# THE UNITED KINGDOM IS A FOREIGN POWER—*SUE V HILL*

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> *At the very latest, the Commonwealth of Australia was transformed into a sovereign, independent nation with the enactment of the Australia Acts. The consequence of that transformation is that the United Kingdom is now a foreign power for the purposes of s 44(i) of the Constitution.*[1]

## I INTRODUCTION

On 23 June 1999 the High Court of Australia handed down its decision in the case of *Sue v Hill*.[2] A majority of the High Court made a declaration that One Nation senator-elect Heather Hill was incapable of being chosen as a senator and therefore was not 'duly elected' within the meaning of s 360(1)(v) of the *Commonwealth Electoral Act 1918* (Cth). Significantly, by doing so the High Court ruled that the United Kingdom of Great Britain and Northern Ireland was a 'foreign power' for the purposes of s 44(i) of the Commonwealth Constitution.

The majority came to this decision despite Australia's strong historical and emotional ties with the United Kingdom. According to the leading majority judgment of Gleeson CJ, Gummow and Hayne JJ:

> The expression 'a foreign power' in s 44 does not invite attention to the quality of the relationship between Australia and the power to which the person is said to be under an acknowledgment of allegiance. ... the inquiry is not about whether Australia's relationships with that power are friendly or not, close or distant, or meet any other qualitative description. Rather, the words invite attention to questions of international and domestic sovereignty.[3]

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[1] *Sue v Hill* (1999) 163 ALR 648, 695 (Gaudron J).
[2] (1999) 163 ALR 648.
[3] Ibid 662.

# II THE DECISION

## A *Facts*

On 3 October 1998, Mrs Heather Hill, representing Pauline Hanson's One Nation party, was elected as a senator for the State of Queensland. The Queensland Governor certified the result on 26 October 1998. Following Mrs Hill's election, businessman Henry Sue lodged a Petition with the Court of Disputed Returns in Queensland requesting that her election be declared constitutionally invalid. Mr. Sue's Petition submitted that at the time of being elected as a senator for the State of Queensland, Mrs Hill was a citizen of a 'foreign power' and therefore incapable of becoming a senator due to s 44(i) of the Commonwealth Constitution.

Section 44 of the Constitution provides in effect that any person who has sworn allegiance to a foreign power or is a foreign citizen is not entitled to sit as a senator or as a member of the House of Representatives. Mrs Hill was born in the United Kingdom in 1960, and emigrated to Australia with her parents in 1971. In January 1998, Mrs Hill applied for and was granted Australian citizenship. At the time her Australian citizenship was granted there was no requirement under the *Australian Citizenship Act 1948* (Cth) that a person's British citizenship be renounced. Mrs Hill retained dual citizenship when her election to the Senate was certified in October 1998.

Due to the High Court's decision in *Sykes v Cleary (No. 2)*,[4] it is necessary that a naturalised Australian with dual citizenship take all reasonable steps to renounce his or her foreign citizenship before the law of Australia treats that person as having renounced it.[5] It was not until 19 November 1998, almost one month after her election was certified, that Mrs Hill took these steps. By s 12 of the *British Nationality Act 1981* (UK), British citizenship ceases upon registration of a declaration of renunciation. Mrs Hill completed a declaration of renunciation, paid a fee of $135 and handed over her British passport.

Mr. Sue's contention was that as Mrs Hill held dual citizenship at the time of being chosen as a senator and had not taken the reasonable steps necessary to renounce her British citizenship, she remained a citizen of a 'foreign power'. As his Petition involved constitutional questions, it was referred to the High Court pursuant to s 18 of the *Judiciary Act 1903* (Cth) for determination by the Full Court.

One of the issues that the High Court had to decide, in its capacity as the Court of Disputed Returns,[6] was whether the United Kingdom was a 'foreign power' for the purposes of s 44(i) of the Constitution. Such a question required the Court to consider whether the Constitution is a static document or a document which facilitates

[4] (1992) 109 ALR 577.
[5] See *Sue v Hill* (1999) 163 ALR 648, 676-7 (Gaudron J).
[6] Found under s 354(1) of the *Commonwealth Electoral Act 1918* (Cth).

and reflects Australia's constitutional evolution towards an independent, sovereign nation.

