the willingness of the United Kingdom Government and Parliament to exercise a constitutionally regulated discretion to reject both the advice of the Commonwealth Government and the request of that Government and the Commonwealth Parliament. This became significant in 1981, when the Canadian Government's claim that the United Kingdom authorities were bound to act on a Canadian request was rejected by the Foreign Affairs Committee of the House of Commons: see Report, supra n 4 at paras 92, 93.

20 Supra n 6 at 110. Emphasis added. The opinion is reported in a letter from the Agent-General for South Australia to the Agent-General for Victoria, dated 2 December 1931, and is Appendix F to Bailey, *The Statute of Westminster 1931* (1935); and see ibid 11-18.

21 Aust, Parl, *Debates* (1942) vol 172, 1396, 1476, 1568, 1569 (HR). In 1936, Evatt J stated: "It is quite clear, in my opinion, that its [the Statute of Westminster's] adoption by Australia cannot affect in any way whatsoever the existing legal and constitutional rights of the States in relation to those of the Commonwealth. Indeed the express safeguarding by the Statute of the position of the States of Australia was quite unnecessary." – (1936) 10 ALJ (Supp) 96, 107.

22 Ibid 1396.

23 Dr Evatt – "Some years ago, when . . . [Mr Menzies] introduced one of the two bills [for the adoption of the Statute of Westminster] that he brought in, one or two of the

In the debates in 1931, the Attorney-General in the [Labor] Commonwealth Government had similarly recognised the constitutional propriety of a refusal by the United Kingdom Parliament to accede to such a request by the Commonwealth Parliament.[24]

The Position as at Independence: a Summary

All this establishes some important points. At the time when the Commonwealth of Australia became independent, it was peacefully accepted by all concerned that the Commonwealth Government and Parliament do not have exclusive responsibility for the government of Australia. It was further accepted that for the United Kingdom authorities to give exclusive or overriding weight to the advice of the Commonwealth on *all* Australian matters would be to defeat the clear constitutional understandings accepted since 1900. The attainment of independence by the Commonwealth was intended not to, and did not in fact, disturb the balance of Federal-State relations insofar as those relations depended and depend on the co-operation of the United Kingdom authorities. And it was accepted that the United Kingdom authorities have a constitutionally regulated discretion to reject advice tendered to them by State or Commonwealth ministers, and ought to reject such advice whenever, in the judgment of the United Kingdom authorities, acceptance of the advice would disturb the constitutionally established balance between State and Commonwealth powers and instrumentalities.

Since 1900 the relations between the United Kingdom authorities and the Commonwealth authorities have changed. In particular, the United Kingdom has, since at latest 1926, no residual responsibility for the external affairs or defence of the Commonwealth; and the Governor-General no longer represents the United Kingdom Government in any

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23 *Cont.*
States said that they did not like section 4, without a preamble in the adopting legislation to the effect that the Commonwealth would not ask the Imperial Parliament for legislation in respect of a matter that really came within the jurisdiction of a State. My answer to that would be, first, that the Parliament of this country would not make such a request; and secondly, that if it did, the Imperial Parliament would not enact the legislation . . . Yesterday, I received from the Premier of Victoria a letter in which he again" (but note that this is in fact a novel suggestion, dubious for the reasons about to be stated by Dr Evatt) "suggested that there should be inserted, not in the section, but in the preamble, a provision to the effect that it would not be in accordance with practice that the Commonwealth should make such a request, unless the matter were within the exclusive jurisdiction of the Commonwealth. Of course, I do not think that the House should adopt such a formula. Our right to request should not be limited to matters within our exclusive jurisdiction, but to matters within our jurisdiction . . . This bill will not in any way disturb the balance of powers between the Commonwealth and the States. That can be altered only by the people acting under section 128 of the Constitution." — ibid 1396f.