In the majority, four justices of the High Court declared that even though the United Kingdom was not a foreign power in constitutional terms at the time of Federation in 1901, Australia—through a series of events and legislative acts—had evolved into an independent and sovereign nation. This means that the United Kingdom now answers the description of foreign power in s 44(i) of the Constitution. As a consequence, Heather Hill's election as the first One Nation senator was declared invalid, and a recount was ordered.[7]

In the majority, Gleeson CJ, Gummow and Hayne JJ delivered a joint judgment, and Gaudron J delivered a separate judgment. In the minority, Kirby, Callinan and McHugh JJ each delivered separate judgments.

## B *The Minority Judgments*

The minority did not address the issue of whether the United Kingdom was now a foreign power in their reasoning because each justice agreed with counsel's argument that the High Court, as the Court of Disputed Returns, did not have the power to hear an election petition which raises the bare question of whether a member of the Federal Parliament was constitutionally qualified to stand for election.[8]

Two reasons were relied upon as to why the High Court did not have the power to hear this Petition. First, the Parliament, in enacting the *Commonwealth Electoral Act 1918*, did not intend that the High Court be given the jurisdiction to determine questions respecting the constitutional qualifications (under s 44) of a Senator or a member of the House of Representatives, unless and until the matter is referred to the Court by the House in which the question arises. The judges were in agreement on the point that as s 47 of the Constitution provides that questions respecting the qualification of a senator shall be determined by the Senate, and that as the *Electoral Act 1918* (Cth) continued this long-standing Westminster parliamentary tradition. As Kirby J eloquently opined:

> [A] large measure of deference should be accorded to the exercise by the parliament of its privileges ... [S]ubject to the Constitution, it is for the Parliament, and the parliament alone, to surrender its privileges and to involve the courts in the resolution of controversies that concern those privileges.[9]

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[7] The Court later declared that Mr Len Harris, second on the One Nation senate ticket for Queensland, was the winner of the recount. Mr Harris took his seat on 1 July 1999. In mid-August 1999 it was suggested in the press that Mr Harris might resign to allow Mrs Hanson or Mrs Hill to take up One Nation's only seat in the Senate; however, nothing eventuated.

[8] See *Sue v Hill* (1999) 163 ALR 648, 698 (McHugh J), 720 (Kirby J), 730 (Callinan J).

[9] Ibid 720.

As the case had been initiated by the independent Petition of Mr Sue, rather than a Senate reference, all the dissenting judges concluded that the matter for determination was beyond the jurisdiction of the Court.

Second, the determination of the constitutional qualifications of senators or members of the House of Representatives is an inherent power of Parliament due to long-standing parliamentary practice dating back to the Bill of Rights of 1689,[10] and preserved by s 47 of the Constitution. The vesting of jurisdiction in the High Court to determine such questions on petition, which the majority said s 376 of the *Commonwealth Electoral Act 1918* has done, would be a violation of the strict separation of powers which the Constitution established and protects.[11]

### C *The Majority Judgment*

The majority, deciding to the contrary on the jurisdictional issue, confirmed that Britain had been a foreign power at least since the joint enactment of the *Australia Act 1986* (UK) and *Australia Act 1986* (Cth) (the Australia Acts). Gleeson CJ, Gummow and Hayne JJ noted in their leading judgment that *at least* since the commencement of the Australia Acts, Australian courts are no longer, as a matter of 'fundamental' Australian law, bound to 'recognise and give effect to the exercise of legislative, executive and judicial power by the institutions of government of the United Kingdom.'[12]

## III ANALYSIS

Each of the majority justices state that the UK became a foreign power at some time, probably before the enactment of the Australia Acts.[13] This is troubling. Given the size of the judgment (some 85 pages in total) it would have been desirable if the Court actually set a fixed date in which Australia completed her evolution into an independent and sovereign nation so that it can be established when the UK became a foreign power.