24 Mr Brennan A-G:—
"The honourable member for Corangamite (Mr Crouch) appears to be very earnest in the advocacy of this amendment, but there is one vital objection to his proposal, and that is that the Parliament of the United Kingdom would not entertain it for a moment. It is proposed in the amendment to ask the Parliament of the United Kingdom to pass a statute which would have the effect of declaring that any law passed by the Commonwealth Parliament would thereupon run, whatever the rights or claims of the States might be . . . I do not believe, however, that the Parliament of the United Kingdom could be induced to take such action, in view of our declaration that we do not intend this resolution [requesting and consenting to the enactment of the Statute of Westminster] to interfere with the rights of the States." — Aust, Parl, *Debates* (1931) vol 131, 4492 (HR).

way. Since 1900, too, the relations between the United Kingdom Government and each of the Australian States have perhaps changed, inasmuch as it was not until 1926 that the United Kingdom Government made it clear beyond peradventure that "it would not be proper for the Secretary of State to issue instructions to the Governor with regard to the exercise of his constitutional duties".[25]

What has *not* changed since 1900 is the responsibility of the United Kingdom Government — both under United Kingdom law insofar as it extends to Australia *as part of Australian law*, and as a vital element in the comity existing between the two independent realms — to ensure that, insofar as constitutional laws in force in Australia require the co-operation of United Kingdom authorities, that co-operation will be forthcoming only in accordance with constitutional requirements concerning the division of authority in Australia between Commonwealth and States. The performance of this responsibility by the United Kingdom authorities may, in particular cases, require of those authorities an independent assessment of the constitutional propriety of representations made to them by Commonwealth or State Governments.

Her Majesty's ministers in the United Kingdom no longer, in relation to Australian affairs, have any responsibility for tendering advice to the Crown as "the central authority of . . . the Empire". For in relation to Australian affairs there is no Imperial centre of authority outside the seven-fold constitutional structure of the independent realm of Australia. Thus the residual and indeed anomalous role of United Kingdom ministers and instrumentalities, in relation to Australian affairs not affecting the United Kingdom as such, is essentially marked out by the distribution of powers and responsibilities which is established and effected by the various Australian Constitutions and constitutional laws and conventions. The responsibility of United Kingdom ministers or authorities, insofar as they are advising or acting for the Crown in right of the Commonwealth of Australia or the Crown in right of (and as part of the constitution of) an Australian State,[26] is a responsibility to be discharged in accordance with the distinctive features of the seven-fold Australian constitutional order, in which order (save as to "external affairs") no one constitutional unit represents Australia or the Crown in right of the independent territory called the Commonwealth of Australia. In short, in advising or acting for the Crown as to, say, the appointment of a Governor of an Australian State, United Kingdom authorities stand in a relation to Australia which is essentially neither an "Imperial" nor an "external" relation.

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25 NSW, Parl, *Papers* (1926) vol 1, 318; Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (1936) 127-129. It would be a mistake to suppose that, during the last fifty years or more, State Governors in doubt about the extent of their powers have tended to seek guidance from London.

26 As the Secretary of State wrote to the Governor of South Australia on 15 April 1903: "The Crown undoubtedly remains part of the Constitution of South Australia, and in matters affecting it in that capacity the proper channel of communication is between the Secretary of State and the State Governor." Cd 1587, 25 para 8. It is not the practice for communications by a State Governor on matters of State law (including the State constitution) either to go via the Governor-General or to be referred back to him for advice.

The "External Affairs" Power of the Commonwealth

Can it be argued that the responsibility of the Commonwealth Government for the conduct of the external affairs of Australia, and the power of the Commonwealth Parliament to make laws (subject to the Constitution) with respect to external affairs [Constitution s 51(xxix)], confer on that Government and that Parliament a constitutional right both to make requests to the United Kingdom authorities in respect of the exercise by those authorities of their constitutional functions in relation to the States, *and to have such requests acceded to as a matter of comity between the United Kingdom and Australia?* The answer, I suggest, is plainly: No.

(i) The Joint Committee of 1935 heard elaborate argument of counsel on both sides with regard to the external affairs power of the Commonwealth[27] and was fully appraised of the ambit of that power when it arrived at the aforementioned conclusion that the Commonwealth would have no locus standi in asking for an amendment of the constitution of the State of Western Australia.

(ii) When Dr Evatt gave the aforementioned assurances to the Commonwealth Parliament in 1942 he spoke as one who supported the widest possible view of the ambit of the Commonwealth's external affairs power.[28] In particular Dr Evatt expressly held the view that "the phrase 'external affairs' was adopted [in s 51(xxix)] in preference to 'foreign affairs', so as to make it clear that the relationship between the Commonwealth and other parts of the British Empire, as well as the relationship between the Commonwealth and foreign countries, was to be comprehended".[29] This view, that relations between the United Kingdom and the Commonwealth are within the responsibility of the Commonwealth Government and in some sense within the power of the Commonwealth Parliament, is generally accepted. It has been expressed, for example, by Latham CJ with clarity and emphasis,[30] and by Wilfrid Greene for the Commonwealth before the 1935 Joint Committee.[31] Others have clearly implied it, for example Griffith CJ and Barton J in *McKelvey* v *Meagher* (1906),[32] and Dixon J in *R* v *Sharkey* (1949).[33] But those who have expressed this view have seen with equal clarity that the fact that the Commonwealth Government has relations with the United Kingdom which are "external" relations in no way entails either that there are no aspects of those relations which are regulated by constitutional principles binding on the United Kingdom authorities, or that all the relations of United Kingdom authorities to Australian matters are "external" relations. That is, they have all been aware of the relevant distinction: the fact that the making by the Commonwealth of a treaty with the United Kingdom is an external affair does *not* in any way entail that when Her Majesty appoints a State Governor she exercises a power "external" to Australia or engages in any "external affair", simply because she happens to be outside Australia at the time or takes the

27 Supra n 6 at 94-98, 103, 123-125.
28 See *R* v *Burgess, ex parte Henry* (1936) 55 CLR 608, 681-684.
29 Ibid 684.
30 Ibid 643 and later in *R* v *Sharkey* (1949) 79 CLR 121, 136.
31 Supra n 6 at 98.
32 (1906) 4 CLR 265, 278, 286.
33 Supra n 30 at 149.

advice of ministers outside Australia. To hold otherwise would involve absurd consequences, such as that Her Majesty is engaged in an affair external to Australia when she issues a Commission to a Governor-General. Such functions, although performed geographically outside Australia, are essentially internal affairs, regulated by the various Australian constitutions which regulate Her Majesty's powers with respect to Australian (State and Commonwealth) affairs.

That is why the very same authorities who expressed a view of the "external affairs" power as comprehending Commonwealth — United Kingdom relations were able to refer to the constitutional principles regulating those relations as, within their scope, binding and effective. Thus Dr Evatt was able to express the aforementioned views on the position of the States after the Statute of Westminster, and was able to give the assurances I have referred to. Likewise, Mr Latham was able to state: "The States . . . are unaffected by this legislation [the Statute of Westminster]. They are entitled to preserve such relations as they like with the British Parliament. We" (the Commonwealth Parliament, in which he was then Leader of the Opposition) "do not control the relations between the States and the rest of the Empire." [34] Indeed Latham CJ could see and assert that the fact that "external affairs" include Commonwealth — United Kingdom relations is wholly consistent with the circumstance that "The Government and Constitution of the United Kingdom and the Houses of Parliament of the United Kingdom are also part of the legal and political constitution of the Commonwealth".[35] And likewise, Wilfrid Greene in 1935 maintained before the Joint Committee *both* (a) that for the purposes of the Commonwealth's relationships with external bodies the Imperial Government and legislature is an external body, *and* (b) that Mr Latham's view that the Commonwealth does not control the relations between the States and the rest of the Empire, including the United Kingdom Parliament, was an "absolutely accurate" view (as referring to "those purely State matters in respect of which the States have got that independent relationship").[36]

(iii) Precisely the same view of the external affairs power has been held and maintained by the United Kingdom Government since 1902,[37] and has never been thought in any way incompatible with the solemn and repeated assurances by that Government that it considers its relations with Australia to be regulated by the constitutional rules and principles enshrined in the Commonwealth of Australia Constitution Act and the

34 Supra n 24 at 4065.

35 *R* v *Sharkey* (1949) 79 CLR 121, 136.

36 Supra n 6 at 98, 106.

37 For example, the Secretary of State's despatch of 25 November 1902 to the Governor of South Australia: "By the Act [the Commonwealth of Australia Constitution Act (1900)] a new State or nation was created, armed with paramount power not only to settle the more important internal affairs relating to the common interest of the united people, but also to deal with all political matters arising between them *and any other part of the Empire* . . . the external responsibility of Australia, except in regard to certain matters in respect of which a later date was fixed by the Constitution, vested immediately in the Commonwealth, which was armed with the paramount power necessary to discharge it." — Cd 1587, 25 (quoted to the Joint Committee of 1935 by counsel for the Commonwealth: supra n 6 at 95).