As Callinan J in obiter dictum explained in his minority judgment, evolutionary theory (the theory that the United Kingdom, by a process of evolution, has now become a power foreign to Australia) should be regarded with great caution because proponents of the theory cannot identify a specific date upon which the evolution

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[10] For a splendid exploration of the pertinent events in seventeenth-century England leading up to the enactment of the Bill of Rights in 1689, refer to Michael Kirby, 'The Trial of King Charles I—Defining Moment For Our Constitutional Liberties', speech to the Anglo-Australasian Lawyers' Association in London on 22 January 1999, available on the internet at <www.highcourt.gov.au>.

[11] See *R v Kirby; Ex parte Boilermakers' Society of Australia* (The Boilermakers' case) (1956) 94 CLR 254; *A-G Commonwealth v Breckler* (1999) 163 ALR 576.

[12] *Sue v Hill* (1999) 163 ALR 648, 665 (Gleeson CJ, Gummow, Hayne JJ).

[13] Ibid 665 (Gleeson CJ, Gummow, Hayne JJ), 695 (Gaudron J—who uses the loose phrase 'at the very latest').

became complete.[14] The declaration by the High Court that the United Kingdom is a foreign power is more than merely symbolic. It also has practical implications of fundamental importance to the administration of justice. Leaving open the question as to when the evolution became complete gives rise to doubts with respect to people's rights, status and obligations.[15]

For example, at a federal level, s 4 of the *Australian Security and Intelligence (ASIO) Act 1979* (Cth) and s 78 of the *Crimes Act 1914* (Cth) establish various offences in relation to conspiring with a foreign power.[16] The term 'foreign power' is used but not defined in either statute. What happens if evidence is raised that an Australian citizen or another conspired with the United Kingdom against Australia's interests prior to the enactment of the Australia Acts? Was the United Kingdom a foreign power at this time so that the person can be charged and convicted, or was Australia's evolution to an independent and sovereign nation not yet complete? The difference is a substantial jail sentence.

These are two of possibly hundreds of statutory provisions at a Commonwealth and State level which adopt the term 'foreign power'. It therefore becomes an important task to determine whether Australia evolved into an independent and sovereign nation prior to the enactment of the Australia Acts. In other words, in deciding with precision when the United Kingdom became a foreign power, a closer examination of when—with respect to the Commonwealth and the States—each arm of government operated independently of the United Kingdom is required.

With respect to judicial power,[17] the majority concluded that it was not until the enactment of s 11 of the Australia Acts, which terminated appeals to the Privy Council, that institutions of government of the United Kingdom no longer exercised any judicial power over Australia.[18] Gleeson CJ, Gummow and Hayne JJ said this was the case even though s 74 of the Constitution still allows the High Court to issue a certificate permitting an appeal from a decision of the Court (on a matter concerned with the limits of the constitutional powers of the Commonwealth and those of any State) to the Privy Council.[19] The justices relied on an earlier decision of the High Court in *Kirmani v Captain Cook Cruises (No.1)* [20] in which it was held that the jurisdiction under s 74 to issue certificates of appeal is now obsolete.

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[14] Ibid 730-1.

[15] Ibid 731. His Honour noted that because of this uncertainty, he was inclined to the view that the evolutionary theory should be neither accepted nor applied in this case. However, because of his agreement with McHugh J on the question of jurisdiction, he did not express a conclusion on this point.

[16] Ibid 732.

[17] It must be noted that in *Sue v Hill*, ibid at 685, Gaudron J said that judicial power could best be described as 'that brought to bear for the purpose of "making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies"' (citation omitted).

[18] *Sue v Hill* (1999) 163 ALR 648, 667 (Gleeson CJ, Gummow, Hayne JJ), 695 n 215-17 (Gaudron J—who referred generally to ss 1, 3, 10 and 11 of the Australia Acts.)