Statute of Westminster and by the other constitutional instruments, and indeed the constitutional status of the respective Australian States.[38]

(iv) As I have argued, the matter is not essentially affected by the undoubted independence of the Commonwealth of Australia. From the point of view of the United Kingdom authorities, the Commonwealth of Australia has been an essentially independent realm since at latest 1926. During the half century since then, Her Majesty's ministers in the United Kingdom have continued to perform constitutional functions in relation to Australia; for instance, to advise Her Majesty in respect of the appointment of the Governors of the Australian States.[39]

Indeed, it would be inconsistent with the comity existing between the United Kingdom and Australia for Her Majesty's ministers in the United Kingdom to perform these functions in relation to Australia on any basis other than strict adherence to the law and practice of the Australian constitutions (eg to perform them as a matter of the foreign policy of the United Kingdom). Any other view of the matter leads not only to the absurdities I have mentioned, but also to the unacceptable result that at some unspecified date since 1926 the Commonwealth Government and Parliament acquired a novel power of amending the Constitution of the Commonwealth (and the constitutions of the States), a power exercisable by processes of dealing with passive instrumentalities in the United Kingdom and thus without constitutional control and without proper opportunity for expression of opinion by the people of the Commonwealth or the Governments, Parliaments or people of the States. Both this result and its unacceptability were present to the minds of those authorities in the United Kingdom and Australia who gave the assurances already referred to above.

The suggestion that the "external affairs power" of the Commonwealth affects the questions now under discussion appears to stem from Geoffrey Sawer's article, "The British Connection" (1973).[40] Sawer's argument leads him to the conclusion that the external affairs power "provides a basis for Commonwealth approaches to the U.K. on all Australian matters." He differentiates this broad and ambiguous

38 See especially Cd 1587 (1903) 12-15, 25; Cd 3340 (1907) 30; Cd 5273 (1910) 9, 13; Wright, *Shadow of Dispute: Aspects of Commonwealth-State Relations 1901-1910* (1970) ch 1, especially at 47, where Wright paraphrases the Secretary of State's memorandum to the Governor-General dated 30 March 1911; as to the assurances by the United Kingdom Government to the States in 1931, see supra at n 20.

39 As the Secretary of State wrote to the Governor of South Australia on 9th October 1908, "the evidence of such sovereignty [scil, of the States, unlike the Canadian provinces] is in part secured by making the appointment of Governor in the same manner and on the same terms as prior to federation". — Cmd 2683, 43f; the other parts of this letter, concerning the difference in status between Australian States (and their Governors) and Canadian provinces (and their Lieutenant Governors) repay study. The difference was deliberate: see the *Convention Debates*, Adelaide 1897, 1177-1181. See also the last paragraph of the Secretary of State's letter of 1913, Cmd 2683, 52. On 16 December 1930 the Secretary of State assured the House of Commons that the procedure relating to State Governors "will continue as before": UK, Parl, *Debates*, HC (1930) vol 246, col 1037. And on the wider issues the decisive statement of principle has always been taken to be that contained in the Secretary of State's message to the Governor of New South Wales on 31 March 1908: "it was, and is, intended that all business which has hitherto passed through the State Governors should follow the same channel unless and until there is formal and constitutional authority for a change of system" — Cd 5237, 9.

40 (1973) 47 ALJ 113, 115-117.

conclusion (without further argument) into two more pointed conclusions: that the Commonwealth's "general claim to be heard on Australia's external relations" entails that "the Commonwealth can be heard by the U.K. Government to recommend the abolition of the 'State appeals' [to the Privy Council], in a sense making it politically if not legally obligatory for the U.K. authorities to take such action", and that "however matters might have stood in 1900, the State – Westminster relationship should now be regarded as included within the reach of [the external affairs power – s 51(xxix) of the Constitution]". None of these conclusions is in any way warranted by his argument, which contains only two elements: (a) judicial dicta between 1906 and 1949 which "have treated Australia – UK relations as within the possible scope of s 51(xxix)"; and (b) an unexpressed implication that the external affairs power has materially expanded since 1900.

But, as I have been arguing, the notion that there are "Australia – UK relations" which are "within the scope of s 51(xxix)" has been accepted by everyone since 1902, *including all those persons and authorities* whose utterances guarantee and testify to the binding constitutional principles which form a vital component of United Kingdom – Australian relationships. And as to his second argument, Sawer has not pointed to any authority for the notion that the external affairs power has in any relevant way expanded since 1900, or 1902, or 1906, or 1931, or 1935, or 1942, or 1949 or any other material time; the external affairs power was accorded the widest ambit by each of the aforementioned authorities.