[19] Ibid 665-7 (Gleeson CJ, Gummow, Hayne JJ).

[20] (1985) 159 CLR 351.

It was interesting that the justices raised *Kirmani v Captain Cook Cruises* because in that case the Court also said that when appeals came before the Privy Council from Australia it was settled doctrine that the Privy Council was part of the judicial system of Australia and not an institution of the United Kingdom. Therefore, based on *Kirmani*, it could be argued that as far as the exercise of judicial power is concerned, Australia had completed its evolution prior to the Australia Acts.

As to the Crown and the executive power, the majority found that Australia has been completely independent and sovereign at least since the enactment of s 7(5) and s 10 of the Australia Acts.[21] These sections provide the Premier of each State with powers to advise on regal powers and functions in respect of a State and that the UK government shall no longer have any responsibility for the government of a State. In effect, s 7(5) and s 10 do for the States what s 1 and s 2 of the *Statute of Westminster 1931* (UK) did for the Commonwealth of Australia in redefining its constitutional relationship with the United Kingdom.

The justices are assuredly correct here. Australia could not truly be considered to be independent and sovereign at any point prior to the enactment of s 7(5) and s 10. While these provisions confirm in constitutional law what has been happening in constitutional practice at the federal level at least since the Balfour Declaration of 1926, at the State level the United Kingdom was far from being a foreign power. Prior to the Australia Acts, the States remained subject to the constitutional disabilities which flowed from the *Colonial Laws Validity Act* of 1865: State Governors were appointed on the advice of the United Kingdom government rather than the relevant State governments and by s 1 of the *Australian States Constitution Act 1907* (UK) certain State legislation had to be reserved for Her Majesty's personal assent, acting on the advice of the UK government.

One important question remains: how can Australia be completely independent and sovereign in relation to the exercise of the executive power if the Queen of the United Kingdom remains at the apex of government in Australia legally and constitutionally? The answer is the divisibility of the Crown.[22] Since the enactment of the *Royal Style and Titles Act 1953* (Cth) the Queen of the United Kingdom is to be called Her Majesty Queen of Australia when exercising official duties for Australia.[23] What this means is that the Australian Crown is divisible and separate in constitutional terms to the Crown of the United Kingdom.

Relying on the distinction made between 'the Queen' and 'the Commonwealth' in s 122 of the Constitution (the Territories Power), Gleeson CJ, Gummow and HayneJJ agreed that the Crown was divisible. The justices said:

> [T]hat the same monarch exercises regal functions under the constitutional arrangements in the United Kingdom and Australia does not deny the proposi-

[21] *Sue v Hill* (1999) 163 ALR 648, 665 (Gleeson CJ, Gummow, Hayne JJ), 695 (Gaudron J).
[22] Ibid 671-5 (Gleeson CJ, Gummow, Hayne JJ), 693 (Gaudron J). A friend once said that the notion of the divisibility of the Crown was akin to some kind of 'constitutional schizophrenia'.
[23] See, eg, *Bradken Consolidated Ltd v Broken Hill Proprietary Co Ltd* (1979) 145 CLR 107.

> tion that the United Kingdom is a foreign power within the meaning of s 44(i) of the Constitution.[24]

Gaudron J also provided some valuable insights into the operation of the divisibility of the Crown in Australian constitutional law:

> [A]lthough the notion of the 'divisibility of the Crown' may not have been fully developed at federation, that notion is implicit in the Constitution. It is implicit in the existence of the States as separate bodies politic with separate legal personality, distinct from the body politic of the Commonwealth with its own legal personality.[25]

In declaring that the legislative power of the Commonwealth and the States is exercisable absolutely independently of the United Kingdom, the majority in *Sue v Hill* focused on s 1 of the Australia Acts. This provides that: '[N]o Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.' There is no doubting that prior to the enactment of the Australia Acts, particularly s 1, the United Kingdom was not a foreign power. It was still involved in the exercising of the legislative power of the States, although the Commonwealth had been freed by the *Statute of Westminster Adoption Act 1942* (Cth). Before 1986, as has been discussed, certain State legislation had to be reserved for Her Majesty's personal assent, and some United Kingdom legislation extended to the States and could not be repealed or amended by the States.

In relation to legislative powers, there are other provisions of the Australia Acts which brought constitutional arrangements affecting the Commonwealth and the States into conformity with the status of the Commonwealth of Australia as a sovereign, independent and federal nation.[26] These are: s 3(1) (termination of restrictions on legislative powers of Parliaments of States by the *Colonial Laws Validity Act*), s 8 (State laws not subject to disallowance or suspension of operation by Her Majesty), and s 9(1) (State laws are no longer subject to witholding of assent, or reservation for Her Majesty's pleasure). The majority did not adequately canvass these provisions.

Disappointingly, the majority also failed to make an authoritative statement on the operation of s 58 and s 59 of the Constitution.[27] While the Court has previously acknowledged that at the Commonwealth level the legislature operates independently of the United Kingdom, s 58 still allows the Governor-General to withhold assent to proposed laws or reserve a proposed law for the Queen's pleasure. Moreo-

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[24] *Sue v Hill* (1999) 163 ALR 648, 675.
[25] Ibid 693.
[26] See especially the long title to the *Australia Act 1986* (Cth).
[27] It should be noted that the *Constitution Alteration (Establishment of Republic) Bill 1999* proposed removing both s 58 and s 59 of the Constitution. This proposal was defeated at the s 128 referendum held on 6 November 1999.

ver, s 59 provides that the Queen may disallow any law within one year from the Governor-General's assent. As noted recently by George Williams, s 59 of the Constitution is '[i]nconsistent with the reality of modern democratic governance in Australia'.[28] This is only a problem, with respect, if one ignores the Crown's divisibility. As the High Court declared the notion of the divisibility of the Crown to be firmly entrenched as part of Australian constitutional law, s 58 and s 59 of the Constitution do not stand in the way of Australia being declared an independent and sovereign nation. If a bill is reserved pursuant to s 58, or disallowed pursuant to s 59, then it is the Queen of Australia rather than the Queen of the United Kingdom who becomes involved in the exercise of the legislative power of the Commonwealth of Australia. It would have been useful, however, if the majority had reiterated this point.

## IV CONCLUSION

In an almost offhand fashion, Gleeson CJ, Gummow and Hayne JJ note that '[w]hile the text of the Constitution has not changed, its operation has.'[29] This is one of the most important statements in the history of Australian constitutional law. The justices recognise that the Constitution enables non-revolutionary developments in constitutional arrangements which reflect Australia's current position as an independent and sovereign nation even though, as stated in a nearly contemporaneous case, '[i]ts terms and structure express the ideas and philosophies of men long dead.'[30]

In September 1789, Thomas Jefferson wrote to James Madison claiming that a Constitution enacted by one generation could not bind subsequent generations. The claim was based on Jefferson's famous aphorism 'that the earth belongs in usufruct to the living.'[31] McHugh J remarked in *Re Wakim; Ex Parte McNally* (in which the High Court applied a doctrine of 'constitutional integrity' to invalidate the Commonwealth and State cross-vesting scheme) that '[f]ew, if any constitutional lawyers [in relation to the Australian Constitution] now accept Thomas Jefferson's claim that a Constitution enacted by one generation cannot bind subsequent generations'.[32] The High Court in *Sue v Hill*, in declaring the United Kingdom to be a foreign power, has demonstrated why this is so.

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[28] George Williams, 'How the High Court has Helped Republicans', *The Age* (Melbourne), 25 June 1999, 15.
[29] *Sue v Hill* (1999) 163 ALR 648, 670.
[30] *Re Wakim; ex parte McNally* (1999) 163 ALR 270, 284 (McHugh J).
[31] Koch, *Jefferson and Madison: The Great Collaboration* (1964) 70 quoted by McHugh J in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270, 283.
[32] *Re Wakim; Ex parte McNally* (1999) 163 ALR 270, 283.