There is a savour of paradox or absurdity about any argument, such as that developed by Sawer, which seeks to prove by reference to judicial dicta, supposed developments in Australian constitutional law, close analysis of s 128 of the Constitution of the Commonwealth, and other like considerations, that all relations between the United Kingdom and Australia ought to be conducted as "external" relations in the sense that they should be conducted as a matter of foreign policy and not in accordance with constitutional principles. For if those relations were *merely* "external", constitutional arguments whether subtle or simple would have no place.

The truth of the matter, I suggest, is this. An essential component of the comity, with which the "external" relations between the United Kingdom and Australia are and are to be conducted, is precisely that the United Kingdom Government and Parliament, as the repositories of undoubted legal and constitutional powers to affect the law in force in Australia, should exercise those powers strictly in accordance with the laws and conventions which are their very source.

Are There Matters of Exclusively State Concern?

Treating all these historically grounded constitutional principles and understandings as of no account, the Solicitor-General of the Commonwealth has recently claimed that there are no matters or topics that affect only an Australian State.[41] He falls short of claiming

41 See letter from Mr Byers QC in (1982) 56 ALJ 316-318. It will be observed that although the Solicitor-General's letter sets out to deal with the question whether there is a convention that the Queen will not act on *matters which affect both States and*

explicitly that United Kingdom ministers never have constitutional authority to advise the Crown on Australian matters. But he insinuates that view,[42] which has been advanced clearly enough by Murphy J.[43] And he rests his claim on two arguments.

The first is this:

> "the Commonwealth Parliament, at State request, could abolish, under s.51, pl.(xxxviii) of the Constitution appeals to the Privy Council, and very well may be able to do so under other powers . . . If the topic is, or may be, within Commonwealth legislative or executive power, how may that topic afford an illustration of the suggested convention [scil that the Queen will not act on Commonwealth advice in exclusively State matters]?" [44]

This appeal to s 51(xxxviii) is a weak ground for rejecting the constitutional position so clearly reflected in s 9 of the Statute of Westminster, not to mention the surrounding events and dicta chronicled earlier in this essay: that there are matters "within the authority of the States of Australia, not being . . . matter(s) within the authority of the Parliament or Government of the Commonwealth of Australia". Section 51 (xxxviii) confers no authority on the Commonwealth Parliament over any matter unless and until a condition is fulfilled: that "all the States directly concerned" have requested or concurred in the exercise of such power. The Commonwealth has no authority to require or compel or control the fulfilling of that condition. Thus no matter falls within

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41 *Cont.*
Commonwealth unless all Governments are in agreement, many of his arguments and sallies are in fact directed against the related but distinct contention that there is a convention that the Queen will not act on *exclusively State matters* when the Commonwealth alone asks her to do so. Mr Byers' letter is to be read together with letters from himself and others in (1981) 55 ALJ 360f, 701f (Saunders and Smith), 763f (Solicitor-General for Queensland), 829f (Finnis), 893 (Attorney-General of South Australia). The careful reader of my letter will not, I think, accept any of the rebuttals and imputations directed against it by Mr Byers.

42 Not only by the contention mentioned in the text, but by the ambiguious half-truth that "The Queen, as Queen of Australia, is Australia's constitutional Head of State. As such Her Majesty acts on Australian advice" — (1982) 56 ALJ 316, 318. By the phrase "as such", he avoids commenting on the statement of the Foreign and Commonwealth Office on 28 November 1980: "To the extent that *the Australian States remain self-governing dependencies of the British Crown*, the United Kingdom authorities would consider a request from a State for United Kingdom legislation on any matter which affected no other Australian State and/or the Commonwealth of Australia." — quoted in 55 ALJ at 829. The phrase that I have emphasised is, of course, a stark way of expressing the point more conventionally put in the terms used by the Secretary of State for Foreign and Commonwealth Affairs on 21 December 1976 (repeated by the FCO on 11 November 1980): "United Kingdom Ministers are at present responsible for advising Her Majesty the Queen on certain matters affecting the Australian States ... [as] a direct consequence of the established Australian constitutional position . . ." — quoted in 55 ALJ at 829. Even if the States are dependencies of the British Crown, they are also components intrinsic to the realm of Australia, and their constitutional affairs are not external to that realm.

43 *Commonwealth* v *Queensland* (1975) 134 CLR 298, 335; cf 55 ALJ at 830. Murphy J's opinion on this matter is part and parcel of a wider view of his concerning the constitutional relationship of Australia and United Kingdom instrumentalities, a view rejected comprehensively by the High Court in *China Ocean Shipping Co* v *South Australia* (1979) 27 ALR 1 and *Southern Centre of Theosophy Inc* v *South Australia* (1979) 27 ALR 59.

44 See letter from Mr Byers QC in (1982) 56 ALJ 316, 317.

Commonwealth authority by reason of s 51(xxxviii) alone unless and until a State or States bring it into the range of Commonwealth authority by their request or concurrence. Section 51(xxxviii) is evidence, if anything, of the limitation of Commonwealth authority.

Mr Byers' second argument is this:

> "The notion that there are specific heads of power granted or reserved to the States underpins the suggested convention. Sir Owen Dixon observed that the notion was a fallacy . . . It is not only difficult to agree the matters falling only within State power, . . . it is impossible to do so. No convention on so shaky a base could survive. None exists. . . It is a fundamental constitutional error to regard the legislative powers of the States as if they comprised specific subject-matters . . . How then can it be said of any topic, even, for example, alterations to State Constitutions, that it affects only the States? The suggested convention . . . requires one to assume such a reservation [of power to the States], and to do so contradicts the Constitition." [45]

But in the very paragraph in which Sir Owen Dixon first enunciated the proposition on which Mr Byers thus relies, Sir Owen went on to say:

> "the considerations upon which the States' title to protection from Commonwealth control depends arise not from the character of the powers retained by the States but from their position as separate governments in the system exercising independent functions . . . the efficacy of the system logically demands that, unless a given legislative power appears from its content, context or subject matter so to intend, it should not be understood as authorising the Commonwealth to make a law aimed at the restriction or control of a State in the exercise of its executive authority. In whatever way it may be expressed an intention of this sort is . . . to be plainly seen in the very frame of the Constitution." [46]

The claim that there is no topic that, in a concrete case, affects or concerns only the States (or a State) depends on the following reasoning: because the States have no specifically reserved legislative powers,

(a) there are no limits to the reach of Commonwealth authority and

(b) there are no State functions outside the reach of Commonwealth authority.

Both parts of this reasoning are fallacious, as has been stated again and again in the High Court; no need to rehearse those statements here.[47]

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45 Ibid 317, 318.
46 *Melbourne Corporation* v *Commonwealth* (1947) 74 CLR 31, 83.
47 See the summary review by Gibbs J in *Victoria* v *Commonwealth* (1971) 122 CLR 353, 415-425.

United Kingdom Responsibilities Arise from the Australian Constitution

The key to the whole matter is that the responsibilities of the United Kingdom authorities in relation to Australia are, as they have recently said and repeated, "a direct consequence of the established Australian constitutional position".[48] These responsibilities are not the result of the United Kingdom constitution as such. The Solicitor-General of the Commonwealth forgets this when he says that in 1973, when the Queen was petitioned by Australian States to refer a matter to the Privy Council for an advisory opinion, United Kingdom ministers "assumed to advise solely because of a Statute of the United Kingdom", "upon the basis that . . . presumably the 1833 Act [Judicial Committee Act 1833] was solely a law of the United Kingdom".[49] This speculation, about the assumptions made by those ministers, must be considered fanciful.

After all, in June 1973, the Governments of all the Australian States requested United Kingdom ministers to advise the Queen in relation to the seabed petitions. The Solicitors-General of each and every Australian State argued:

> "The retention of the Privy Council as the exclusive organ for performing the functions contemplated by Section 4 of the Judicial Committee Act is an essential part of the constitutional structure of the Australian States. When matters are referred to it under Section 4, the Judicial Committee sits as a judicial organ *of that part of Her Majesty's dominions to which the question relates.* The Crown when it acts in right of [an Australian State] acts in its constitutional capacity as sovereign within the fields of constitutional power exercisable by [that State]." [50]

They all further argued:

> "The States, as partners with the Commonwealth in a statute-based Federal structure, assert their right to seek to invoke the jurisdiction conferred by the Judicial Committee Act 1833 in accordance with the long-established convention that when Her Majesty's Ministers in the United Kingdom tender advice to Her Majesty in *matters, which like the present Petition[s], arise under the Constitution of a State,* they do so in strict conformity with the genuinely federal nature of that constitutional structure." [51]

It is in the highest degree unlikely that United Kingdom ministers tendered advice on the ground, let alone "solely" on the ground, that the

48 UK, Parl, *Debates*, HC (1976) vol 923, col 118 (Secretary of State for Foreign and Commonwealth Affairs — Written Answers). See likewise the Memorandum of the Foreign and Commonwealth Office to the Foreign Affairs Committee, dated 11 November 1980: HC Paper 42 (1980-1981) vol 2, 61f. See also 55 ALJ 829. It is, of course, a mistake to suppose (as does Cooray, *Conventions, the Australian Constitution and the Future* (1979) 93) that because United Kingdom ministers do not *wish* to retain their responsibilities, they do not retain them, or do not exercise them on their own best judgment.

49 Supra n 44 at 316, 317.

50 Qld, Parl, PPA11 (1973) 11, 33. Emphasis added. See also ibid 33, 39.

51 Ibid 36, see also ibid 22, 39.

Judicial Committee Act 1833 is a United Kingdom statute. Rather, they must be presumed to have tendered advice on two distinct bases:

(a) the basis firmly argued by every Australian State, and supported by repeated judgments in the High Court,[52] viz that the provisions of both Imperial and State legislation relating to this jurisdiction of the Judicial Committee *are part of the constitution of each Australian State.* In this respect, United Kingdom ministers would be tendering advice to Her Majesty because of their residual responsibilities in relation to the Australian States — not because the petitions happened to be for a reference under an Act originally enacted by the United Kingdom Parliament.

(b) furthermore, but secondarily, there is reason to think that United Kingdom ministers took the view that since the personnel and staff and facilities of the Judicial Committee are within the United Kingdom and indeed within the administrative responsibilities of the United Kingdom Government, United Kingdom ministers had a responsibility to advise Her Majesty as to the appropriateness of exercising a discretion vested in her where that exercise would affect those personnel, staff and facilities.

Of these two bases for the giving of advice on the 1973 petitions, the first is the more important and more generally applicable. As was clearly appreciated by Commonwealth statesmen, of both parties, in 1931, 1935 and 1942, and as remains well appreciated by State and United Kingdom authorities to this day, the significant "residual constitutional links" between the United Kingdom and Australia are what they are, not because imperialism or colonialism takes a long time dying, but because it is unacceptable to suppose that the structure of Australia's federal constitutional system could be substantially altered by some arrangement between Canberra and Whitehall, Westminster or Buckingham Palace, without reference to the representative governments of the States or the people voting federally under s 128 of the Commonwealth Constitution.

The conventions and understandings (and the interpretations of constitutional instruments) which constitute that federal constitutional system do not rest on isolated incidents.[53] Rather they rest, to adopt Dixon J's words, on what the efficacy of the system rationally demands. The most potent basis for constitutional conventions and constitutional responsibilities alike is their *rationale.*[54]

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52 See especially *McCawley* v *R* (1918) 26 CLR 9, 51f, per Isaacs and Rich JJ; (1920) 28 CLR 106, 112; [1920] AC 691, 701; *Commonwealth* v *Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 418, per Isaacs J (Rich J concurring); and since 1973 see likewise the majority judgments in *Commonwealth* v *Queensland* (1975) 134 CLR 298, 309f and *Southern Centre of Theosophy Inc* v *South Australia* (1979) 27 ALR 59, 66: "The Judicial Committee . . . forms part of the judicial structure of South Australia . . ."

53 Mr Byers contends that the convention(s) in question could rest on nothing but this 1973 incident; see (1982) 56 ALJ 316, 317: "there seems to be no other [material]."

54 This is really the ratio of the majority finding of the Canadian Supreme Court, rejecting the pretentions of the Canadian Government and Parliament to address the United Kingdom Parliament free from any Provincial concurrence: *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, 90, 103-107. See also UK, Parl, *Third Report on the British North America Acts: The Role of Parliament* (Foreign Affairs Committee) HC Paper 128 (1981-1982) commenting on the reasoning and significance of the Canadian Supreme Court's judgment.